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letter from the editor

Dear *CPER* Readers:

Recently, when my 11-year-old daughter had to show me how to work my new cell phone, it caused me to reflect on the way in which work has changed for those of us whose stock-in-trade is the written word.

In the late 1970s, after I graduated from law school, I went to work at the Public Employment Relations Board. As a legal advisor to one of the board members, memos and draft decisions were prepared using a typewriter. Okay, it was an electric typewriter. But it meant that if, for example, I reread a document and it was not exactly right, I sheepishly had to ask Chris Wong — who still labors at PERB — to please retype it.

At some point, the board hired clerical staff who used computers and were proficient at word processing. Eventually, there were office computers that we shared. But it was years before we each had our own individual keyboard at our desks.

When I came to CPER in 1988, we were just starting to abandon typewriters and use computers to compose our stories. And, I can remember fumbling around with Internet searches that usually were fruitless. None of us was very comfortable with the new machines, and there were times when we would mysteriously lose a document after logging hours of work.

Before faxes, email, and the Internet, we got a court decision or legislation from Sacramento by calling and asking that it be mailed to us. Then we waited days for it to arrive. Now, of course, information is available at the stroke of a key, and passed along cable lines with ease.

So, has all this made the writing craft easier? Yes and no.

B.C. — before computers — there was only so much you could do. You'd make your calls and go to the library and, after that, you'd have to cut and paste your way to the finish line.

Now, it's all out there, all the time. Research is never really "done." One more search is always a possibility…..

I'm not complaining. But, sometimes it gets a little over the top. I'm no Luddite, but do I really need text messaging on my cell phone?

Sincerely,

Carol Vendrillo
CPER Director and Editor

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'Don't Mess With PERB'

Public Testimony Resoundingly Rejects Plans to Alter PERB

Carol Vendrillo, CPER Editor

Representatives of both labor and management came together at a public meeting called by PERB, and spoke with one voice in opposition to plans to merge the agency with the SPB or to require the board to report to the proposed Labor and Economic Development Department, envisioned as part of the California Performance Review.

The California Performance Review Commission was impaneled by Governor Schwarzenegger to recommend ways in which state government could become more efficient and cost effective. In chapter four of the commission's report, it proposed that a number of programs be integrated into a new Department of Labor and Economic Development. The commission further proposed that the department be given authority over many labor boards and commissions, including the California Unemployment Insurance Appeals Board, the Workers' Compensation Appeals Board, the Industrial Welfare Commission, the Occupational Safety and Health Appeals Board, and the Fair Employment and Housing Commission.

With regard to the Public Employment Relations Board and the Agricultural Labor Relations Board, the commission suggests that "a reporting relationship" should be established between the department and these two agencies. In the exhibit visually depicting the newly constructed department, boxes identified as PERB and the ALRB can be seen floating off to the side, untethered to any other segment of the diagram.

What is contemplated by this "reporting relationship" was one of the topics discussed during a public meeting convened by PERB on September 21. Calling for input regarding the CPR proposal, the board heard from a number of those who regularly practice before the agency.

It also heard practitioners' reaction to a plan floated by the State Personnel Board to merge PERB with that agency. The unanimous opinion of those who spoke — with the exception of the SPB spokesperson — was to leave matters as they are. For the sake of preserving PERB's autonomy and its independence, all who offered their opinion rejected the notion that PERB should be grouped with the SPB and most reacted negatively to the more nebulous "reporting relationship" suggested by the CPR commission.

Feedback

More than 40 "stakeholders" were in attendance as Chairman John Duncan explained that the public meeting was conducted to gather comments that would be summarized and presented to the commission. Specifically, he asked the seasoned group of practitioners to give their thoughts on the idea of combining PERB with the SPB, moving the California State Mediation and Conciliation Service to PERB, and whether to shift the responsibility for compensating factfinders from PERB to the parties.

Mike Navarro, the recently named director of the Department of Personnel Administration, questioned the organizational split between DPA and SPB, given the overlap of duties executed by the two entities. The two should be brought closer together. But Navarro said it is "absolutely essential that PERB remain independent." In his opinion, it would be impossible to have a single board adjudicate issues involving the merit system and unfair practice charges involving the scope of representation and good faith bargaining.

Micki Callahan, director of the California State Mediation and Conciliation Service, explained that her job is to foster a sound labor relations climate in the public sector by mediating labor disputes and "sowing labor peace." Callahan said that 40 percent of their public sector mediation work is referred to SMCS by PERB. In some circumstances, Callahan said, it does not make sense for there to be a division of labor between PERB and the mediation service. For example, SMCS has the authority to make unit determinations in transit districts but must defer to PERB the resolution of unfair practice disputes that arise in those instances. Why, she asked, should SMCS render unit determinations in transit districts when, as she put it, "PERB does that for a living?" Since SMCS staff mediates unfair practice charges, Callahan suggested that her agency might be given the authority to mediate all unfair practice charges brought to PERB. Although the report generated by the CPR commission did not mention the SMCS, Callahan said it would be inappropriate to place the mediation service in the proposed Labor and Economic Development Department because the department is an enforcement agency and SMCS "wants to be everyone's friend."

Responding to a question from Chairman Duncan, Callahan said she could envision having SMCS consolidated with PERB. She added, however, that it is important for SMCS to maintain an "organizational identity." While she admitted that the mediation service "wants to be under someone's umbrella," she noted that some practitioners see PERB as an enforcement agency. People need to be confident in the independence of SMCS, she added.

One model suggests that the two boards could be merged, serving as a single independent body, speaking with one voice.

