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letter from the editor

Dear *CPER* Readers:

From the looks of it, Governor Arnold Schwarzenegger is really stirring things up in Sacramento. Challenged by a \$15 billion budget deficit, the governor sidestepped the movers and shakers in the state capital and cut deals with the teachers unions, higher education officials, and local government lawmakers. These groups agreed to accept budget cuts this year and next in exchange for guaranteed levels of funding in the future. At least that's how it's supposed to work — if the governor can deliver on what he's promised.

While some see Schwarzenegger's dealmaking as politically astute, it did not win him any friends among the Democratic leadership in Sacramento. Used to playing a central roll in the budget debate, many lawmakers were caught off guard and were miffed by the artful end run the governor seems to have executed.

Another of the governor's cost-cutting strategies is likely to make him even less popular with state employees.

Support is mounting on both sides of the aisle for the view that salary increases contained in multi-year contracts signed by Gray Davis are not binding on the state employer without an annual budget appropriation passed by the legislature. Eyeing the 11 percent wage increase promised to the state's prison guards effective July 1, it seems more and more likely that some budget reductions will come at the expense of state employees' promised salary increases.

The governor's budget proposal has gotten low grades from legislative analyst Elizabeth Hill, who charges that it does not do enough to address the state's "long-term structural imbalance." But, despite that criticism, Schwarzenegger's budget appears to have picked up momentum, in part, perhaps, because of his pledge to have the budget passed by the legislature in time to meet the constitutional deadline. In the past, as you know, wearily watching the budget debate go on and on has become a well-worn summertime activity. Whether the Democrats have the political will to buck the tide and call for tax increases remains to be seen. In an election year, taking a measure of the political winds may be trickier than usual.

Sincerely,



Carol Ventrillo
CPER Director and Editor

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The Compleat Ombuds

A Spectrum of Resolution Services

Margo Wesley



Margo Wesley, Ph.D., is Ombudsperson and Director of the Staff Ombuds Office at the University of California, Berkeley, where she has worked for over 30 years. She has presented numerous workshops at U.C. Berkeley and elsewhere on topics related to conflict resolution. Wesley is a member of The Ombudsman Association and is President-Elect of the University and College Ombuds Association.

Ombuds positions,¹ mediation centers, and other types of problem-resolution services are catching on in the workplace. The primary goal of these alternative dispute resolution systems is to resolve employee concerns at an early stage — to approach work-related conflicts constructively before positions harden and become so polarized that there is a felt need to resort to formal dispute mechanisms. Those more formal options, such as appeals, arbitrations, outside agency complaints, or lawsuits, tend to be time-consuming, costly, and unpredictable in their outcomes, often culminating in decisions that leave neither party entirely satisfied.

This article focuses on the services of the “organizational” ombuds as opposed to “classical” and “advocate” ombuds. The organizational ombuds is a designated neutral who is appointed or employed by an organization to facilitate the informal resolution of concerns of employees, managers, students, and, sometimes, external clients of the organization.² The “classical” ombuds, on the other hand, typically is appointed by a legislative body to represent the public with regard to concerns about the conduct of governmental agencies; they conduct formal investigations. And, the “advocate” ombuds advocates on behalf of a designated population, such as patients in long-term care facilities. The organizational ombuds neither conducts formal investigations nor advocates on behalf of (or represents) individuals.

Foundational Principles

The effectiveness of the organizational ombuds is grounded in adherence to four foundational principles: independence, informality, impartiality (or neutrality), and confidentiality.³

Independence. An ombuds is not part of line management, does not make management decisions, and cannot compel anyone to take any particular course

of action. In order to preserve independence, the ombuds office cannot be considered a place where “notice” of improper activities can be given to the institution. In order to assure independence, the ombuds typically reports to the head of the organization and does not take on other roles that might compromise, or appear to compromise, independence.

Informality. Ombuds encourage people to resolve problems at the lowest effective level, before they escalate. If informal resolution is unsuccessful, and the problem moves into a formal arena, an ombuds’ involvement ceases. An ombuds does not participate in formal processes, even if given permission to do so.

Impartiality. The ombuds does not advocate for the employee, the employer, or anyone else. As a designated neutral, the ombuds helps people to gain perspective on situations so they can make better-informed choices as to how to proceed. This often entails helping visitors gain access to relevant information, as well as opening avenues of communication. The facilitation of constructive communication, whether through mediation, facilitation, or “shuttle diplomacy,” is a key aspect of impartiality. Conversely, ombuds do not negotiate on someone’s behalf, pressing for a particular outcome or course of action; nor do they render decisions.

Confidentiality. Essential to an ombuds’ effectiveness, confidentiality is what makes the ombuds’ office a safe place for people to bring their concerns, open their minds, and explore potential courses of action. The only instance in which an ombuds would breach confidentiality is if he or she believes that doing so is necessary to address an imminent threat of serious harm. Because of the expectation of confidentiality, the ombuds office cannot serve as an “office of record” or an “office of notice” to the institution. Confidentiality belongs to the ombuds, not to those providing information to the ombuds. For example, even if a visitor were to give an ombuds permission to discuss a situation, the ombuds might not do so in the belief that such a move might violate another ombuds principle (such as not participating in formal arenas). Confidentiality is one of the ombuds’ most valu-

able tools. For this reason, ombuds professional associations are working to develop explicit federal “shield” legislation.

A Distinctive Role

While bearing some similarity to, and sometimes collaborating with, other offices, the ombuds role can be distinguished in the following ways:

- Like human resources professionals, ombuds inform about relevant policies, procedures, and rights. However, unlike their HR counterparts, ombuds do not develop policies or procedures; impart authoritative interpretations of, or defend or enforce, them; or participate in formal arenas (such as appeals, arbitrations, or lawsuits).
- Like employee organization representatives, ombuds help employees recognize and gain access to rights. For example, ombuds point out that critical time lines govern collective bargaining agreements, and educate clients that bargaining agents can answer questions and represent employees regarding these rights.⁴ Conversely, however, ombuds do not interpret agreements or advocate on behalf of individuals.
- Like professionals working in employee assistance programs, ombuds deal with underlying concerns and needs. Also, both ombuds and EAP professionals are concerned with identifying and preventing potential violence. However, while EAP professionals focus on psycho-social assessment and referral or coping with problems outside of work, ombuds concentrate on practical, constructive methods for addressing workplace conflicts.
- Like those who handle certain compliance-related functions (such as audits, whistleblowing, and non-discrimination), ombuds encourage people to report wrongdoing, help them learn about and gain access to their rights, and assist them in finding safe ways to come forward. However, unlike compliance offices, ombuds do not function as offices of record or notice.⁵

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Central to the role of ombuds is the function of coaching. First, coaching helps people to discern what they *actually* want (their underlying “interests”) as opposed to their initial “positions.”⁶ Next, it allows them to explore potential avenues for addressing those interests. The coaching process includes “reality checks,” which help people determine what is, or is not, reasonably attainable, and the possible costs and advantages of each option. Such one-on-one counseling is at the core of ombudsing. Our other services radiate from that core.

The Staff Ombuds Office

The Staff Ombuds Office at the University of California, Berkeley, serves more than 12,000 staff employees, supervisors, and managers, including academics with management responsibilities, such as deans, department chairs, and principal investigators. It provides a good working model of the ombuds’ mission, the type of complaints received, and the process of resolution.⁷

Early-warning system on the need for systemic change.

The mission of the Staff Ombuds Office at U.C. Berkeley states: “The Staff Ombuds Office advocates for fairness, equity, justice, and humane treatment in the workplace. From these principles, the Staff Ombuds Office offers a confidential, impartial, objective, informal alternative for resolution of work-related concerns for staff, student employees, and managers of staff.”

On the face of it, the use of the word “advocates” may seem contrary to what has been said regarding ombuds’ impartiality. The important distinction is that while ombuds do not advocate on behalf of individuals, they do advocate to encourage systemic change within the organization. For example, each time we issue a report, we include a series of recommendations for systemic changes that support fair and humane treatment.

The most recent annual report included four major recommendations to campus management:

- No one should be placed in a supervisory role who does not have the time and desire to exercise adequate supervisory oversight.

- All supervisors (both faculty and staff) should be given training in basic supervisory skills, including conflict management. Priority should be given to the training of first-time supervisors, including new department chairs.
- Workshops on methods for developing and sustaining a civil workplace should be offered to the campus community on a regular basis.
- Staff workloads should be reviewed for reasonableness in light of demands resulting from new ways of doing work, such as systems innovations.

Examples of key recommendations from previous years include:

- Encouraging training in civility and multicultural competencies at all levels
- Monitoring selection practices to assure lack of cultural bias
- Encouraging attendance at programs on dealing effectively with change
- Assuring appropriate use of technology, so that it does not impair the fabric of interpersonal relationships
- Developing means to hold management accountable for upholding the campus’s stated principles and values

‘Ear’ of the organization. These recommendations are not mere guesswork. They arise out of an in-depth understanding of the many kinds of problems that employees, including supervisors and managers, are experiencing, and the barriers, both personal and institutional, that impede satisfactory resolution. By adhering to the principles of independence, impartiality, and confidentiality, we have created a safe place where people feel comfortable telling us what really is going on. Because we hear about our visitors’ thoughts and emotions, we become the “ear” of the organization. People often leave our office saying that this was the first time they truly felt heard — evidence that one skill which badly needs to be developed, and used, on campus is *active listening*.

Individual counseling and coaching. Our next task is to help people sort through what actually is going on and what outcome they really want. This entails disentangling many threads that the person may have tangled into one seem-

ingly insurmountable problem. And that problem often appears to that person to have only one apparent, and unsatisfactory, solution. We help people to identify the threads, sort them into categories, and then explore options for satisfactory resolution of each concern.

Say an employee expresses a single, giant problem: “My supervisor doesn’t reward me fairly,” and perhaps one simplistic solution: “If I can’t make my supervisor change, I’ll have to quit — but there’s no other job in sight!” Through conveying empathy and asking open-ended questions,⁸ an ombuds gains a greater understanding of the situation and can bring to light a number of options. For example, if by “rewards” the employee is talking about a supervisor’s decision concerning pay, the ombuds may inform the client that appeal rights may exist under the collective bargaining agreement, that the union can inform and represent the person regarding such rights, and that important time limits exist. But cases rarely are this simple. Often a word like “rewards” is not about a particular decision regarding compensation but is an umbrella term with a host of other connotations such as:

- Lack of appreciation: “My supervisor criticizes every little thing I do wrong and never shows appreciation for what I do well.”
- Inequitable workloads: “Others are given far lighter workloads for the same pay.”
- Lack of access to privileges: “I don’t get to attend conferences while others do.”
- Lack of visible credit: “My supervisor takes full credit with higher-ups for my work.”
- Lack of advancement: “When hired, I was told I could move up quickly, yet only outsiders seem to get the better jobs.”
- Lack of necessary space/equipment: “My work environment makes it hard for me to perform effectively.”

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The ombuds may discern other underlying issues, such as fear of inadequate skills for taking on new duties, anger regarding perceived slights, a belief that someone is discriminating,⁹ or personal problems impinging on performance (such as mental or physical illness, family difficulties, or financial crises). Once it is determined what really is wanted, priorities are identified and possible courses of action are explored. The ombuds then provides coaching on how to understand other perspectives, effective listening and speaking, giving constructive feedback, dealing with anger, effective use of apologies (giving or receiving of same), and other skills as needed. Role-playing can be helpful as well.

Although “rewards” or compensation-related claims often are the “presenting problem” when people first seek an ombuds’ assistance, monetary compensation often turns out not to be the person’s primary concern. In our last reporting period, for example, only 8 percent of the situations were fundamentally about monetary rewards. Apart from problems concerning impaired communications — which are a primary component of nearly every situation brought to our attention — the leading concern of most of our visitors is unfair or uncivil treatment in general (43 percent), which may be manifested in many different ways. The next-most-common concern is conflicting work styles (26 percent). Communication, treatment, and work styles are the “big three,” year after year. Indeed, we stopped counting impaired communication as a separate category because the topic essentially was a “given” in nearly every conflict.

Other common concerns are performance evaluation (14 percent), job status (14 percent), discrimination (10 percent), and disciplinary actions (9 percent). Of the 10 percent of concerns that fell within the “discrimination” category, 48 percent of the cases concerned race/ethnicity; 28 percent gender; 6 percent sexual orientation; 6 percent disability; 2 percent age; 2 percent national origin; 2 percent religion; and 7 percent “other.”¹⁰

Group assessment and counseling. The same kind of “disentangling” and resorting that is done with individuals also works for groups. While sometimes difficult and time consuming, group counseling can get at long-standing, pervasive, even pernicious problems in a way that can lead to dramatic transformations of troubled work groups.

Mediation. Most ombuds act in some capacity as mediators, whether the role means simply facilitating a constructive conversation between two people, “shuttle diplomacy” (working behind the scenes, with permission, to help people understand each other better), or more structured processes. Even within the more structured processes, there are varying types of mediation, from “traditional” to “transformative.” The mediation that I see as most appropriate to the role of an organizational ombuds is a process that is focused less on obtaining written agreements than on restoring or transforming relationships.

Other Opportunities for Systemic Change

There are additional ways that an ombuds, as an “ear,” can provide early warning concerning troubling trends or systemic problems.

Committees. Some ombuds are concerned that serving on committees may compromise impartiality. However, attending committee meetings of broad-based groups, and serving as a non-voting observer of process rather than as a “member,” can be a useful role. It enables the ombuds to:

- Track what is going on within the organization
- Provide the committee with information regarding relevant trends
- Encourage members to bring forward problems in constructive ways
- Encourage fair process, such as the inclusion of all appropriate voices before decisions are made.

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'ear,' can provide early
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systemic problems.*

However, the ombuds must not act as a policymaking member or serve on committees that make determinations about rewards for, or sanctions against, individuals or groups (such as judicial or disciplinary committees). At U.C. Berkeley, ombuds serve as non-voting members of campuswide committees on community-building and on balancing work and family responsibilities.

Outreach to campus organizations.

The U.C. Berkeley ombuds office periodically meets with key groups affecting campus climate. The purpose is to hear concerns, assist in preventing unnecessary conflict from developing, and support constructive approaches to unavoidable (and often healthy) conflicts that do occur. An additional purpose is outreach: making people more aware of who we are and what we do.

Training. Today, attention to training is more important than ever — and, unfortunately, less likely to be given adequate funding because of budgetary exigencies.¹¹ In the long run, training will lessen the need for individual consultation. However, over the short term, training can lead to more requests for individual consultation as people gain a greater awareness of their problems and begin to address them.

Workshops are central to the effective prevention and resolution of conflict. At U.C. Berkeley, we offer “Civility: Respect in Action,” “Civility in the Use of E-Mail,” “Resolving Conflict,” “Managing and Mediating Conflict,” and “Dealing With Difficult Situations and Behavior in the Workplace.” Offerings are constantly being revised based on reassessment of campus needs. The class on email civility, for example, came into existence because our office began to be inundated with instances of raging email wars. In recent years, we have found that more and more departments benefit from training tailored to their work unit. Usually, we can adapt an existing workshop to a department’s particular needs.

Some may question whether training is appropriate to the ombuds role. I am convinced that if training focuses on the heart of ombudsing — preventing and constructively resolving conflict — no one is in a better position to do it, for

three reasons. First, we hear the true nature of underlying conflicts. Second, we comprehend the subtle yet critically important characteristics of the organization, such as where power lies, how it is exercised, what values are held in high or low esteem, and what hidden manner of communication is at play. Finally, training is an important communication medium for the ombuds. It facilitates outreach, encouraging people to make individual appointments to explore problems not addressable in the group setting.

Copresenting or consulting. Collaborating with others who are engaged in training can result in rich offerings. For example, the employee assistance program has integrated segments on dealing with anger or stress into our programs. We have provided the human resources department with a section on conflict resolution as part of their supervisory training series and have spoken about recognizing underlying issues as part of their performance management series. Sometimes consulting is all that is needed. We have helped other trainers, including external consultants, gain an awareness of relevant issues as they design their programs. At all times, care must be taken to assure both the perception and the reality of the ombuds' independence.

Self-help tools. In addition to including selected bibliographies in each of our workshops, our office has a lending library of books and tapes on a variety of ombuds-related topics, such as conflict resolution, communication skills, multicultural awareness, dealing with anger and violence, organizational development, and civility. Our comprehensive website can also be a valuable reference tool for self-help: <http://ombudsforstaff.berkeley.edu>.

'Small' Gestures, Large Effects

Some seemingly small things that an ombuds can do may have large positive effects. For example, ombuds sometimes serve in ceremonial roles that contribute to the development of a caring community. At U.C. Berkeley, the ombuds participates in a campus ceremony honoring the memory of members of the community who have died in the past year. We also participate in Charter Day events as the visible symbol of staff presence. At the campus gathering immediately after "9/11," the ombuds described the impact of that tragedy on

staff. We also welcome staff to the campus at employee orientations. This ceremonial visibility is important because at universities, staff often feel like second-class citizens, the forgotten, invisible partners of a more visible community of faculty and students. Whichever role we are playing, we try to model the empathy, integrity, understanding, and passion for fairness and justice that we encourage in others. *

1 Although the terms "ombudsman" and "ombudsperson" are in frequent use, I prefer the simplicity of "ombuds," which appears to be gaining ground — just as "chair" appears to be superseding "chairman" and "chairperson."

2 Detailed descriptions of ombuds functions and services are contained in two valuable booklets published by The Ombudsman Association: "Why an Organizational Ombudsman? What an Organization's Management Might Want to Know," by Thomas Furtado; and "Options, Functions and Skills: What an Organizational Ombudsperson Might Want to Know," by Mary Rowe, Ph.D. The Ombudsman Association and the University and College Ombuds Association both have contributed to the profession by establishing standards of practice, codes of ethics, and a broad range of professional development programs for new and experienced ombuds. Their websites (www.ombuds-toa.org and www.ucoa.org) contain useful information for ombuds and for employers who are thinking about establishing an ombuds function.

3 Some associations affirm only three principles (independence, impartiality/neutrality, confidentiality); however, for organizational ombuds, informality also is a bedrock principle.

4 Some collective bargaining agreements may preclude an ombuds' involvement with employees covered by those agreements. In addition, some ombuds do not provide services to employees covered by collective bargaining agreements, out of concern that they may be perceived as interposing themselves between employees and their authorized representatives. To work effectively with employees covered by collective bargaining agreements, ombuds must take scrupulous care not to interfere with rights of representation and that their impartiality/neutrality is manifest to all concerned, including the union. Unions may value ombuds' efforts to help employees sort out their personal concerns from their work-related concerns, to help coworkers resolve personal "workstyle" conflicts with each other, and to assist members of a work group to promote greater civility in all their interactions. As one union

representative told me, “I’m in favor of having a whole arsenal of tools available for problem-solving, including ombuds services.”

5 At present, there are lively debates as to under what (rare) circumstances, if any, an institution may be considered to have been put on “notice” by an ombuds. Ombuds’ terms of reference should be explicit regarding this issue. Our office at U.C. Berkeley states that talking to us does *not* constitute notice to the institution.

6 Terminology regarding “interests,” “positions,” and “reframing” is common to the field of alternative dispute resolution. See work that has emerged from Harvard’s Program on Negotiation, especially Roger Fisher and William Ury’s *Getting to Yes* and Ury’s *Getting Past No*.

7 The office was cited as a model in *The Complete Guide to Conflict Resolution in the Workplace*, Marick F. Masters, and Robert R. Albright (New York: AMACOM, 2002) 195-196.) My reports describing activities of the Staff Ombuds Office since 1993 are available at our website, <http://ombudsforstaff.berkeley.edu>. The most recent report, from which many of the following statistics are derived, covers 2000-02.

8 Examples: “What do you mean when you talk about ‘rewards’?” “What would seem ‘fair’ to you?” “How do you think your supervisor views you — in terms of both positives and negatives?” “Was there a time when you felt more fairly treated? In what way, and when and how did things begin to change?” “What is the worst that might happen if you tried X approach?”

9 The terms *perceived* slights and *belief* of discrimination are not meant to suggest that either the slights or the discrimination are not real, but simply that the ombuds is not in a position to adjudicate what actually is happening. The ombuds can, however, help the person look thoroughly into what is going on and gain access to potential remedies.

10 Statistics concerning sources of conflict may total more than 100 percent because people often present multiple concerns.

11 Further information about the importance of training is detailed in my article, “Ombuds as Teacher: Developing Training Programs,” *Journal of the California Caucus of College and University Ombuds* (2:1, November 1999, pp. 23-27).

It takes time and experience to understand the nuances of labor relations. Here's a start...

Pocket Guide to the Basics of Labor Relations

By Rhonda Albey

- Why we have public sector unions
- State laws that regulate labor relations
- The language of labor relations
- What is in the typical contract
- How to negotiate and administer labor agreements
- How to handle grievances
- What to do in arbitration and unfair practice hearings
- How to handle agency shop arrangements
- How to cope with extraordinary situations (including downsizing and/or restructuring, work actions, and organizing drives)

FOR INFORMATION ON ORDERING, SEE THE BACK COVER OF THIS ISSUE OF *CPER*

CalPERS Moves to Contain Health and Retirement Costs

Katherine Thomson, CPER Associate Editor

The last year has seen some big shifts in the CalPERS health benefits program. The agency has reversed itself on one policy, and Blue Shield is working with CalPERS in the battle against high-cost hospitals. CalPERS also has thrown a lifeline to local agencies with budget crises that threaten retirement contributions. But the help may have arrived too late and be too limited to rescue more than a handful of agencies.

Eager to keep hundreds of public entities in its health care benefits program, the California Public Employees' Retirement System has reversed its position on regional rates for health care premiums. Although final decisions will not be made until later this month, the CalPERS board decided in March to explore the possibility of setting premium rates closer to market rates in several areas of California, which would lower costs for Southern California employers.

CalPERS' battle to restrain costs also has resulted in a skirmish with Sutter Health over the possible exclusion of half the hospitals in the Sutter network, along with other high-priced hospitals, from the list of Blue Shield providers. Sutter responded by offering a discount to CalPERS, but the agency says the discount does not save as much as would be saved by limiting the network to less-expensive hospitals. One of the big factors CalPERS is considering is the number of employees who will need to change primary care providers.

Relief for retirement contribution costs also may be available to some public entities if they act fast. In late April, the board adopted a plan to allow agencies with a severe budget crisis to pay lower costs in 2004-05, but make higher retirement contributions beginning in 2007-08. However, interested public agencies only have until June 15 to apply.

Regional Costs Vary

Health care costs in some parts of the state are nearly 65 percent higher than in others. Rural northern counties tend to be the most expensive, while populous southern counties have the lowest costs. Last year the board considered and rejected a proposal to charge different rates according to the different health care costs in various areas of the state. Regional rates would not have been available to the state em-

employer, but they would have been applied to the 490,000 employees, retirees, and dependents of local agencies and school districts that contract with CalPERS for health care coverage. At the time, CalPERS spokesperson Clark McKinley told *CPER* that some board members considered it unfair to charge lower premiums for local employees while making the state pay more for its employees living in the same area. The board also realized it needed more time to study how to implement regional rating and to seek legislation that would authorize the board to contract with health care plans that charge varying rates based on regional costs. The legislation became effective at the beginning of this year.

The impetus for reconsidering regional pricing is the ability of contracting agencies to end their relationship with CalPERS after the board announces rates for the following calendar year. Last year, 27 agencies did not renew contracts, and eight others withdrew at least one group of employees from CalPERS benefit plans. Most of the agencies that pulled out were in Southern California, where agencies could find other plans at a lower cost. (See story in *CPER* No. 162, pp. 46-49.)

Because the withdrawal of large numbers of participants, particularly those in lower-cost areas, affects the demographics of the pool of covered employees, it can affect the rates charged by the health plans. CalPERS estimates that last year's defections, involving 37,000 of the 1.2 million participants, will push Blue Shield rates up about 1 or 2 percent in 2005. Fearing a domino effect, where rising premiums cause more departures from the health benefits program and further destabilize the risk pool, the board approved regulations that allow regional pricing.

CalPERS' staff is organizing the state into four geographic areas: (1) San Francisco Bay Area, Sacramento, and adjoining counties; (2) other northern California counties; (3) Los Angeles, Ventura, and San Bernardino counties; and (4) other Southern California counties. A fifth rate will be established for retirees and dependents who live outside of

the state. In May, the board considered two scenarios from each health plan. In one, premiums are based on actual local market rates. In the second, disparities in rates between different regions are "smoothed" so that agencies in higher-priced regions will pay slightly less than the local market rate while those in lower-priced regions will see their rates fall, but will pay somewhat more than local prices. Final decisions on the rates for 2005 will be made this month.

Fearing a domino effect, where rising premiums cause more departures from the program, the board approved regional pricing.

Negotiations With Sutter

CalPERS contracts with Blue Shield, Kaiser, Western Health Advantage, and two Blue Cross preferred-provider plans for health care benefits for the 1.2 million participants in its health care program. In 2003, Blue Shield conducted a survey of costs for hospitals within its network. It found huge differences among hospitals in the prices for various procedures. In particular, Blue Shield found that some Sutter Health hospitals were 60 per-

cent more expensive than other Northern California hospitals, and 80 percent more expensive than average California hospitals. Hospital costs have accounted for about 40 percent of CalPERS' premium increases in the past two years.

In negotiations for premiums for 2004-05, Blue Shield suggested that a smaller network of less-costly hospitals could save \$53 million of the estimated annual \$3.9 billion cost of the CalPERS program. Blue Shield covers about 36 percent of CalPERS participants. At first, Blue Shield proposed excluding 15 of Sutter Health's 26 hospitals, along with 40 others.

Sutter initially refused to consider allowing Blue Shield to exclude a portion of its hospitals from the Blue Shield list of providers. Although Sutter eventually relented on its all-or-nothing policy, CalPERS cosponsored S.B. 1509 (Alpert, D-San Diego), which would limit the power of health care providers or networks to require a health plan to contract for the use of all of the provider's facilities or services rather than choosing to contract for the least-expensive facilities or services. The bill also would force non-profit hospitals to make more financial disclosures.

