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POLICE CHIEFS' AND SHERIFFS' LEGAL UPDATE

LEGAL UPDATE

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COURT OF APPEAL PUBLISHES OPINION AFFIRMING SHERIFF'S LIMITATION ON PRE- INTERROGATION JOINT MEETINGS BY DEPUTIES INVOLVED IN SHOOTINGS

On September 24, 2008, the State Court of Appeal, Second Appellate District rendered its opinion in *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, Los Angeles County Sheriff's Department et al*, case number B197611. This matter was argued in the Court of Appeal by **Richard M. Kreisler** of Liebert Cassidy Whitmore and the opinion can have a significant impact upon the manner in which Internal Affairs proceedings are conducted in critical incidents, and upon the necessity or lack thereof for the meet and confer process preceding changes in fundamental managerial policies.

I. THE SHERIFF'S DEPARTMENT POLICY

This case revolves around the propriety of the Sheriff's Department, without engaging in the meet and confer process, unilaterally imposing a policy governing deputy-involved shootings. In pertinent part, the unilaterally imposed policy provides that:

"Deputy-involved shootings are likely the most critical incidents in which Department personnel become involved; therefore, they appropriately warrant an in-depth and objective analysis. A central component in this process is the collection of statements from every identifiable witness. The investigative process must be undertaken promptly and with the highest level of investigatory integrity, while at the same time, honoring the rights and needs of Department members.

The following investigative protocols have been established by the Department in order to ensure these objectives: *Personnel, either involved in, or a witness to, the event, shall not discuss the circumstances of the incident among themselves or with uninvolved persons prior to being interviewed by assigned Department investigators....*

Members who were either involved in or witness the incident may consult individually with legal counsel or labor representatives telephonically or in person before providing an interview with Department investigators. Members who were either involved in or witnessed the incident shall not consult with legal counsel and/or labor representatives collectively or in groups (e.g., two or more

members consulting at the same time with the same legal counsel/labor representative.)" (Emphasis added.)

As regards the above, the Court of Appeal holds:

1. Relying upon the Liebert Cassidy Whitmore argued case of *Upland Police Officers Association v. City of Upland* (2003) 111 Cal.App.4th 1294, police agencies may impose reasonable limits on a police officer's statutory right to counsel of his or her choice during an interrogation regarding an officer-involved shooting. The Court holds as being reasonable, the restrictions imposed by the Sheriff's Department policy which prohibit collective meeting of deputies with a single attorney.

2. In rejecting the Union's claims that the above policy unconstitutionally impinges on the First and Sixth Amendments of the United States Constitution (the rights to associate and to be represented by counsel), the Court finds that there is no constitutional right for two or more officers to jointly meet with legal counsel regarding a pending officer-involved shooting interview. The Court notes that the Sheriff's policy does not impede an officer's right to counsel and to consult with counsel. Rather, the policy only prohibits multiple deputies from jointly meeting with the same attorney, or labor representative at the initial interrogation stage of the proceedings.

II. THE MEET AND CONFER ISSUES

Although the Sheriff's Department did "meet" with Union representatives prior to implementing the above policy, the Department consistently took the position that the conferences were not statutory "meet and confer" sessions and that engaging in the meet and confer process was not a condition precedent to implementing this policy.

The Court of Appeal first noted that the ability of multiple deputies to meet together and/or with a singular attorney prior to an interrogation addressing an officer-involved shooting, is not a necessary component of a peace officer's working conditions.

Of more import, the Court of Appeal generally held that the Department's decision to implement the policy revision, evidenced implementation of a "fundamental managerial policy decision", *and was thus a decision that may be outside the meet and confer requirements of the MMBA.*

Recognizing that another Liebert Cassidy Whitmore crafted case (*Claremont Police Officers Association v. City of Claremont* (2006), 39 Cal.4th 623) provides that a fundamental managerial policy decision need not be subject to the meet and confer process where the Department's need for unencumbered decision making in managing its operations outweighs the benefit to employer-employee relations of bargaining, the Court holds that in this case, the deputies' working condition claim is tenuous and the Department's interest in public accountability is significant on its face. Thus, the Court holds that the Department's need for unencumbered decision-making in managing its operations did indeed outweigh any benefit to employer-employee relations which could be brought about by engaging in the meet and confer process.

III. THE RIGHT TO COUNSEL

The Court of Appeal also rejected all Union claims that the policy interferes with the Union members' right to counsel, in that no deputy has a "communal right to huddle with other deputies and counsel."

IV. CAUTIONARY STATEMENT BY THE COURT OF APPEAL

In closing, the Court of Appeal does note that, "...if an individual deputy can show that he or she was harmed, or is being harmed, or will be harmed, by some violation of his or her statutory or constitutional

rights, then that is a matter for another day, and another case." Suffice it to say, the *record* in this case was found by the Court of Appeal to be devoid of evidence of any such harm.