The task of defending the idea of having PERB subsumed by the State Personnel Board fell to SPB Chief Counsel Elise Rose. First, Rose noted that the SPB is a constitutionally founded agency charged in Article 3 with overseeing the merit system in state government employment. Although SPB and DPA have clashed on a number of occasions — most recently in two cases now pending before the California Supreme Court — Rose supports the CPR suggestion that the SPB and DPA should be consolidated into one human resources agency. But, going beyond the CPR recommendations, Rose urged that PERB be moved into the SPB's jurisdiction. While sensitive to the need for PERB to maintain its independent status, Rose noted that both SPB and PERB are quasi-judicial agencies that hear cases brought by state employees. Both boards perform similar functions, albeit interpreting and enforcing different laws.

Rose offered two versions of what a consolidation might look like. One would involve the merger of the agencies' administrative law judges and legal staff. This would generate a pool of lawyers with expertise in the enforcement of all the laws administered by SPB and PERB. As a second consolidation model, Rose suggested that the two boards could themselves be merged, serving as a single independent body speaking with one voice.

Following Rose was Jeff Sloan, now with the law firm of Renne, Sloan, Holtzman, and Sakai. Calling SPB's position "more Heimlich maneuver than application of CPR," Sloan explained that, like other civil service commissions and boards, SPB grew out of a movement to roust the spoils system from public employment and instead operate under a system where merit wins out. But when public sector employees began to gain collective bargaining rights, he explained, conflict arose because many functions that had been performed by these civil service entities, like setting compensation levels and reviewing disciplinary actions, were subject to collective bargaining. In light of this history, Sloan said, SPB is the wrong entity to have oversight over PERB. PERB must be as completely independent as possible.

Offering his opinion as to ways in which PERB could save money, Sloan suggested the board change the way in which the regional attorneys investigate cases. Reiterating a debate that has taken place more than once in the last 20 years, Sloan proposed that the R.A.s should investigate charges to determine if there is reasonable cause to believe that a violation has taken place. By issuing a complaint in instances merely where the charging party has alleged a prima facie case, valuable resources are wasted on matters where no unlawful conduct has occurred.

In this vein, Sloan suggested that the board operate as a prosecutorial body. As such, it would become more attentive to whether the charging party could prove up its case. Sloan approved of having SMCS moved within PERB's domain.

Steven Bassoff, a Sacramento attorney who represents state workers, empathized that employees want to have an independent, impartial body review their claims. Rather than a reorganization, what is needed is an infusion of money to PERB in order for it to sustain the jurisdictional authority it has been given. It is imperative that PERB adjudicate cases in a timely fashion, he added. "People want to feel good about coming to PERB."

Rather than a reorganization, what is needed is an infusion of money to PERB in order for it to sustain the jurisdictional authority it has been given.

Terry Filliman, with Atkinson Andelson Loya & Ruud, told the board his management clients have an overriding interest in having the board remain an independent, quasi-judicial agency. Even the "reporting relationship" contemplated by the CPR drew his disapproval. While it is unclear what is meant by the phrase, he said if PERB is reporting to an agency that is part of the state administration, PERB is no longer neutral.

Filliman was the first speaker to address the question of factfinding. While in favor of having the parties, rather than PERB, finance factfinding, he urged the board to consider relaxing the mandatory factfinding process set out in the Educational Employment Relations Act. He said that factfinding was made part of EERA as "an experimental approach" without much empirical evidence that it worked as a strike avoidance technique.

Michelle Castro told the board that SEIU, which represents 350,000 public employees, opposes any efforts that would reduce PERB's independence. Public agencies, including PERB, are facing serious budget difficulties, she said, but merging PERB with the SPB is not the way to address that problem. PERB functions well, she said, pointing to the board's ever-expanding jurisdiction as a measure of its bi-partisan support. "If it's not broken, don't fix it," she concluded.

The California State Association of Counties has not yet taken a formal position on the commission's recommendations, but Steve Keil credited the CPR report as "a good start." He, too, stressed the need to have PERB retain its independence and praised the board for its accessibility.

Keil also had words of support for SMCS, which he said is "always there" for both sides and is valued by labor and management alike. Despite its small size, said Keil, SMCS is a valuable tool. And, he said, it would be worthwhile having a discussion about moving SMCS to PERB.

Bob Purcell, Director of the Public Employees Department of the Laborers International Union of North American, said the "reporting relationship" envisioned by the CPR

commission would be a "major mistake," charging that it would compromise the independence of PERB. In addition, he said, having another layer of bureaucracy would be a "step backwards" in terms of establishing good government.

Purcell told the board members they should be "more aggressive" by reporting more frequently to employers and employee organizations. He urged them to conduct an annual meeting or conference to discuss such topics as the timeliness of case processing and whether PERB should adopt a prosecutorial posture. "PERB should take the initiative," said Purcell, "and involve its stakeholders."

As for the notion of moving PERB to the SPB, Purcell said, "if that idea is a trial balloon, it should be blown up before it gets off the ground." Such a merger would pose more problems than the "reporting relationship" recommended by the CPR.

As for the notion of moving PERB to the SPB, 'if that idea is a trial ballon, it should be blown up before it gets off the ground.'

Patricia White, who chairs the public sector department at Littler Mendelson, also viewed the "reporting relationship" idea negatively but saw the SPB merger plan as an especially bad idea, calling it "unimaginable." She envisioned the possibility of having PERB be charged with adjudicating cases in which the SPB is a party. She has experienced that type of conflict in community college districts that have a civil service commission.

Like others, White said that despite funding cutbacks, PERB has done an effective job at keeping peace between a diverse group of actors. She also lauded the SMCS for doing a good job.