As an alternative, Sutter offered CalPERS a discount for 2005 and 2006. CalPERS says the discounts do not restrain costs sufficiently, but the implications of reducing the hospital network have forced the board twice to delay making a decision whether to use the full Blue Shield provider network or reduce it beginning January 2005.

The major concern is the disruption of patients' relationships with their primary care providers. Exclusion of hospital providers in turn affects which medical groups are able to contract with the CalPERS Blue Shield health plan. Originally, it was estimated that 93,000 patients would be required to switch hospitals and doctors.

In May, Blue Shield's reduced network proposal excluded only 38 hospitals. The new list reflected the health plan's updated analysis of the cost, quality of care, disruption in patient-provider relationships, and the distance to new providers that would have the capacity to absorb new patients. Some hospitals were added back to the network because the driving distance to new providers would exceed 15 miles. A new estimate of patients affected by provider changes was reduced to 53,000. Members whose care is coordinated with Medicare would retain access to the full network, as there is no cost-savings from a reduced network for this population.

At the board meeting last month, CalPERS weighed whether to accept the Sutter discount for 2005, but maintain the option of adopting a smaller network in 2006, while encouraging expensive hospitals to reduce their cost to the plan. This option has the advantages of predictable costs and no patient dislocation, but there is less potential for cost savings and no impetus for the hospital industry to commit to pricing reforms or to disclose financial information during negotiations.

The reduced network option has the largest potential for cost savings, but the numbers are unpredictable. There is some concern that patients will continue to use the hospitals that are no longer in the network, especially those patients with chronic conditions. Patients may also resort to using

the emergency room more often. Additionally, CalPERS worries that employer savings could be offset by patients who switch from the Blue Shield health maintenance organization to a preferred provider plan to keep their primary care doctor. It is likely that those who switch plans would have chronic conditions and require more hospitalization. Although there also is a greater potential to force changes in the hospital market by refusing to contract with the most-expensive hospitals, using a smaller network entails a risk that the less-expensive hospitals and networks will have more clout in future negotiations.

*Representatives from
several counties
and SEIU appealed
for relief from
spiraling retirement
contribution rates.*

Retirement Rate Restructuring

In March, representatives from the counties of Santa Clara and Riverside, the City of Long Beach, the Riverside Sheriff's Association, and the Service Employees International Union appealed to the CalPERS Benefits and Program Administration Committee for relief from spiraling retirement contribution rates. These three large contracting agencies were facing large employee layoffs due to budget crises. Skyrocketing retirement contribution rates have added to budget pressures caused by the weak economy and state raids on sources of local government funding. During the stock market boom, many agencies had an abundance of assets in their retirement plans and were required to make few or no contributions; however, recent market performance has resulted in the requirement to make contributions equal to 5 or 6 percent of payroll for each employee.

In response to the plea for help, the board adopted a temporary resolution that allows the chief actuary of CalPERS to restructure an employer's contribution rates for 2004-05 if the employer meets seven criteria. Employers will be permitted to pay the same rate as last year plus at least 20 percent of the increased cost of this year's contribution rates. Higher payments will be made beginning in 2006-07, to offset the reduced contributions.

In response to the plea for help, the board adopted a temporary resolution that allows the chief actuary of CalPERS to restructure an employer's contribution rates for 2004-05 if the employer meets seven criteria. Employers will be permitted to pay the same rate as last year plus at least 20 percent of the increased cost of this year's contribution rates. Higher payments will be made beginning in 2006-07, to offset the reduced contributions.

Very few employers are eligible for the contribution relief. The plan is available only to those who already have

obtained all rate restructuring that CalPERS offers, such as increasing the amortization period for the plan's unfunded liability from 20 to 30 years. According to CalPERS, only 12 contracting agencies have taken advantage of the 30-year amortization program.

Three agencies that have moved to 30-year amortization and still face budget crises are the City of Long Beach, Santa Clara County, and Riverside County. To be approved for the new rate-restructuring plan, they will have to request restructuring jointly with their employees or the labor organizations that represent most of their employees and agree to the amount of the deferred contributions. The employers will need to show that they will experience a severe budget crisis during fiscal year 2004-05, and that they already have analyzed the feasibility of using pension obligation bonds to obtain funds for retirement contributions. Agencies may not apply for restructuring to fund an increase in pension benefits, other than an early retirement incentive, unless the pension enhancement was negotiated with an employee organization prior to April 30, 2004.

Meeting the seven criteria will not guarantee that the chief actuary will approve restructuring of an agency's contribution rates. The actuary will determine whether the reduction in contributions will risk benefit payments in the short run and whether the increased contributions in the future will put the employer at risk of default, thereby jeopardizing future benefits. The actuary also will consider whether the restructuring plan places too much responsibility onto future taxpayers to pay the costs of today's generation.

The board made the deferment program temporary to enable staff to reassess the advisability of restructuring in the wake of an unusual series of events in the stock market. In addition, though, the temporary nature of the plan may save it from legal challenges. CalPERS members have a vested contractual right to a sound retirement system. In 1997, the board challenged legislation that allowed the state employer to delay contributions, putting it 12 months in arrears. The Court of Appeal held that legislation impaired the vested rights. (See discussion of *Board of Administration v. Wilson*, 52 Cal. App. 4th 1109, in *CPER* No. 123, pp. 47-50.) Although employees' contractual rights may be modified prior to retirement, the modification "must bear some relation to the theory of a pension system and its successful operation."

It must preserve or protect the system or enable the employer to meet its pension obligations. Any changes that disadvantage employees should be offset by comparable new advantages.

The *Wilson* court distinguished the 12-months in arrears legislation from prior measures that permitted delayed employer contributions. It accepted the board's contentions that a 1990 move from monthly payments to quarterly payments was legal because CalPERS members received an advantageous new formula basing their benefits on a one-year final compensation period, instead of a three-year compensation period. It also agreed that a one-time, temporary change from the quarterly payment schedule to a semi-annual payment cycle for one year was lawful because the board was given the authority to increase contributions in future years to make up for any losses to the retirement fund.

CalPERS expects that the rate reduction will survive any legal scrutiny because it is temporary and will be accompanied by higher future contributions. No employer's application will be approved unless the restructuring is necessary because the employer is facing a severe budget crisis and has exhausted all other means of funding its contributions. By enabling employers to meet their contribution obligations, rate restructuring will benefit members. Members' rights to an actuarially sound pension plan will be safeguarded by the chief actuary, who will not allow restructuring if it would undermine the actuarial soundness or integrity of the employer's plan.

Ken Marzion, chief of actuarial and employer services, explains that the short window in which to submit applications was necessary to enable the actuaries to review the applications and approve the plans before the first contributions for 2004-05 are due on July 1. As *CPER* went to press, Marzion said only one agency had applied for rate restructuring. But Terry Brennand, SEIU governmental relations advocate, told *CPER* that the City of Long Beach and Santa Clara and Riverside counties were preparing their applications.

For those unable to take advantage of this rate restructuring plan, the board has not ruled out approving another restructuring plan next year. However, CalPERS staff will not act without a specific request from an agency or employee organization. *

Recent Developments

Public Schools

Verdict in Favor of Teacher Terminated for Defending Disabled Students Upheld

The Ninth Circuit Court of Appeals reinstated a jury verdict in favor of a teacher who was terminated following her complaints about the way disabled students were treated. The court in *Settlegoode v. Portland Public Schools* found that the district court should not have thrown out the jury's decision that the teacher had been punished for exercising her First Amendment rights and that her termination violated Sec. 504 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. The jury had awarded the teacher \$500,000 in non-economic damages, \$402,000 in economic damages, and \$50,000 in punitive damages.

Factual Background

Dr. Pamela Settlegood was hired on a probationary basis by the Portland Public Schools for the 1998-99 academic year as an adapted physical education teacher. She taught students with disabilities at various schools in the district, and drafted individualized education programs (IEPs) for them, as required by federal law.

Settlegoode had trouble finding a place to teach her high school students. Material and equipment often were

nonexistent, inadequate, or unsafe. Her complaints to her supervisor, Susan Winthrop, were ignored. At the end of her first year of teaching, Settlegoode wrote to Winthrop's supervisor, Robert Crebo, complaining that the Adapted Physical Education Program suffered from "systematic discrimination, maladministration, access, pedagogy, curriculum, equity, and parity," and "greatly compromised federal law." She compared the district's treatment of disabled students to that of African-American students before the Civil Rights Movement. She also criticized Winthrop in her letter.

Crebo showed the letter to Winthrop, who was concerned that "a staff member with such limited experience has the potential to defame my character and damage my professional reputation." She told Settlegoode to stop writing letters as they were not "an effective means of communicating." Crebo, in his response to Settlegoode's letter, defended Winthrop and the school district.

Settlegoode's performance evaluations generally were positive during her first year of teaching. But, after Settlegoode's letter to Crebo, Winthrop's evaluations of her were

much more negative, including criticism of her ability to write IEPs. Winthrop also wrote that Settlegoode was "strong, outspoken, and demanding," and was "not able to listen to constructive criticism, complete a self reflective process, and improve professional behavior."

Settlegoode then wrote to the superintendent of schools that she was being retaliated against for complaining about the treatment of her students. In her letter, she reiterated her concern about the conditions for the disabled students.

In Settlegoode's final performance evaluation, Winthrop rated her below district standards and stated that she would not be recommended for renewal. The school board accepted the recommendation and did not renew Settlegoode's contract.

Settlegoode filed suit in federal court claiming that the district, Winthrop, and Crebo had violated Sec. 504 of the Rehabilitation Act of 1978, her free speech rights under 42 USC Sec. 1983, and Oregon's Whistleblower Act. After the jury returned a verdict in her favor on all counts, the trial court set it aside.

Court of Appeals Decision

The Ninth Circuit first analyzed Settlegoode's claim that the defendants had violated her constitutional right of free speech. Relying on its decision in *Keyser v. Sacramento USD* (9th Cir. 2001) 265 F.3d 741, the court stated:

When a government employee alleges that he has been punished in retaliation for exercising his First Amendment rights, we engage in a three-part inquiry: To prevail, an employee must prove (1) that the conduct at issue is constitutionally protected, and (2) that it was a substantial or motivating factor in the punishment. Even if the employee discharges that burden, (3) the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct.

Though the lower court found that Settlegoode had met the first two elements of the *Keyser* test, it determined that she had not met the third because “her inability to write IEPs was sufficient for [the district] to deny renewal of her probationary contract.”

The Court of Appeals disagreed: “The only documentary evidence that Settlegoode’s IEPs were inadequate consists of Winthrop’s evaluations, which were written after Settlegoode had sent her first letter criticizing her and the school district.”

In addition, said the court, there was “no evidence that the defendants discarded or substantially revised Settlegoode’s IEP drafts” and “no single teacher writes an IEP alone.”

The court also found that, even if the defendants had been able to show that Settlegoode’s IEPs were inadequate, that would not have been enough to meet the *Keyser* test. “Defendants were required to show that they ‘would have taken the same action even

in the absence of the protected conduct,” not just that they *could* have done so. This is a crucial distinction, said the court, and defendants did not offer any evidence that, for example, “other teachers had been fired for drafting inadequate IEPs.”

The court held that the jury’s verdict could not be overturned on the evidence presented:

In bringing their Rule 50 motion for judgment notwithstanding the verdict, defendants must vault a very high hurdle: They must show that no reasonable juror could have found that the school district *would* have renewed her contract but for her speech. At best, they have shown that whether Settlegoode’s inadequate IEPs were the reason for her termination, or whether they were inadequate in the first place, is a close call. In such circumstances, the rule is clear: The verdict trumps.

The Court of Appeals also disagreed with the lower court’s finding that Winthrop and Crebo were entitled to qualified immunity. As the court recognized, “public officials are immune from liability for section 1983 damages ‘insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” Turning again to its decision in *Keyser*, the court summarized the factors that must be established for a government employee claiming a violation of his First Amendment rights to prevail:

(1) that his speech involved a matter of public concern, and (2) that the interests served by allowing him to express himself outweighed the state’s interest in promoting workplace efficiency and avoiding workplace disruption....When balancing interests under the second prong of the test, defendants must show actual injury to legitimate interests beyond the disruption that necessarily accompanies such speech.

The lower court held that, though Settlegoode’s speech was within the ambit of the First Amendment, the bal-

‘The rule is clear: The verdict trumps.’

ancing of interests under the second prong of the test did not weigh clearly in Settlegoode’s favor. The Court of Appeals disagreed with the trial court, finding that the magistrate judge failed to “acknowledge the jury’s determination of this issue.” In light of the instructions given to the jury, “the jury’s verdict in favor of Settlegoode necessarily reflected a finding that any disruption her comments might have aroused was outweighed by Settlegoode’s interest in free expression....The magistrate judge should only have found that the defendants were protected by qualified immunity if it was ‘quite clear that the jury reached a seriously erroneous result.’”

NEW!!!

Pocket Guide to K-12 Certificated Employee Classification and Dismissal

By Dale Brodsky

For K-12 employees and their representatives and public school employers including governing board members, human resources personnel, administrators, and their legal representatives

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“We cannot see how the jury’s finding could possibly be deemed ‘seriously erroneous,’” the court explained. And, in a vigorous showing of support for the role of teachers in our society, the court clarified its position on this point:

There was a strong interest in allowing Settlegoode to express herself. Not only were Settlegoode’s core First Amendment rights implicated, but her speech may have

We have long recognized the importance of allowing teachers to speak out on school matters.

had important effects for the disabled students in the district and their parents. Teachers are uniquely situated to know whether students are receiving the type of attention and education that they deserve and, in this case, are federally entitled to. We have long recognized the importance of allowing teachers to speak out on school matters because teachers are, as a class, the members of a community most likely to have informed and definite opinions on such matters. This is particularly so with respect to disabled children, who may not be able to communicate effectively that they lack appropriate facilities. Teachers may therefore be the only guardians of these children’s rights and interests during the school day.

Whether or not Settlegoode’s assertions were accurate, or were communicated in the best manner possible, it is clear that the subject matter of her expression was of public importance.

On the other hand, the court found that the district presented very little evidence of disruption. The court emphasized that Settlegoode communicated her dissatisfaction through internal letters and discussions with supervisors rather than making statements to the public or the media. “We are hard pressed to figure out what Settlegood could have done that would have been more pleasing to the school district — except, of course, keep quiet.”

The court also found that none of the testimony on which the lower court relied showed “actual injury” to the district. In fact, the court found, “Settlegoode’s letter brought the teachers together to help make positive changes to their

department and the physical education program, and that many of the teachers agreed with Settlegoode.”

Concluding that the jury was “more than reasonable” in finding that the interests served by allowing Settlegoode to express herself outweighed any resulting minor workplace disruption, and that “it is well settled that a teacher’s public employment cannot be conditioned on her refraining from speaking out on school matters,” the court held that Winthrop and Crebo were not immune from liability.

Because the Court of Appeals held that the lower court was wrong on the Sec. 1983 claim, it did not need to address the other claims, and it ruled that Settlegoode was entitled to the full jury award, including punitive damages. It also awarded her attorneys’ fees. (*Settlegoode v. Portland Public Schools* [9th Cir. 4-5-04] 362 F.3d. 1118, 2004 DJDAR 4168.) ❁

Legislature Rejects Schwarzenegger’s Attempt to Repeal Contracting-Out Law

The California legislature rejected a bill backed by Governor Arnold Schwarzenegger aimed at repealing a 2002 law that limits the ability of school districts to contract out school services. A.B. 2992 would have repealed S.B.1419 but was not allowed to advance out of the Assembly Public Employees, Retirement and Social Security Committee.

Schwarzenegger called for repeal of S.B. 1419 in his State of the State address. Supporters of the repeal claim that school districts would save \$300 million a year if A.B. 2992 were passed. (See related article in *CPER* 164, pp. 39-41.)

Existing law enacted as S.B. 1419 provides that school districts can contract with outside companies for services such as busing, food service,

groundskeeping, and janitorial services only if the district can show that cost savings are not derived solely from workers' salaries and benefits and that no school employees will lose their jobs.

Republicans argue that the law binds the hands of local districts trying to cut costs to balance their tight budgets. They point to examples, such as the Santa Ana School District, where they say new computers sit in boxes because employees have no time to handle setup, while the district is precluded by the law from hiring an outside company to do the work.

Those opposing the repeal, such as the 240,000-member California School Employees Association, argue that districts are not precluded from contracting out; they just must show that they will save money by doing so and that school employees' jobs will not be replaced by jobs with low wages and poor benefits. They assert that contracting out could cost the state much more money by having to provide health benefits for private workers who are not offered those benefits as part of their employment.

Democrats suggested that Schwarzenegger address the issue during the upcoming budget negotiations. The governor issued a press release in response to the defeat of his measure, stating: "[I] will not be deterred by today's action and will continue to work with Assembly Republican Leader McCarthy and local school board members, superintendents and school business officials until SB 1419 is repealed."

In a related matter, CSEA has come out against the governor's appointment of Jeannine Martineau to the state Board of Education because of her stand on

the issue. Martineau, former president of the California School Boards Association, is chairperson of the coalition trying to repeal S.B. 1419. ❁

Local School Board Wins Confrontation With State Department of Education

Conservative school board members in the small Orange County town of Westminster have forced the state Department of Education to back down after a tense struggle, during which they risked the loss of millions in state funds. Three of the five trustees on the board of the Westminster School District refused to revise the district's discrimi-

of the trustees had accepted campaign donations from the Family Action Political Action Committee, a conservative advocacy group. One transferred her son from public to parochial school after sixth grade in order to avoid "all the social engineering that happens in public schools, like sex education."

Westminster was the only district in the state to refuse to adopt California Code of Regulation Title 5, Sec. 4610(k), which defines gender as "a person's actual sex or perceived sex and includes a person's perceived identity, appearance or behavior, whether or not that identity, appearance or behavior is different from that traditionally associated with a person's sex at birth." California Superintendent of Public Instruction Jack O'Connell threatened to withhold up to \$7.8 million in state funds if the district refused to revise its policy by April 12th. Hundreds of teachers, parents, and students protested against the three trustees, and a recall drive was begun against two of them. State Senator Joe Dunn (D-Santa Ana) introduced legislation allowing the state to take control of the district. Board President James Reed has been very vocal in his

The Superintendent of Public Instruction threatened to withhold up to \$7.8 million in state funds.

nation complaint policy to adhere to a state law that allows students and staff to define their own gender, regardless of their biological sex. The three defied the state Department of Education, saying that they had to remain true to their Christian beliefs, and that the law allows young children and staff to immorally define their sexual identity. Two

opposition to the three board members. Referring to the three trustees, he said, "If you are an advocate of public education, what possible justification would you have for saying this [funding] is not important? They are being bigoted against these protected classes because they don't like them."

But, even in the face of such overwhelming opposition, the trustees held

The trustees adopted the state policy with the exception of the definition of gender.

firm. One of them, Judy Ahrens, called O'Connell's threat to withhold state funds "blackmail," saying, "Morality is not for sale, at any price." In order to bolster their position, and over the strong objection of the other two trustees, the three fired David Larsen, the attorney who had counseled the district for the last 27 years and who was reported to have advised the board to comply with the state's requirements. They hired attorney Mark Bucher in his place. They rejected a compromise position put forward by district officials that would have allowed Larsen to continue to represent the district in matters other than the revision of the anti-discrimination provisions.

Bucher is co-founder of the Education Alliance, a group that has had

success in electing conservative candidates to school boards in Orange County. The organization was born in 1993 as a lobbying group for Proposition 174, a measure that would have legalized school vouchers had it passed. The Alliance has made campaign donations to one of the three trustees in the Winthrop school district majority.

Bucher became a lawyer in 2000. That same year, he was hired as an attorney by the Orange Unified School District to deal with legal issues arising from a recall effort against the conservative board majority there. In 1998, he co-wrote Proposition 226, a state-wide initiative that would have required unions to get permission before using dues for political purposes. The measure failed. In January 2000, he organized opposition to a decision by the Orange County Board of Supervisors to use union labor on public works projects. His most recent campaign involved an initiative that would have required parents to be notified before a minor has an abortion.

Bucher and the three trustees drafted a revision of the district policy that adopted the general state policy with the exception of the definition of gender. Westminster's policy defines a person's gender as his or her biological sex at birth or "the alleged discriminator's perception of the alleged victim's sex." The new policy reads, in part: "perception of the alleged victim is not relevant to the determination of 'gender,' ... it is the perception of the alleged discrimi-

nator which is relevant." District spokeswoman Trish Montgomery explained that the majority of trustees "don't want to give the person the right to define their own sex."

After a review by his legal team, O'Connell grudgingly agreed that Westminster's new policy was in compliance with the state law. But, he said, the district's rejection of the gender

The majority of trustees 'don't want to give the person the right to define their own sex.'

definition "was of no legal effect." He informed the district that he would be monitoring their actions closely to be sure that it complies with state law.

This is not the first time that the small Westminster school district has made headlines regarding an issue of discrimination. In 1944, an eight-year-old Mexican American girl named Sylvia Mendez sued the district for its policy of sending whites and Latinos to separate schools. Mendez, represented by Thurgood Marshall, prevailed before the Ninth Circuit in *Mendez v. Westminster* (9th Cir. 1947) 161 F.2d 774. The case ended school segregation in California, setting the stage for *Brown v. Board of Education* (1954) 347 U.S. 483.

The trustees and Bucher, flush with victory, are now planning to take on another battle with state officials over a new sex education and awareness law. The California Comprehensive Sexual Health and HIV/AIDS Prevention Act, which took effect last January, requires districts to inform parents of the content of classes and allows them to re-

move their children if they wish to do so. But Westminster currently has an "opt-in" policy, one that requires that parents affirmatively state that they want their children included in such classes, and it is expected that the three trustees will want to keep it that way. The triumvirate also is seeking to replace Reed as board president. ❁

ter. On October 1, 1996, Franzosi submitted an application to the State Teachers Retirement System for an "unmodified disability retirement allowance." In a letter dated May 6, 1997, STRS notified Franzosi that his application had been approved effective October 1, 1996; he began receiving his disability allowance retroactive to that date.

On April 28, 2000, Franzosi's vocational rehabilitation counselor contacted the district to discuss Franzosi's return to work. On August 21, 2000, the counselor and Franzosi discussed his return with a district representative. On June 1, 2001, the district notified Franzosi that he had no right to reinstatement because he had retired from the district on October 1, 1996.

Franzosi filed suit, seeking reinstatement to his former full-time position. The trial court denied his request,

College Instructor Has Only 39 Months From Start of Disability Retirement to Seek Reinstatement

The California Court of Appeal has determined that a tenured college instructor is entitled to reinstatement after a period of disability only if he applies within 39 months from the beginning of the term of disability. In *Franzosi v. Santa Monica Community College District*, the court rejected the instructor's argument that the time should begin running from the date it was determined that he was eligible for a disability allowance.

Factual Background

Ricardo Franzosi began working for the Santa Monica Community College District in 1980, as a part-time instructor. He became a full-time instructor in 1984 and obtained tenure in 1986.

Before the fall semester of 1995, Franzosi informed the district that he would not be able to teach that term because of a medical condition. He used his accrued sick time for that semester. Before the following spring semester, he advised the district that he still was un-

able to teach because of his medical condition. On April 1, 1996, the district approved a medical leave of absence for the period from February 12 to June 11, 1996.

Franzosi again contacted the district on August 7, 1996, and stated that he could not return for the fall semes-

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Bill Gates

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finding that the plain language of Education Code Sec. 87789 required that he request reinstatement within 39 months from the start of his disability. It rejected Franzosi's contention that the period starts to run on the date STRS granted his disability application, i.e., May 6, 1997.

Court of Appeal Decision

The Court of Appeal agreed with the lower court's interpretation of Sec. 87789. That section provides that the governing board of a community college district may grant a leave of absence to an academic employee who has applied for disability allowance, not to exceed 30 days beyond final determination of the disability allowance by STRS. It also provides that "if the employee is determined to be eligible for the disability allowance by the system, the leave shall be extended for the term of disability, but not more than 39 months."

Franzosi argued that this paragraph creates two different types of leave: the first sentence allowing for leave during the time that the application for disability is pending and the second establishing a mandatory extension of leave if the application is granted. The Court of Appeal agreed. However, it disagreed with his further argument about the date on which the 39 months begins to run. The court found the plain language of the statute provides that the time period begins to run on the effective date of disability retirement:

As an employee's disability retirement is effective as of a date certain, that date marks the beginning of the "term" of an employee's disability. In contrast, should we hold that the 39-month period commences from the date the employee is determined to be "eligible" for disability retirement, that would fly in the face of a plain reading of the statute. The statute does not refer to "approval of" disability benefits or "the determination of" or "confirmation of" eligibility for disability benefits, but rather speaks plainly of the "term of" disability. Commencement of disability retirement provides a date certain and establishes a uniform and readily ascertainable date from which the 39-month period should commence.

The court found that using any other date for the commencement of the term would raise practical difficulties and would require that the court rewrite the statute, modifying the legislature's clear intent. As further support for its position, the court relied on the canon of statutory construction, which requires that a statute be interpreted "with reference to the whole system of law of which it is part so that all may be harmonized and have effect." The court looked to another Education Code statute containing identical language, Sec. 44986, which applies to K-12 certificated employees. An earlier form of that statute provided, "if the employee is determined to be eligible for the disability allowance by the system, such leave shall be extended for the term of disability, but not more than

39 months *from the date of approval of the disability allowance.*" The statute later was amended to eliminate the italicized language. The court reasoned that if the legislature did not intend to change the meaning of the statute, the amendment would have been a pointless act. (*Franzosi v. Santa Monica Community College Dist.* [5-10-04] B168749 [2d Dist.] ___ Cal.App.4th ___, 2004 DJDAR 5554.) ❁

Local Government

Decision to Hire Retirees to Ease Staff Shortage Not Subject to Bargaining

The City of Sacramento was not required to meet and confer with the Sacramento Police Officers Association over the decision to hire retirees to serve as limited-term employees until the police department could replenish its ranks with new recruits. Reversing the trial court, the Third

The parties anticipated that this new benefit would increase the number of retirements.

