THE ULTIMATE BACKUP

A CLIENT NEWSLETTER
RAINS, LUCIA & WILKINSON LLP
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2300 CONTRA COSTA BLVD., SUITE 230
PLEASANT HILL, CA 94523
TELEPHONE: 925-609-1699
FACSIMILE: 925-609-1690

2485 NATOMAS PARK DRIVE, SUITE 340
SACRAMENTO, CA 95833
TELEPHONE: 916-646-2860
FACSIMILE: 916-646-2861

ATTORNEY GENERAL ISSUES OPINION ON MILITARY LEAVES OF ABSENCE

On January 24, 2003, Attorney General Bill Lockyer issued an opinion on two questions relating to military leaves of absence under the Military and Veterans Code, which provides that an employee who is a member of the National Guard and is called to temporary active duty is entitled to receive his or her salary for a period not to exceed thirty calendar days. Mil. & Vet. C. §389 *et seq*. The Attorney General concluded that those provisions granting military leaves of absence are not applicable to persons who seek leaves of absence for service in the militia of another state. He also concluded that under those provisions, "30 calendar days" consists of the number of working hours the employee would ordinarily work during the 30 calendar days. He gave as an example, that for a person who works forty hours per week, the 30 calendar days is the equivalent of 21.5 working days or 172 hours.

Many collective bargaining contain more generous provisions for military leave than those contained in the Military and Veterans Code. For questions concerning the implementation of military leave under your MOU, please contact our office.

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RLW has created an e-mail notification system for important legal developments and case updates. To subscribe, please send an e-mail request to Newsletter@RLWlaw.com.

HIGH COURT LIMITS PROSECUTOR ACCESS TO PITCHESS DISCOVERY OBTAINED BY CRIMINAL DEFENDANTS

By Alison Berry Wilkinson

On February 27, 2003, in *Alford v. Superior Court*, the California Supreme Court severely restricted the right of a prosecutor to access the *Pitchess* discovery obtained by the defense in a criminal proceeding.

While at first blush this may appear to be an adverse ruling for law enforcement, given the willingness of many district attorney offices to liberally construe the *Brady* disclosure requirements, this ruling may prove to be a positive prohibition on the wholesale access of prosecutors to peace officer personnel records that might be subject to *Brady* disclosure requirements.

First, the Court reaffirmed the responsibility of any court releasing *Pitchess* discovery to limit the ability of defense attorneys, including the public defender, from using the material in any action other than the specific case in which the material was released.

At issue was the interpretation of Evidence Code section 1045(e), which states: "The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law." This was interpreted to impose

a *mandatory* duty upon the court to issue a protective order limiting the use of *Pitchess* material to the case in which it was sought.

This mandatory duty would thus require a public defender to file a *Pitchess* motion to obtain or use material already known to it through *Pitchess* discovery in an unrelated action. Indeed, the court went so far as to suggest that material obtained without filing a *Pitchess* motion or in contravention of the procedures under Evidence Code section 1043 would not be admissible.

The Supreme Court then went further to rule that the prosecutor does not have any standing to argue for or against disclosure in a *Pitchess* motion brought by the defendant, and that a prosecutor *is not entitled* to receive the *Pitchess* discover granted to a defendant in a criminal prosecution.

Consequently, the high court ruled that the personnel records and documents sought pursuant to *Pitchess* do not lose their confidential and privileged status vis-a-vis the prosecution simply by release to the defense. Unless the prosecution complies with the *Pitchess* procedures and files a motion that establishes the relevancy and materiality of the records to the prosecution case, the prosecution cannot examine the discovered material simply because the defendant received it.

While at first blush peace officers may feel that the Court's ruling unfairly prejudices the district attorney's ability to prosecute its case, the reality is that, due to the *Brady* disclosure requirements, this decision may aid officers in protecting the confidentiality of their records. Because, if the district attorney learns of allegations or findings that would be subject to *Brady* disclosure requirements due to a *Pitchess* motion filed by the defense, the prosecution may feel compelled to reveal that material in all subsequent prosecutions in which the officer is a witness.

Indeed, the Court noted in footnote 6 of its opinion that the provision of information to the prosecution following a defense *Pitchess* motion might create a *Brady* obligation in future cases to disclose the information. The Court further noted that the *Brady* principles operate outside the statutory scheme and, therefore, in such circumstance, the "prosecutor is obligated to disclose such evidence *voluntarily*, whether or not the defendant makes a request for discovery." Therefore, a procedure that permits the prosecutor to share in *Pitchess* discovery obtained by the defense might render the prosecutor a "*Brady* vessel" in future cases for any police personnel information he thereby receives.