When attorney Matthew Gauger, with Weinberg, Roger & Rosenfeld, announced he was in agreement with Littler's White, he claimed this made the day an "historic moment." He credited PERB with doing a great job in making the parties "fight fair." But he had sharp words for the SPB, citing "an incredible antipathy" between PERB and that agency. Gauger charged that the SPB was "stuck back in time, when there was no collective bargaining," and accused the agency of having never supported collective bargaining.

Howard Pripas, U.C.'s executive director of labor relations, voiced support for the goals of the CPR, but was concerned with a provision of the report that calls on PERB to transfer the unexpended balance of all its funds as of July 1, 2005, to the Labor and Economic Development Department and vests budgetary authority for PERB with the department. Like others, he was unclear about what is meant by the "reporting relationship" mentioned in the commission's recommendations and indicated he did not support a merger with the SPB.

When Michael Clancy with the California School Employees Association commented about the CPR and SPB recommendations, he admitted it felt like he was "beating a dead horse." But, he added, "this horse deserves a beating." PERB has expertise in labor relations that is not duplicated elsewhere, he said. Oversight by the department or the SPB would present a conflict of interest, especially in the case of the SPB, a state agency subject to PERB's jurisdiction. And, he noted, rather than eliminate unnecessary bureaucracy, the CPR plan adds to it but without any accompanying benefit.

Gregg Adam, with Carroll Burdick & McDonough, said his public sector union clients were "absolutely united in opposing" a merger with the SPB. In his view, the SPB does not offer state employees a "fair shake." The agency was designed to stand up for employees; instead, he said, it has blocked their progress.

California Nurses Association also expressed the need that PERB remain an independent agency. Of the SPB plan, Vicki Bermudez said that the agency has no expertise regarding collective bargaining. Nor does it know what constitutes an unfair practice. PERB, on the other hand, has worked to uphold collective bargaining laws and, modeled after the National Labor Relations Board, is a "time-tested model." While there may be a small area of overlap between PERB and the SPB, Bermudez said the latter is perceived as having a pro-employer bias. Giving that agency the authority to administer the collective bargaining laws would cause labor unrest, she said.

Like others who testified, Bermudez favored bringing the SMCS under the umbrella of PERB, noting that the mediation of labor disputes falls within PERB's mandate.

Shane Gusman of the California Teamsters Public Affairs Council disagreed with the idea of bringing SMCS under PERB. While not an impossible arrangement, Gusman said the move would be inappropriate at this time because of SMCS's jurisdictional authority over transit districts. He suggested a solution may be to further expand PERB's jurisdiction to operate in the transit field.

Christi Bouma, speaking on behalf of the California Professional Firefighters, echoed the view that PERB must remain independent and said a merger with SPB would have "a terrible impact on the work of both agencies." While the two organizations both have administrative staff and lawyers, she emphasized that the agencies enforce very different laws.

A merger of PERB and the SPB would have 'a terrible impact on the work of both agencies.'

United Auto Workers spokesperson Mary Ann Massenburg voiced support for having PERB assume a prosecutorial function. Like many others who testified, Massenburg expressed the view that PERB must maintain its independent status and said she was "mystified" by the prospect of an SPB merger.

California State Employees Association's Sherri Golden praised the accessibility of the board's staff. As for a merger with the SPB, she said simply, "it won't work."

The California Teachers Association, which represents 300,000 certificated employees, was strongly opposed to an SPB merger. Ken Kerr told the board that such a move would create an actual and perceived conflict of interest. Because the board exercises jurisdiction over state employees, joining forces with the SPB would place PERB in a compromising position. Having the two agencies share their administrative law judges would be a disaster, Kerr said, because PERB ALJs have expertise in the state's labor laws, not the personnel laws. He urged the board not to discount the specialized nature of the ALJs' knowledge and the many years of service with PERB that some of the ALJs have had.

Kerr also spoke in favor of increased funding to pay the neutrals who conduct factfinding under EERA. Requiring the parties to pay neutrals places many small CTA chapters at a disadvantage. If they cannot afford to finance the factfinding process, they are unable to exhaust the statutory impasse procedures.

Gerald James, now with Blanning and Baker, also opposed the "reporting relationship" sought by the CPR and the merger proposed by the SPB. Joshua Golka, representing AFSCME, and Jeremy Smith, from the California Labor Federation, voiced opinions similar to those expressed by other participants.

Written submissions were received from the law firm of Leonard Carder, which represents a broad spectrum of public sector labor unions. Attorney Arthur Krantz praised PERB's dedicated staff but said the board needs additional funding to hire more administrative law judges. He also urged that all five board member positions be filled in order to reduce the agency's backlog of cases.

He also observed that by merging PERB with another agency, the board would forfeit its independent nature. Like the NLRB, Krantz wrote, PERB must remain an independent agency with a unique and specialized duty to enforce the different statutes "as they apply to complex, often tense labor disputes."

Robert Shelburne submitted written comments on behalf of Kronick Moskovitz Tiedemann & Girard, which represents over 100 public education agencies. Having PERB periodically report to the Department of Labor and Workplace Development would be reasonable and appropriate, he said. But, "it would be a mistake to require PERB to take direction from the Labor Department's chief executive, since such direction could inhibit or compromise PERB in fulfilling its statutory and regulatory responsibilities." Shelburne was in favor of a plan that would move SMCS to PERB, stating that such a restructuring would save money and create efficiencies. With regard to the proposed SPB merger, Shelburne noted that the SPB's task of monitoring and regulating employment practices "is a colossal mandate standing alone." Adding to that the responsibilities held by PERB "would be in the interest of no one." He also noted the differ-

ences in the laws the two agencies enforce. "These differences would create confusion of the State civil service merit principle with the employment law and labor laws applicable to local agencies…."