District Court of Appeal concluded that the proposal to temporarily hire annuitants was prompted by an abrupt staffing shortage and involved a fundamental public policy decision designed to maintain the existing level of public safety in the community.

Since the city policy stated that nothing in its implementation was to affect the terms and conditions of employment of unit members, the court reasoned that the details of implementation were not subject to the meet and confer obligation. Individual officers

who were adversely affected by the plan were free to utilize the existing grievance procedure, the court said.

The dispute stemmed from an interest arbitration award issued under provisions of the city charter following negotiations over the terms of the 2001-05 memorandum of understanding. One of the benefits awarded by the arbitrator was a significantly enhanced retirement formula, effective July 2002. The new benefit ushered in a 3 percent at age 50 pension calculation.

The parties anticipated that this new benefit would increase the number of employee retirements. The police department already had been operating with fewer than its full complement of authorized officers. But, effective July 2002, 44 members of the force retired, and by September 2002, 92 rank-and-file police officer positions stood vacant.

Although the city authorized an additional \$500,000 to finance needed recruitment efforts, it had difficulty filling these positions because of the tight labor market for law enforcement officers in the Sacramento region. In addition, because a successful applicant must satisfactorily complete a 23-week training academy, there was a lag time between identifying the need for

more personnel and the availability of new hires.

The police academy graduated 20 cadets in June 2002, and the city scheduled three more sessions in 2003. By taking these actions, the city anticipated that it could fill all vacancies by December 2003.

In the meantime, however, the city told SPOA it wanted to use retirees as part-time, non-career, limited-term employees until the department could hire new recruits. City department heads were authorized to appoint retirees for terms not to exceed 960

The city had difficulty filling positions because of the tight labor market.

hours. The city expressly advised the departments that the use of retirees “shall not be used to circumvent the civil service system or labor agreements.” Nor did the policy permit retirees to be counted in terms of minimum staffing requirements.

The city rebuffed the union’s request that it submit the issue to binding arbitration, and in July 2002, the city’s personal director asked the city council to permit the appointment of retirees to the police force until the completion of the scheduled police academies in 18 months. The director

also asked the council to adopt “administrative principles” ensuring that “use of retirees at this time is not to save money, block promotional opportunities, or eliminate acting assignments.” The council was instructed to insure that the rehired retirees did not create any significant adverse impact on career employees.

The city council went along with the personnel director’s proposal citing the need to provide a level of staffing necessary for public safety until December 2003.

SPOA said the city’s use of retirees had displaced unit members from assignments.

SPOA filed suit seeking a court order barring enforcement of the policy based on the city’s failure to meet and confer as mandated by the Meyers-Milias-Brown Act. It also recounted several anecdotal examples where the city’s use of retirees had displaced unit members from assignments in specialty and supervisory positions, or had interfered with seniority rights. The city did not contradict the substance of these allegations but suggested that they could be addressed as grievances.

In its ruling, the trial court determined that the city had a duty to meet

and confer before putting the retiree resolution into effect because the policy represented a change in the status quo since the city admitted it never before had used retirees to fill vacancies in sworn positions in the bargaining unit. The trial court reasoned that the policy affected working conditions by limiting overtime and the opportunity to work in an acting capacity in specialty and supervisory positions. It gave no weight to the city’s claim of an exigent need to respond to staffing shortages.

The city successfully appealed the trial court’s ruling.

The Court of Appeal acknowledged the city’s obligation to meet and confer with the SPOA concerning any

change in terms and conditions of employment that fall within the scope of representation. But, the court commented, “determining the ambit of this obligation is not as simple as it might seem.”

For purposes of the appeal, however, the court assumed that the retiree proposal represented a change in the status quo. The appellate court then turned to the central point in the case — whether the policy is excluded from the scope of representation because it concerns the “consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.” Citing *Building Material & Construction Teamsters Union v. Farrell* (1986) 41 Cal.3d 651,

Clothes make the man. Naked people have little or no influence in society.

Mark Twain

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the court took note that the statute carves out an exception to the definition of scope for “fundamental managerial policy decisions that involve matters at the core of management control of the basic direction of an enterprise.” Although there may be a duty to bargain about the “*details*” of implementing a fundamental managerial decision, said the court, “the decision *itself* is not subject to the bargaining process unless the need for unfet-

The enhanced retirement benefits were the product of binding arbitration beyond the city’s control.

tered decisionmaking is less important than the benefit of improved personnel relations from the bargaining process.”

The court then looked for guidance to a number of cases that have considered what constitutes a fundamental policy decision. In *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, the Supreme Court concluded that selecting a particular standard for fire prevention in a community — including the number of fire stations or the amount of equipment — involves a fundamental policy decision unless staffing is decreased to a

point that the individual workloads are increased or safety is threatened.

In *State Association of Real Property Agents v. State Personnel Board* (1978) 83 Cal.App.3d 206, the Court of Appeal found that a decision to reduce workforce in the face of budgetary restrictions implicated fundamental management policy.

On the other hand, in *Dublin Professional Fire Fighters, Loc. 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, the court concluded that reassignment of overtime to temporary personnel outside the bargaining unit was not a fundamental management policy decision and therefore was subject to bargaining. Likewise in *Farrell*, the court determined that the decision to reduce staff and transfer work to personnel outside the unit could not be considered a fundamental policy decision because it did not relate to any choice about the level of service provided to the public; it merely reallocated the work required to staff an existing level of service.

“These cases,” said the Court of Appeal, “are instructive primarily to the extent they define a context that is opposite to the present: *removing* work from a bargaining unit with available personnel.” “Although the parties bat these cases back and forth,” said the court, “there is little guidance that we can derive from them for the present dispute, because they resolve the abstract principles in a context other than unit workload.” Said the court:

At the risk of being an additional example of “ruling from the gut” in this area of jurisprudence, it is readily apparent to us that the trial court erred. It both overstepped its bounds in its disregard of the findings of the local legislative body, and mechanically applied the concept of subcontracting unit work without considering the nuances of the specific factual context.

The Court of Appeal chastised the trial court for rejecting the city’s claim that “urgency underlay its plan to

The plan included a commitment to prevent significant adverse impact on career employees.

make use of retirees.” And, it noted that the enhanced retirement benefits that prompted the exodus of the police officers were the product of binding arbitration beyond the city’s control.

The appellate court also charged the superior court with incorrectly concluding that the retiree plan was not the product of a review of the level of community police services. The city council determined the proper degree of protection for city residents, said the court, and the retiree plan was the means by which the city sought to reach that goal.

Finally, the court noted that the present case did not involve a decision

to reallocate work from unit members to other personnel outside the unit. Rather, said the court, there was a shortage that could not otherwise be filled with unit members.

Accusing the trial court of focusing on SPOA's anecdotal claims of displaced unit members in order to bring the city "within *Farrell's* pigeonhole," the Court of Appeal looked to the express administrative principles included in the personnel director's memo to the council in support of the retiree policy. The plan included protections against the blocking of promotional opportunities or elimination of acting assignments, and the commitment to prevent significant adverse impact on career employees from use of the retirees. "Nothing about the decision to appoint retirees or its *planned consequences* resulted in the reallocation of work opportunities away from unit members," concluded the court. "If indeed SPOA is correct that the execution of this policy in fact resulted in detriment to individual unit members, then the proper procedure would have been to file grievances pursuant to the existing MOU..., not to compel the City to engage in the bargaining process over effects contrary to the City's stated policy."

"We conclude," said the court, "that the City's decision to use retirees to respond to a short-term staffing shortage in a work force concerned with public protection involves a question of fundamental managerial policy that neither SPOA nor the trial court

were entitled to second-guess." Because this shortage was beyond the power of SPOA to remedy, the court found no benefit in subjecting the decision to the bargaining process, thereby preserving what it viewed as the city's weightier interest in unfet-

tered decisionmaking. (*Sacramento Police Officers Assn. v. City of Sacramento* [3-30-04, certified for publication 4-27-04] C042493, C043377 [3d Dist.], ___ Cal.App.4th ___, 2004 DJDAR 5033.) ❁

Underfunded Pension System Burdens City of San Diego

The pension fund maintained by the City of San Diego is in crisis mode. Since 1996, city officials intentionally have underfunded the San Diego City Employees' Retirement System and have diverted more than \$100 million in order to balance its tight annual city budget. Despite stern warnings from at least one trustee of the pension system, lawmakers, including Mayor Dick Murphy, recently voted to continue the underfunding strategy until 2009. This move prompted a class action lawsuit filed by retired city workers who charged that the underfunding was unlawful.

As a result of the city's budget manipulations, the \$3 billion retirement system has been saddled with a deficit said to equal \$1.1 billion. In addition, the municipality is facing a tab of more than \$1 billion in unfunded retiree health care costs.

The scope of the problem came to light in January, when financial disclosure reports made public by city officials projected that by 2011, the city will need to infuse the pension

system to the tune of \$306 million — up from \$85 million in 2004 — and this will not improve the system's circumstances in terms of its liabilities versus its assets. By 2011, the report estimated, the deficit could be as high as \$2.4 billion.

Swiftly reacting to the report, Moody's Investor Service, a Wall

By 2011, the deficit could be as high as \$2.4 billion.

Street credit-rating agency, lowered the city's fiscal outlook from stable to negative. The situation worsened in February when, due to concerns about errors and omissions in budget documents, federal authorities announced that the city's finances would be the focus of investigations by the U.S. Attorney's Office and the Securities and Exchange Commission.

While the focus of the federal probe is on the \$3 billion pension sys-

tem, the city's financial difficulties don't stop there. In terms of general operating funds, it is facing a mounting budget deficit that has prompted some city officials to consider work furloughs and wage freezes. Also on the table is a 10 percent temporary salary cut imposed on unrepresented managers and supervisors, who would take one day off without pay every two

The focus of the federal probe is on the \$3 billion pension system.

weeks. More controversial, however, is a proposal to get labor leaders representing city employees to postpone an impending wage and benefit increase. By and large, union leaders were not warm to the idea of wage concessions.

As word of the city's fiscal woes and its troubled pension system were further scrutinized, Standard & Poor's downgraded the rating on all of the city's general obligation bonds. Fitch Ratings, another credit-rating agency, downgraded the city's rating and dropped the city's fiscal outlook to "negative." Fitch cited the "rapid deterioration" of the retirement system as the reason for its action. These moves mean that the city will have to pay higher interest rates when it needs to borrow money in the future.

In terms of affording some stability and predictability to the situation,

matters improved in March when the city agreed to settle the lawsuit filed by retirees who charged that the underfunding of the pension plan was illegal. The settlement requires the city to make a contribution of \$130 million to the fund for the upcoming fiscal year and to make full payments to the pension system beginning in July 2005.

Most observers were happy with the settlement agreement, which was given approval by the city council and the trustees of the retirement system. But the accord does not deal with the fact that the city still owes the system for its past underpayments. And, critics of the deal charge that, while it helps the retirees covered by the pension system, it does not solve the ongoing funding crisis facing the city.

A nine-member pension reform committee was established in September 2003 to study the system's un-

funded liability and to recommend actions to address the city's financial problems. A final report is due from the committee this summer, but in April, it recommended that the city boost its annual contribution to the pension fund to \$189 million and make an additional contribution of \$13 million to finance retiree health care costs. Committee members cautioned city lawmakers that the problem is greater than is perceived and that their recommended increases in the pension contributions will not solve the problem. It will only "stop the bleeding," as committee chair April Boling put it. Furthermore, the need to shore up the underfunded pension system will greatly impair the city's ability to make other improvements to city services, such as upgrading its library system or increasing the strength of its fire and police forces. ❁

Firefighters Take Their Case to the Voters

California firefighters are mad as hell and they're not gonna take it anymore. What's the problem? Up and down the state, firefighters and their unions are complaining that they have been cut out of their share of the sales tax authorized by Proposition 172. In 1993, voters overwhelmingly approved a half-cent tax earmarked for public safety. Specifically, the proposition directed that the additional revenue

would go to fund "police, sheriffs, fire, criminal prosecution, and corrections." Firefighters are doubly angry because the public was led to believe that some of the newly collected money would be used to improve fire protection. They recall that television advertisements using dramatic footage of raging fires were part of the campaign urging approval of Prop. 172 and the new tax.

You can't have everything...where would you put it?

Stephen Wright

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But despite that mandate, firefighters have received little, if any, Prop. 172 funding. To remedy that situation, some groups have decided to take the issue back to the voters in the form of local initiatives.

In Orange County, for example, the sales tax authorized by Prop. 172 has generated \$1.8 billion since 1994, averaging approximately \$200 million a year. Of this, 80 percent goes to the sheriff's department and 20 percent goes to the district attorney's office. This allocation of Prop. 172 funds was set shortly after passage of the initiative. Early this year, however, the Orange County Professional Firefighters Association, Local 3631, began to col-

lect signatures in support of a countywide initiative to enact the Guaranteed Fire Protection and Firefighter Safety Funding Ordinance.

If passed by voters, the local measure will require that 50 percent of any increase in future Prop. 172 funding beyond its current level be directed to the Orange County Fire Authority. This amount will be capped at 10 percent of the total funds generated by Prop. 172. The formula allows the sheriff and district attorney to continue to receive the same amount of sales tax revenue they currently are allocated. And, they will share in the remaining 50 percent of any increase in funding. Once the fire authority's part

of the take reaches 10 percent of the total tax revenue, the three agencies will split the funding, with the sheriff's office getting 75 percent, the district attorney's office getting 15 percent, and the fire authority taking in 10 percent.

The association has collected more than the 67,000 signatures needed to qualify the measure for the November ballot, but the organization has vowed to postpone its plans to place the measure before the voters if the board of supervisors agrees to formally negotiate a tax-sharing deal with them.

Firefighters in L.A. and Santa Barbara counties are considering similar tactics.

Firefighters in Los Angeles and Santa Barbara counties are considering similar tactics to appeal to voters for increased Prop. 172 funding for fire protection.

In Northern California, there's a different beef but similar tactics. Oakland firefighters are in the process of gathering 30,000 signatures to qualify a measure for the November ballot that would change the city charter and impose a number of staffing requirements. Specifically, it would mandate that the city have 26 engines and 7 trucks operating every day. The mea-

sure also ensures that there be four people on every engine and truck. When the union, the International Association of Firefighters, Local 55, could not reach an acceptable solution with management concerning the staffing problem, it decided that, like Governor Schwarzenegger, it would take its case directly to the voters.

At the heart of the union's campaign is anger over the fact that the city recently closed one fire station and has shuttered three others on a rotating basis. The ballot measure would require the city to reopen the stations.

Critics of the union's effort charge that its real purpose is to guarantee overtime pay. The minimum staffing requirements would force the city to reopen the closed station and pay overtime whenever it could not staff each engine and truck with four firefighters. Opponents also argue that the charter amendment would tie the city's hands and, in tough financial times, make the fire department "untouchable."

Firefighters in Berkeley and Richmond are watching the Oakland campaign with interest and have talked about taking similar actions should their colleagues in Oakland succeed. ♦

profit and non-profit organizations; and from public sector attorneys at the local, state, and federal levels.

For the 2002 market survey, data revealed an overall wage gap that averaged 27.7 percent. In accordance with the parties' agreed-upon cap, the County Board of Supervisors implemented a general wage realignment of 9.5 percent.

Data revealed an overall wage gap that averaged 27.7 percent.

Effort to Win Binding Arbitration in Santa Clara County

Santa Clara County may be the next local public agency to have its collective bargaining disputes resolved through binding interest arbitration. Employee organizations in the county have joined forces and are working to get such a measure on the November ballot. Two groups are leading the charge: the Government Attorneys Association, which represents more than 300 prosecutors and deputy public defenders, and the County Counsel Attorneys Association, which is the exclusive representative of approximately 50 attorneys in the county counsel's office.

For several years, attorneys represented by GAA and CCAA have waged court battles with the county

over salaries. In sum, the employee organizations have asserted that their salaries are lower than those of their public and private sector counterparts in the Silicon Valley. A provision of the county charter that links county attorneys' pay to "those prevailing through the county for comparable work" is at the center of the associations' legal claims.

Along with an "extension agreement" to the 2001 MOU, the parties executed a Joint Market Survey Agreement that detailed the methodology for determining attorneys' compensation. It called for a random sampling of attorneys' salaries from small, medium, and large law firms; from in-house attorneys employed by both for-

In 2003, another salary survey was conducted. This time, however, a number of disagreements arose concerning the response rate to salary data requests and the representative nature of the wage information made available for analysis. The parties requested that arbitrator Alexander Cohn serve as a facilitator and issue a written advisory recommendation.

In a decision issued in March, Cohn cautioned that his job was not to set the wages or determine the wage gap of attorneys represented by the two organizations. The parties agreed to allow an outside firm to conduct a "scientifically valid stratified sampling" to reach an average effective wage rate for each category of attorney.

But, Cohn concluded, the methodology the parties agreed on "had an inherent flaw." It was based on the premise that the survey would gener-

ate a scientifically valid sampling of attorneys in specified strata. "For whatever reason," wrote Cohn, this did not occur. That meant that the outside survey firm was unable to discharge its duties because of an insufficient data base. "This finding alone," said Cohn, "means that the market survey method, its application and/or interpretation are fundamentally flawed."

The association wants a binding arbitration provision placed in the county charter.

Cohn recommended that the survey firm complete its work within 60 days using available public data for non-responding surveyed employers, appropriate follow-up calls and correspondence, and data supplied by employers after the July 1, 2003, deadline. Once the survey results and applicable wage gaps are calculated, Cohn recommended that the attorneys' salaries be realigned retroactive to August 4, 2003, with no interest accruing.

Jim Shore, GAA president, told CPER that the unions have asked the county to accept and abide by Cohn's advisory recommendation.

In the meantime, GAA and CCAA are pressing for a binding arbitration

provision to be placed in the county charter. Dustin DeRollo, with the consulting firm of Saggau and DeRollo, told CPER that the attorneys' unions have had a long history with the county of "not getting anywhere" at the bargaining table. These groups want a process that will guarantee an end result so that they do not end up in court, perpetuating bad feelings.

DeRollo said that the associations reached out to organizations representing the county's registered nurses and probation officers. The attorneys have garnered support from the Santa Clara County Correctional Peace Officers Association and the Registered Nurses Professional Association. These groups have formed a coalition and have set up a campaign committee to collect the 36,000 signatures needed to get an interest arbitration charter amendment before voters this fall. As CPER went to press, DeRollo said the coalition "was more than half-way there."

Should the association succeed in placing the matter before voters and winning come November, they will become the second county, along with Sacramento, to have selected arbitration as the means of resolving bargaining impasses with their public sector unions.

In addition to the two counties, voters in the following cities have authorized the use of binding arbitration for the resolution of bargaining impasses involving some or all of their employees: Alameda, Anaheim,

Gilroy, Hayward, Modesto, Monterey, Napa, Oakland, Oroville, Palo Alto, Petaluma, Redwood City, Sacramento, Salinas, San Francisco, San Jose, San Leandro, San Luis Obispo, Santa Cruz, Santa Rosa, Stockton, Vallejo, and Watsonville.

All bargaining impasses that involve police and fire fighters in California (except for the state) are subject to binding arbitration according to provisions set out in Secs. 1280 et seq. of the Code of Civil Procedure. ❁

State Employment

PECG's Contracting-Out Battle Spills Over to Other Units

Labor-management committees reviewing contracts for personal services are on hold after the Consulting Engineers and Land Surveyors of California obtained a preliminary injunction against contract review meetings between the state and the Professional Engineers in California Government. The committees, established in negotiations with several unions last summer, review contracts and determine whether to terminate those that unnecessarily cost more than if state employees performed the work. CELSOC challenged only PECG's committee, but the Department of Personnel Administration is postponing the meetings of all committees except those of the Union of American Physicians and Dentists.

Committees Can Terminate Contracts

The UAPD and the American Federation of State, County and Municipal Employees convinced Governor Davis' administration last August that state departments were contracting out work appropriately done by state employees, and that the services contracts were costing the state 25 percent to 500 percent more than if state

employees were doing the work. DPA agreed with both unions that the state would make "every effort to hire, utilize and retain Unit...employees before resorting to the use of private contractors." Exceptions were made for "extremely unusual or urgent, time-

The MOUs also allocate any savings from terminated contracts toward avoiding layoffs.

limited circumstances, or under other circumstances where contracting out is recognized or required by law, Federal mandate, or court decisions/orders." The purpose of the provisions is "to guaranteed that the State does not incur unnecessary, additional costs by contracting out work appropriately performed at less expense to the State by Unit...employees."

The state agreed to provide the unions with requests for bids or proposed contracts to allow the unions to

present alternatives to contracting out services while satisfying the state's needs. But the agreements go beyond union review of new contracts. Each collective bargaining agreement set up a committee consisting of representatives of the relevant union, DPA, the Department of Finance, and the contracting state departments to review existing contracts. The committees were charged with determining by mutual agreement "which contracts should and can be terminated immediately, ...which contracts may continue (for how long and under what conditions) and how (if necessary and cost effective) to transition contract employees or positions into civil service." However, the memoranda of understanding contain a stipulation that the review and cancellation of contracts would not disrupt state services.

The MOUs also allocate any savings from terminated contracts toward avoiding layoffs and displacements in the respective bargaining units and toward the hiring of any necessary employees. An employee in the bargaining unit has preference over contract employees if the duties being contracted are consistent with the employee's classification, the employee is qualified to perform the job, and there will be no disruption in services.

After reaching agreement with UAPD and AFSCME, DPA agreed to include the contracting-out provisions in labor agreements with the California Association of Professional Scientists and several units represented by the California State Employees Asso-

ciation. PECG's Bruce Blanning told *CPER* that the language was proposed by DPA, not the union.

Suit to Enjoin Meetings

PECG had one committee meeting last fall, but the labor relations officer on the committee left DPA before a second meeting was held. CELSOC filed suit to enjoin the meetings in November.

CELSOC's primary claim is that the contracting-out provisions of the MOU violate Article XXII of the state Constitution, which authorizes state agencies, not a labor-management committee, to make decisions whether to contract for architectural and engineering services for public works projects. For these services, Article XXII abrogates the Article VII civil service limitations on contracting for services that state em-

The impairment serves only the interests of PECG members "under the guise of purported 'cost savings' to the State."

— CELSOC

ployees traditionally have performed. It proclaims that "the [state's] choice and authority to contract shall extend to all phases of project development."

The Article XXII challenge to the committee is not applicable to the other bargaining units. However, DPA has informed several unions that CELSOC's other challenges to the PECG contract could affect the viabil-

ity of their contracting-out language. CELSOC also asserts that the provisions which allow the committee to terminate existing contracts violate the constitutional prohibition on laws that impair the obligation of contracts. The impairment is not reasonable and necessary to serve an important public purpose, CELSOC argued in its motion for a preliminary injunction, because it serves only the interests of PECG members "under the guise of purported 'cost savings' to the State." CELSOC also contends that terminating current contracts or preventing future ones constitutes tortious interference with contractual relations and interference with their prospective economic advantage.

The consulting engineers attack the decisionmaking of the committee by arguing that it is an unconstitutional

I have not failed. I've just found 10,000 ways that don't work.

Thomas Alva Edison

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Each chapter tackles a broad topic by providing a detailed discussion of the law's many applications in special workplace environments. For example, the chapter that covers overtime calculation begins by defining regular rate of pay and then considers the payment of bonuses, fluctuating workweeks, and alternative work periods for law enforcement and fire protection employees. Other chapters focus on record keeping requirements, hours of work, and "white collar" exemptions. Detailed footnotes offer an in-depth discussion of the act's varied applications.

Pocket Guide to the Fair Labor Standards Act

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delegation of executive powers. They point to the lack of standards, such as the absence of a definition of what will constitute “mutual agreement of the committee.” They also contend that the inclusion on the committee of union representatives who have a direct pecuniary interest violates the Constitution. In a similar vein, CELSOC charges that provisions of the MOU and the approving legislation constitute a gift of public funds for a merely private purpose — compensation of PEEG and its members.

CELSOC argues that the MOU violates the Dills Act.

Finally, CELSOC argues that the MOU violates the Dills Act because the decision to contract out is a management prerogative not within the scope of negotiations except for its effects on wages, hours, and other terms and conditions of employment. Its unconstitutional provisions also are not within the scope of bargaining, CELSOC contends.

DPA Supported the Preliminary Injunction

In a surprising turn of events, DPA, which agreed to the provisions in the MOU, supported the motion for a preliminary injunction against the committee meetings in February. Its brief ex-

pressed agreement that the potential damage to CELSOC members and taxpayers outweighed any potential harm caused by delaying the implementation of the contracting-out provisions of PEEG’s agreement. While DPA emphasized that it had negotiated the contract in good faith and that the provisions are legal, it recognized the serious constitutional challenges raised by CELSOC. It supported the preliminary injunction to avoid unnecessary state expenditures until the court makes the final determination on the legal issues. Caltrans and the Department of Finance also supported the injunction on the basis that it violates Article XXII of the Constitution.

Committees on Hold

Since issuance of a preliminary injunction in late February, DPA is not providing PEEG with information that the MOU demands it share with the union, and it is not meeting with the union on the contracting issues. Recently, DPA told the other unions with similar contract sections that the CELSOC lawsuit could affect portions of their MOUs as well.

The UAPD has responded by filing a motion to intervene in the CELSOC lawsuit and is asking the other affected unions to join it. AFSCME has filed a grievance and an unfair practice charge alleging the state is refusing to carry out its contractual obligations.

DPA spokesperson Lynelle Jolley told *CPEER* that the department is pro-

viding the unions with copies of requests for proposals and invitations for bids, but Kristen Haynie, labor relations consultant for CAPS, says she has not received any requests for proposals she demanded from DPA. Only the UAPD committee is scheduling meetings. UAPD Executive Director Gary Robinson said that the union has received registry contracts from DPA and is discussing with DPA the possibility that the Department of Corrections will hire several contract doctors.

The UAPD has responded by filing a motion to intervene in the CELSOC lawsuit.