Many district attorney offices are now looking for a simple, expedient way to get around this ruling, without regard for the potential *Brady* impact. One commonly suggested idea is to simply have the officer sign a waiver or other similar form that permits the district attorney to obtain copies of whatever material is disclosed in response to a defendant's *Pitchess* motion. Officers are cautioned that, given the *Brady* disclosure requirements, such a waiver should be approached cautiously. Blanket waivers are discouraged. Decisions about whether to waive confidentiality and permit the prosecution to receive the same material as the defendant should be made *only* with full knowledge of what has been specifically disclosed to the defense, what the possible *Brady* implications of the material are, and, where appropriate, after consultation with a representative, such as those at RLW, whose sole responsibility and interest is to protect the officers rights.

HAYWARD POA WINS GRIEVANCE OVER RETIREMENT CASH-OUTS

Since 1971, the Hayward POA collective bargaining agreement has included an educational incentive provision. Once an employee obtains certain POST certifications, there is an increase in compensation ranging from between 2.5% to 7.5%. An employee who utilizes vacation time to gain a respite from work is paid in accordance with normal salary rates, including the appropriate amount of educational incentive.

But, recently the Hayward POA discovered that, upon retirement, the City was not including educational incentives in the wage calculation when cashing out accrued vacation. When the City refused to correct this practice, the parties agreed that the grievance should be heard by Arbitrator Tom Angelo.

The Arbitrator ruled in favor of the Hayward POA and concluded that "once earned, educational incentive pay becomes a part of an employee's regular wage entitlement," and rejected the City's argument that the incentive pay should properly be included only in wages for normal vacation purposes but not in cases of separation or retirement.

This grievance was handled by both Mike Rains and Rick Pattison. Congratulations on a terrific victory!

LEGISLATIVE UPDATE 2003

By Leo Tamisiea

SB1516: *Romero*
Public Safety Officers Procedural Bill of Rights amended to include damages provision

This bill amended Government Code section 3309.5 to provide that, when a superior court finds that a public safety department, its employees, agents, or assigns, acting within the scope of employment, maliciously violates any provision of the "bill of rights act" with intent to injure a public safety officer, the officer can recover a civil penalty (up to $25,000) and attorney's fees.

SB1464: *Soto*
Health Care Benefits - Employer Contribution

This bill increased the minimum amount that employers must pay for PERS health plans from $16 per month to $97 per month over three years starting on January 1, 2004 and reaching the maximum on January 1, 2008.

SB1471: *Romero*
Sick Leave - Labor Code section 234

This bill made it a per se violation of the law for an employer's absence control policy to count sick leave taken pursuant to Labor Code section 233 (leave taken to attend to ill child, spouse, parent or domestic partner) as an absence that may lead to discipline. Provides both legal and equitable relief.

AB2766: *Runner*
Retirement Bill - Accumulated Contributions

Expands rights for former (public safety) members of a county, city or local agency retirement system who left employment prior to vesting the right to redeposit those withdrawn contributions, if he/she is an active member of a specified reciprocal public retirement system at the time of redeposit.

NEGOTIATIONS INFORMATION

As the budget news from Sacramento continues to worsen, we still see rays of light from some quarters.

- 3% at 50 agencies are now up to 345 statewide.
- 3% at 55 agencies have risen to 101.

Call the Pleasant Hill office for the complete list. (925) 609-1699 and ask for Leo Tamisiea.

FOR YOUR INFORMATION

The Public Employees' Retirement Law is now on-line at www.michie.com/california.html

DOES YOUR EMPLOYER WANT TO RE-OPEN YOUR COLLECTIVE BARGAINING AGREEMENT?

By Leo Tamisiea

If you represent members covered by the Meyers-Milias-Brown Act (MMBA) and you have heard from your employer that they want to reopen the contract, discuss or explore ideas to save jobs -- use caution.

Do not give up your rights unintentionally. Do not meet and confer under section 3500 et seq. Government Code unless you intend to do so.

Document carefully your responses to the employer's invitations to meet over changes to your current agreement. Be clear when you respond. If you intend to meet and confer over the contents of your contract, say so. If you intend only to listen, discuss, or obtain information, say so. If you intend to meet and confer over only one item, say so. If Management does not agree to your conditions, do not meet.

Be sure to document; document; document. Under MMBA, if you cannot come to agreement with the other side after meeting and conferring, they may impose a settlement on you.

If you have any questions or concerns about your employer's suggestions about finding ways to resolve budgetary difficulties, contact our office immediately.

REMEMBER:

The Meyers-Milias-Brown Act requires the employer to meet and confer in good faith with the designated collective bargaining organization on matters within the scope of bargaining or representation. Once approved by the local agency, a collective bargaining agreement is a valid and enforceable contract. *Glendale City Employees Association v. City of Glendale*, 15 Cal. 3d 328 (1975). Be sure to contact RLW for your legal options in enforcing the terms of your collective bargaining agreement.