In written comments, Lieutenant Governor Cruz Bustamante expressed his concern that management will gain more influence over employees' rights if the functions of the board are shifted to a large bureaucracy, like the new Labor and Economic Development Department. He wrote, "Assigning a hearing officer to hear contract violation cases is no substitute for an independent board reviewing cases in a public forum."

As the hearing concluded, Member Al Whitehead pointed out that there currently are three cases on PERB's docket where the SPB is a party and cautioned against any merger with that agency. As for the potential reporting relationship proposed by the CPR commission, Whitehead remarked that "the devil's in the details and there are no details in the report."

Member Neima called the day's assembly "the most important public meeting" he has attended since joining the board three years ago. The comments gave him a clear sense of the feelings of the employers and employee organizations.

Chairman Duncan directed the board's staff to summarize the testimony presented at the hearing and draft a formal recommendation to the CPR commission which reflects the consensus that PERB's constituents oppose both the reporting relationship as suggested by the commission and the SPB merger. ❋

Recent Developments

Public Schools

Teacher Cannot Sue for Wrongful Termination or Deprivation of Right to Free Speech

The California Court of Appeal for the Second District ruled in *Motevalli v. Los Angeles Unified School District* that a teacher may not claim that the district's nonrenewal of her contract violated public policy. Nor does she have the right to sue the district for damages resulting from deprivation of the right to free speech protected by the California Constitution, held the court.

Factual Background

In May 1999, the district hired Motevalli to teach art and art history at Locke High School for the 1999-2000 school year. She began work on September 6, 1999, under an "emergency credential." Motevalli and the district signed a one-page agreement stating that her contract status was "provisional" and that the term of service was to commence "on or before 10-18-99 and ending 6-30-00." As stated in the agreement, it was "subject to the provisions of the District and the United Teachers-Los Angeles Collective Bargaining Agreement, all rules and regulations of the Board of Education, and all provisions and regulations of the State of California."

The agreement also included the following language: "I understand that this offer is for a provisional contract, service under an emergency permit does not count toward permanent status (tenure) with the District; I also understand that this contract can be cancelled at anytime without cause at the discretion of the District."

Motevalli was offered and accepted another identical contract for the 2000-01 school year.

Motevalli believed the weapons search of students to be illegal.

On December 13, 2000, school officials selected Motevalli's classroom for a weapons search, pursuant to the district's policy of conducting regular random weapons searches in its secondary schools. Motevalli refused to allow the scan team to conduct the search, stating that she believed it to be illegal under the Fourth Amendment of the United States Constitution. She asked the team to come back another time.

The next day, Annie Webb, the principal at Locke, sent Motevalli a memorandum stating that her refusal to cooperate with the search team was against district policy and warning her that her refusal to cooperate could lead to a Notice of Unsatisfactory Act (Unsat) with a possible recommendation for suspension without pay. Under district practice, a provisional teacher who is given an Unsat is not offered a contract for the following year.

On January 23, 2001, the search team returned to Motevalli's classroom. Motevalli told that team that her class was busy and that she believed that the proposed search violated the Fourth Amendment. Webb came to the classroom and told Motevalli to come to her office. Before leaving, Motevalli told her students "You know what to do." Most of the students then left the room and the search did not proceed. Motevalli previously had told her students that unless they were on probation, they were entitled to refuse to cooperate with a weapons search.

On April 2, 2001, Webb issued Motevalli an Unsat notice which charged that on January 23, 2001, Motevalli "failed to follow an administrative directive when she failed to allow the school's weapon screening team to enter her room to scan her students." The notice further charged that Motevalli: used poor judgment and demonstrated "little or no regard" for the safety of students by "yelling, 'You know what to do,'" when the scanning team entered the classroom; instructed her students to "begin shouting," and walked out of the classroom if the scanning team came in, thereby allowing

students to leave the classroom without supervision; and failed to follow school administrative policy regarding the random scanning of students for weapons.

Though the Unsat notice recommended that Motevalli be dismissed from the district, she was not dismissed and served out the full term of her contract. Her contract was not renewed for the following year.

Motevalli filed suit against the district. She alleged, among other causes of action, wrongful termination in violation of public policy in that she was terminated for engaging in speech protected by the Fourth Amendment, and violation of her right to free speech under the California Constitution. Motevalli claimed that the district enforces a "custom and policy of conducting suspicionless pat-downs of students when they are in class," that the policy was "disruptive and takes valuable time away from learning" and "violates the students' right to privacy." She also alleged that "Locke officials arbitrarily select students for bag inspections without any reasonable suspicion of weapons possession," and that "she spoke up when she believed that students were being treated unfairly by the police." She also was "very vocal about Locke's need for more teachers."

The trial court dismissed Motevalli's wrongful termination claim but allowed the free speech claim under the California Constitution to go to trial. The jury awarded Motevalli $425,000, finding that she was engaged in a legally protected activity and was subjected to an adverse employment action. The jury also concluded that Motevalli's protected activity was a substantial or motivating factor in the district's adverse employment action and that the district would not have reached the same decision had she not engaged in such activity.

The district filed motions with the trial court, alleging that the California Supreme Court's decision in *Degrassi v. Cook* (2002) 29 Cal.4th 333, 158 CPER 64, was controlling and that the trial court should enter a judgment in its favor nothwithstanding the jury's verdict. In *Degrassi*, the Supreme Court disallowed a claim for damages for an alleged violation of the free speech clause of the California Constitution. The trial court agreed with the district and entered judgment in its favor. Motevalli appealed.