In addition to being upset about violation of the MOUs, the unions are outraged by the ever-increasing dollars paid to contractors. According to the Bureau of State Audits, spending by the Department of Corrections on contracts for physicians, psychiatrists, pharmacists, and nurses has increased from \$11 million to \$64 million in four years. PEEG’s Blanning claims that engineering service contracts are twice as costly as using state employees. An employee costs the state about \$92,000 per year, including pay, benefits, and state overhead; a consultant costs \$193,000 annually, he says.

Blanning insists that contract review is in line with the governor's belt-tightening executive order in December. The order prohibits the state from entering into new contracts, unless the director of finance determines they are in the state's best interests. It also directs agencies to disencumber and cancel non-essential contracts that will be

paid from the general fund, in situations where the services have not yet been received. AFSCME's April *Bulletin* sums up the unions' position: "Every day that goes by without implementing [the contracting-out section] costs the taxpayers money, since the huge waste caused by contracting out is allowed to grow." ❖

procedures, limiting the reasons the board could overturn discipline, and creating an alternate dispute resolution system for minor discipline. The *Times* advocated for public access to personnel and discipline files of law enforcement and correctional officers, and for improved screening of job applicants, particularly for prison guards.

Some of these suggestions were not new. As the *Times* noted, in 1995, the Little Hoover Commission suggested transferring the SPB's duties to DPA. (See story in *CPER* No. 112, pp. 59-61.) But the *Times* quoted San Francisco

Attack on SPB Redirected Toward Corrections

A newspaper's unflattering exposé of the State Personnel Board has resulted in one more charge against the Department of Corrections and the California Youth Authority. Spurred by stories that large numbers of disciplinary actions were being overturned by the SPB, the Senate Select Committee on Governmental Oversight conducted a hearing on the state employee discipline system and the SPB. But the losers of the day were the CDC and CYA, not the SPB.

Calls to Reform

In the fall of 2002, a reporter for the *Contra Costa Times* began a hunt for bad apples in state service. After a legal battle, the *Times* gained access to the disciplinary files of 200 employees in the Department of Health Services. (See story in *CPER* No. 158, pp. 60-61.) A 21-month investigation of SPB cases and disciplinary files from all areas of state service led to "Uncivil Servants," a series of articles on employee discipline

in state service that highlighted stories of egregious employee behavior.

The *Times* reported that the SPB reduced or overturned suspensions, demotions, and docked pay in more than 60 percent of the 114 cases it reviewed, and reinstated 41 percent of the 125 employees who had been fired. Overall, the board modified disciplinary action in favor of the employee in 49 percent of its cases in 2002. The series painted a picture of an inept personnel board dominated by pro-union members, frustrated and timid managers, powerful employee unions, and an unaccountable bureaucracy that spends untold sums of money but fails to punish abusive, incompetent, and dishonest employees.

Editorials in the *Times* called for dismantling the SPB and transferring its functions to the Department of Personnel Administration. They recommended making managers and probationary employees at-will employees, streamlining disciplinary rules and

*Jelincic found that
only 79 of 2,500
disciplinary actions
were overturned.*

State University professor Katherine Naff as saying the unions resist reform.

Sure enough, two state employee unions responded in the pages of the newspaper. J.J. Jelincic, president of the California State Employees Association, noted that the *Times'* analysis had focused too narrowly on cases appealed to the board. When all cases in the system were considered, Jelincic found that only 79 of 2,500 disciplinary actions were overturned, and another 89 were modified, in some cases made harsher.

Tony Myers, president of the California Association of Psychiatric Technicians, delved into the details of two of the *Times'* examples of egregious employee behavior and reported that there was contradictory witness testimony in one case and inaccurate depiction of the facts in the other. He suggested better training for managers in administering discipline. He also called for more discretion by the Department of

Employee relations officers often are lieutenants on a two-year rotation.

Developmental Services in applying its policy of zero tolerance for employees suspected of abusing developmentally disabled residents, no matter how minor or disputed the facts. Both union presidents emphasized the need for due process.

Legislative Scrutiny of Corrections

Alarmed by the articles and lack of action on prior calls for reform, Senator Jackie Speier, chair of the Senate Select Committee on Governmental Oversight, held a hearing this spring. The agenda title was, "State Employee Discipline and the Personnel Board: Is Justice Served?" But by the time of the hearing, the focus had turned. At the hearing were not only SPB and DPA

representatives, but the directors and chief counsel of the corrections department and the Youth Authority.

The committee's briefing paper reported that in a four-year period, over half of the SPB's decisions on disciplinary appeals involved employees of the CDC and the CYA, and discipline was overturned or modified in 60 percent of the cases. But problems with disciplining correctional officers start long before the case is appealed to the board, according to a 2002 audit of the CDC disciplinary process conducted by the Office of the Inspector General. The committee reported that in a sampling of cases, the 2002 IG audit found, in 43 percent of them, the investigation and decisionmaking process were not completed within the one-year period under the Public Safety Officers Procedural Bill of Rights Act for filing adverse actions. Therefore, no action could be taken against the employee. Of those cases where action was taken, more than half were appealed to the SPB.

The IG audit laid blame for the high rate of SPB reversals on the lack of training of the CDC employee relations officers that often represent the departments before the SPB. The committee's research indicated that employee relations officers often are lieutenants on a two-year rotation. CDC's employment lawyers become involved in only half of the cases, and only after a hearing before the board is scheduled. By that time, the attorneys can do little to correct defects in management's case against the em-

ployee. In contrast, highly trained and skilled union representatives or legal counsel represent employees at SPB hearings.

SPB representatives testifying at Speier's hearing echoed the criticism of the CDC and CYA disciplinary processes. Generally, the SPB sustains 90 percent of the cases that come before it, board president William Elkins testified. Even the California Highway

CDC's chief counsel anticipates she would need to add six more attorneys to her unit.

Patrol, which is subject to the same one-year deadline, has its decisions sustained 70 percent of the time, the board's chief counsel, Elise Rose, told the committee. Vice President Ronald Alvarado asserted that the employee's side of the case was better researched and more professionally presented than that of either CYA or CDC.

Prison officials told the committee they are planning to improve the training for investigators and to institute a system where an attorney has supervision of a case from start to finish. CDC's chief counsel anticipates she would need to add six more attorneys to her unit of 13 employment lawyers to carry out the plan. CYA, which has

only two employment attorneys, also is considering expanding its legal staff.

While the CYA and CDC were on the hot seats, the SPB did defend its record in disciplinary cases. Rose asserted that the board overturned only 2 percent of an estimated 3,000 disciplinary actions taken against state employees in 2002. Of the 1,648 actions appealed to the board, 312 were withdrawn by the employee, and 913 were settled before hearing. The board modified or revoked the penalty in 125 cases. In 45 percent of those cases, the employer failed to meet its burden of proof that the misconduct occurred; the rest were marred by procedural errors or lack of legal cause for discipline. The SPB emphasized that in an attempt to reduce errors, it provides training for supervisors, managers, human resources personnel, and advocates. It reported, however, that the CDC and CYA have seldom taken advantage of the training.

Micromanaging the CDC

Within weeks of the hearing, Senator Gloria Romero (D-Los Angeles) amended S.B. 1400, a bill co-sponsored by Romero and Speier, that had been targeted at the internal affairs office within the CDC. The amendments included findings of inadequacy in the investigation and disciplinary processes of the CDC. The bill directs the Department of Corrections to adopt regulations to improve investigations, to eliminate the “code of silence” that critics allege hampers investigations

against guards accused of wrongdoing, and to improve the disciplinary process. It contains a detailed list of mandated regulations. For example, the regulations require changes in the CDC’s employment law unit that “eliminate the use of untrained, nonattorney employment relations officers in presenting cases before the State Personnel Board.” The regulations also must “implement a vertical prosecution system that shall include the assignment of an attorney to assist beginning at the investigation stage, and attorney assistance in drafting of adverse actions and in the presentation of cases before the [SPB].”

Erin Ryan, a legislative aide to Senator Speier, told *CPEr* that the senator has no plans to introduce legislation aimed at the SPB this year. “The SPB is not perfect, but the real problem is how the departments are bringing the cases to the SPB. CDC and CYA

are not the only departments that have poor records before the board, but they’re the biggest piece of the pie.” The senator is not planning to eliminate the SPB, she said, because it serves different functions than DPA. Senator Speier is considering legislation next year that would give the SPB more tools to enforce whistleblower laws that protect state employees.

As for S.B. 1400, its passage is dependent on the willingness of the Senate to spend the money needed for its implementation. The detailed requirements for an Office of Investigative Services in addition to the disciplinary process mandates may require expenditures of over \$1 million annually. As *CPEr* went to press, the bill had been placed in the suspense file of the Senate Appropriations Committee pending information on cost and decisions on state spending priorities. ❁

State Employees Win Some, But Contracts Still a Target

Legislative efforts to cut state employee costs are falling by the wayside. Bills cutting holidays, allowing contracting out, and reinstating a lower tier of retirement benefits for new employees will not be enacted this year. But the most startling maneuver of the year is still on the playing board: the budget is being set up to enable the legislature or the governor to renege on previously approved collective bargain-

ing agreements by refusing to appropriate money for salaries. And the measures defeated in the legislature are reappearing in the Department of Personnel Administration’s “reopener” proposals for units with closed contracts. They also reappeared in the governor’s May revision of his budget, as *CPEr* went to press.

Holidays and Retirement Benefits Preserved

Assembly Member John Campbell (R-Irvine) introduced a bill in February that would have mandated that state employees observe no more than 12 state holidays, including the personal day allowed by statute. Opponents derided A.B. 2460 because it would have allowed the governor and the head of each agency, commission, or board to choose which holidays would be jettisoned, creating confusion and conflict-

The maneuver allows legislators to see who is getting the biggest raises.

ing schedules. The bill A.B. 2460 was aimed at reducing overtime costs of about \$10 million per holiday, most of which is incurred in the Department of Forestry and Fire, the California Highway Patrol, the Youth and Adult Correctional Agency, and health care facilities. But it would not have applied to state firefighters, correctional officers, or highway patrol officers until July 2006, at the earliest, because those employees are covered by collective bargaining agreements until then. The bill was rejected in the Assembly Public Employees, Retirement and Social Security Committee.

To love oneself is the beginning of a lifelong romance.

Oscar Wilde

To know workplace rights is the start of a healthy relationship with your career. CPER's Pocket Guide gives a clear and concise explanation of the rights of public employees – which are many and varied. The Guide includes an overview of rights granted to individual employees by the U.S. and California Constitutions, and by a variety of federal and state statutes.

Portable, readable, and affordable, the Guide covers both personal rights (discrimination, wrongful termination, family and medical leave) and those that arise in the context of union representation (right to union representation and duty of fair representation).

Pocket Guide to Workplace Rights of Public Employees

See back cover for price and order information

Another bill by Assembly Member Campbell, A.B. 2903, would have required state employees to contribute an additional 1 percent of their paychecks to the retirement system. It also would have reintroduced a Tier 2 retirement package with lower benefits for all newly hired employees. The Tier 2 plan was established in 1984, but has had few new members since January 1, 2000, after S.B. 400 (Ortiz, D- Sacramento) mandated that all new hires be placed in the Tier 1 plan unless they elected Tier 2 benefits. In addition, the bill would have made newly hired safety and patrol employees, peace officers, and firefighters ineligible for the en-

hanced benefit formulas and maximum benefits enacted in S.B. 400.

Unions opposed the tiered benefits portion of the bill based on workforce morale concerns. They predicted that the state would have difficulty attracting new employees, although the state's hiring freeze may weaken the force of this contention. They also questioned whether an increase in the employee contribution would impair vested contractual rights in violation of the state Constitution.

Contracting Out Thwarted

In line with the recommendations of Governor Schwarzenegger's January budget to increase competition in state

services, SCA 15 (McClintock, R-Thousand Oaks), introduced in the Senate, would have required competitive bidding for state contracts. The constitutional amendment would have allowed the governor to require a state agency to contract out to the private sector tasks that civil service employees perform if he determined that the terms of the contract would be "more favorable" to the state. Although it was defeated in the Senate Governmental Oversight Committee, it may reappear in front of voters if the governor's penchant for "ballot box governing" continues, particularly if the California Performance Review results in recommendations to privatize specific state work. (See story on the California Performance Review in *CPER* No. 165, pp. 44-45.)

Line Items for Salaries Introduced

While state employee unions may have garnered a few victories, they still are facing a fundamental attack on their ability to lock in long-term economic benefits for their members. The governor has joined the legislature's drive to force renegotiation of union collective bargaining agreements by refusing to appropriate money for employee salary increases guaranteed by the contracts.

In March, the legislative counsel issued an opinion that the legislature could refuse to appropriate money for salary hikes for correctional officers even though the raises were promised in a memorandum of understanding

between the state and the California Correctional Peace Officers Association that had been approved by a prior legislature. (See story in *CPER* No. 165, pp. 40-43.) A month later, the Department of Finance amended the budget bill to itemize separately the amounts of compensation increases for each bargaining unit. The letter accompanying the amended budget said the change "will provide important information to

'CCPOA will be responding to these sunshine proposals as being premature, presumptuous, and inappropriate.'

the Legislature and the public on the incremental costs of a Memorandum of Understanding signed with each collective bargaining unit."

By far the largest dollar amount from the general fund for bargaining unit increases is \$199 million for 31,000 correctional officers, followed by \$38.8 million for a unit of 43,000 auditors and analysts. Compensation increases budgeted from the general fund for unrepresented employees total \$136 million.

The maneuver allows legislators to see who is getting the biggest raises, and potentially to pare down selected

appropriations. If the legislature does not reduce the appropriations for compensation increases, the separate itemization for each bargaining unit allows the governor to exercise his line-item veto of a bargaining unit's appropriation for salary increases. A governor's veto can be overridden only by a two-thirds vote of each house of the legislature.

Reopening Closed Contracts

The administration followed its budget maneuver with "sunshine" proposals for reopener negotiations with CCPOA, CDF Firefighters, California Association of Highway Patrolmen, and the California Union of Safety Employees. DPA proposes negotiations on salaries, recruitment and retention differentials, allowances, reimbursements, and other compensation issues "that consider the State's current fiscal situation," even though the CCPOA and CAHP MOUs contain no provisions allowing reopener negotiations on these items, and CDFF's contract says only that the union may reopen on wages. DPA also demands to negotiate overtime provisions, retirement benefit formulas, the number of holidays, and paid leave provisions. CCPOA's chief of labor, Steve Weiss, advised in a letter to members, "CCPOA will be responding to these sunshine proposals as being premature, presumptuous, and inappropriate, but we will be ready, willing and able to begin discussions as soon as the state wishes." ❀

Higher Education

New CSU Student Employee Unit Considers Strike

A newly organized unit of academic student employees at the California State University has been busy preparing to bargain its first contract this spring. But the student employees' plans have been thwarted by the university's objection to the appropriateness of the unit the United Auto Workers proposes to represent. In response, the union is contemplating a strike.

Cardcheck Successful

In January, the UAW filed a petition for recognition using the new cardcheck procedures contained in the Higher Education Employer-Employee Relations Act. The procedures allow the petitioning union to file proof of at least 50 percent support in the unit to avoid a representation election. (See *CPER* No. 163, p. 58.) In March, the Public Employment Relations Board announced that the new California Alliance of Academic Student Employees/UAW had presented proof that a majority of the 6,000 teaching associates, graduate assistants, tutors, and graders in the university system had chosen to unionize.

Xochitl Lopez, a UAW organizer who is a graduate student at Sacramento State, told *CPER*, "Employer-employee relations at CSU was behind the times,

so it was about time for us to be represented. We want a democratic way of determining workplace benefits." The union is in the process of surveying student employees to determine their bargaining priorities, and elections for a bargaining team already have been held.

CSU Disputes Unit

In April, however, CSU filed a response to the union's request for recognition, claiming that the unit the UAW had chosen to represent was not an appropriate one. The university contends

CSU and CFA have filed a unit clarification petition.

that either graduate students or undergraduate students should be excluded from the unit because they do not share a community of interest and because it is inappropriate to have professionals and non-professionals together.

The university also objects to including student employees whose positions are paid for with federal work-study funds because they are not students under HEERA. Even if they are students, CSU contends, they do not

share a community of interest with those students whose salaries are paid from other funding sources.

CSU also challenges inclusion of students who spend less than one-third of their work hours on bargaining unit work. CSU asserts that they do not share a community of interest with employees who perform predominantly bargaining unit work. Sam Strafaci, assistant vice chancellor for Human Resources, told *CPER* that the university knows there are students who are doing grading or tutoring only a small percentage of their work time. The university suspects that these students also may be doing work that belongs to other bargaining units.

The response to the petition also questions whether any student employees already are included in another bargaining unit. CSU and the California Faculty Association, which represents professors and lecturers, have filed a unit clarification petition concerning certain employees they believe may be properly represented by CFA, but whom the UAW included in their proposed bargaining unit. A 1991 modification of the CFA-represented bargaining unit included all employees who performed instruction, except for those whose employment is solely dependent on their status as degree-seeking students. CSU also argues that teaching associates and graduate assistants are not employees as defined by HEERA because their teaching employment is related to their educational objectives and the educational objectives are not subordinate to the services they perform.

Finally...a resource to the act that governs
collective bargaining at the University of California and
the California State University System

Pocket Guide to the Higher Education Employer-Employee Relations Act

By Carol Vendrillo, Ritu Ahuja and Carolyn Leary
(1st edition 2003)

- Full text of the act
- An explanation of how the law works and how it fits in with other labor relations laws
- The enforcement procedure of the Public Employment Relations Board
- Analysis of all important PERB decisions and court cases that interpret and apply the law

FOR INFORMATION ON ORDERING, SEE THE BACK COVER OF THIS ISSUE OF *CPER*

The Academic Professionals of California, which represents employees such as library assistants and student services professionals, also has identified students that it believes should be in the unit represented by APC. The California Association of State Employees and APC have filed petitions to clarify their units. CSU argues that the petition for recognition may have been untimely filed for any employees already represented by the other unions because contract bars were in effect.

Instead of bargaining sessions, Strafaci has been involved in conferences with PERB and the other unions about their units. Les Chisolm, regional director of PERB in Sacramento, declined to say what would happen if CSU's challenge excluded a significant number of student employees from the proposed unit. In past cases involving overlapping units at the University of California, PERB made the unit determinations and then required the petitioning unions to demonstrate support within the newly defined units. Unions used the same proof of support — dues deduction authorizations, membership applications, signed authorization cards, and petitions — that they initially had presented to qualify for a representation election.

Imminent Negotiations Predicted

Despite the university's response, Strafaci predicts that CSU will be bargaining with CAASE/UAW within a couple of months. Strafaci told *CPEP*

that if the CFA unit is clarified, he hopes the bargaining unit issues can be settled in a meeting with the UAW this month.

The UAW views the unit clarification issues as a stalling technique. The union contends that the proposed unit

is appropriate because the same unit description was used successfully for the academic student employee unit at the University of California. The union held a strike authorization vote last month. ❁

Inequity in Academia

Some faculty members are “decoupled” from the salary scale. Most other unrepresented employees at the University of California have received only a .5 percent cost-of-living raise in three years. While U.C. is pleading poverty in negotiations with unions and powerbrokers in the state capital, some senior executives have had their pay boosted over 25 percent in the past year. Citing the need to attract and retain top talent, U.C. blames inadequate state budgets for the inequities.

Faculty Salaries Lag

For 2003-04, the average U.C. professors' salary of \$96,000 lagged 6.2 percent behind the average salaries at eight comparison institutions and may fall 10.6 percent behind the comparators for 2004-05. The U.C. lag for 2003-04 is 22 percent when compared to the four private institutions — Harvard, Yale, Stanford, and the Massachusetts Institute of Technology — although U.C. salaries are 11 percent higher than those in the public universities in Michigan, Virginia, Illinois, and at the State University of New York in Buffalo.

In addition, housing prices and other costs in California are some of the highest in the nation. It takes a \$65,000 salary in San Francisco to live at the same standard as a person earning \$50,000 in Boston or \$52,000 in Chicago.

Extra Perks and Pay

The combination of lower salaries and higher costs of living has made it hard for U.C. to continue to attract the high-quality faculty for which it is known. The university has addressed the cost-of-living challenge by providing housing assistance to more than 70 percent of newly hired faculty, up from 36 percent in 1998. It has combated salary competition by hiring selected faculty above-scale. U.C. anticipates that it will need to make these extra expenditures for greater numbers of faculty over the next several years as student enrollment grows and large numbers of faculty retire. Whereas it hired only 362 new professors in 1998, the university now projects it will need to hire 530 annually until 2010-11.

Retention of faculty is another challenge. Full-professor salaries are

nearly 30 percent higher at Harvard, and more than 10 percent higher at Yale and Stanford, than at U.C. While the number of faculty resignations has not increased significantly statewide, U.C. Berkeley is watching some of its star faculty being lured to private competitors. To fend off the raids, it has offered “retention awards” out of the pool of funding for faculty merit awards that professors normally are eligible to receive every three years. While a merit award is about \$7,000, the average retention award in 2003 at Berkeley was

Systemwide, half of all professors are paid above or off the salary scale.

\$26,000. Thirty-two awards were made, according to a March presentation by Executive Vice Chancellor Paul Gray to the U.C. regents.

As a result of hiring and retention challenges at Berkeley, 65 percent of new faculty salaries since 1999, and 21.5 percent of salaries of all 1,230 faculty, are “decoupled” — more than 5 percent higher than the step at which the faculty member would normally be placed. The phenomenon is not limited to the Berkeley campus however. Systemwide, half of all professors are paid above or off the salary scale. In some disciplines, such as business, engineering, and public health, more than

60 percent of the faculty are off-scale. The resulting faculty salary compaction, where junior professors earn almost as much as senior full professors, is affecting faculty morale, Gray told the regents. In addition, the necessity of paying a premium for some professors is consuming money that ordinarily would be used to hire more faculty to keep pace with growing student enrollment.

Others Gain Little

Professors are not the only employees suffering from low morale and inequitable pay increases, say U.C.’s employee unions. Clerical employees, represented by the Coalition of University Employees, gained only a 1 percent cost-of-living increase and merit increases for 2001-02 and 2002-03. (See story in *CPER* No. 160, pp. 48-50.) The university acknowledges that pay for its clerical employees is about 8 to 10 percent below the market rate. However, U.C. and CUE are now at impasse on wages for 2003-04, because the university is offering no increases for employees other than police dispatchers, whose pay lags the market more than the wages of others in the unit.

CUE has difficulty accepting U.C.’s proposal, since United Auto Workers Local 2865, which represents 11,000 academic student employees, recently won 1.5 percent raises every year through 2005-06, for the unit of mostly graduate student instructors. The increases are contingent on the faculty continuing to receive merit awards each year, which the university acknowl-

edges is highly likely. Lyn Boland, who negotiated the UAW contract for U.C., told *CPER* that the university agreed to the raises because of the need to recruit top graduate students. The ability to attract graduate students is crucial to attraction and retention of professors. As Mary Ann Mason, dean of U.C. Berkeley’s graduate division, recently told the *Berkeleyan*, “If we enrolled second-tier students instead of first-tier students, it wouldn’t take long for the faculty to decide that they would not want to stay, either.”

U.C. and CUE are now at impasse on wages for 2003-04.

But not all academic employees ride on the coattails of the professors. In two contracts spanning 2000 to 2006, librarians represented by the University Council-American Federation of Teachers, have been unable to squeeze any more money out of U.C. than it is giving to academic employees not represented by unions, such as academic specialists and coordinators. Unrepresented employees received a .5 percent increase in 2001-02, and nothing since.

Bounty for Some Brass

While most employees continue with small or no pay increases, some of the highest-paid employees of the university have received increases equal to

twice the average salary of a secretary. Last summer, just after several unions concluded contract negotiations for small raises, Senior Vice President Joseph Mullinex received a \$78,000 salary increase, for a total of \$370,000. At that point, he was earning more than at least two of his superiors, then-President Richard Atkinson and Provost Judson King. Atkinson's successor, President Robert

Most senior administrators have not received raises in over two years.

Dynes, was hired later that month at a salary of \$395,000; and the new provost, M.R.C. Greenwood, hired in February 2004, is paid \$380,000, \$100,000 more than her predecessor. A new chancellor at U.C. San Diego was hired at a salary of \$350,000, more than \$70,000 higher than Dynes received when he was the chancellor in early 2003.

The university again points to market lag to explain the increases. A study conducted last fall by Mercer Human Resource Consulting shows that U.C. chancellors' salaries were 2 percent behind the average public university chancellor's salary, and 46 percent less than the \$424,000 base salary of similar positions at the eight comparison

institutions. U.C. chancellors also benefit from 12 perquisites, whereas most of the eight comparators offer only seven or eight. In addition to the common perks such as housing allowances and sabbaticals, the university offers its chancellors benefits such as severance pay and relocation assistance that are not available to chancellors at other institutions.

U.C. emphasizes that most senior administrators have not received raises in over two years because of former President Atkinson's policy to hold executive pay constant during the university's budget squeeze. What staff employees hear about, though, are the exceptions. If an administrator receives a written offer of employment from outside the university and U.C. wishes to retain the administrator, the employee will receive an increase. And salaries are increased for positions when the university is recruiting in the open market, such as the U.C. San Diego chancellor vacancy.

The university insists that competitive compensation for all employees is a top priority. It puts the blame squarely on inadequate funding from the state. If the governor's current budget proposal for U.C. passes, the university will have suffered a 16 percent cut in funding at the same time as it has absorbed a 16 percent increase in enrollment.

Some relief may be in sight, however. Last month the university announced a deal with the governor that calls for annual 3 percent funding

boosts for salaries and other cost increases beginning in 2005-06, and 4 percent increases from 2007-08 to 2010-11. ❁

Discrimination

Employer Liable Under FEHA for Client's Harassment of Employee

The Second District Court of Appeal, in a split decision, has determined that an employer can be held liable for the sexual harassment of one of its employees by a third party under California's Fair Employment and Housing Act, even though the harassment took place years prior to passage of an amendment to the FEHA which specified that employers are responsible for the third-party's conduct. In *Salazar v. Diversified Paratransit, Inc.*, the court reversed its previous opinion in the same case. (See *CPER* No. 157, pp. 53-56, covering *Salazar v. Diversified Paratransit, Inc.* [2002] 103 Cal.App.4th 131.)