DISCIPLINE UPDATES

CHARGES DISMISSED AGAINST SAN JOSE OFFICER

By
Todd Simonson
Rains, Lucia & Wilkinson LLP

Vehicular manslaughter charges were recently dismissed against San Jose Police Officer Bruce Young after an independent investigation and extensive discussions with the Alameda County District Attorney's office.

In the early morning hours of June 19, 2001, Officer Young was simply in the wrong place at the wrong time. As he was driving home in his fully marked San Jose police car with his canine partner in the back seat, Officer Young collided with a car that was inexplicably stopped with its lights off in the far right lane of northbound Highway 680 near Scott Creek Road in Fremont. The horrific collision resulted in the death of the driver of the parked car and significant injuries to Officer Young and his canine companion. Due to the fatality, the California Highway Patrol assigned its Major Accident Investigation Team (MAIT) to examine and reconstruct the collision.

This case hinged on the credibility of the CHP's report. Initially, the CHP opined that Officer Young's patrol car was traveling 74 m.p.h. before impact, 9 m.p.h. above the posted 65 m.p.h. speed limit. Based upon the initial report, the Alameda County District Attorney's office declined to file charges against Officer Young. However, the family of the decedent was not satisfied with that result and, predictably, hired a plaintiff's attorney to sue the City of San Jose and Officer Young.

The plaintiff's attorney, realizing that criminal charges against Officer Young could give his client a tremendous amount of leverage in the civil suit, wrote a letter to the District Attorney's office claiming that his own accident reconstruction expert had concluded, based on his examination of

the raw data, that Officer Young was traveling in excess of 90 miles per hour. At that, the District Attorney asked the CHP to reexamine their data.

Amazingly, the CHP not only agreed to re-investigate the accident, the MAIT team authored a second report admitting to several errors in its first report. Based upon the "revised" data and "correct" calculations, the CHP put forth a new estimated speed for Officer Young's vehicle of 86 m.p.h., 21 m.p.h. above the posted speed limit. The Alameda County District Attorney's office quickly filed vehicular manslaughter charges against Officer Young nearly one year after the accident based entirely upon the CHP's speed estimate in the supplemental report. Officer Young then contacted Rains, Lucia & Wilkinson for representation in the criminal matter.

Our first order of business was to retain the best accident reconstruction expert that we could find. We were fortunate enough to hire Rudy Degger, a former Contra Costa County Sheriff's Deputy and highly respected accident reconstructionist who, ironically, had trained several CHP officers in the past. We subpoenaed the voluminous amount of data that the CHP used to consider in each of their reports and submitted that data to Mr. Degger for his analysis. The results of his analysis were staggering.

Mr. Degger's analysis tore the CHP's reports to shreds. He concluded that the CHP's estimates failed to comport with the laws of physics and the conservation of energy and that the CHP's collection of data and investigation were outmoded, inaccurate and surprisingly sloppy.

For instance, the CHP apparently either ignored or did not possess widely available software used by most accident reconstructionists to check their calculations and to simulate the collision. Applying that software, Mr. Degger found that the CHP's manual calculations, using the laws of physics and conservation of energy as a reference point, did not hold water and could not be justified. Working with those very basic laws as a guide and using the software, Mr. Degger concluded Officer Young's patrol car was traveling at a speed closer to 59 m.p.h. at impact, six m.p.h. under the posted speed limit.

In addition to Mr. Degger's work, our case was strengthened by three witnesses who each observed Officer Young driving immediately before the collision. All of them were prepared to testify that Officer Young was traveling at or around the posted speed limit Additionally, despite the CHP's assertion to the contrary, all three witnesses were prepared to testify that the decedent's car lights were off immediately before and after the collision, which would have made her compact car nearly impossible to see in pitch black conditions that night.

To her credit, the Deputy District Attorney assigned to the case agreed to meet with us to hear the presentation of Mr. Degger's new evidence with members of the CHP's MAIT team present as well. Mr. Degger presented his computer simulations of the accident, pointed out the flaws in the CHP's calculations and put the proverbial ball in the CHP's court to respond to his very convincing recital. The CHP opted not to respond at all and, after another couple of months of negotiations, the District Attorney' Office dismissed the charges against Officer Young on January 31, 2003.

After nearly one and a half years of extensive physical rehabilitation, a boring desk job and the black cloud of a criminal prosecution behind him, Officer Young has finally been returned to the streets of San Jose with his canine partner. We wish both of them all the best.

OAKLAND OFFICER RETURNED TO WORK

By
Harry S. Stern
Rains, Lucia & Wilkinson LLP

Arbitrator Joe Henderson has returned Oakland Police Officer Kwang Lee to work after the Department fired him in April of 2001. At the conclusion of a three day evidentiary hearing, Arbitrator Henderson determined that the City of Oakland terminated Lee without just cause.