Court of Appeal Decision

Employment status. Before addressing either party's arguments, the court found it "necessary as a preliminary matter to determine Motevalli's classification under the Education Code and the nature of the employment relationship."

The court first considered the reference in the contract to Motevalli's "provisional" status, determining that this term "denoted her licensure status, not her employment classification." The court specified that Motevalli's classification under the Education Code "was *not* that of a temporary teacher."

Motevalli's employment classification was probationary, held the court, citing Ed. Code Sec. 44915:

> Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute teachers.

The court reasoned that "'probationary' is the default category for those persons not classified as permanent or substitute teachers," and that, as Motevalli was not classified as a temporary, permanent, or substitute teacher while serving under her emergency permit, "we conclude her classification was probationary by operation of law."

The court next addressed whether Motevalli was protected by Ed. Code Sec. 44929.21(b). Under that section, unless a probationary teacher is notified of nonreelection by March 15 of his or her second consecutive school year, that teacher is automatically deemed reelected and is entitled to classification as a permanent employee at the commencement of the succeeding school year. The court determined that the section was inapplicable to a probationary teacher employed under an emergency credential, as was Motevalli. Accordingly, "the District properly notified Motevalli at the end of the 2000-2001 school year that her contract, with an expiration date of June 30, 2001, would not be renewed."

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

Navigate the often-convoluted web of laws, cases, and regulations that govern or affect classification and job security rights of public school employees.

The guide covers dismissal, suspension, leaves of absence, layoffs, pre-hearing and hearing procedures, the Commission on Professional Competence, the Commission on Teacher Credentialing, the credential revocation process...and more.

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Wrongful termination claim. The court began its analysis with a brief summary of the case law, citing *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, as the "seminal case" that "recognized a cause of action in tort where an employee is wrongfully discharged in contravention of fundamental public policy." The court acknowledged that "subsequent cases, like *Garcia v. Rockwell International Corp.* (1986) 187 Cal.App.3d 1556, have held adverse employment action short of termination may give rise to a *Tameny* claim." In *Garcia*, the employee was suspended without pay and demoted in retaliation for revealing his employer's misconduct to NASA's inspector general. The *Garcia* court stated, "we see no reason why the rationale of *Tameny* should not be applicable in a case where an employee is wrongfully (tortiously) disciplined and suffers damage as a result," even though "the ultimate sanction of discharge has not been imposed."

The Second District summarized the issue before it as "whether the District's *nonrenewal* of Motevalli's employment contract constituted a sufficient adverse employment action for purposes of maintaining a *Tameny* claim." It determined that, under *Daly v. Exxon Corp* (1997) 55 Cal.App.4th 39, it was not.

The court in *Daly* found that the plaintiff could not claim wrongful termination in violation of public policy because she had not been fired, discharged, or terminated. Rather, her one-year contract had expired and had not been renewed. The Second District summarized the holding of the *Daly* court: "Had Exxon fired, discharged, or terminated Daly before the contract expired because she complained about unsafe working conditions, she could have sued for wrongful discharge…However, the plaintiff could not sue for tort damages where the employment contract was for a fixed term and expired." The *Daly* court also ruled that the plaintiff could not amend her complaint to claim a "tortious nonrenewal of her employment contract in violation of public policy" because that cause of action had never been recognized by any court.

The court held that *Daly* applied directly to Motevalli's situation:

> The District did not terminate Motevalli — she was a probationary teacher, working under an emergency credential, whose contract was not renewed. Absent a termination, there is no cause of action for wrongful termination in violation of public policy. Further, Motevalli was incapable of amending her complaint to allege a new cause of action for tortious nonrenewal of her employment contract in violation of public policy because no such cause of action is recognized.

Free speech claim. The court analyzed Motevalli's claim that the district should pay her damages for violating her right to free speech in light of the California Supreme Court's decision in *Degrassi v. Cook*. The plaintiff in that case was a former city council member who alleged that she should be awarded damages because various city officials and other individuals had interfered with the performance of her duties, violating her right to free speech.

In *Degrassi*, the Supreme Court adopted the factors set forth in *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 158 CPER 64,

Would recognition of a damages action produce 'adverse policy consequences'?

to analyze whether the plaintiff should be able to collect damages. Those factors were: (1) whether the plaintiff had meaningful alternative remedies; (2) the fact that a damages action to remedy a violation of free speech rights is not authorized by the Constitution or by statute; and (3) the fact that courts have expressed reluctance to create a damages action when doing so might, among other things, produce adverse policy consequences or practical problems of proof. The court concluded that, in that case,"money damages simply are not an appropriate remedy." However, it also limited its ruling, stating, "This does not mean that the free speech clause, in general, never will support an action for money damages."

As *Degrassi* did not issue until after the jury had decided Motevalli's case, the Second District first had to determine if the Supreme Court's decision should be applied retroactively. The court found that it should in that there was no reason to deviate from the general rule that "judicial decisions are given retroactive effect, even if they represent a clear change in the law."

Applying the factors set out in *Degrassi* to the facts before it, the court determined that, "the critical factor in this fact situation is whether recognition of a damages action would produce 'adverse policy consequences.'" It concluded that it would, stating:

> Untenured teachers have fewer rights than permanent teachers. This difference is the product of an explicit legislative scheme….Recognition of a constitutional damages action here would result in the anomaly of untenured teachers denied rehiring having *greater* rights than tenured teachers who have been discharged. A tenured teacher is required to exhaust his or her internal administrative remedies before going to court…, which decision then would be reviewed on administrative mandamus…, wherein the employer's liability would be determined by a court before the employee could bring an action for damages….
>
> However, if a probationary/provisional teacher who is not rehired were allowed to proceed directly to court in a damages action in which liability would be decided by a jury, that teacher would be in a position superior to his or her tenured counterparts. To allow a probationary/provisional teacher, such as Motevalli, to bring an action for damages in this context would be to provide protection the Legislature chose to withhold."