Factual Background

Diversified Paratransit, Inc., provided transportation for developmentally disabled adults and children from their homes to day-care centers and schools. Raquel Salazar was hired by Diversified as a bus driver in late-summer 1997. Prior to that date, Diversified had received a number of complaints about one of its clients, a Mr. Rocha. Three male drivers had filed written reports regarding Rocha's misconduct, including his refusal to stay seated and his withholding of a knife.

Three female drivers filed reports complaining that Rocha had exposed himself to them.

For the first few days of her employment, Salazar drove with a male driver. Rocha was a passenger on her route. After Salazar began driving alone, Rocha repeatedly got up, requiring that Salazar stop the bus, return him to his seat, and fasten his seat belt. Salazar reported problems with Rocha to her supervisor and to the dispatcher; she asked for a different route because she did not like how Rocha looked at her and because he wanted to touch her all the time.

On September 2, 1997, Rocha got out of his seat and exposed himself to Salazar. Salazar put him back in his seat and continued on her route. She reported the incident to her employer in writing. On September 8, 1997, Rocha attacked Salazar and exposed his genitals. He touched her all over and tried to put his hands under her clothing. She called for help and finally was rescued by two male drivers from other buses. Within two days, Salazar felt she could no longer work for Diversified, and she quit.

Procedural Background

The trial court determined that the FEHA does not protect an employee from harassment by the employer's clients or customers. The Second District Court of Appeal upheld the trial court's opinion in a two-to-one decision issued October 28, 2002. On January 23, 2003, the California Supreme Court granted Salazar's petition to hear the case, defining the issue as whether an employer is required by the FEHA to "take all reasonable steps to prevent harassment" of an employee by a non-employee.

On December 23, 2002, less than two months after the Court of Appeal decision, A.B. 76 was introduced into the legislature. It was passed by both houses and became law on October 3, 2003. A.B. 76 amended Sec. 12940(j)(1) of the FEHA to include the following provision:

An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

The legislature also included the following declaration in the amendment:

It is the intent of the Legislature in enacting this act to construe and clarify the meaning and effect of existing law and to reject the interpretation given to the law in *Salazar v. Diversified Paratransit, Inc.* (2002) 103 Cal.App.4th 131.

Less than a month after passage of A.B. 76, the California Supreme Court returned the case to the Court of Appeal for reconsideration in light of the new legislation.

Court of Appeal Decision

In an opinion authored by Justice Joan Klein, the lone dissenter in the earlier decision, the Court of Appeal relied on the Supreme Court's decision in *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232. In that case, the court found that the amendment was one "which in effect construes and clarifies a prior statute" and thus "must be accepted as the legislative declaration of the meaning of the original act" where, as here, "the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute." The amendment was a "formal change" rather than a "substantial change" to the statute, meaning that it can be applied to determine the effect of a prior act.

Alternatively, reasoned the majority, "even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a 'clarification,' the declaration of intent may still effectively reflect the Legislature's purpose to achieve a ret-

rospective change." And, "where a statute provides that it clarifies or declares existing law, '[I]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment.'"

The court in the present case explained that Sec. 12940, as it stood prior to the enactment of A.B. 76, "was somewhat ambiguous and in need of clarification," as exemplified by the

*A.B. 76 was a
'formal change'
rather than a
'substantial change.'*

differences of opinion expressed in the first *Salazar* opinion. In the earlier decision, the dissent focused on the preamble to the 1984 amendment to Sec. 12940 that "specifically referred to protecting employees from sexual harassment by an employer's 'clientele.'" The majority, on the other hand, relied on the legislative history leading up to the 1984 amendment. Specifically, the lead opinion pointed to comments made by Senator Watson in support of its position: "*The bill does not hold an employer responsible for outside harassment*" and that an employer's responsibility for customer harassment was "amended out of the bill." The majority attributed the conflicting language in the preamble to a drafting error.

The court in the present *Salazar* case reasoned that A.B. 76 was enacted by the legislature in order to "eliminate this ambiguity." Accordingly, the court concluded that "A.B. 76 is nothing more than a clarification of section 12940," and because it is a clarification, rather than a substantive change, "it applies to this case." "Thus," said the court, "an employer may be held liable under the FEHA for sexual harassment by clients or customers."

Justice Patti Kitching, in her dissent, argued that A.B. 76 did not clarify the law, but rather substantively changed it, and that the legislature did not declare any intent to make it retroactive:

Although the Legislature stated that Assembly Bill No. 76 merely "clarified" existing law, abundant evidence shows that A.B. 76 made significant, substantive changes in the law, expanding the scope of employer liability and the scope of a plaintiff's cause of action against an employer for sexual harassment by its clients under the California Fair Employment and Housing Act. The Legislature cannot change "the rules of the game" to make employers liable for past sexual harassment of employees by non-employees, customers, or clients....For these reasons A.B. 76 should apply prospectively only, should have no effect on this appeal, and should not alter the court's decision filed on October 28, 2002.

Justice Kitching cited cases for the proposition that "California courts presume that statutes operate prospectively unless the Legislature clearly

manifests its contrary intent.” She reasoned that as the legislature did not include an express retroactivity provision in the statute and since there were no “extrinsic sources” making it very clear that the legislature intended a retroactive application, the presumption must control. She found that the legislature substantively changed the law when it enacted A.B. 76 “to expand the scope of employer liability for sexual harassment.” She argued that it would be unfair to apply the amendment retroactively.

The majority concedes that the 1984 statute and later versions of section 12940 before enactment of A.B. 76 were ambiguous with regard to employers’ liability for harassment by customers and clients. Thus the prior statute did not clearly give notice to Diversified Paratransit that it would be responsible for sexual harassment of Salazar by Diversified Paratransit’s customers or clients.

A petition for review has been filed with the California Supreme Court on behalf of the employer. Two other cases with similar facts now are pending before the Court of Appeal and may also end up at the Supreme Court as companion cases to *Salazar*, according to attorneys for Diversified. In *Carter v. Department of Veterans Affairs* (2003) 109 Cal.App.4th 469, 161 CPER 71, the Fourth District reversed the trial court, holding that the FEHA did not extend an employer’s liability to hostile environment sexual harassment of a nurse by a patient-resident

of a veteran’s hospital. The Supreme Court granted review and then remanded the case after passage of A.B. 76. In the case of *Adams v. Los Angeles Unified School Dist.*, B159310, the Second District Court of Appeal will render an opinion as to whether the school

district is liable for sexual harassment of a high school teacher by several students. (*Salazar v. Diversified Paratransit, Inc.* [3-30-04] B142840, B144243 [2d Dist.] 117 Cal.App.4th 318, 2004 DJDAR 3960.) ❁

Supervisor Terminated for Harassing Gay Employee Cannot Claim Religious Discrimination

The Ninth Circuit Court of Appeals rejected the case of a woman fired from her job for harassing a lesbian subordinate who claimed that her termination violated Title VII’s prohibition against religious discrimination. The court, in *Bodett v. Coxcom, Inc.*, upheld the trial court’s finding that the plaintiff was unable to rebut the evidence submitted by her employer demonstrating a legitimate nondiscriminatory reason for the firing.

Factual Background

At the time of the events giving rise to the case, Evelyn Bodett, an Evangelical Christian, had been working for the employer for 18 years. She supervised 13 employees, including Kelley Carson, an openly gay woman. When Bodett and Carson began working together, Bodett told Carson that homosexuality was against her Christian beliefs. In June 2000, Carson reported to Bodett for a regularly scheduled “coaching” session. Carson was upset as she had broken up with her partner and was concerned about how

she was going to make the house payment. Bodett told Carson, “God’s design for a relationship was between a man and a woman” and that “homosexuality is wrong, and considered by God to be a sin.” Bodett and Carson

*Bodett told Carson
‘homosexuality is
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by God to be a sin.’*

then prayed together. Shortly thereafter, Bodett purchased a ticket to a “Women of Faith Conference” for Carson, which Carson attended after originally refusing the ticket offer.

In November 2000, Carson was offered a promotion to another office. Mireille DeBryucker, who supervised both Bodett and Carson, heard from another employee that Carson had complained about Bodett’s comments. After learning that Carson had accepted the new position, she asked

Life may have no meaning. Or even worse, it may have a meaning of which I disapprove.

Ashleigh Brilliant

Ponder the meaning of unfair practices. Consider what action constitutes an unfair practice under California laws governing public sector employer-employee relations. Think about what conduct signifies bad faith bargaining and when strikes are illegal.

This Pocket Guide offers a comprehensive look at the unfair practices created by state laws covering public school, state, higher education, and local government employees. It includes the text of the unfair practice provisions of EERA, the Dills Act, and HEERA. Included are a summary of key cases that provides a clear explanation of what conduct is unlawful, a table of cases, and an index of terms.

**Pocket Guide to Unfair Practices:
California Public Sector**

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Carson to lunch to find out why she was leaving. Carson told her that she was uncomfortable with the way Bodett treated her sexuality. She gave as an example a comment made by Bodett at the end of one of her performance reviews that she would be disappointed if Carson were dating another woman, but happy if she were dating a man. DeBryucker asked Carson why she had not told Bodett that the comments made her uncomfortable or complained to human resources. Carson explained that “Bodett was her boss and she could not afford to lose her job.”

At the time that Bodett made her comments to Carson, the employer

had an anti-harassment policy in effect that stated:

No employee shall harass another employee on the basis of race, color, religion, sexual orientation, national origin, age, disability or veteran status; An employee who harasses another employee may be subject to corrective action, up to and including termination....Verbally or physically harassing, coercing, intimidating or threatening a coworker, supervisor or customer is conduct which may be cause for immediate discharge.

DeBryucker discussed the situation with the employer’s human resources manager, her supervisor, and in-house counsel. It was determined

that the comments reported by Carson violated the antidiscrimination policy and that, if Bodett admitted to them, she would be terminated. At a subsequent meeting, Bodett did admit to the occurrences and comments described by Carson. She was terminated for a “gross violation of Cox’s policy.”

Bodett filed a complaint with the Equal Employment Opportunity Commission and received a right to sue letter. She filed suit with the district court, which dismissed her complaint. She then appealed.

Court of Appeals Decision

After a thorough review of the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 for disparate treatment claims under Title VII generally, the court refocused on the specific issue before it. Referring to its decision in *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 164 CPER 77, the court said:

In the context of a disparate treatment claim based on religious discrimination, we recently outlined methods by which a plaintiff can meet his or her *prima facie* burden. He or she must show that “(1) she is a member of a protected class; (2) she was qualified for her position; (3) she experienced an adverse employment action; and (4) similarly situated individuals outside her protected class were treated more favorably, *or* other circumstances surrounding the adverse employment action give rise to an inference of discrimination.”

The Ninth Circuit agreed with the district court that Bodett had failed to show that “other similarly situated employees outside of the protected class were treated more favorably.” It also found that Bodett had failed to prove her case by the alternative method:

Viewing the evidence that she did present to the district court in the light most favorable to Bodett, we cannot say that she has demonstrated other circumstances surrounding her termination that demonstrate a bias or animus against her religion that give rise to an inference of discrimination.

Even though both the district court and the Court of Appeals concluded that Bodett had failed to prove a prima facie case, both courts went on to analyze the case as if she *had* met her burden. The Ninth Circuit agreed with the district court that the employer showed a legitimate nondiscriminatory reason for terminating Bodett, i.e., “that she had violated the facial terms of its discrimination policy.”

Bodett does not dispute that she was on constructive notice of this policy, or that she admitted to DeBryucker and [the human resources manager] that she had made certain statements to Carson. Specifically, Bodett acknowledged that she told Carson at the end of a performance review that she would be disappointed if Carson was dating another woman. From either an objective or subjective viewpoint, these statements clearly fall within the gambit of harassment, particularly because Bodett was in a position of authority over Carson.

Under these circumstances, the burden then shifts to Bodett to show pretext, said the court. The court rejected Bodett’s argument that the fact that her record was “discipline and complaint free” raised an inference that her termination was motivated by her religion rather than by her behavior toward Carson.

The court also dismissed Bodett’s other argument — that the employer’s stated reason for terminating her was

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“unworthy of credence” because “her behavior toward Carson viewed in the light most favorable to Bodett cannot constitute ‘harassment’ under the policy” and the employer “did not follow the discretionary steps that typically precede termination” when an employee violates the policy. The court found that Bodett’s admitted behavior was sufficient to support the conclusion that she had harassed Carson. As to the procedural argument, the court pointed to the fact that Bodett had admitted in her deposition that she was aware that there were cir-

cumstances under which an employee could be fired without prior warning. In addition, said the court:

When DeBryucker and [the human resources manager] informed Bodett that her behavior was in gross violation of the company harassment policy, Bodett admits responding that “sometimes there is a higher calling than a company policy,” an acknowledgement that her actions may very well have violated company policy.

The court also rejected Bodett’s claims for breach of contract, wrongful discharge, and intentional infliction of emotional distress under Arizona state law. Bodett’s claims under the federal and state constitutions also were rejected as private employers, such as Cox, are “not subject to the constitutional strictures applied to state actors.”

Cox is permitted under Title VII to create an internal harassment policy designed to equally protect its employee’s rights. Bodett may only freely exercise her First Amendment rights as long as such exercise does not infringe on the rights of others by manifesting discrimination prohibited by Cox’s harassment policy. (*Bodett v. Coxcom, Inc.* [9th Cir. 4-26-04] 03-15112, ___F.3d___, 2004 DJDAR 5008.) ❁

Broad Definition of Supervisor Under FEHA

A supervisor for purposes of the California Fair Employment and Housing Act is anyone who has the responsibility for directing the complaining employee's day-to-day duties, held the Court of Appeal in *Chapman v. Enos*. The court found that the trial court had given an erroneous jury instruction that impermissibly narrowed the definition of supervisor under the FEHA.

Factual Background

April Chapman became an investigator for the Sonoma County District Attorney's office in 1988. Her duties involved investigating criminal and civil cases, including interviewing witnesses, law enforcement officers, and victims. She performed her duties under the direction of the deputy district attorney assigned to her unit but was under the supervision of the senior and chief investigators. The senior and chief investigators, and the district attorney, were responsible for hiring and firing investigators. The senior or chief investigator approved vacation leave for investigators.

In 1997, Chapman was assigned to the major fraud unit, involving the prosecution of insurance and workers' compensation fraud. Bruce Enos was the deputy district attorney assigned to the unit. Though the unit shared office space with three other deputy district attorneys, Chapman and Enos

were in the office alone for most of the workday. Enos directed Chapman in virtually all of her duties; she received no assignments from her direct supervisors. Though Enos did not have the authority to promote her or to prepare her performance evaluations, the chief investigator would seek his input in evaluating Chapman. Chapman routinely cleared her time off with Enos and believed this was required. She understood Enos to be her boss.

Enos directed Chapman in virtually all her duties.

Both Enos and the county denied that Enos exercised any supervisory authority over Chapman. Enos claimed that he was not responsible for her work performance and was not subject to discipline if her work was inadequate. Enos and others testified at trial that the deputy district attorneys did not tell investigators how to do their work, but they directed their work in the sense of describing and assigning the tasks to be performed.

Approximately two months after her transfer to the fraud unit, Chapman noticed a change in Enos' behavior. He began to eavesdrop on

her telephone conversations and became very interested in who she was seeing outside the office. He asked her if he could go with her to interview witnesses though there was no reason for him to do so. He asked if he could go on her noontime walks and if he could help or watch when she changed clothes before walking. He asked about her private life, gave her gifts, and asked to join her on a cruise. He had a business card made up showing a woman with a skirt slit up to her crotch and jacket cut down to her cleavage. He asked Chapman, "If I kill my wife, would you run away with me?" She received a voice mail message from another deputy district attorney during which he repeated her name and used heavy breathing while she could hear Enos laughing in the background.

Enos' inappropriate behavior continued for months. Chapman dreaded going to work and felt "very uncomfortable, very upset." She developed chronic stomach problems, difficulty sleeping, and a loss of concentration.

On November 10, 1998, Chapman reported Enos' inappropriate behavior to County District Attorney Michael Mullins. He said he would investigate her allegations and transferred her to the main office the following day. He subsequently disciplined Enos with a one-week suspension.

Chapman filed suit, and her case was tried before a jury. By special verdict, the jury found that Chapman had not proven that Enos was her supervisor. It found that the district attorney

had taken an adverse employment action against her and that the action was motivated by her sexual harassment complaint, but that there was a legitimate nondiscriminatory reason for the adverse action.

Chapman appealed.

Court of Appeal Decision

The trial court proceeded on the theory that an employee is not personally liable to a coworker for sexual harassment under the FEHA absent a supervisory relationship. Chapman

The trial court modified the usual jury instruction.

had argued that the amendment to the FEHA which specifically provided that a coworker could be held personally liable for harassment should be applied retroactively to her case. But the trial court rejected that argument, and she did not raise it again on appeal. The California Supreme Court in *McClung v. Employment Development Department* has agreed to decide whether the coworker amendment is retroactive, but in this case, the controlling issue was whether Enos was a supervisor within the meaning of the FEHA and could support both his and the county's liability for sexual harassment.

The trial court in this case modified the usual jury instruction regard-

ing the definition of supervisor. The basic jury instruction uses the definition found in Gov. Code Sec. 129269(r):

[A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The trial court modified this jury instruction by adding the following language to define "responsibility to direct":

In order for a person to be found to be a supervisor because he or she is... "responsible to direct the work of others"... there are three requirements that must be met: 1. The direction must be more than merely routine or clerical; 2. The direction must require the use of independent judgment; 3. The person giving the direction must be directly responsible for the performance and work product of the employees in his or her department or unit and must be fully accountable and responsible for the performance and work product of the employees in his or her department or unit.

The court agreed with Chapman that the last requirement was not supported by the FEHA. The court explained that, "while accountability and responsibility are certainly indicia of

supervisory power, they are not *required* elements of the...FEHA definition of supervisor." The court found that Enos did have supervisory power over Chapman in that he "directed her day-to-day duties to conduct investigations and trial preparation on cases, and outlined her role in meetings and trainings." Further, she cleared her time off with him and he provided input into her performance evaluations.

The court rejected the argument that the dictionary definition of "responsible" is "marked by accountabil-

Accountability and responsibility are not required elements of the FEHA definition of supervisor.

ity" and, therefore, "responsibility to direct" is the functional equivalent of being "fully accountable and responsible for the performance and work product of the employee." The court found the dictionary definition unhelpful for two reasons: "one can be accountable for one's own actions without being accountable for those of others" and "the plain language of the statute...defines the circumstances under which the exercise of the responsibility to direct will be considered supervisory, i.e., 'if...it is not of a

merely routine or clerical nature, but requires the use of independent judgment.’”

The court also looked to the nature of the statute being interpreted:

We must construe the provisions of the FEHA broadly to protect employees’ rights to seek and hold employment without discrimination.... We, therefore, conclude the court erred in instructing the jury that a supervisor must be fully accountable and responsible for the employee’s performance and work product. In our view, the error significantly restricted the class of employees subject to liability for sexual harassment, contrary to the FEHA.

The court also held that Chapman had not waived her right to appeal the lower court’s ruling. Although she did not object to the modified instruction when it was given, she had argued that the unmodified instruction was accurate and that no revisions were necessary. In addition, the Court of Appeal concluded that the trial court’s error was prejudicial to Chapman “as it seems probable that the error prejudicially affected the verdict.” It reversed the judgment and sent it back to the lower court for a new trial. (*Chapman v. Enos* [3-10-04] A097943 [1st Dist.], 116 Cal.App.4th 920, 2004 DJDAR 3100.) ❁

Public Sector Arbitration

Court Employees Fight Against Fiscal Cutbacks

California court employees only recently received the right to collectively bargain, and they wasted no time in having their first-ever grievance resolved in their favor. While the parties are new, the state's financial problems provided a familiar background for the dispute. And, the grievance proved that the state court system is not immune to the effects of the state's economic crisis.

In January 2003, the State Judicial Council recommended two plans to conserve resources. One was a proposal for legislation that would allow the state court system greater use of electronic recording of trial court proceedings. The second plan was a recommendation that would give trial courts ownership of court transcripts. The state estimated that these two proposals would amount to more than \$40 million in savings over the next two fiscal years.

Both the California Court Reporters Association and the California Official Court Reporters Association opposed, and actively lobbied against, the enactment of these recommendations. In May 2003, the unions' efforts paid off, and the proposals were defeated.

When the San Bernardino County Superior Court became aware of the associations' lobbying efforts,

the court's chief executive officer began to deny union members reimbursement for organizational dues and for tuition costs of seminars and workshops sponsored by CCRA and COCRA. The chief executive officer feared that tuition and dues money from those organizations was being

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used for purposes adverse to the court. Grievances were filed by the San Bernardino Public Employees Association on behalf of three unit members when the county denied their applications for reimbursement of dues and tuition costs.

The association argued that the court violated the parties' agreement which explicitly establishes a "tuition reimbursement and membership dues procedure" to encourage employees "to pursue educational opportunities and involvement in organizations to

enhance their contribution as court employees and assist in their career development." The association claimed that the court violated the intent of this language, and argued that the parties' agreement does not allow the court to deny reimbursement because of political activity.

The court contended that the contract plainly provides broad discretion to determine whether or not to approve requests for reimbursement. The contractual language allows reimbursement only if the "expenditure enhances furtherance of Court or continuing education goals." In the court's view, the requested reimbursement money would go to organizations that oppose the court's fiscal goals. Therefore, the court argued that it reasonably denied requests to fund union lobbying.

In determining the contractual intent of the parties, arbitrator C. Allen Pool emphasized the importance of examining the circumstances prevalent at the time the language was written. The contract was formed in 2001, he noted, before California's budget crisis. Pool also acknowledged the court's intent to recognize its employees' worth by fostering continuing education and career development. Although the contract makes reimbursement contingent on prior approval, Pool found the reason for this condition was to ensure that the content of the course or seminar was related to the employee's job and was within the framework of continuing education.

Pool was not persuaded by the court's argument that it retained the discretion to deny reimbursement in conflict with the court's "goals." Pool emphasized that the contract does not mention any goals regarding political activity or conservation of funds, and he refused to read any such goals into the contract. Instead, the parties' agreement only stated that the court's goals were to contribute to employees' effectiveness to the court, to encourage employees to further their

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concern.*

careers, and to reimburse employees for participation in classes, seminars, and involvement in professional organizations.

Pool found that CCRA and COCRA had a long record of aggressive lobbying and that this record must have been known by the court at the time the contract was ratified. Pool reasoned that the court should have addressed its political concerns before it agreed to the contract. Rather than addressing any of the court's professed concerns, the contract promoted participation in professional organizations.

The court argued that a distinction exists between different methods of political lobbying. The court's deputy chief executive officer testified that applications for reimbursement of dues to CCRA and COCRA were rejected because those organizations hire professional lobbyists to work against the court's interests. In contrast, applications for reimbursement of dues to the Court Clerks Association are approved because the CCA does not oppose recommended legislation, it only responds to enacted legislation. The court argued that it permitted political lobbying by an organization's members, but did not permit lobbying by hired professionals.

Arbitrator Pool found that for the court to condone one method of lobbying and not the other was arbitrary, unreasonable, and an abuse of power. A better approach would have been for the court to return to the bargaining table to negotiate its newly expressed concern with CCRA and COCRA's political activities. Pool sustained the grievance and ordered the court immediately to reimburse tuition fees and membership dues. (*San Bernardino Public Employes Assn. and Superior Court of California, San Bernardino County* [12-08-03] 20 pp. *Representatives*: Mary Neeper for the association; Douglas Freifeld, Esq. [Wiley, Price & Radulovich] for the court. *Arbitrator*: C. Allen Pool.) ❁

Arbitrator's Award Vacated for Failure to Disclose Prior Service With Law Firm

The First District Court of Appeal vacated an arbitration award issued by John Kagel because of his failure to disclose prior service in a case involving the same law firm that was representing one of the parties in the dispute currently before him. Relying on Code of Civil Procedure Sec. 1281.9, the court concluded that disclosure of his service in a non-collective bargaining case was statutorily mandated and, since there had been no disclosure, there could be no knowing waiver of the right to disqualify Kagel as the neutral hearing the case.

The vacated award was issued in a case involving a sex discrimination lawsuit filed by Charlotte Laughon against the International Alliance of Theatrical Stage Employees and Moving Picture Operators, Local 16. Laughon and the union entered into a settlement agreement that relegated any dispute concerning the terms of their accord to binding arbitration before one of four named arbitrators, Kagel being one.

When a dispute arose, Kagel was selected to hear the case. The law firm of Van Bourg, Weinberg, Roger & Rosenfeld served as counsel for the

The worst part of success is trying to find someone who is happy for you.

Bette Midler

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union. The firm also had recently represented Stationary Engineers Local 39 in a non-collective bargaining arbitration involving an individual named Hydorn. Kagel also had conducted arbitrations in a number of collective bargaining cases in which the Van Bourg law firm served as counsel.

Kagel's involvement as the arbitrator in the Hydorn matter came to light near the end of the first day of the arbitration hearing between Laughon and Local 16, when the union introduced Kagel's decision in the Hydorn case as an exhibit in the Laughon case. Kagel did not acknowledge that he had failed to disclose his service in the Hydorn case, nor did he alert Laughon's attorney that his service as an arbitrator might be grounds for disqualification in the Laughon arbitra-

tion. Instead, he marked the decision as an exhibit, and the parties moved on to other matters.

On April 29, 2002, Kagel issued an award in the Laughon case that was largely in favor of Local 16. On June 27, Laughon filed a petition to vacate the award on the ground that Kagel failed to disclose his prior employment as an arbitrator in cases involving Local 16 or its counsel, the Van Bourg law firm. The trial court concluded that once information about the Hydorn case came to light, Laughon's counsel made a tactical decision not to raise the issue of disclosure or demand Kagel's disqualification. The court concluded that this constituted a knowing, voluntary, and intelligent waiver of the right to disqualify Kagel. The Court of Appeal disagreed.