Kwang Lee grew up in Milpitas and while attending Cal State Hayward, decided he wanted to embark on a career in law enforcement. Lee was hired as a Police Cadet with Oakland and, eventually, attended the Police Academy. After successfully completing the field training program he became one of the men and women patrolling the crime-ridden streets of Oakland.

Lee's termination was premised, according to Department documents, on three incidents. The common theme among the incidents was that Officer Lee was, in each instance, engaged in proactive police work as has always been expected and required of Oakland officers.

By way of background, Oakland is one of the most dangerous cities in America to be a police officer. Oakland officers are murdered by gun-fire at a higher rate than any other municipality in California. Oakland's officers are also subject to a wide range of violence ranging from stabbings to being run over by motor vehicles. Historically, the Police Administration has recognized that Oakland Officers are required to use force to protect themselves and the public.

Yet, Officer Lee's termination occurred in a striking departure from this recognition. One of the three allegations which resulted in Lee's termination was the result of Officer Lee striking a woman with a baton and punching her once in the face during a riot at a "booty shaking contest." In the second incident, Lee fired three shots at a wanted felon who had attempted to ram Lee and his partner with his car during a routine traffic stop. A Shooting Review Board determined that the first two shots were within policy but that the third shot, fired on a steep embankment when the suspect lunged at Lee, was excessive. Lastly, the Department tacked on a non-injury traffic collision that occurred during the pursuit of a stolen auto. These events are described in greater detail below.

The Force at the Booty Shaking Contest

The Henry J. Kaiser Auditorium is a large concert venue in downtown Oakland. A small contingent of Oakland officers was assigned to the Kaiser Center to provide a police presence for what they believed was a Stanford University sorority party. During the pre-event squad briefing the officers learned, to their dismay, that the event was not a sorority party but rather a "rap concert and booty shaking contest." Given the past unfortunate experiences with rap concerts in Oakland, the sergeant in charge of the detail ordered his officers to bring crowd control equipment to the event.

Predictably, the promoters oversold the event and, when the authorities attempted to close access to the auditorium, approximately two hundred people rushed at the main entrance. The concert goers threw rocks and bottles, smashing a number of windows in the process. The Oakland sergeant on the scene radioed for all available assistance.

Officer Lee was working patrol and responded to the call for help. When he arrived he saw another officer being attacked by a group of women. That officer (a seventeen year veteran) had attempted to move one member of a group of women off of the Center's front steps. While escorting her away from the steps the woman turned and punched him in the face. When the officer attempted to take her into custody he was jumped by a group of ten to fifteen of her friends who began kicking and punching him.

Officer Lee waded into the fracas in order to help his fellow officer. One of the attackers snatched Lee's microphone off of his lapel and began to run away with it. Lee was jerked in her direction and then began to chase the woman.

At this point, a second woman emerged from the group that had set upon the other officer. This woman charged toward Officer Lee. She was so determined to go after him that she even shook off a man who tried to hold her back. She raced

toward Officer Lee shouting and holding her fists in an aggressive manner. Thus, when Lee turned from the woman who had snatched his microphone the second woman was in his face.

Officer Lee responded to this immediate threat by striking her once in the leg with his baton. When the baton strike had no discernable effect, Lee struck her once in the face with his hand.

Officer Lee's confrontation with the two women was captured on a videotape taken by Kaiser security. The Legal Defense Fund authorized our office to hire expert Don Cameron and to utilize our own private investigator, Mike Schott. Mike Schott provided service as a "forensic videotape analyst." He took the raw video footage and broke it down to an enhanced frame by frame sequence. Schott determined that Kwang only had three tenths of one second to react once the second woman was on him.

Don Cameron testified as a use of force expert. Cameron studied the videotape and the reports and gave the opinion that Kwang's uses of force were reasonable given the hostile crowd and the woman's obvious aggressiveness. In short, Kwang reacted reasonably in order to protect himself when she violated his "critical space."

The City hastily hired their own use of force expert to rebut our evidence. Amazingly, the City's expert contradicted the conclusions of the Internal Affairs investigation and the testimony of several Oakland Police Administrators and gave the opinion that the baton strike was objectively reasonable given the circumstances. However, the City's expert stated that the hand strike to the face constituted excessive force. Some of the City's expert's testimony centered on the idea that, in essence, it did not look good politically for a male officer to punch a woman in the face. On cross-examination the expert was forced to concede that there was no policy against such a strike. Furthermore, all of the witnesses (from both sides) agreed that the baton strike was ineffective. Accordingly, we argued that the hand strike was appropriate since the woman was still a danger.

The City also faulted Officer Lee for failing to make a timely report of his use of force. The evidence proved that the only officers who reported uses of force were those summoned to the post-incident-debriefing at the behest of the scene supervisor. As a patrol officer, Lee was not summoned to the debriefing. In fact, Lee reported his use of force to his own patrol sergeant after he consulted with more senior officers.