The court affirmed the judgment of the trial court. Motevalli plans to file a petition for review with the Supreme Court. (*Motevalli v. Los Angeles Unified School Dist.* [9-9-04] B165380 [2d Dist.] ____Cal.App.4th____, 2004 DJDAR___.)

The *Williams* Settlement: How Much Will It Help?

The settlement of the *Williams v. State of California* lawsuit, reached in August after more than four years of intense and expensive litigation, has been widely reported in the press, lauded by the attorneys representing the school districts and students, and applauded by the governor. Educators have been less enthusiastic. Differences in how these various groups view the terms of the settlement have been characterized as either seeing the glass as half full or as half empty. Though important concessions were made, the dismal condition of California public education means the $1 billion that will go toward improving the worst schools in the state is hardly a drop in the bucket, let alone a half-full glass.

The class action lawsuit was filed in May 2000 by the American Civil Liberties Union, Public Advocates, and the law firm of Morrison & Foerster on behalf of more than one million public school students in grades K through 12. The plaintiffs alleged that the state has a duty under the California Constitution to ensure that all public school students are provided equal fundamental educational conditions and that it is not doing so. They pointed to the Supreme Court decision in *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 CPER 38, which proclaimed education as a fundamental interest to which basic equality is guaranteed under the California Constitution. They also relied on *Butt v. State of California* (1992) 4 Cal.4th 668, 98 CPER 26, where the Supreme Court announced that the state has a nondelegable duty to intervene rather than allow a bankrupt district to close its schools before the end of the school year.

$1 billion is hardly a drop in the bucket.

The plaintiffs and their attorneys argued that there were gross inequalities among schools, specifically focusing on access to textbooks and materials, the physical plants of the schools, and the proportion of teachers with training and experience. One of the plaintiffs' lawyers described the conditions in some of their clients' schools:

> Some young children share their classrooms with rats. Many have no books with which to study at home. Many attend schools so crowded that they shorten every school year by 17 days for a year-round calendar, called "Concept 6." In many schools, dirt and disrepair remind students constantly that they are not valued as highly as children in other schools. Many schools are workplaces so discouraging that they cannot attract or retain enough high-quality teachers.

Governor Davis fought the plaintiffs vigorously, hiring O'Melveny & Myers, a high-priced law firm that ended up costing the state between $14 and $18 million in legal fees. The state's lawyers argued that local districts, not the state, are responsible for ensuring decent school conditions. Upon taking office, Governor Schwarzenegger made settling the case a priority, stating, "it is a shame that we as a state have neglected the inner-city schools. This is why the state was sued…and it was crazy for the state to go out and hire an outside firm to fight the lawsuit."

On August 27, the legislature passed the bills required to implement the terms of the settlement:

• S.B. 6 requires the state to spend $25 million to determine what health and safety repairs are needed at the lowest-scoring schools — those ranking one to three on the ten-point Academic Performance Index. To pay for the identified repairs, the state will use a portion of any educational money left unspent at the end of the year, known as "reversion funds." Either one-half of the funds, or $100 million, whichever is greater, will go into the School Facilities Emergency Repairs Account each year, capped at $800 million. This year, the account will be given $5 million to start off.

• A.B. 1550 outlaws Concept 6 schools by 2012.

• S.B. 550 provides that "to the extent that funds are provided," county superintendents will have to visit each low-scoring school (ranked three or below) in their county during the first month of each school year to determine whether there are enough texts for students, and to ensure that classrooms have permanent instructors who are teaching what their credentials allow. County superintendents also must certify that there are no health or safety threats — including major annoyances such as leaky roofs and broken heaters. This year, $15 million will be provided for this purpose. The county superintendent has five days to report textbook shortages to the state. School districts must fix the problem by the second month of the school term, or the state will do it at the district's expense. Every school will have to publicly report such problems annually. All schools, regardless of ranking, must post a notice in each classroom explaining the district's complaint process regarding insufficient textbooks, health and safety problems, teachers without credentials, or the lack of a permanent instructor. The bill also provides more than $138 million for textbooks in schools that rank one or two on the API.

'The broad message is that every child counts.'

• A.B. 3001 focuses on teacher quality at schools that are in financial trouble, regardless of their API ranking. The statute gives the state's Fiscal Crisis and Management Team the authority to counsel schools on ways to improve teacher hiring, retention, and assignment and eases the requirements for allowing out-of-state credentialed teachers to earn California credentials.

The goal of the settlement agreement and of the laws enacting it are to give the poorest students in the state the same access to books, qualified teachers, and clean facilities as those enjoyed by students in wealthier districts. The legislature included the following language in the implementing legislation:

> These thresholds for teacher quality, instructional materials, and school facilities are intended by the Legislature and by the governor to be a floor, rather than a ceiling, and a beginning, not an end, to the state of California's commitment and effort to ensure that all California school pupils have access to the basic elements of a quality public education.

The children's lead attorney, Mark Rosenbaum of the ACLU, stated that the settlement is "the first time that

these assurances have been made in California or to the children of any state in the nation. The broad message is that every child counts.