An arbitrator's disclosure obligations as set out in Code of Civil Procedure Sec. 1281.9(a)(4) specify that an arbitrator must disclose "the names of the parties to all prior or pending non-collective bargaining cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator served or is serving as neutral arbitrator." The statute requires the arbitrator to make such a disclosure to all parties in writing within 10 calendar days of his or her appointment. The Court of Appeal explained that had Kagel complied with this directive, the law would have entitled Laughon to disqualify Kagel based on his disclosure.

A party who does not move to disqualify an arbitrator may seek to vacate an arbitration award where an arbitrator has failed to disclose a ground for disqualification of which he or she was then aware. The statute provides that when such a failure occurs, the court is required to vacate the arbitration award once it is shown that the arbitrator failed to make the required disclosure. In this case, said the appellate court, the trial court had no choice but to vacate Kagel's award once it was shown that he failed to make the required disclosure in a timely manner.

The Court of Appeal rejected the union's assertion that Laughon waived any challenge to Kagel's service as a neutral arbitrator when she made no objection to Kagel's service after the Hydorn opinion was marked for identification as an exhibit and was pro-

vided to her counsel. While close scrutiny of the Hydorn decision would have revealed that Kagel had served as the arbitrator in a case where the Van Bourg firm represented a party, there was no discussion of the possible conflict and neither Kagel nor the union called it to Laughon's counsel's attention. Nor was Laughon given an opportunity to object to Kagel's continuing service as an arbitrator.

Relying on *HSMV Corp. v. ADI Limited* (C.D. Cal. 1999) 72 F.Supp.2d

*The question of
whether Kagel
actually was biased
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the inquiry.*

1122, the court said that, "as a threshold matter one must know of, understand and acknowledge the presence of a conflict of interest before one can waive the conflict." No waiver can be found when "the record simply does not demonstrate that the party actually knew, understood and acknowledged the presence of a conflict before the conclusion of the arbitration proceedings."

The court also took note of the U.S. Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.* (1968) 393 U.S. 145, which held that the failure to make a

required disclosure is grounds for vacating an arbitration award even if there is no proof of actual bias. "We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias," said the *Commonwealth* court.

Turning to the instant case, the Court of Appeal commented:

Our Legislature has crafted disclosure rules designed to protect the integrity of the arbitration process, including the specific disclosure requirements set out in section 1281.9. The requirement that arbitrators make timely disclosures of potential conflicts is a particularly important safeguard. We cannot agree that this important disclosure requirement may be fulfilled in the manner Local 16 contends. At the very least, Laughon was entitled to the functional equivalent of the disclosure mandated by statute, that is, an explicit proffer of the disqualifying information and an opportunity to object.

The appellate court concluded that because no effective disclosure of the disqualifying information took place, the trial court erred in finding that Laughon "knowingly" waived her objection to Kagel's service as a neutral arbitrator when she failed to object after the Hydorn opinion was offered into evidence.

The court stressed that the question of whether Kagel actually was bi-

ased against Laughon was not relevant to the inquiry where, as in this case, the arbitrator was required to disclose matters that might create an impression of bias. "Under the plain language of the statute," said the court, "the disclosure explicitly mandated in section 1281.9, subdivision (a)(4), involves facts that could cause a reasonable doubt of impartiality and is certainly grounds on which to vacate the arbitration award." The trial court was not required to determine whether the undisclosed information created an impression of bias because "the Legislature has already decided that, when a proposed arbitrator had previously served in an arbitration involving parties to the proposed arbitration, an impression of possible bias is created."

Finally, the court concluded, the statute imposed no obligation on Kagel to disclose his service as a neutral arbitrator in disputes arising under collective bargaining agreements. Section 1281.9 makes a distinction between those cases and previously arbitrated non-collective bargaining cases because service in prior cases arising in the collective bargaining context does not carry the same doubt of impartiality that surrounds arbitration in the non-collective bargaining arena. (*International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 16 v. Laughon* [4-22-04] A101839 [1st Dist.] 117 Cal.App.4th 1188, 2004 DJDAR 4916.) ❁

Arbitration Log

• Contract Interpretation — Vacation/Sick Leave

City and County of San Francisco (Fire Department) and Service Employees International Union, Loc. 790 (01-22-03; 9 pp.). *Representatives:* Anne Yen, Esq. (Weinberg, Roger & Rosenfeld) for the union; Thornton Bunch, Jr., Esq., for the city. *Arbitrator:* Frank Silver.

Issue: Did the city violate the parties' agreement by requiring the grievant to exhaust her accrued vacation, floating holidays, and sick leave during her absence under the FMLA?

Union's position: (1) The grievant, a paramedic, submitted a request for leave under the Family and Medical Leave Act in order to care for her own serious health condition.

(2) The grievant requested not to be required to exhaust her accrued paid leave. The city denied her request and paid her for all of her accrued vacation, floating holidays, and sick leave so that all of her accrued leave was exhausted.

(3) The parties' agreement is inconsistent with Sec. 2652 of the FMLA. While the act states that vacation, floating holidays, and sick leave shall be exhausted, the contract does not permit such exhaustion in this case.

(4) The contract mandates that the city cannot schedule vacation or holiday time for an employee unless that employee agrees to it. The city violated the

contract by requiring the grievant to use her accrued vacation and holiday time.

(5) The parties' agreement states that sick leave "may be granted" to employees with sick leave credits, but the grievant's request for unpaid sick leave was denied. Where the contract allows employees to substitute paid leave for unpaid leave, the city cannot require employees to exhaust paid time off during FMLA leave.

(6) The city required employees on FMLA leave to exhaust accrued paid time but did not impose this requirement on employees taking time off for other reasons. This constitutes disparate treatment of city employees and a violation of the contract.

City's position: (1) The city's policy requiring employees to use vacation, floating holidays, and sick leave when taking otherwise unpaid FMLA leave is authorized by the statute and is consistent with the parties' agreement.

(2) Nothing in the contract confines the scheduling of paid leave to the exclusive discretion of the employees. To

the contrary, the scheduling of vacations and floating holidays are subject to city approval.

(3) The city's policy does not diminish any contractual benefits. Allowing employees to be paid during at least part of their FMLA leave enhances their statutory unpaid leave.

(4) The city's policy does not constitute discrimination. It merely implements the federally recognized right to require benefits to be paid concurrently with FMLA leave.

(5) The grievant was paid all of her accrued leave, and there is no remedy to which she could be entitled.

Arbitrator's decision: The grievance was affirmed in part and denied in part.

Arbitrator's reasoning: (1) The FMLA allows, but does not mandate, an employer to require concurrent use of accrued leave and FMLA leave. The FMLA further provides that nothing in the act shall be construed to diminish an employer's obligation to comply with any collective bargaining agreement.

(2) The parties' agreement provides that it supercedes any inconsistent city rules. Therefore, if the agreement states that an employee cannot be required to use accrued leave concurrently with FMLA leave, this provision prevails over

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the city's rule requiring concurrent use of accrued leave.

(3) The city's policy requiring concurrent use of vacation leave and floating holidays with FMLA leave is inconsistent with the agreement. The agreement does not allow the city to require an employee to take accrued time off unless the employee agrees.

(4) The grievant's desire to save her vacation leave until after she had completed her FMLA leave was reasonable and understandable. The city improperly required her to exhaust accrued vacation and holiday time during her FMLA leave.

(5) The parties' agreement provides that sick leave with pay "may be granted" to employees with earned sick leave credits. This contract language is ambiguous and does not necessarily imply that the employee has the option of taking paid *or* unpaid sick leave.

(6) The city did not discriminate against the grievant by requiring her to exhaust accrued sick leave. Section 2612 of the FMLA allows employers to require an employee to substitute accrued paid leave for FMLA leave.

(7) The city violated the parties' agreement by requiring the grievant to exhaust vacation leave and floating holidays during her FMLA leave, but not by requiring her to exhaust accrued sick leave. She will be given the option of paying back the vacation and holiday pay that she received, or taking as unpaid leave the vacation and holidays that she had accrued at the time of her FMLA leave.

(Binding Grievance Arbitration)

• **Contract Interpretation —
Non-Reelection
Grant District Education Assn.
and Grant Joint Union High School
Dist.** (07-01-03; 11 pp.). *Representatives:*

David Oshige for the association; Jacques Whitfield, Esq., for the district. *Arbitrator:* John Wormuth.

Issue: Did the district violate the parties' agreement when it declined to remove the incumbent department head after a majority of department members made a determination of non-re-election?

Association's position: (1) The parties' agreement provides that a majority of department members have the authority to non-reelect the incumbent department head. The district violated the agreement when it failed to honor the majority's decision to non-reelect.

(2) The district adopted but did not follow its site-based management framework. An integral component of site-based management is the district's acceptance that a majority of teachers can best determine the most appropriate person to lead the department.

(3) The incumbent is not protected from non-re-election by virtue of a three-year term of office.

(4) The agreement permits a mandatory mid-term non-re-election when a majority of teachers determines the incumbent is not serving the department and the students' needs.

(5) Once a majority determines non-re-election is appropriate, the site administrator must follow the recommendation of non-re-election.

District's position: (1) The district did not violate the agreement when it declined to follow the majority's recommendation to non-reelect the incumbent department head.

(2) The agreement allows a department majority to recommend mid-term non-re-election, but the principal maintains the final authority to non-reelect.

(3) The agreement states that termination of the department head *may* occur, rather than *shall* occur, by a recommendation of reelection. This language preserves the principal's authority to determine non-re-election.

(4) The department's recommendation of non-re-election merely was advice to the site administrator. There was no contractual obligation to follow the department's non-re-election advice.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) In order to address the parties' dispute, primary consideration must be given to whether or not the agreement contains ambiguities.

(2) The agreement states that a majority of department members shall nominate two people who it concludes meet the requirements for department head. Then, it is the principal's duty to select from those two candidates. This self-regulating mechanism is the true balance of power between the administration and department members.

(3) Service as department head is not to exceed a three-year duration, but a shorter period of service may occur.

(4) The agreement provides for circumstances under which termination *may* occur, but it does not state that ter-

mination *shall* occur. Therefore, the majority's recommendation of non-re-election merely is advisory to the site administrator.

(5) The agreement is clear and unambiguous in stating that the majority of department members nominate, but the site administrator elects, the department head.

(6) The integrity and efficiency of these provisions is not dependent on site-based management or any other form of administration.

(7) The majority has no right to require the removal of a department head. The department head is not subject to mid-term election but serves a defined term of office.

(8) Interpreting the agreement to accommodate non-reelection of an incumbent department head mid-term would result in chaos and instability within the department and in the election provisions.

(9) The district did not violate the agreement when the site administrator declined to remove the incumbent department head.

(Binding Grievance Arbitration)

• **Majority Status**
• **Exclusive Representation**

El Dorado County Employees Assn., Loc. 1; International Union of Operating Engineers Stationary Loc. 39; and Superior Court, County of El Dorado (10-13-03; 27 pp.). *Representatives*: Paul Goyette, Esq. (Goyette and Associates) for EDCEA; Mathew Gauger, Esq. (Weinberg, Roger & Rosenfeld) for IUOE; Linda Ashcraft for the court. *Arbitrator*: Bonnie Bogue.

Issue: Did Local 39 have majority status on the date the recognition/derecognition petition was filed? Can Local 39 be recognized as the exclusive representative of court employees?

Local 1's position: (1) The Trial Court Employment Protection and Governance Act was enacted in January 2001. It made trial courts, instead of counties, the "employers" of court employees.

(2) In relevant part, the act states that a trial court shall grant exclusive or majority recognition to a union based on proper showing, unless another union previously has been lawfully recognized as the representative of the same unit. In the event the union has the support of at least 30 percent of the employees in the unit, a neutral third party shall

order an election to establish which union has majority status.

(3) In anticipation of this legislation, Local 1 included a proviso in its agreement stating that until a state statute provided that court employees were not county employees, the agreement would control the personnel rules under which the court employees would operate. After the Trial Court Act became law, Local 1 signed a letter of understanding with the court stating that Local 1 represented court employees and county rules would remain in effect until changed.

(4) After rejecting Local 39's initial petition seeking formal recognition, the court accepted a petition that was amended to exclude employees in the supervisor and professional unit. The court found this petition in compliance with its personnel rules.

(5) Local 39 did not have majority status on the date the petition was filed because it misstated how many employees are in its proposed unit. Court employees cannot be included in the petition because they must remain in the county unit represented by Local 1.

(6) The court violated its personnel rules when it accepted Local 39's untimely amended petition.

(7) Local 39 cannot be recognized as the exclusive representative of a bargaining unit of court employees. The court and Local 39 violated the county's unit modification procedures when they improperly created a "court general bargaining unit" that includes court employees in the general unit of county employees.

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Send your prepaid order to CPER, Institute of Industrial Relations, 2521 Channing Way, University of California, Berkeley, CA 94720-5555. Make checks payable to Regents, U.C. (The number of pages in each award is indicated at the beginning of the abstract.) All orders will be filled promptly and mailed first class.

Local 39 and the court's position: (1) Local 39 had majority status on the date the petition was filed. The proposed unit is appropriate because it includes non-supervisory, non-professional court employees who were not included in the county's existing general unit.

(2) The court properly applied its personnel rules when it accepted Local 39's timely amended petition. The agreement allows a petitioner to correct its deficiencies.

(3) The court properly modified the existing county unit and created a separate unit pursuant to the changes brought about by the Trial Court Act.

(4) Local 1 did not comply with the court's personnel rules. Its protest letter was issued more than 15 days after it received the court's notice that it was accepting Local 39's petition.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The county's personnel rules state that an appropriate bargaining unit consists of the "broadest feasible grouping of positions that share an identifiable community of interest." It specifies that supervisory, professional, and law enforcement employees are to be in separate units.

(2) Local 39's proposed unit of non-supervisory, non-professional court employees is appropriate. No other bargaining unit configuration for court employees has been proposed by Local 1 or by the court as being appropriate.

(3) The petition cannot be rendered untimely; it initially was filed within the time allowed, then refilled after deficien-

cies noted in the initial filing were corrected.

(4) The county properly followed the consultation procedure outlined in its personnel rules when it accepted Local 39's amended petition.

(5) The court correctly applied its personnel rules in determining the appropriate unit of court employees by requiring Local 39 to remove supervisory and professional employees and include "the broadest feasible grouping" of court employees.

(6) Local 39 provided a sufficient number of signatures in its petition, but the Trial Court Act requires the court to hold a secret ballot election to determine representation of the general unit of court employees. Such elections are required when another labor organization previously has been recognized as the representative of part of the same unit.

(Binding Grievance Arbitration)

• **Contract Interpretation — Return to Work**

• **Remedy — Issuance of Award**
Metropolitan Transportation Authority and Amalgamated Transit Union (12-08-03; 5 pp.). *Representatives:* William Flynn, Esq. (Neyhart, Anderson, Freitas, Flynn & Grosboll) for the union; Timothy Wykert for the employer. *Board of Arbitration:* Philip Tamoush, impartial chairman; Neil Silver, union appointee; Rudy Lipscomb, management appointee.

Issue: Did the MTA violate the "return to work" provision of the parties' agreement?

Union's position: (1) The grievant, a mechanic, suffered an industrial injury and was released to full duty on November 1, 1999. He should be allowed to return to actual work duties and be paid from the time of his release.

(2) The grievant's 50-pound lifting restriction is irrelevant because the MTA's maintenance guidebook provides that employees "shall obtain help when moving objects which are too heavy for them to lift or push."

(3) The grievant is perfectly able to perform his mechanic's work, and the MTA's guidebook should be enforced.

(4) An award in the grievant's favor is necessary to ensure compliance.

(5) The fact that the MTA scheduled a "return to work" examination is irrelevant because the grievant should have been reinstated upon being released to full duty.

Authority's position: (1) The MTA has given the grievant backpay and was prepared to reinstate all benefits that had been curtailed or lost in the past. No award should issue because the MTA will remunerate the grievant.

(2) So long as the 50-pound restriction existed, the grievant could not be returned directly to his mechanic's job.

(3) Pursuant to a workers' compensation claim, the grievant was scheduled for another physical examination to determine his capabilities. That examination was conducted on October 1, 2003, and the treating physician determined that the grievant was capable of returning to his job without any restrictions.

(4) Once the grievant is returned to work, the remedy requested by the union has been fulfilled.

Arbitrator's decision: The grievance was affirmed in part and denied in part.

Arbitrator's reasoning: (1) The parties' dispute concerns the "safety issue" dealing with the 50-pound lifting restriction indicated in the grievant's medical evaluations. Therefore, the issue revolves around application and enforcement of an appropriate remedy rather than a physical inability to do the job.

(2) An award should issue to guarantee the grievant's return to active duty, and to ensure that all benefits have been paid.

(3) Since the MTA agreed to fulfill the grievant's demand to return to work and receive backpay, there is no need to decide whether the MTA violated the "return to work" provision of the parties' agreement.

(4) The MTA is ordered to put the grievant back on duty and to provide him with full backpay, including benefits.

(Binding Grievance Arbitration)

• **Contract Interpretation — Retiree Medical Benefits Enterprise Elementary School Dist. and Enterprise Elementary Teachers Assn.** (02-27-04; 11 pp.). *Representatives:* Gail Holmes for the association; Ralph Stern, Esq., for the district. *Arbitrator:* Paul Staudohar (CSMCS Case No. ARB-02-1283).

Issue: Is the grievance arbitrable? Did the district violate the parties' agreement by failing to provide the same level of health benefit coverage for retirees as for active employees?

Association's position: (1) The grievance is arbitrable. The grievant is the association, which is entitled to grieve contract violations on behalf of itself to ensure enforcement of the language bargained between the parties.

(2) The agreement unambiguously provides health benefits as an early-retirement incentive to teachers. By pursuing the grievance, the association is exercising its rights and responsibilities to force the district to comply with the agreement.

(3) As a result of significant increases in health care costs for the 2002-03 school year, the district and the association negotiated changes in insurance coverage for active employees. The parties agreed that the district's contribution to the insurance cap would increase overall by \$90,000, raising the health benefit cap by \$439 per employee to \$8,964.

(4) Although the increase was designated for active employees, five medical plan options were offered to employees *and* retirees. The lowest-cost medical plan was provided at no charge, but those enrolling in any of the other four plans had to pay extra for increased coverage.

(5) The district wrongly determined that the proper way to calculate retirees' coverage is to allocate a pro rata share of the cap increase granted to active employees.

(6) The district arbitrarily set a lower cap for retirees, and retirees were shortchanged by not being provided with the same level of health benefit coverage as active employees. In order

to offer the same level of benefits to retirees as it offers to active employees, the district is obligated to contribute the full cost of the cap.

(7) Retirees should be reimbursed for their out-of-pocket contributions for health benefits. Also, the district should be required to pay retiree benefits up to the health benefit cap of current employees.

District's position: (1) The grievance is not arbitrable because the association does not represent retirees, and retirees are excluded from the grievance procedure.

(2) Although the grievance may be brought in the name of the association, there must be a unit member concerned with the violation. There is none in this case.

(3) The California Public Employment Relations Board has found that retirees are not entitled to collective bargaining rights under the Educational Employment Relations Act. There is no obligation to negotiate on retirees' behalf because they are not in the representation unit.

(4) The contract states that the district will maintain insurance benefits "at the same level" as full-time employees. However, this provision refers to coverage rather than cost. Retirees *and* active employees must now make a copayment, and retirees receive the same medical coverage as before.

(5) If the association prevails in its grievance, there would be a windfall to retirees. The district would be required to pay \$8,964 for retiree benefits that cost only \$5,021 during the 2002-03 school year.

(6) Even if the association could have negotiated the contribution cost of benefits for retirees, it chose not to do so. Therefore, the association clearly waived any rights to challenge the district's contribution to retiree benefits.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) Retirees are not covered by state law or the agreement. There is no obligation to negotiate on their behalf.

(2) However, the agreement requires the district to maintain benefits for retirees at the same level as for active employees. Although retirees would profit from an arbitration decision finding their benefits have not been maintained, the association has a clear interest in the issue of contract interpretation affecting rights granted.

(3) The agreement allows the association to file a grievance concerning "a violation, misinterpretation, or misapplication of specific provisions," and the grievance was appropriately filed regarding an alleged contract violation.

(4) State law does not appear to prohibit a contractual interpretation from inuring to the benefit of retirees, even though the collective bargaining statute does not apply to them. Therefore, the grievance is arbitrable.

(5) While the amount of the cap was higher for active employees (\$8,964) than for retirees (\$5,021), the proportionate increase was the same for both groups. The caps were increased in proportionate amounts so as to provide the same level of coverage. The changes to the plan regarding choices and costs were communicated to retirees.

(6) There was no reduction in coverage or level of benefits. The lowest-cost plan for both active and retired employees resulted in no extra charge. Copayments were required for retirees who chose plans providing greater benefits, but the same copayments were required to be made by active employees.

(7) The agreement called for parity, and parity was maintained because the level of coverage and benefits remained the same for active and retired employees.

(Binding Grievance Arbitration)

Resources

Decline in Number of Working Disabled

Researchers agree that the employment rate for working-age people with disabilities declined during the 1990s. But they do not agree on the downturn's main cause. Some cite the increasing severity of disabilities while others argue that the easing of eligibility standards and increases in the relative benefits of Social Security disability programs (SSI and SSDI) are to blame. Still others argue that the passage and implementation of the ADA offers a rationale for the decline. This book opens the door on the debate.

The book begins with a documentation of the puzzling employment-rate decline, moves into an examination of the various explanations, and ends by spelling out its implications for public policy. The latest research on the employment woes of the working-age population with disabilities is made accessible to researchers, policymakers, advocacy groups, and grass-roots disability communities.

The Decline in Employment of People With Disabilities: A Policy Puzzle, edited by David C. Stapleton and Richard V. Burkhauser (2003) 448 pp. W.E. Upjohn Institute, <http://www.upjohninst.org/>. Hardcover, \$45, softcover \$22.

Evolution of Public Sector Labor Law

From the dawn of the twentieth century to the early 1960s, public sector unions generally had no legal right to strike, bargain, or arbitrate, and government workers could be fired simply for joining a union. *Public Workers* analyzes why public sector labor law evolved as it did, separate from and much more restrictive than private sector labor law, and what effect this law had on public sector unions, organized labor as a whole, and by extension, all of American politics. Joseph Slater shows how public sector unions survived, represented their members, and set the stage for the most remarkable growth of worker organization in American history.

Slater examines the battles of public sector unions in the workplace, courts, and political arena. He covers the infamous Boston police strike of 1919; teachers in Seattle

fighting a yellow-dog rule; the BSEIU in the 1930s, representing public-sector janitors; the powerful Transit Workers Union after New York City purchased the subways; and the long struggle by AFSCME that produced the nation's first public sector labor law in Wisconsin in 1959. Slater introduces readers to a determined and often-ignored segment of the union movement and expands the reader's knowledge of working men and women, the institutions they formed, and the organizational obstacles they faced.

Public Workers: Government Employee Unions, the Law, and the State, 1900-1962, by Joseph E. Slater (2004) 272 pp. Cornell University Press, <http://www.cornellpress.cornell.edu/>. Hardcover, \$39.95.

Web Redesign at LAO

The Legislative Analyst's Office has redesigned its website to include pages devoted to specific subject areas (e.g. Higher Education) and one-click access to their recurring publications like the *Analysis of the Budget Bill* and *California's Fiscal Outlook*. This spring, they released the *Analysis of the 2004-05 Budget Bill* and *Perspectives and Issues*, which are available both in printed and electronic versions.

Legislative Analyst's Office, <http://www.lao.ca.gov/>.

Survey-Based Analysis and Insights for Negotiators

To help negotiators come to the table with a better understanding of attitudes and expectations, BNA offers this report to provide insight into employers' bargaining preparations and to help develop strategies for upcoming contract negotiations.

The report covers a variety of core contract provisions including wage adjustments for the first year and over the term of the contract, incentive pay and variable pay systems, insurance and health benefits, health care cost containment, pensions and retirement plans, paid leave, and job security.

The analyses review data from employers that are bargaining in 2004, with breakouts by employment sector and size of bargaining units covered by the labor agreements.

Employer Bargaining Objectives 2004: Survey-Based Analysis and Insights for Labor-Management Negotiations, 60 pp. BNA Plus, email bnaplus@bna.com/. \$275 (\$195 for BNA subscribers).

Couples and Careers

It's About Time examines the mismatch between outdated scripts and the experiences of dual-earner couples. It broadens the understanding of occupational and family career strategies couples use in light of the widening gap between their real lives and the outdated work-hour and career-path roles, rules, and regulations they confront.

The book draws on data from Cornell University's Couples and Careers Study to demonstrate that:

- Regardless of income, time is a scarce commodity in dual-earner households. With two jobs, two commutes, often long work hours, high job demands, business travel, several cars, children, ailing relatives, and/or pets, time is always an issue.
- Time is built into jobs and career paths in ways that make continuous full-time (40 or typically more hours a week) paid work a fact of life in American society.
- The multiple strands of life — career, family and personal — unfold over time. Spouses move through their life courses in tandem, with early choices, such as whether to have children or not, to work long hours or not, to switch jobs or not, to relocate for his or her career or not. And each decision has long-term consequences for life quality and for gender inequality.

The evidence from this book suggests that it is about time for the United States to confront the realities and needs of contemporary working couples and indeed, all members of the new workforce. To do so requires more than Band-Aid, short-term (and often short-sighted) policy remedies. *It's About Time* argues that it is essential to re-imagine and reconfigure work hours, workweeks, and occupational career paths in ways that address the widening gaps between the time needs and goals of workers and their families, at all ages and stages of the life course.

It's About Time: Couples and Careers, edited by Phyllis Moen (2004) 448 pp. Cornell University Press, <http://www.cornellpress.cornell.edu/>. Hardcover, \$45.00, softcover \$19.95.

No-Fee Legal Resource

The Employment Law Information Network (ELIN) is a free legal resource website that is designed for employment lawyers, in-house employment counsel, and human resource professionals.

Its concept simply is to connect those who know about employment law (employment lawyers) with those who need to know more (HR professionals). Its portal allows users to keep pace with the changing landscape of workplace law.