V. PRACTICAL APPLICATION

Initially, it must be noted that virtually every case is to some extent fact specific. In other words, the particular facts existing in any other department could impact application of the holdings in the *ALADS* case. Therefore, no department should implement the *ALADS* case without consultation with counsel and a careful consideration of the facts in its particular situation.

This being said, the *ALADS* case can provide a foundation for individual departments to:

1. Consider drafting internal investigatory policy provisions which are designed to foster greater public trust in the investigatory process.
2. Although subject to careful consideration in every given case, there do exist reasonable arguments that implementation of such a policy is not subject to the meet and confer process.

Additionally, the *ALADS* case highlights the *Claremont POA* holding, to the effect that there do indeed exist circumstances where changes in a fundamental managerial policy need not be subject to the meet and confer process, if engaging in the meet and confer process would be an unreasonable obstacle to addressing public needs to be served by the fundamental managerial decision.

This office cautions that a determination that implementation of a fundamental managerial policy need not be preceded by the meet and confer process, should only be made after detailed analysis of the facts and law in any particular case. Certainly, implementation of policies in general, absent the meet and confer process, would be the exception and not the rule. Nonetheless, cases such as *ALADS* and *Claremont* remind management that there do indeed exist narrow circumstances where the meet and confer process need not be employed.

VI. AN EXPANDED POLICY?

Finally, LCW takes an opportunity to address an issue which was favorably addressed in the trial court, but which the Court of Appeal believed was not properly in the record and therefore, not before it for consideration.

In reliance upon the proscription on pre-interrogation discovery stated in *Pasadena Police Officers Association v. City of Pasadena* (1990) 51 Cal.3d 564, the Department argued both at the trial and appellate levels, that since the policy at issue here validly prevents multiple deputies simultaneously meeting pre-interrogation with a single lawyer, the interests of a full and accurate investigation mandate that one law firm with multiple attorneys can only represent one deputy involved in the investigative process. For example, if one attorney in a law firm apprised a colleague of what a particular deputy stated in an interrogation, *discovery* would in essence be provided to the second deputy being represented by the other attorney in the same law firm.

The trial court (the superior court proceedings were regarding a preliminary injunction and not a final decision on the merits) held that such a broad disqualification of a law firm is likely valid. The Court of Appeal set the trial court finding aside, holding that the policy at issue did not address this topic and therefore, the trial court went too far in its determination.

Nonetheless, it remains this offices view that a reasonable position (albeit not necessarily sustainable) is that pre-interrogation discovery is proscribed by *Pasadena, supra*, in order to assure that the statements of multiple involved officers are not tainted by information provided by colleagues or other outside sources. In advancing that interest, it remains this offices view that a reasonable argument can be made that pre-interrogation discovery is indeed provided where either one lawyer represents multiple officers

involved in an incident and/or where multiple lawyers in the same law firm represent multiple officers involved in a single incident.

This is an issue that remains to be addressed by the courts. However, it is this office's recommendation that such a position be examined and given serious consideration in the drafting of future investigation-related policies.

VII. LIEBERT CASSIDY WHITMORE IMPACT ON THE LAW ENFORCEMENT MANAGEMENT WORKPLACE

This is the latest in a string of recent appellate decisions supporting management's discretion to operate its law enforcement agency.

In *Upland Police Officers Association v. City of Upland* (2003) 111 Cal. App.4th 1294, handled by **Scott Tiedemann** and **Peter Brown** of LCW's Los Angeles Office, the Court of Appeal held that a peace officer's right of representation under Government Code § 3303(i) is not unlimited. The Court of Appeal held that an officer could not delay an internal affairs interrogation by selecting a representative who was not reasonably available.

In *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, handled by **Cynthia O'Neill** of LCW's San Francisco office, the Court of Appeal limited a police officer's right to receive investigatory documents under both the Skelly due process procedures and the Act.

In *Claremont Police Officers Association v. City of Claremont* (2006) 39 Cal.4th 623, a case handled through the court of appeal level by **Richard Kreisler** and **Mark Meyerhoff** of LCW's L.A. office, the California Supreme Court held that implementation of a racial profiling study by a police department was a management prerogative and was not a mandatory subject of bargaining under the Meyers-Milias-Brown Act.

Also, in *Steinert v. City of Covina* (2006) 146 Cal.App.4th 458, a case handled by **Richard Kreisler** and **Jennifer Hong**, the Court of Appeal held that a peace officer was not entitled to the protections of the Act when asked questions by her supervisor in the ordinary course of duty where the supervisor did not suspect that the officer had engaged in serious misconduct.

In *Benach v. County of Los Angeles* (2007), 149 Cal.4th 836, handled by **Scott Tiedemann**, the Court held that removing a deputy from a special assignment as a pilot "without a concomitant loss of pay" is not a punitive action entitling the officer to a POBR administrative appeal.

Of course, the application of these decisions will vary depending upon the facts in a given case. Be sure to consult with your legal counsel before applying these cases (and the *ALADS* case) to your agency.

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