The Shooting

In a second case, Officer Lee and his partner were on patrol when they noticed a car driving in an erratic manner. They initiated a traffic stop and the suspect vehicle stopped in a gas station. Lee became suspicious when the driver did not have proper identification. As Officer Lee walked from his patrol car to consult with his partner, the driver of the suspect car suddenly threw his vehicle into reverse. Lee, who had crossed in between the suspect car and the front of his patrol car, saw the suspect car's reverse lights come on, heard the tires squeal and saw the car hurtle toward him at a high rate of speed. Lee was trapped and had no other option but to fire two shots at the driver in order to protect himself. The suspect put the car in drive and sped out of the gas station but crashed a short distance later. The suspect then fled on foot.

Officer Lee and his partner gave chase. Citizens in the area pointed up a steep embankment under a nearby freeway. Lee began to search the embankment which was covered with vegetation. Suddenly, Lee spotted the suspect who was attempting to hide. The suspect's hands were hidden beneath him. He ordered the suspect to show him his hands. Instead, the suspect lunged at Lee and swiped at his legs in an apparent attempt to knock him off balance and down the embankment. In response, Lee fired a single shot at the suspect. The round did not find its mark, however.

The uninjured suspect ran off but was quickly taken into custody. It turned out that he was wanted on a felony drug warrant. Furthermore, a

citizen informed the police that he had seen the suspect running with a gun just before he scaled the embankment, although a search of the area did not uncover the gun.

The Police Department convened a Shooting Review Board to examine Lee's discharge of his firearm. The Board determined that the first two rounds fired at the gas station were appropriate, given the fact that the suspect was attempting to ram Lee with his car. However, the Board determined, by a four to three vote, that Lee should not have fired the third shot on the embankment because it was a poor tactical decision the climb the embankment by himself.

At hearing we were able to establish that no other Oakland officer had ever been disciplined for discharging his firearm in such a circumstance. We were also able to lock the City in the untenable position that their finding of fault as to the third shot was based on a "Monday morning quarterbacking" view of Officer Lee's tactics. Moreover, we proved that the Department's written decision in support of Lee's termination stating that Lee fired out of unjustifiable "bare fear" was completely misguided: the firing of the third shot was not based on unsupported " bare fear." Rather, Officer Lee had a number of factors in his mind given the fleeing felon's dangerous actions that led him to believe that the suspect posed an imminent threat to Lee's safety.

The Traffic Collision

The City threw in an allegation concerning a noninjury traffic accident in support of their termination of Lee. In that case, Lee and his partner spotted a stolen car in North Oakland and gave chase. Lee collided with some parked cars when he tried to avoid the stolen car which had also crashed. The Department called a traffic officer who stated that Lee was probably traveling under 25 miles per hour and was not involved in any particularly unsafe driving. The Department Administration witnesses conceded that the traffic collision was not an independent grounds for termination but, instead, would routinely warrant a written reprimand.

The Arbitrator's Decision

Arbitrator Henderson completely discounted all the allegations of excessive force concerning the Kaiser Center riot. Arbitrator Henderson found that Lee acted reasonably when he used his baton and hand strike to defend himself from the woman who charged him. The Arbitrator did find that the City "could have reason" to discipline Lee for his failure to immediately report his use of force and, thus, said that a three day suspension was in order.

With regard to the shooting, the Arbitrator agreed with our position that it was inappropriate to rely upon Lee's alleged inappropriate pre-shooting tactics to conclude that the third shot was fired outside of policy. However, in what amounted to a minor concession to the City, Arbitrator Henderson ruled that the City "could" have "some" reason to discipline Lee for the third shot and, therefore, allowed the City to suspend him for fifteen days.

Not surprisingly, Arbitrator Henderson followed the testimony of the City's own witnesses and gave Lee a written reprimand for what was his second preventable traffic accident.

Arbitrator Henderson wrote that the City "terminated Lee without just cause." Henderson awarded Lee reinstatement with restoration of seniority, full back pay including all benefits, with the only offset being a subtraction of eighteen days of suspension. Thus, given the fact that Lee was off work for nearly two years he will be entitled to over $100,000 in back pay and benefits. Suffice to say that this was a major victory for Lee, the Oakland Police Officers' Association and the rank and file officers of the OPD who patrol one of the Country's most dangerous jurisdictions. Lee was particularly thankful for the support of the Legal Defense Fund, not the least of which was hiring expert Don Cameron and utilizing The Ultimate Backup's own Mike Schott, whose testimony and analysis was so crucial to victory.