ELIN is divided into the following sections:

- *Employment Laws*: This area contains links to the text and regulations of the most prominent federal employment laws, such as the ADEA, ADA, E.O. 11246, ERISA, FLSA, FMLA, OSHA, 42 USC Secs. 1981 and 1983, Title VII, and WARN. In addition, there are links to sites allowing the user to search state statutes, the U.S. Code, the Code of Federal Regulations, and the Federal Register. Also, there are links to download each of the above-mentioned statutes.

- *Human Resources*: This section provides links to sample personnel policies (e.g. FMLA, employee discipline, etc.), sample personnel forms (e.g., COBRA forms), and sample employment contracts (e.g., non-compete agreements).

- *Employment Law Articles*: Users are provided with categorized links to online content pertinent to topics in employment law.

Employment Law Information Network (ELIN), <http://www.elinfor.net.com/>.

Public Employment Relations Board

Orders & Decisions

Summarized below are all decisions issued by PERB in cases appealed from proposed decisions of administrative law judges and other board agents. ALJ decisions that become final because no exceptions are filed are not included, as they have no precedent value. Cases are arranged by statute – the Dills Act, EERA, HEERA, and MMBA – and subdivided by type of case. In-depth reports on significant board rulings and ALJ decisions appear in news sections above.

Dills Act Cases

Unfair Practice Rulings

Reconsideration request lacks specificity: Department of Corrections.

(Vickers v. State of California [Department of Corrections], No. 1559a-S, 2-19-04; 5 pp. dec. By Member Whitehead, with Members Neima and Baker.)

Holding: Vickers' request for reconsideration was denied because it did not contain the requisite specificity, nor did it allege the limited grounds that support a grant of reconsideration.

Case summary: Jesse Vickers requested reconsideration of his charge alleging that the Department of Corrections violated the Dills Act by taking state vehicles away from parole agents, by creating a supervision level in the Immigration and Naturalization Service unit, by reducing the status of INS cases, and by entering into a local agreement that increased the workload beyond that allowed for INS unit agents.

Vickers' request for reconsideration alleged that the board did not fully delineate issues involving violations of PERB regulations and the California Penal Code. Vickers also claimed the board's decision contained an error of fact by overlooking the evidence in his charge. He further claimed the agreement between the department and the California Correctional Peace Officers Association was a conspiracy that operated to his detriment.

The board found that Vickers' request did not meet the requirements of PERB Reg. 32410 because it did not "state with specificity the grounds claimed" or specify the page of the decision at which the error occurred. Furthermore, the board found Vickers did not identify which issues the board allegedly did not delineate, and that he made only general references to PERB regulations and the California Penal Code. The board noted that it lacks jurisdiction over violations of the Penal Code unless the alleged conduct also constitutes an independent violation of the Dills Act. The board concluded that Vickers did not identify a conspiracy agreement, describe the alleged conspiracy, or show how the conspiracy violated the act. Accordingly, Vickers' request for reconsideration was denied.

Request for reconsideration approved where union lacks right to pursue grievance to arbitration: Department of Corrections.

(Vickers v. State of California [Department of Corrections], No. 1540a-S, 2-24-04; 5 pp. dec. By Member Whitehead, with Members Neima and Baker.)

Holding: No good cause exists to excuse the late filing; but upon reconsideration, deferral is inappropriate.

Case summary: PERB reviewed Jesse Vickers' motion to excuse a late-filed second amended charge and re-

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(Note: PERB headquarters in Sacramento will provide copies of decisions, currently at \$5 a case, plus \$3 shipping and handling. Also, PERB decisions are collected in the government documents section of all state depository libraries, including the libraries of major universities. Most county law libraries and major law school libraries also receive copies.)

quest for reconsideration of the dismissal of his charge alleging that the Department of Corrections violated the Dills Act by discriminating against him for his activities as job steward and for filing grievances.

The board agent deferred the charge to arbitration. After the board adopted the B.A.'s dismissal, Vickers filed a request for reconsideration and subsequently filed a second amended charge. The appeals assistant informed Vickers that the request was not timely filed, and Vickers filed an administrative appeal to that determination.

Vickers argued that the board should accept his second amended charge because it made a positive step toward reconciliation by reducing the issues in contention. The board found no good cause to excuse the late filing.

In Vickers' timely request for reconsideration, he attached a letter from the California Correctional Peace Officers Association stating that the department had denied the grievance at the third level. The letter further stated that since the grievance involved a policy dispute, the parties' agreement precluded arbitration.

The board cited *Moreno Valley USD* (1995) PERB No. 1106, 113 CPER 85, among other cases, for the principle that deferral is inappropriate where a union lacks the right to pursue a grievance to arbitration. Reasoning that the letter constituted newly discovered evidence, the board found that Vickers' request for reconsideration warranted approval. Because the union lacks the right to pursue the grievance to arbitration, the board found it should no longer defer the matter and directed the general counsel's office to investigate whether Vickers has stated a prima facie violation of the Dills Act.

Procedures for authorizing union leave are negotiable: CSEA, SEIU Loc. 1000.

(*State of California [Department of Personnel Administration] v. California State Employees Assn., SEIU Loc. 1000*, No. 1601-S, 2-24-04; 12 pp. + 22 pp. ALJ dec. By Member Baker, with Member Whitehead; Member Neima dissenting.)

Holding: Procedures for authorizing union leave are negotiable where they directly impact the employment relationship. CSEA unilaterally changed its past practice for authorizing union leave.

Case summary: The California State Employees Association filed exceptions to an administrative law judge's proposed decision finding that CSEA violated the Dills Act by unilaterally changing its past practice for authorizing union leave for its members.

The relevant provision in the parties' agreement provides that union leave may be granted "at the discretion of the affected department head or designee." However, the contract states only that "the union" shall have the choice of requesting unpaid leave; it does not identify which CSEA officers are authorized to make requests for union leave on behalf of a member. Historically, CSEA officers at different levels of authority had signed requests for members to receive union leave. Then in January 2001, a CSEA attorney advised the director of the Department of Personnel Administration that only the CSEA general manager would have the authority to make such a request, and that all other requests for union leave should be denied.

The ALJ addressed the issue whether procedures for determining who approves union leave are negotiable. Applying the three-pronged test set forth in *Anaheim Union HSD* (1981) PERB No. 177, 52 CPER 64, the ALJ found that CSEA failed to meet and confer in good faith when it advised DPA that only the general manager of CSEA was authorized to request permission for union leave.

CSEA excepted to the ALJ's modification of the test for negotiability in *Anaheim*. CSEA argued the ALJ inappropriately replaced the word "significantly" with "specifically" so that the third prong of the test states a subject is negotiable if obliging the union to negotiate would not "specifically" abridge the union's freedom to exercise those managerial prerogatives. CSEA claimed that the word "specifically" invokes a more stringent standard for the union than for an employer.

The board disagreed with CSEA, and did not attach any significance to the term "specifically" as opposed to "sig-

nificantly” in the context of the *Anaheim* test. The board noted that the test only was modified to recognize that unions have interests that may be subject to negotiation.

CSEA further argued that DPA should not be allowed to dictate a union’s internal governance structure, and that the ALJ’s decision infringed on internal union policies. The board agreed that an employer may not dictate a union’s internal governance structure, but found no such infringement here. Applying the *Anaheim* test, the board agreed with the ALJ that such procedures are negotiable because they directly impact the employment relationship. Where there is an impact on the employment relationship, the board reasoned, an employer may propose for negotiation a requirement that the union identify those officers authorized to act on its behalf. Limited to these unique situations, the majority refused to hold that the identity of the individuals authorized to approve union leave is solely an internal union matter.

The board found that having to negotiate over the procedures for authorizing union leave does not abridge CSEA’s fundamental managerial prerogatives. Having to negotiate such procedures is akin to requiring an employer to negotiate over procedures for filing a grievance. Accordingly, the board rejected CSEA’s exceptions, ordered CSEA to reinstate prior practice, and told CSEA to reimburse the state for union leave requests authorized in accordance with prior practice.

Member Neima dissented from the majority’s decision, stating that it departs from two fundamental principles of labor law. First, the internal organization of a union is not a matter for review by the board, and second, each party decides the identity of its own representative. Neima found that the parties never had any previous problems with the ambiguity in their agreement, and that the identity of the individuals authorized to approve union leave is solely a non-negotiable internal union matter. Neima concluded that the majority’s decision deviates from *Yolo County Superintendent of Schools* (1990) PERB No. 838, 86X CPER 15, holding that an employer may not dictate which union representatives appear at the bargaining table on behalf of the union.

Provision of security at disciplinary hearing not exclusive to security guard union: Department of Developmental Services.

(*California Union of Safety Employees v. State of California [Department of Developmental Services]*, No. 1614-S, 4-5-04; 3 pp. + 6 pp. R.A. dec. By Member Neima, with Member Whitehead and Chairman Duncan.)

Holding: The department did not unilaterally transfer work previously performed by CAUSE because there was an overlapping duty between CAUSE and the CHP to perform that work.

Case summary: The California Union of Safety Employees appealed a regional attorney’s dismissal of its charge alleging that the Department of Developmental Services transferred work previously performed by CAUSE to another bargaining unit in violation of the Dills Act.

CAUSE is the exclusive representative of bargaining unit employees in the peace officer developmental center classification. These employees serve as unarmed hospital police officers at facilities such as the Sonoma Developmental Center, which is administered by the DDS. After SDC took adverse action against an employee, safety concerns emerged based on the employee’s “contentious behavior” and threats of violence. As a result, a California Highway Patrol officer was to be present at the employee’s *Skelly* hearing. Thereafter, SDC officials made arrangements for a CHP officer to be present at the employee’s State Personnel Board hearing to be held at SDC.

Based on the applicable class specifications and contradictory statements in the charge itself, the R.A. found that providing security at the hearing was an overlapping duty between CAUSE and the CHP. On appeal, CAUSE reiterated its assertion that providing security at SPB hearings is work that falls within the exclusive domain of its unit. However, the board agreed with the R.A.’s conclusions.

CAUSE further argued that its members are better suited to provide security at SPB hearings because they are unarmed; using armed officers imposes special concerns. CAUSE admitted that its concern with using armed officers related to their contact with developmental center residents,

but there was no allegation that residents would be present at the SPB hearings. Furthermore, the board held that the decision to use CHP officers instead of CAUSE members was non-negotiable because CAUSE failed to allege any negotiable impact on its members. Accordingly, the dismissal was affirmed.

Charge fails to show retaliation: State of California.

(*Kunkel v. State of California*, No. 1617-S, 4-16-04; 2 pp. + 12 pp. R.A. dec. By Member Neima, with Member Whitehead and Chairman Duncan.)

Holding: The charge failed to show any protected activity, any “nexus,” or that the charge was within PERB jurisdiction.

Case summary: Donald Wayne Kunkel appealed a regional attorney’s dismissal of his charge alleging that the State of California violated the Dills Act by retaliating against him for engaging in protected activity. Kunkel was suspended without pay for six months after engaging in a litany of insubordinate actions while employed as an equipment operator with the Department of Transportation. The R.A. found the charge failed to show that Kunkel engaged in any protected activity, that there was any “nexus” between protected activity and the employer’s adverse action, and that the charge was within PERB jurisdiction. The board affirmed the dismissal and adopted the R.A.’s decisions as those of the board itself.

New evidence rejected, untimeliness unexcused: Department of Forestry and Fire Protection.

(*Sarinana v. State of California [Department of Forestry and Fire Protection]*, No. 1619-S, 4-16-04; 3 pp. + 6 pp. R.A. dec. By Member Neima, with Member Whitehead and Chairman Duncan.)

Holding: New evidence offered to excuse the charge’s untimeliness was denied because the charging party failed to file an amended charge including such evidence.

Case summary: Moses Sarinana appealed a regional attorney’s dismissal of his charge alleging that the Department of Forestry and Fire Protection violated the Dills Act

by retaliating against him for engaging in protected activities. The R.A. dismissed the charge as untimely.

On appeal, Sarinana offered new evidence and urged the board to excuse his untimely charge. However, the board found no reason why he could not have included such evidence in an amended charge, which he failed to file. Accordingly, the board found no good cause to accept the new evidence.

Even if the board were to accept Sarinana’s new evidence, the board found that the disposition of the case would not change. Although Sarinana alleged the union “misrepresented” his claim by allowing it to expire, the board found no evidence that he or his union ever filed a contract grievance that may have tolled the limitations period. The R.A.’s dismissal was affirmed.

EERA Cases

Unfair Practice Rulings

Charge dismissed after California Supreme Court denies review: Turlock JESD.

(*Turlock Teachers Assn. v. Turlock Joint Elementary School Dist.*, No. 1490a, 2-19-04; 2 pp. dec. By Member Neima, with Members Baker and Whitehead.)

Holding: The association’s unfair practice charge was dismissed.

Case summary: PERB issued a decision finding that the Turlock Joint Elementary School District violated EERA by prohibiting teachers from wearing buttons in their classrooms to support the Turlock Teachers Association’s bargaining demands. The district appealed this decision to the Fifth District Court of Appeal, which issued a published decision vacating the board’s decision and ordering the board to issue a new decision dismissing the complaint and the underlying unfair practice charge. The California Supreme Court denied the board’s petition for review and ordered the Court of Appeal opinion to be depublished. Accordingly, the board issued this decision dismissing the association’s unfair practice charge.

District followed removal policy, did not retaliate for protected activity: San Bernardino City USD.

(*San Bernardino Association of Substitute Teachers v. San Bernardino City Unified School Dist.*, No. 1602, 2-24-04; 30 pp. dec. By Member Baker, with Member Whitehead; Member Neima concurring and dissenting.)

Holding: The district met its burden of showing it would have removed the two substitute teachers even in the absence of their protected activity. The ALJ's decision was reversed.

Case summary: The San Bernardino Unified School District filed exceptions to an administrative law judge's proposed decision finding that the district violated EERA by retaliating against two substitute teachers for their protected activity. Applying the well-established test in *Novato USD* (1982) PERB No. 210, 54 CPER 43, the ALJ found the district improperly removed the teachers from its eligibility list for employment because of their activities in the organizing campaign of the San Bernardino Association of Substitute Teachers. The ALJ rejected the district's affirmative defense that it would have removed both teachers from the eligibility list even if they had not engaged in any protected activity. The board reversed the ALJ's decision and dismissed the charge.

The board agreed with the ALJ that the district had knowledge of the protected conduct, and that the association established a sufficient nexus between the adverse action and the protected conduct. In contrast to the ALJ, the board found that the district demonstrated it would have removed both teachers from the eligibility list even if they had not engaged in any protected activity.

The district argued that when allegations of unnecessary or excessive force are levied against a substitute, it is the district's policy to remove substitutes from the eligibility list. Given the district's responsibility for the safety of its students, the board found the policy reasonable and prudent. The board gave further credence to the fact that neither the investigating officer nor the complaining students and teaching aides knew about the substitutes' protected activities.

The district merely followed the recommendation of the district's trained investigator.

The board noted that it had no duty to determine whether "just cause" existed for the action taken against the substitute teachers, nor did it have a duty to determine whether the district fairly conducted its investigations. The board identified the issue only as whether the district would have taken action absent any protected activity. Since these were at-will employees, the board held that the district was not required to conduct evidentiary hearings to determine whether there was cause for discipline. The board further noted its recent decision in *Bellevue Union ESD* (2003) PERB No. 1561, 164 CPER 109, holding that a school district is entitled to set a higher standard for its at-will employees. Accordingly, the association's consolidated charges were dismissed.

Member Neima concurred with the majority's conclusion that the association established a prima facie case of unlawful discrimination, but he dissented from the majority's finding that the district established its affirmative defense. Neima found evidence in the record that the district failed to follow its own procedures for investigating charges of misconduct against the substitutes. Given this evidence, Neima asserted that he would have affirmed the ALJ's decision.

Board finds teacher's transfer not triggered by protected activity: Las Virgenes USD.

(*Las Virgenes Educators Assn. v. Las Virgenes Unified School Dist.*, No. 1605, 2-25-04; 3 pp. + 25 pp. ALJ dec. By Member Neima, with Members Baker and Whitehead.)

Holding: The district met its burden of establishing an affirmative defense that Shagin would have been transferred even absent any protected activity.

Case summary: The Las Virgenes Unified School District and the Las Virgenes Educators Association both filed exceptions to an administrative law judge's decision dismissing the association's charge alleging the district violated EERA by transferring Lee Shagin because of his protected activities.

Although the board accepted the ALJ's findings of fact and upheld the dismissal, it declined to adopt the ALJ's conclusions of law. Applying the three-pronged test elucidated in *Novato USD* (1982) PERB No. 210, 54 CPER 43, the board found that the district met its burden of establishing an affirmative defense that it would have transferred Shagin absent any protected activity. The board cited district testimony showing an extensive history of problems caused by Shagin's activities that were unrelated to his role as an association site representative. Accordingly, the association's charge was dismissed.

Wrong entity charged: Santa Rosa Junior College.

(*DeLauer v. Santa Rosa Junior College*, No. 1612, 4-2-04; 2 pp. + 6 pp. R.A. dec. By Member Neima, with Member Whitehead and Chairman Duncan.)

Holding: The charging party failed to state a prima facie case because she was not employed by the college, but was a student.

Case summary: Marilee DeLauer appealed a regional attorney's dismissal of her charge alleging that Santa Rosa Junior College violated EERA by retaliating against her for protected activities. From other unfair practice charges, the R.A. determined that DeLauer was not employed by the college, but was in fact a student. She was, however, a substitute bus driver in the Sonoma Valley Unified School District. Based on these facts, the R.A. dismissed the charge for its failure to state a prima facie case. The board affirmed the dismissal and adopted the R.A.'s decision as the decision of the board itself.

Charge omits dates and parties involved: Sonoma Valley USD.

(*DeLauer v. Sonoma Valley Unified School Dist.*, No. 1613, 4-2-04; 2 pp. + 6 pp. R.A. dec. By Member Neima, with Member Whitehead and Chairman Duncan.)

Holding: The charge failed to include the dates and parties involved in the alleged retaliation, and failed to show a nexus between any of the district's alleged adverse actions and the charging party's protected conduct.

Case summary: Marilee DeLauer appealed a regional attorney's dismissal of her unfair practice charge alleging that the Sonoma Valley Unified School District violated EERA by retaliating against her for engaging in protected activities. The R.A. found the charge failed to provide the dates and parties involved in the alleged retaliation, and failed to show a nexus between any of the district's alleged adverse actions and the charging party's protected conduct. Therefore, the R.A. found the charge failed to state a prima facie case of retaliation. The board affirmed the R.A.'s dismissal and adopted the R.A.'s decision as the decision of the board itself.

Charge failed to establish past practice to show unilateral change: San Juan USD.

(*San Juan Teachers Assn., CTA/NEA v. San Juan Unified School Dist.*, No. 1616, 4-5-04; 5 pp. dec. By Member Whitehead, with Member Neima and Chairman Duncan.)

Holding: The association failed to allege sufficient facts to establish a past practice, and the charge was dismissed for failing to state a prima facie case showing a unilateral change.

Case summary: The San Juan Teachers Association appealed a board agent's dismissal of its charge alleging the San Juan Unified School District violated EERA Sec. 3543.5 by unilaterally changing a past practice when it eliminated shared contract positions without the consent of shared contract teachers.

The association alleged that two shared contract positions had been eliminated, and this evinced a pattern of conduct changing the past practice of requiring teachers' consent to such elimination. Although the association knew of an affected teacher's involuntary transfer at a date rendering its charge untimely, the association argued its charge was timely because it did not learn of the teacher's actual elimination until a later date.

The board assumed the essential facts alleged in the charge were true, thus rendering the charge timely, but the board agreed with the B.A. that the association failed to allege sufficient facts to establish a past practice. The board found that the parties' agreement showed only that the par-

ties agreed to establish a committee to create guidelines for addressing the mechanics for voluntary reduced-time shared contract positions. Furthermore, the association did not cite examples of instances where the district eliminated other voluntary reduced-time shared contract positions after obtaining consent from the impacted teachers. The charge was dismissed for failing to state a prima facie case showing a unilateral change.

Representation Rulings

Administrative appeal withdrawn: Part-Time Faculty United, AFT.

(*Santa Clarita Community College Dist. v. Part-Time Faculty United, AFT*, No. Ad-332, 2-26-04; 2 pp. dec. By Member Neima, with Members Baker and Whitehead.)

Holding: PFU's request to withdraw its administrative appeal was granted.

Case summary: Part-Time Faculty United brought an administrative appeal before PERB to lift a stay imposed by the board agent. The stay was imposed pending resolution of an appeal by the Santa Clarita Community College District involving a factually related case. After the Court of Appeal issued a decision rejecting the district's appeal, the B.A. lifted the stay and allowed PFU's representational proceedings to move forward. Accordingly, PFU requested to withdraw its administrative appeal. The board found that withdrawal was in the best interests of the parties and is consistent with the purposes of EERA.

Duty of Fair Representation Rulings

Late-filed amended charge dismissed: Shasta College Faculty Assn.

(*Sloan v. Shasta College Faculty Assn.*, No. 1603, 2-25-04; 2 pp. + 11 pp. R.A. dec. By Member Neima, with Members Baker and Whitehead.)

Holding: The charge failed to state a prima facie case showing that the association breached its duty of fair representation.

Case summary: Daniel Wayne Sloan appealed a regional attorney's dismissal of his charge alleging that Shasta College Faculty Association violated its duty of fair representation under EERA by failing to represent him in a teaching assignment dispute and in matters related to his position as a pollution prevention coordinator.

The association determined that there was no contractual basis on which to pursue Sloan's non-appointment to teaching positions. The R.A. agreed with the association, and found that Sloan's charge failed to provide facts establishing this determination was without a rational basis or was not based on honest judgment. The R.A. further explained that Sloan failed to demonstrate the association's position was discriminatory or improperly motivated, and the charge was dismissed for failing to state a prima facie case.

On appeal, Sloan argued that the R.A. improperly refused to consider his late-filed amended charge. However, the board found that the R.A. accepted the amended charge, even though it was late, and thoroughly analyzed the additional information it provided. Therefore, the board found Sloan's contention was without merit.

Sloan also argued that he was not provided enough time to prepare an amended charge. The board found that Sloan did not allege in his appeal that he had requested an additional extension, and it rejected his request on appeal. Accordingly, the R.A.'s decision was adopted as the decision of the board itself.

Union has no duty to arbitrate teacher's grievance: United Teachers of Richmond.

(*Holford v. United Teachers of Richmond*, No. 1604, 2-25-04; 2 pp. + 8 pp. R.A. dec. By Member Neima, with Members Baker and Whitehead.)

Holding: The charge failed to state a prima facie case showing that the union breached its duty of fair representation.

Case summary: Lorraine Holford appealed a regional attorney's dismissal of her charge alleging the United Teachers of Richmond violated its duty of fair representation under EERA by failing to arbitrate her grievance. The R.A. found that UTR consistently explained it did not believe

Holford's grievance was meritorious. The R.A. further found that the charge failed to demonstrate UTR acted in an arbitrary, discriminatory, or bad faith manner, or that UTR's position was without rational basis. Thus, the B.A. dismissed the charge for failing to state a prima facie case, and the board adopted the decision as that of the board itself.

Allegation deemed timely, but failed to show DFR violation: CSEA, Chap. 244.

(*Gutierrez v. California School Employees Assn., Chap. 244*, No. 1606, 2-26-04; 6 pp. + 8 pp. R.A. dec. By Member Whitehead, with Members Baker and Neima.)

Holding: One allegation in the charge was untimely; others failed to state a prima facie case showing a breach of the duty of fair representation.

Case summary: Elvina Gutierrez appealed the regional attorney's dismissal of her charge alleging the California School Employees Association breached its duty of fair representation in violation of EERA. Gutierrez alleged that CSEA violated its duty of fair representation with regard to several issues including slander, a change in her work schedule, and a reduction in pay. The R.A. found that the aspects of the charge regarding the schedule change and slander were untimely, and she dismissed the remainder of the charge for failing to state a prima facie case.

On appeal, Gutierrez argued that her allegation regarding slander was timely, and she identified an alternative date set out in her amended charge for her first contact with CSEA. However, she did not provide an alternative date regarding the scheduling issue. The scheduling allegation was dismissed as untimely.

In determining whether Gutierrez stated a prima facie case, the board cited *Golden Plains USD (2002) PERB No. 1489, 156 CPER 91*, holding that PERB must credit the charging party's allegation of facts over those of other parties. The board credited Gutierrez's assertion regarding her first contact with CSEA, and this rendered her slander charge timely. However, the slander allegation was dismissed because the board found it lacked specificity regarding dates of the occurrence, circumstances, the nature of the alleged slan-

der, or the substance of CSEA's refusal to grieve the issue.

Finally, the board stated that Gutierrez failed to state a prima facie case regarding her allegations of reduced pay. The board found that Gutierrez provided no evidence to show CSEA's refusal to process her complaint was without rational basis or devoid of honest judgment. Accordingly, the R.A.'s decision was adopted as the decision of the board itself, and the charge was dismissed.

HEERA Cases

Unfair Practice Rulings

CSEA withdraws charge alleging unilateral student fee increase: Trustees of the California State University (San Luis Obispo).

(*California State Employees Assn. v. Trustees of the California State University [San Luis Obispo]*, No. 1599-H, 2-19-04; 2 pp. dec. By Member Baker, with Members Neima and Whitehead.)

Holding: The request to withdraw the charge was granted.

Case summary: The California State Employees Association appealed a board agent's dismissal of its unfair practice charge alleging that the Trustees of the California State University violated HEERA by unilaterally implementing a student fee increase that affected CSU employees enrolled in university courses. CSEA sought to withdraw its charge because the parties reached a settlement. The board found that a withdrawal was in the best interests of the parties and was consistent with the purposes of HEERA. Accordingly, the appeal and unfair practice charges were withdrawn.

Employee lacked standing to challenge refunded agency fees: CNA.

(*O'Malley v. California Nurses Assn.*, No. 1607-H, 3-18-04; 8 pp. dec. By Member Whitehead, with Member Neima and Chairman Duncan.)

Holding: The charging party lacked standing to challenge the calculation of agency fees because they were refunded in full.