Not everyone sees reason to rejoice. The 2,400 school districts charged with implementing the settlement terms are worried they will face more obligations and bureaucracy without any assurance that they will receive the funds needed to pay for the improvements. The West Contra Costa School District estimates that the $138 million provided for books translates to $70 per child, the cost of just one textbook. California School Boards Association Director Scott Plotkin expressed concern that the settlement focuses too much on monitoring and compliance, and not enough on educating every child. "It will take more than counting textbooks and inspecting bathrooms to provide a better education for the students who need and deserve extra help," he said. Many people have questioned where the state is going to find the $800 million promised for facilities improvements. And, even if each of the schools gets its share of the full $800 million, that will only be $333,333 per school, spread out over an undetermined amount of time.

Without more to offer them, few qualified teachers will come.

The most disappointing aspect of the settlement for many parents and students concerns the quality of teachers in the poorest schools. Although the agreement calls for closer monitoring to identify schools with underqualified teachers, it does not provide any incentives to attract and retain qualified teachers in the impacted schools. There are no provisions for more preparation time, smaller classes, or additional support personnel. The plaintiffs and their attorneys hope that good teachers will be more likely to come to schools that are cleaner and have adequate materials. However, the fear is that, without more to offer them, few qualified teachers will come and, if they do, they won't stay for long.

The immediate impact of the *Williams* settlement may be limited to some small improvements at some of the worst schools. Still, it is likely to have a much bigger impact in the future. The state government now has admitted, and the legislature now has recognized by statute, that all California students have a constitutionally protected right to equal access to "the basic elements of a quality public education." Those elements include, as expressed in *Serrano, Butt,* and now *Williams*, equal payment per average day of student attendance, equal numbers of days of instruction, and equal access to textbooks and healthy and safe school facilities. But nothing in any of these cases or in the implementing legislation limits the "basic elements" to this short list. Because of *Williams*, future litigants now will have a much easier time convincing juries and courts that the State of California has a duty to provide them with many other factors that go into a "quality education." Small classes, computers, library resources, counselors, field trips, and music, art, and sports programs also may be determined to be "basic elements" of a quality education to which all students must be provided access. Looked at in this way, Rosenbaum's description of the *Williams* settlement as "a civil rights watershed" may be entirely accurate. "The face and culture of the California educational system will never be the same," he said.

'The face and culture of the California educational system will never be the same.'

District Not Required to Give Teacher Non-Reelection Notice by March 15

The California Court of Appeal for the Second District has determined that school districts are not required to give a March 15 notice of non-reelection to an employee pursuant to Education Code Sec. 44929.21(b) unless that employee is eligible for permanent employment under the provisions of the same code section.

Factual Background

During the 1999-2000 and 2000-01 school years, the San Gabriel Unified School District employed Torey Culbertson in a teaching position requiring certification qualifications. For 1999-2000, Culbertson was employed under an "Emergency Long Term Single Subject Teaching Permit" pursuant to a one-year contract. He then received a "Professional Clear Single Subject Teaching Credential," valid from June 2000 to July 2005. Culbertson was classified as a probationary employee by the district for the 2000-01 school year.

On May 23, 2001, when the district sent Culbertson a notice of non-reelection of employment for the upcoming school year, he filed a lawsuit arguing that, as he had completed two years of service in a teaching position requiring certification qualifications, he had the right to notice of non-reelection of employment for the upcoming school year by March 15, 2001, pursuant to Sec. 44929.21(b). As the May 23 notice was untimely, the district was required to reemploy him for the 2002-03 school year.

The trial court ruled against Culbertson, finding that the district's notice was timely. Culbertson appealed.

Court of Appeal Decision

The Court of Appeal agreed with the trial court. In coming to this conclusion, the court analyzed the relationship between the first two paragraphs of the statute. The first "tenure" paragraph of Sec. 44929.21(b) states that a school district employee who has been employed by the district for two complete consecutive school years in a position requiring certification qualifications, if hired for a third succeeding school year to a similar position, becomes a permanent employee at the commencement of the third year. The court noted that it was undisputed that this paragraph did not apply to Culbertson as he was not eligible for permanent employment.

Culbertson, however, maintained he was covered by the second "notice" paragraph of subsection (b) that provides:

> The governing board shall notify the employee, on or before March 15 of the employee's second complete consecutive school year of employment by the district in a position or positions requiring

> certification qualifications, of the decision to reelect or not reelect the employee for the next succeeding school year to the position. In the event that the governing board does not give notice pursuant to this section on or before March 15, the employee shall be deemed reelected for the next succeeding school year.

Culbertson argued that the tenure and notice paragraphs are independent of each other. He reasoned that because he was in his "second complete consecutive school year of employment by the district in a position requiring certification qualifications," he was entitled to receive notice of non-reelection by March 15. Because the notice was not sent until after that date, he asserted that he should have been "deemed reelected for the next succeeding school year."

The court rejected Culbertson's assertion that the two paragraphs can be applied independently, finding that they are interdependent for several reasons:

> First, nothing in the term "the employee" in the notice paragraph indicates that it refers to any other person than the "employee" who is eligible to become a permanent employee pursuant to the tenure paragraph.
>
> Second, the tenure paragraph states that if the employee is employed for two complete consecutive school years in a certificated position, and is reelected for a third year, the employee is deemed to be [a] permanent employee of the school district. However, the tenure paragraph contains no procedure to prevent tenure, that is, to non-reelect a second-year probationary employee eligible for permanent employment. This is because the notice paragraph sets forth the non-reelection procedure, which requires the district to give notice of non-reelection prior to March 15 of the second year of employment.