ARBITRATOR REVERSES DISCIPLINE FOR SAN JOSE SERGEANT

By Todd Simonson
Rains, Lucia & Wilkinson LLP

Arbitrator Joe Henderson recently reversed a two day suspension imposed on San Jose Sergeant Michel Amaral, ordered back pay and attendant benefits restored and compelled the City of San Jose to remove all documents relating to the discipline from Sgt. Amaral's personnel files. The award was made pursuant to Mr. Henderson's findings that the City of San Jose had not made a sufficient showing that Sgt. Amaral was either absent from duty without leave or that he had willfully neglected his duty on June 26, 2001. Mr. Henderson's decision and award represent a complete and total vindication for Sgt. Amaral who faithfully served the San Jose Police Department for twenty-six years until retiring in January.

On June 26, 2001, Sgt. Amaral and another officer attended a parole revocation hearing at the Santa Rita County Jail in Dublin, California. Prior to the hearing, they were given "release time" from their regular patrol duties in order to properly backfill their positions while they attended the hearing. Before they left for Dublin, Sgt. Amaral and the officer checked out radios and cell phones so that they could be easily contacted in case a need arose during the day.

While present at the jail facility, Sgt. Amaral was paged by a member of the Police Department and promptly returned the call. Based on that call, Sgt. Amaral did not believe that he needed to immediately return to San Jose. After their hearing was continued, the parole hearing officer invited Sgt. Amaral and the officer to stay and witness a couple of additional hearings. Neither of them had ever witnessed a parole revocation hearing in their respective careers and regarded the invitation as a good opportunity to learn about the process. When the hearings were completed, Sgt. Amaral recontacted the member of the Department that had called him earlier and confirmed that he did not need to return right away to the Police Department. Accordingly, Sgt. Amaral and the officer went to lunch.

Upon return to San Jose, there was a limited amount of time remaining in their shift. Rather than leaving early, Sgt. Amaral and the officer decided to spend the remainder of the shift addressing a chronic parking problem for a proprietor on the officer's beat. After tending to the problem, their shift was over and the two went home at the proper time. During the course of the day, nobody from the Department ever questioned the propriety of their actions or ever attempted to contact them to inquire about their whereabouts or request that they return to the Department immediately. Indeed, Sgt. Amaral and the officer believed that they were acting in accordance with the release time given to them and were properly performing Departmental functions while on release time. Apparently, the Department disagreed.

The San Jose Police Department completed an investigation and suspended Sgt. Amaral for two days without pay, the first mark on his otherwise unblemished career. During the disciplinary process and the arbitration, the City claimed that Sgt. Amaral had not properly obtained release time and that the use of his time away from his regular patrol duties was inappropriate. The Arbitrator took serious issue with those assertions in his decision.

Arbitrator Henderson ruled that Sgt. Amaral had not been given the proper notice regarding a release time "policy." Despite several requests, the City could not produce any written policy regarding proper authorization or use of release time. In fact, witnesses called by the City gave very different interpretations of what they believed that proper authorization and use of release time meant.

Arbitrator Henderson also ruled that Sgt. Amaral had been disparately treated. Testimony addressed during the arbitration made it clear that other employees on release time had never been asked about proper authorization, never questioned about their comings and goings while on release time and were not always engaged in Departmental functions

while on release time. Lastly, Arbitrator Henderson held that a two day suspension was a blatant overreaction given Sgt. Amaral's spotless history with the Department. Based on those findings, Arbitrator Henderson found that the City did not have just cause to impose twenty hours of suspension without pay and granted the grievance in favor of Sgt. Amaral.

With that unfortunate business now behind him, Sgt. Amaral plans to fully enjoy his well-deserved retirement.

CORRECTIONS OFFICER RETURNED TO DUTY

By Leo Tamisiea
Rains, Lucia & Wilkinson LLP

Santa Clara County Corrections Officer Randy Robinson was returned to work at the Main Jail in San Jose last month ending a 27 month ordeal. The officer was reinstated by order of Arbitrator Alexander Cohn who overturned a termination decision by the Department of Corrections and replaced it with a written reprimand.

In October 1999, an inmate escaped from the fourth floor of the Main Jail while Robinson and another officer were on duty. The inmate used hacksaw blades that had been smuggled into the jail to cut the bars in his window, and then forced the window glass out of its frame. The inmate escaped down a rope of jail sheets.

Originally, no action was taken by the DOC against either of the officers that were on duty the night of the October 1999 escape. It was only after another escape using the same technique occurred on a different shift six months later that the DOC then investigated both escapes.

Based upon the officers answers to questioning by IA about the October 1999 escape, the Department decided that both officers were lying about their activities on that night and decided to impose termination for 12 different violations of County rules and DOC rules and regulations. However, the DOC waited until five days before the one year statute of limitations expired (*see*, Government Code section 3304) to notify the officers that it intended to terminate them.

At the *Skelly* predisicplinary hearing, new information was presented by *Leo Tamisiea*, who also requested that DOC interview other witnesses who possessed exculpatory information. But, instead of following up on any of the new information presented (a fact admitted by the hearing officer at the arbitration), the *Skelly* hearing officer simply rubber stamped the original investigation and termination.