Case summary: Robert O'Malley appealed a board agent's dismissal of his charge alleging the California Nurses Association violated PERB regulations and HEERA by unilaterally returning agency fees and failing to follow the agency fee appeal procedure.

O'Malley alleged that CNA sent him an agency fee notice, after which he sent a protest letter to CNA and filed a charge asserting that CNA did not permit him to challenge the agency fee calculations. He later withdrew the charge after CNA agreed to proceed to arbitration and returned the agency fees collected from him. During the arbitration hearing, CNA cited *Deglow v. Los Rios College Federation of Teachers* (1992) PERB No. 950, 96 CPER 55, as justification to challenge O'Malley's standing to participate in arbitration. The arbitrator subsequently excluded him from the hearing.

O'Malley contended that even though CNA returned his fees, he retained standing to challenge the calculations because CNA collected fees for the entire year and then refunded them only after the year ended. He further alleged that Senate Bill 645 and Senate Bill 1960 amended HEERA and EERA to require either membership in a recognized union or payment of fair share service fees as a condition of employment. He was concerned that these amendments required his termination from employment with the University of California, Davis Medical Center. Finally, he complained that CNA violated HEERA by returning his agency fees without proceeding with the agency fee appeal procedure.

The B.A. relied on *Los Rios* to conclude that where the exclusive representative refunds the agency fees in full, the objecting nonmember lacks standing to challenge the fees. The B.A. dismissed the charge for failure to state a prima facie case. O'Malley filed a timely appeal to the B.A.'s decision, but an untimely supplement providing new information regarding CNA's escrow account and corroboration for the refund of O'Malley's agency fees. The supplement was not considered.

On appeal, O'Malley reiterated many of the same arguments. The board found that O'Malley did not cite any legislative history to support his concern that HEERA Sec. 3583.5 would require termination of his employment. The board further cited *San Lorenzo Education Assn. v. Wilson* (1982) 32 Cal.3d 841, holding that the parallel provision under EERA Sec. 3540.1(i)(2) has been interpreted not to require termination of nonmembers for failing to pay agency fees. The board found that CNA voluntarily refunded O'Malley's fees and that neither CNA nor the university had any interest in terminating his employment.

The board also deferred to the arbitrator's ruling that O'Malley lacked standing to participate in the arbitration proceeding because CNA refunded all the collected fees. The board further determined that O'Malley did not allege sufficient facts showing the arbitration proceeding was unfair, procedurally defective, or repugnant to HEERA. Instead, O'Malley merely provided a sentence summarizing the arbitrator's ruling.

Citing *Los Rios*, the board concluded that CNA could not use the fees at all, let alone wrongfully use them, because they had been fully refunded to O'Malley. Therefore, there was no possibility of harm to O'Malley that the board could remedy. Similarly, the board held that CNA could not have violated PERB's agency fee regulations because those regulations presume the association's possession of the collected fees. The charge was dismissed for failure to state a prima facie case, and the B.A.'s dismissal was affirmed.

Allegations fail to state prima facie case: Trustees of the California State University (San Bernardino).

(*Webb v. Trustees of the California State University [San Bernardino]*, No. 1609-H, 4-2-04; 2 pp. + 8 pp. R.A. dec. By Chairman Duncan, with Members Whitehead and Neima.)

Holding: The charge failed to state a prima facie case of retaliation.

Case summary: Maurice Webb appealed a regional attorney's dismissal of his charge alleging that the Trustees of the California State University violated HEERA by re-

taliating against him for filing a grievance and by denying him a fair grievance hearing.

The R.A. dismissed the charge because it did not include a “clear and concise statement of the facts and conduct alleged to constitute an unfair practice” as required by PERB regulations. Instead, the charge merely alleged that Webb was denied a fair grievance process because the associate dean “failed to report the facts” of his case in an accurate and timely manner. The R.A. found this did not provide an explanation as to the “who, what, when, where and how” of the allegations. Furthermore, the R.A. found the charge failed to demonstrate a sufficient nexus between the protected activity and the adverse action, and therefore failed to state a prima facie case.

The dismissal was affirmed, and the R.A.’s decision was adopted as the decision of the board itself.

Charge withdrawn: Regents of the University of California (Lawrence Livermore National Laboratory).

(*Security Police Officers Assn. v. Regents of the University of California [Lawrence Livermore National Laboratory]*, No. 1615-H, 4-5-04; 2 pp. dec. By Member Neima, with Member Whitehead and Chairman Duncan.)

Holding: The request for withdrawal was granted.

Case summary: The Security Officers Association appealed a board agent’s dismissal of its charge alleging an arbitration award violated HEERA. The board granted the association’s request to withdraw the charge.

MMBA Cases

Unfair Practice Rulings

Informal petition rejected, charge dismissed: Solano County (Human Resources Dept.).

(*SEIU, Loc. 1280, AFL-CIO v. Solano County [Human Resources Dept.]*, No. 1598-M, 2-19-04; 3 pp. dec.. By Member Whitehead, with Members Neima and Baker.)

Holding: SEIU’s informal petition was rejected as untimely, and its charge was dismissed for failing to state a

prima facie case of unilateral change or unlawful discrimination.

Case summary: Service Employees International Union, Loc. 1280, appealed a board agent’s dismissal of its charge alleging that Solano County violated the MMBA by refusing to process grievances over its alleged discriminatory failure to place unit members in a higher classification that would give them a salary increase. In its amended charge, SEIU alleged that the county discriminated against the three employees based on age and union activity because they were not granted the same step increase as four other, younger employees.

The B.A. dismissed the charge for failing to state a prima facie case of unilateral change or discrimination. SEIU filed a timely appeal but did not provide any information supporting the appeal. Several months after the appeal was due, two of the affected employees filed an “informal petition to submit an informational brief” designed to clarify the basis for SEIU’s appeal.

The board rejected the informal petition because SEIU did not provide any facts showing good cause for its untimeliness. The board further determined that SEIU’s appeal did not meet the requirements of PERB Reg. 32635. The board dismissed the charge for failure to state a prima facie case of unilateral change or unlawful discrimination.

B.A. decision reversed, case remanded to provide union chance to prove impasse involves subject within scope of representation: San Joaquin County.

(*Service Employees International Union, Loc. 790 v. San Joaquin County*, No. 1570-M, 12-19-03; 8 pp. By Member Baker, with Members Whitehead and Neima.)

Holding: The B.A.’s decision was reversed, the county was found to have violated its local rules, and the case was remanded to allow the union a chance to establish the alleged impasse involves a subject within the scope of representation.

Case summary: The charging party appealed the board agent’s dismissal of its unfair practice charge alleging that San Joaquin County violated the MMBA and PERB

Reg. 32603(e) by refusing to participate in impasse procedures regarding a dispute concerning retirement funds. The Service Employees International Union argued that such impasse procedures are mandated by the county's local rules.

The local rules state that mediation "shall only apply to disputes arising out of and in the context of annual salary and employee benefit meet and confer sessions." The county refused to participate in impasse procedures. It argued that the procedures were not applicable because the dispute over retirement funds arose from a side-letter agreement after completion of salary and benefit negotiations.

The B.A. noted that the side-letter agreement stated the parties would "continue discussions" and did not say the parties would continue to "negotiate" or to "meet and confer." The B.A. concluded that the discussions contemplated by the side-letter did not qualify as a dispute under the county's local rules. Even if the dispute were covered by the local rules, the B.A. held that the union's charge should be dismissed because it failed to request mediation within the required 14 days.

In its appeal, the union argued there is no difference between "discussions" and "negotiations." Furthermore, the union asserted that the discussions could still "arise" out of salary negotiations even though they were continued apart from the main table negotiations. Finally, the union argued that its request was timely, and nothing thereafter broke the impasse.

Accepting the union's factual allegations as true, the board could not find the county's local rules to be clear and unambiguous. Instead, the board found the rules reasonably susceptible to the union's interpretation. Where a local rule is reasonably susceptible to conflicting interpretations, the board elucidated, the matter should be resolved at an evidentiary hearing. Accordingly, the board found the dispute "arises out of and in the context of the annual salary and employee benefit meet and confer sessions" for the purposes of establishing the union's prima facie case.

The board also disagreed with the B.A.'s determination that the union's request to submit the dispute to impasse procedures was untimely. The board found no evidence that

the time lines under the county's rules are jurisdictional, and since the county did not assert untimeliness as a defense, there existed a question whether the county waived its defense. The county itself was found guilty of violating the time lines because it took more than five days to respond to both of the union's requests. Finding that neither party adhered to the time lines, the board held the union's request was sufficient to establish a prima facie case.

Instead of ordering the issuance of a complaint, however, the board was not satisfied that the union had established the dispute over retirement funds was a subject within the scope of representation. The board found that the only issue in dispute was the union's proposal to enhance retirement benefits for retirees. The board cited well-established precedent stating that this is a permissive subject of bargaining. Therefore, the union may not insist to impasse on this issue, if in fact it is the only issue in dispute. Accordingly, the board remanded the case to the general counsel's office to provide the union an opportunity to establish that the alleged impasse involved a subject within the scope of representation.

Board refuses to enforce mediator's recommendation: San Joaquin County.

(*SEIU, Loc. 790 v. San Joaquin County*, No. 1600-M, 2-24-04; 6 pp. + 5 pp. B.A. dec. By Member Whitehead, with Members Neima and Baker.)

Holding: The allegation that the county refused to adopt the recommended decision of a mediator did not state a prima facie case.

Case summary: Service Employees International Union, Loc. 790, appealed a board agent's dismissal of its charge alleging that San Joaquin County violated the MMBA by refusing to adopt a mediator's recommended decision without explanation. The mediator found that the county committed an unfair practice by failing to provide SEIU negotiators with accurate information. She recommended that the county should provide its respiratory therapy staff with the requested holiday compensation.

The B.A. found that SEIU failed to state a prima facie case and found no precedent to support the board's enforcement of a non-binding mediator's recommendation. SEIU never addressed how the county's failure to justify its decision was unlawful. And, the B.A. found SEIU had not shown that the county had rejected the mediator's recommendations.

In its appeal, SEIU cited *Topanga Association for a Scenic Community v. Los Angeles Co.* (1974) 11 Cal. 3d 506, to support its argument that the county must provide a rationale for its refusal to adopt the mediator's findings. However, the board distinguished *Topanga*, which involved a local agency's review of a variance permit under statutory standards. In the present case, the local rule adopted by the county after good faith consultation with SEIU or its predecessor union only requires that the mediator's decision "may be adopted by the Board of Supervisors."

Also, *Topanga* involved a variance hearing that was under review by the court. The board found no evidence in the present case that the mediator's decision ever was brought before the county's board of supervisors. In fact, SEIU stated that the parties had continued to negotiate after the mediator issued her decision. Therefore, the board concluded, no facts support SEIU's allegation that the county unreasonably refused to adopt the mediator's decision.

SEIU also argued on appeal that the charge states a prima facie case because it incorporates by reference the findings in the mediator's report concluding that the employer failed to provide necessary and relevant information about holiday pay. The board found that this did not amount to a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. Alternatively, the board found that SEIU was attempting to raise new allegations on appeal. Absent good cause to do so, the board dismissed this allegation.

The board also rejected SEIU's claim that state policy favors mediation and that the county violated this policy by ignoring the mediator's recommendation. Cases cited in support of its contention were not controlling, the board explained, because they involved the state's policy to support agreements providing for binding arbitration, not media-

tion, which is non-binding. The board adopted the B.A.'s dismissal of the unfair practice charge.

Good cause exists to sever cases: Monterey County.

(*Service Employees International Union, Loc. 817 v. Monterey County*, No. Ad-331-M, 2-25-04; 3 pp. dec. By Member Neima, with Members Baker and Whitehead.)

Holding: Good cause exists to sever MCPRA's case from SEIU's case.

Case summary: Service Employees International Union, Loc. 817, filed an unfair practice charge alleging that Monterey County violated the MMBA by allowing the Monterey County Park Rangers Association to register as an employee organization under the county's local rules. The Office of the General Counsel issued a complaint, and MCPRA filed an application to be joined as a party to this matter. The administrative law judge granted the application for joinder and ordered the case to be consolidated with a case involving the identical issue with respect to another bargaining unit.

The ALJ's proposed decision found the county violated the MMBA in the consolidated case, but dismissed the complaint and underlying charge regarding MCPRA. Because exceptions were filed in the consolidated case, however, both cases remained pending before the board. MCPRA filed a request to sever and to allow the ALJ's decision in its case to become a final order so that its decertification efforts would not be prejudiced. The county joined in MCPRA's request.

The board found good cause to grant MCPRA's request to sever. SEIU did not respond to the request, and no exceptions were filed. Once severed, the ALJ's proposed decision became final and binding on the parties.

Assignment of duties not within scope of representation: City and County of San Francisco.

(*Service Employees International Union, Loc. 790, AFL-CIO v. City and County of San Francisco*, No. 1608-M, 3-22-04; 4 pp. + 10 pp. R.A. dec. By Member Neima, with Member Whitehead and Chairman Duncan.)

Holding: The city did not commit a unilateral change because the city's purported agreement not to assign certain duties involved a permissive subject of bargaining and was not embodied in the contract.

Case summary: The Service Employees International Union appealed a regional attorney's dismissal of its unfair practice charge alleging the City and County of San Francisco violated the MMBA by unilaterally assigning new duties to senior clerks and typists. The R.A. cited *Davis Jt. USD* (1984) PERB No. 393, 62X CPER 12, and other PERB decisions to show that the assignment of duties is not a mandatory subject within the scope of representation if the newly assigned duties are reasonably related to existing duties. The R.A. found that the assignment was not within the scope of representation because the new duties were reasonably related to existing duties.

SEIU argued that even if the assignment of duties was not a mandatory subject of negotiation, it was at least a permissible subject. SEIU further argued that the parties entered into an agreement regarding the assignment of duties and that the city committed an unfair practice by unilaterally breaching that agreement.

The board found that the R.A. failed to address the legal effect of the purported agreement between SEIU and the city. Citing *Eureka City School Dist.* (1992) PERB No. 955, 98 CPER 56, the board stated that once an agreement is reached regarding a permissive subject, and is embodied in the parties' agreement, the parties are bound to that agreement for its duration. However, the board found that the purported agreement not to assign certain duties was not embodied in the contract. Furthermore, the board found that since the duties were reasonably related to existing duties, the purported agreement solely involved a permissive subject of bargaining. The board reasoned that the city did not commit a unilateral change because the purported agreement involved a permissive subject and was not embodied in the contract. The R.A.'s dismissal was affirmed.

Settlement of past disciplinary actions prevents establishment of past policy: City and County of San Francisco.

(*San Francisco Firefighters Union, Loc. 798, IAFF, AFL-CIO v. City and County of San Francisco*, No. 1611-M, 4-2-04; 3 pp. + 9 pp. R.A. dec. By Member Neima, with Member Whitehead and Chairman Duncan.)

Holding: The charge failed to establish an unlawful unilateral change in discipline policy. The union could not rely on the settlements in two disciplinary cases to establish past practice.

Case summary: The San Francisco Firefighters Union appealed a regional attorney's dismissal of its unfair practice charge alleging the City and County of San Francisco violated the MMBA by unilaterally changing the discipline imposed for first-time violations of the city's alcohol and drug use policy.

The union argued that the city violated its practice of providing firefighters with an opportunity to enter into a "last chance" agreement when charged for the first time with an alcohol-related offense. It is undisputed that the city's discipline policies do not discuss the use of "last chance" agreements. However, the union argued that the city's practice of doing so is proved by the fact that the only two firefighters charged with first-time substance abuse violations in the last five years both were offered "last chance" agreements.

The city argued that those two examples could not be used to establish past practice because the settlement agreements in both those cases stated that they were not precedent setting. On appeal, the union argued that the non-precedent-setting nature of the agreements applies only to cases where that individual employee is disciplined again.

The board found that the union's argument flies in the face of the plain meaning of a "last chance" agreement. By definition, "last chance" agreements are only offered once, and an employee would not qualify for such an agreement if that same employee later violated the city's alcohol policy.

Therefore, the board held that the union was not allowed to use the two cases as examples of past practice, and the charge was dismissed.

Employer not obligated to meet with employee: Alameda County Medical Center.

(*Kimbrough v. Alameda County Medical Center*, No. 1620-M, 4-21-04; 3 pp. + 6 pp. R.A. dec. By Member Whitehead, with Member Neima and Chairman Duncan.)

Holding: The employer did not violate the MMBA by refusing to meet and confer with the charging party.

Case summary: Judith Kimbrough appealed a regional attorney's dismissal of her unfair practice charge alleging that the Alameda County Medical Center violated the MMBA by refusing to meet and confer with her.

On appeal, Kimbrough argued that the center refused to process her grievance through arbitration and otherwise hear her grievance beyond the third level. She further argued that the R.A. was incorrect in citing cases from EERA and the Dills Act. Finally, Kimbrough raised new allegations, adding an unfair practice charge against the Service Employees International Union, and supporting evidence.

The board explained that the MMBA does not require an employer to meet and confer with individual employees, but rather allows an employee to meet with the employer without the employee organization. Furthermore, the board found it appropriate to take guidance from cases interpreting California labor relations statutes with parallel provisions. The board concluded that Kimbrough's new allegations were known to her during the time her charge was being processed, and therefore she lacked good cause to raise these issues on appeal. Accordingly, the board affirmed the R.A.'s dismissal.

District violated local rules by conducting unit modification election: Westlands Water Dist.

(*Operating Engineers, Loc. 3 v. Westlands Water Dist.*, No. 1622-M, 4-22-04; 10 pp. dec. By Member Neima, with Member Whitehead and Chairman Duncan.)

Holding: The dismissal was reversed. The district violated its own local rules by conducting an election on the unit modification petition.

Case summary: Operating Engineers appealed a board agent's dismissal of its charge alleging that the Westlands Water District violated the MMBA by accepting a unit modification petition, approving the petitioned-for unit, and scheduling an election. The board reversed the B.A.'s dismissal.

In February 2002, the district accepted a petition seeking to decertify Operating Engineers as the exclusive representative of a miscellaneous unit of employees. Operating Engineers won the resulting representation and agency fee elections. In April 2002, the district received a petition seeking to modify the miscellaneous unit by creating a separate office clerical unit to be represented by the Westlands Office and Clerical Employee Association. The district determined that this modification created the more appropriate unit. In June 2002, clerical employees voted on and approved the modified unit. Pursuant to MMBA Sec. 3507, the district adopted local employer-employee rules governing such modifications.

First, Operating Engineers alleged that the district violated EER 12.10, stating that a unit modification petition may be filed only "during the last two months of any twelve-month period following the month in which the formal recognition was granted." Since Operating Engineers was formally recognized on August 29, 1996, it argued that a unit modification petition could be filed only in July or August of each year. According to Operating Engineers, the district violated its own local rules by accepting a petition in April.

The district claimed that EER 12.10 allows a representational petition to be filed during the two-month period before expiration of the memorandum of understanding or any time thereafter. The district argued there was no bar to its acceptance of WOCEA's petition because the contract with Operating Engineers expired in April 2002. Relying on NLR precedent, the district argued that its application of EER 12.10 is consistent with the federal contract bar rule.

The board disagreed. It found that the district's argument failed because nothing in EER 12.10 resembles a contract bar provision. Instead, the board explained, EER 12.10 is a 12-month bar triggered by formal recognition of the union, and intended to insulate the union for 12 months to permit it to negotiate with the employer without interference.

The board found that Operating Engineers also interpreted EER 12.10 incorrectly because it read the phrase "any twelve-month period" as "the one-year period." The board held that the rule provides protection for the incumbent union only for the first twelve months after formal recognition, after which there is no bar to representational petitions. Therefore, the board found Operating Engineers failed to state a prima facie case when it alleged the district violated EER 12.10.

The board also rejected Operating Engineers' contention that the relevant factors and criteria contained in EER 12.7 do not support the district's conclusion that a clerical unit is appropriate. The board noted that an unfair practice occurs only where it is alleged that the local rule is invalid or where there has been unlawful interference or denial of rights. The board dismissed this portion of the charge because Operating Engineers made no such allegations.

Lastly, Operating Engineers argued that the district violated EER 12.9(g) by conducting an election on WOCEA's unit modification petition within 12 months of the decertification election. EER 12.9(g) states that a union's recognition rights "shall not be subject to challenge by election for a period of at least twelve months following the date" of recognition. Operating Engineers asserted that "recognition rights" are established any time there is a representational election, including any decertification and unit modification election.

The board agreed with Operating Engineers' argument regarding the rights conferred to the union by EER 12.9(g). Examining the district's local rules as a whole, the board found that the clear meaning of "recognition rights" includes more than the initial formal recognition of a union. The board found that EER 12.9 expressly was incorporated into other provisions of the local rules such that a modifica-

tion election under 12.11 was required to comply with EER 12.9. Accordingly, the board ordered a complaint to issue based on its conclusion that the district violated its own local rules by conducting an election on the unit modification petition in June 2002.

The board noted that the district is not prohibited from asserting a contrary interpretation or prevented from introducing extrinsic evidence at the hearing. However, the board further noted that even if the district's local rules permitted the instant unit modification election, the district could be in violation of MMBA Sec. 3507(b), stating that union recognition "may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of recognition." Since the applicability of this section was not raised on appeal, the board deferred this issue to the administrative law judge.

Duty of Fair Representation Rulings

No breach of DFR when some employees are dissatisfied with union contract: SEIU, Loc. 250.

(Stewart [Mental Health Workers] v. Service Employees International Union, Loc. 250, No. 1610-M, 4-2-04; 3 pp. + 8 pp. R.A. dec. By Member Neima, with Member Whitehead and Chairman Duncan.)

Holding: Some bargaining unit members' dissatisfaction with an agreement is insufficient by itself to demonstrate a prima facie violation of the duty of fair representation.

Case summary: Cassandra Stewart appealed a regional attorney's dismissal of her charge alleging that the Service Employees International Union violated its duty of fair representation under the MMBA by negotiating a new salary scale that did not immediately benefit employees such as her. Stewart, a mental health rehabilitation worker for the City and County of San Francisco, alleged that the agreement between the city and SEIU provided salary increases that were unfairly directed toward new employees rather than incumbents.

Citing *Violett v. Los Rios College Federation of Teachers* (1991) PERB No. 889, 90 CPER 66, the R.A. held that some bargaining unit members' dissatisfaction with an agreement is insufficient by itself to demonstrate a prima facie violation of the duty of fair representation. The board agreed.

Although the board affirmed the R.A.'s dismissal, it found that the R.A. did not address the "vague allegations" that SEIU threatened Stewart because of her complaints regarding the contract. However, the board held that these allegations failed to provide the factual specificity necessary to state a prima facie case of interference with protected activity.

Charge failed to show abuse of discretion: IUOE, Loc. 39.

(*Siroky v. International Union of Operating Engineers, Loc. 39*, No. 1618-M, 4-16-04; 6 pp. + 8 pp. R.A. dec. By Member Neima, with Member Whitehead and Chairman Duncan.)

Holding: The charging party failed to meet his burden to show how the union abused its discretion by failing to represent him in a wage dispute.

Case summary: Mark Siroky appealed a regional attorney's dismissal of his charge alleging the International Union of Operating Engineers violated its duty of fair representation under the MMBA by failing to represent him in a wage dispute. Siroky argued that shortly after an arbitration hearing involving his grievance against the City of Folsom, the city prepared a settlement agreement substantially changing the terms to which he agreed at the hearing. After the union attempted to convince the city to agree to Siroky's desired version of the agreement, the union urged Siroky to sign the modified agreement. The union argued that it did not differ substantially from Siroky's desired version. Siroky contacted the union to correct the alleged misstatements, requested further representation, and then filed the present charge.

The board agreed with the R.A. that Siroky failed to show how the union abused its discretion. The union sought the city's approval of Siroky's desired version of a settlement

agreement, then provided its legal opinion that Siroky should sign the modified agreement. The board found these facts established a rational basis for the union's decision not to further represent Siroky. Also, the board found that Siroky failed to explain his refusal to sign the modified agreement, and he alleged no facts demonstrating why the union's decision was without rational basis or devoid of honest judgment. Accordingly, the board dismissed the charge for failing to state a prima facie case.

Union had no obligation to pursue grievance where success is doubtful: IAFF, Loc. 55.

(*Waqia v. International Association of Firefighters*, No. 1621-M, 4-21-04; 9 pp. dec. By Member Whitehead, with Member Neima and Chairman Duncan.)

Holding: The charge failed to show that the association's refusal to pursue the grievance to arbitration was arbitrary, discriminatory, or in bad faith.

Case summary: Delmont Waqia appealed a board agent's dismissal of his charge alleging that the International Association of Firefighters violated the MMBA by failing to take his grievance to arbitration. Waqia, a firefighter for the City of Oakland, was terminated from his job due to job abandonment. He subsequently was denied a *Skelly* hearing because the city claimed his termination was not "disciplinary." After the association brought Waqia's grievance through the third step of the grievance procedure, it decided against taking his case to arbitration because it was concerned about the timeliness of the grievance. In his amended charge, Waqia argued that the association's refusal was unreasonable because the city had responded to the merits during previous grievance steps, and the city itself failed to adhere to timelines.

The B.A. cited a provision of the negotiated agreement between the association and the city stating that the grievance would be nullified if a unit member missed any deadline. Despite its untimeliness, the B.A. found that the association processed the grievance through the third level and provided a detailed analysis of the chance of success. The B.A. found no evidence that the association's decision was

without rational basis or devoid of honest judgment. Furthermore, the B.A. found no implied agreement arising from the city's failure to adhere to time lines because such adherence merely moved the grievance to the next level and did not show any breach of the duty of fair representation.

On appeal, Waqia asserted the same arguments, but the board found that he failed to show the association's conduct was arbitrary, discriminatory, or in bad faith. Instead, the board found the association assisted Waqia with his grievance despite the fact that he originally attempted to resolve his dispute outside the grievance process, and as a result, filed an untimely grievance. Furthermore, the board stated that an exclusive representative has no obligation to pursue a grievance where the potential success of arbitration is doubtful. The board also dismissed Waqia's argument that the city would not claim untimeliness at the arbitration level. It called the argument "pure speculation." Accordingly, the B.A.'s dismissal was affirmed.