A six day arbitration ensued. The County claimed that the officers lied about being inside the high security module where they were assigned for the three hours between midnight (when the Department said the escape occurred) and 3 a.m. (when the officers reported the escape). The Department also claimed that the officers falsified the log book and never made the cell inspections recorded during those three hours.

The Department's case ran into serious problems because it centered on the conclusion that the escape occurred at 2 minutes after midnight. In support of its theory, the DOC offered the testimony of an inmate who claimed to have been watching the whole incident, and also offered two months worth of tape recordings of the escaped inmate's phone calls from the pay phone in the module to his associates outside, as well as those of a trustee to the same associates planning the escape. As a side note, it was very unfortunate that these tape recordings were not listened to until after the escape occurred. Had they been, circumstances may have been quite different.

Ultimately, the County's case failed because the defense confronted the Department witnesses with a Sheriff's Office criminal report which contradicted the statements in the DOC Internal Affairs report. Also, the defense used a Spanish translation of a key phone call on the night of the escape which differed from the DOC translation, as well as cell phone records that absolutely

contradicted the conclusion that the inmate escaped at 2 minutes after midnight.

The Department also based its termination case upon the conclusion that, after the escape, orange sheets hung from the missing fourth floor window to the ground for *three hours* in the rain and that (1) a DOC Sergeant walked within 15 feet of them without noticing them, (2) no one noticed the sheets during the San Jose P.D. shift that occurred next door to the jail, and (3) the DOC bus driver and guard failed to notice the sheets despite stopping their bus in the parking lot next to the sheets while on their way to the Elmwood Jail facility.

But, the County's case argument about the sheets fell apart when a DOC Sergeant testified that the sheets (which the Department claimed had been hanging out the window for three hours in the rain) were dry when he touched them just after the escape was reported around 3 a.m. Also, the DOC bus driver testified that he did not see the sheets hanging down four floors when he left the main jail after midnight but that they were plainly visible from over a block away when he returned to the jail after the escape was reported.

The Department had further evidence problems when it was discovered that no photos were ever taken of the sheets hanging out of the window, or of the intact window lying on the sidewalk sixty feet below. The video tape taken the night of the escape also contradicted the conclusions in the DOC report.

In separate allegations, the DOC charged that the officers falsified the log and inspections book. But the defense successfully proved that a nurse made a diabetic call logged at 2:32AM in the module, which was recorded in the middle of the claimed false entries, and that the nurse was never interviewed by the Department and no claim was ever made by the County that the nurse's entry was false. The DOC also alleged an impropriety in the use of intercom inmate checks, but the defense provided testimony from several DOC officers that intercom welfare checks were common during this time period despite what the Department claimed.

In the end, the Arbitrator found that the inmate who testified for the county was not credible in his time recollections or in his claims that these two officers *always* failed to do welfare checks, since the defense evidence showed that this was the first time these two officers ever worked together in this module. Also, the inmates claims that other inmates watched the escaped inmate climb down the wall were found unbelievable because the evidence showed that it was not possible to see the wall below the escaped inmate's cell from any other cell in the module. The arbitrator also had problems with the Department's claim that the officers had "poor memories" of the night of the escape despite the County's own failure to interview them for six months. Also, these young officers had only three weeks on this job after graduation from the academy when the incident occurred.

The arbitrator found no just cause for the termination of these officers and ordered them reinstated with full back pay and benefits. The arbitrator did order a written reprimand for a minor violation of DOC post orders. Officer Robinson was represented by Leo Tamisiea of Rains, Lucia & Wilkinson.

FELONY CRIMINAL CHARGES AND TERMINATION RECOMMENDATION RESCINDED

by
Mary L. Sansen
Rains, Lucia & Wilkinson LLP

Getting a fair result based on the actual conduct of the client is one of the greatest challenges an LDF Panel Attorney faces. Combine that ever-present fact with the complexities involved in handling a case where there are overlapping serious issues in multiple legal forums – family court, criminal court and disciplinary proceedings – where the resolution in each forum will play a significant role in the resolution in the other forum, and the LDF panel attorney is faced with quite a challenge. Add to that mix the significant impact of the Federal Gun Control Legislation, and you have a next to

impossible case to resolve at the *Skelly* predisciplinary stage. Thankfully, in the case of a Contra Costa County Deputy, these challenges were not insurmountable due to Mary's determination and hard work and the resolve of the Contra Costa County Sheriff's Department to render a fair result.

In this case, the sheriff's deputy had felony charges issued by Napa County District Attorney's Office that alleged he committed acts of child abuse during an argument with his child over grades. Simultaneously, the deputy's former spouse obtained an *ex parte* order restraining preventing him from having any contact with their children.

In a case like this, first and foremost it was critical to quash the restraining order so as to avoid the Deputy losing his gun carrying privileges which, in all likelihood, would have ended his career as a sheriff's deputy and prevented any opportunity that he would have to be a police officer again in California or elsewhere. While California law allows for exceptions in restraining orders to allow police officers to continue to carry their firearms in the course of their employment, federal law does not.

After contracted negotiations with the ex-spouse and multiple appearances in Family Court, Mary Sansen obtained an agreement of the parties and no restraining order was issued. Thus, one of the problems and complexities presented by the Federal Gun Control Legislation in the family law case was thus resolved.

That, however, still left the problems presented by the criminal case and the felony child abuse charges. Adding to the strain, the deputy was placed on administrative leave pending the outcome of the criminal case. In order to save his career, a prompt resolution of the criminal case was critical.

After undertaking a detailed review of the evidence in the criminal case revealed that in both the photos taken by the criminal investigator the day after the alleged incident and in the photos taken by Internal Affairs 4-5 days after the incident, Mary Sansen determined that *there were no visible injuries consistent with either the child's version of the events or the felony charges*. Based upon this information, Mary was able to convince the District Attorney to reopen and reinvestigate the case. After *five months* of Mary's almost constant haranguing of the DA, the charges were reduced to a simple 415 P.C.

One of the most significant reasons that the criminal case ended as well as it did, was that the Contra Costa Sheriff's Department's Internal Affairs investigators were willing to share exculpatory evidence both *prior to* interviewing the deputy and *prior to* any recommendation for discipline. Although the Department was under no legal obligation to provide any evidence at that stage, in this case, the fact that they did so was critical to Mary's ability to convince the DA to reinvestigate the felony charges.

That willingness to share information was based, in large part, on the recognition by the internal affairs investigators that a true injustice would occur if the information was not provided earlier than they were legally required to provide it. While often internal affairs investigators (either because of their own personal beliefs or Department policy) often will play "hide the ball" with counsel rather than looking at what is fair and equitable for the subject officer; in this case, *the Sheriff's Department did not* -- a fact critical to getting the felony criminal charges dismissed.

Another significant contribution to this result was the willingness of the Sheriff's Department to defer the administrative interview until after the criminal case was resolved. Had internal affairs attempted to compel a statement during the pendency of the criminal case, an insubordination allegation could easily have arisen. When faced with this kind of situation, the attorney always has to consider whether the subject officer faces greater jeopardy by giving a statement and having it disclosed to the District Attorney or by refusing to give a statement and being terminated for insubordination. When a Department is willing to recognize this dilemma and is further willing to allow the criminal process

to be completed before the administrative interview is conducted, the end result is to everyone's advantage.

With the restraining order no longer an issue and the criminal case completed, there was one last hurdle to clear and that was the administrative process. Following the conclusion of the internal investigation, a notice of intent to terminate was issued. Although this was anticipated, after everything that had been accomplished to date, it was still demoralizing for everyone involved.

At the *Skelly* hearing, in what was truly a joint effort between the client and the lawyer, Mary Sansen was able to show Sheriff Warren Rupf that not only was this not a termination case, but that it was not even a case which merited discipline. As a result, the Sheriff reduced the termination to a written reprimand. After five and a half months of this Deputy fearing that his law enforcement career was over, the matter was finally at an end.

The most satisfying aspect of this case is that hard work and cooperation between the Sheriff and the employee advocate can pay off. In this day and age where Departments are often unwilling to deviate from the normal way of doing business and are unwilling to shoulder any risk, this Sheriff's Department listened to, seriously considered and was persuaded by Mary's demonstration of why such a risk was worthwhile. While it did not have to do so, as a credit to Mary's determination and skill, this Department looked beyond the procedure and showed compassion for the employee's dilemma.

Further, in a day and age where management attorneys (in fear of negligent retention issues) are telling their clients to "terminate and litigate," Contra Costa County Sheriff Warren Rupf recognized that what was "safe" was not what was morally right or fair. So often as LDF Panel attorneys we find ourselves arbitrating cases which should, by all rights, have been equitably settled at the *Skelly* level. This case should be an object lesson to all Chiefs, Sheriffs and City Managers throughout the State of California that sometimes "doing the right thing" isn't about saving face or eliminating liability, but is truly about looking at the merits of the case and imposing discipline based on the actual conduct of the employee.

OAKLAND RIDERS UPDATE

As most of our clients know, since mid-summer 2002, RLW partner Mike Rains has been leading the defense team in the criminal trial against the three Oakland police officers accused of misconduct and dubbed by the media as "the Riders."

After five months of evidence, the prosecution finally rested its case. Two weeks ago, the defense team began presenting its witnesses. The case is expected to continue for another four to six weeks before it is submitted to the jury.

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