Accordingly, held the court, Culbertson "cannot insist upon notice pursuant to the notice paragraph if he is not eligible for permanent employment pursuant to the tenure paragraph." The court found that its conclusion that the notice paragraph does not apply in this case furthered the legislature's intent in enacting Sec. 44929.21(b), which was to provide "procedural protections to teachers eligible for permanent employment." In support of its interpretation of legislative intent, the court pointed out that the code section is contained in article 2.7, which the legislature entitled "Permanent Status."

The court also rejected Culbertson's argument that its conclusion renders Sec. 44911 superfluous. That section bars application of the tenure paragraph of Sec. 44929.21(b) to employees, like Culbertson, who are not eligible for permanent employment. As the notice paragraph of 44929.21(b) expressly refers to teachers who fall within the tenure paragraph, "by implication, section 44911 also bars application of the notice paragraph of subdivision (b) of section 44929.21, to teachers who are not eligible for permanent employment," reasoned the court. "Therefore, applying section 44929.21, subdivision (b), only to those probationary employees eligible for permanent employment does not render section 44911 nugatory, but instead furthers its legislative purpose."

Culbertson's argument that, by operation of law, he must be deemed a two-year probationary teacher under Sec. 44915, also failed to persuade the court. That section states, "Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees."

In making this argument, Culbertson relied on *California Teachers Assn. v. Governing Board of Golden Valley Unified School Dist.* (2002) 98 Cal.App.4th 369, 155 CPER 98. The court found that the case did not apply:

> *Golden Valley* held that for purposes of applying the midyear dismissal provisions of section 44948.3, a teacher who served under an emergency credential could qualify as a probationary employee. The *Golden Valley* court, however, did not address the issue presented in this case, whether the second notice paragraph of 44929.21, subdivision (b), applies to a probationary employee not eligible for permanent employment.

The court refused to "adopt different definitions of what constitutes a probationary employee for purposes of

the tenure and notice paragraphs" of Sec. 44929.21(b), reiterating its holding that the notice paragraph "does not apply to teachers, like plaintiff, who are not eligible for permanent employment." *Culbertson v. San Gabriel Unified School Dist. and the Board of Education of the San Gabriel Unified School Dist.* [8-31-04] B162986 [2d Dist.] ___Cal.App.4th___, 2004 DJDAR 10843.

Credentialed Teacher Not Entitled to Permanent Status After Two Years

In yet another case involving the interpretation of Education Code Sec. 44929.21(b), the California Court of Appeal for the Third District has determined that a teacher holding a California teaching credential was not entitled to permanent status even though she had taught for two consecutive years.

Factual Background

Emily Smith held a social science teaching credential and had passed the California Basic Educational Skills Test. In August 1999, she was hired as a resource specialist in the Elk Grove Unified School District's special education program for the 1999-2000 school year. Because her credential did not qualify her for that job, she had to obtain an "Emergency Education Specialist Instruction Permit." She continued in the same position for the 2000-01 school year, obtaining another identical permit. She was also hired by the district for the 2001-02 school year, but her duties changed. She served for two-thirds time as a social studies teacher and one-third time in special education.

Smith asked the trial court to order the district to classify her as a permanent tenured teacher as of the beginning of the 2001-02 school year. She contended that, under Sec. 44929.21(b), she was entitled to permanent status because she taught for two full years in a position requiring certification qualifications, which automatically gives permanent status.

The district argued that Smith was not entitled to permanent status because she taught under emergency permits during the first two years, and, according to Sec. 44911, time spent teaching under an emergency permit does not count towards permanent status.

The trial court held for the district, and Smith appealed.

Court of Appeal Decision

The court agreed with the trial court that Sec. 44929.21(b) "would entitle Smith to relief but for the exclusion provided by section 44911: 'Service by a person under a provisional credential shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district.'"

Smith argued that Sec. 44911 should not apply to her because she had a California teaching credential at all relevant times. The court disagreed, stating:

> [The] statute refers to service "under a provisional credential," and there is no dispute that despite her social studies credential, Smith was not qualified to teach special education with it, and that she actually performed her service "under" the emergency credential, bringing her within the terms of section 44911.

The court also rejected Smith's second argument that her situation should be considered an exception to Sec. 44911, like that given to holders of sister-state credentials who are granted a one-year emergency credential pending completion of the CBEST. The court found that the exception can be invoked only by holders of sister-state credentials, quoting from *Summerfield v. Windsor Unified School Dist.* (2002) 95 Cal.App.4th 1026, 153 CPER 37:

> Under section 44911, time spent teaching under an emergency teaching credential may not be counted in computing an employee's progress toward permanent status unless the employee is credentialed in another state and demonstrates adequate basic skills proficiency pending successful completion of the California Basic Educational Skills Test (CBEST).

Smith argued that this narrow interpretation of the exception "is nonsensical and could not possibly comport with legislative intent" because the result would be that a teacher "credentialed out of state without demonstrated competence" would be in a better position than herself, a certified California teacher who already had passed the CBEST.

Nothing about Smith's social studies credential authorized her to teach special education.

The court disagreed, finding that the sister-state teacher "must have passed equivalent examinations, and has [a] one year window in which to pass the California test."

The court also disagreed with Smith's claim "that the code generally assumes that tenure and permanency is not based on the particular *assignment* a teacher receives" and, therefore, the fact that she was assigned to teach special education should not be a limiting factor. The court stated:

> Smith's view seems to be that the distinct types of regular credentials (e.g., social studies, English, music) are irrelevant because so long as a teacher possesses any one credential, she or he can teach anything. That is not the law: Instead, as indicated, there are limited ways in which the Education Code authorizes governing boards to permit teachers to teach outside their credentials. Here, nothing about Smith's social studies credential authorized her to teach special education, and Elk Grove did not allow her to teach special education under it.

(*Smith v. Governing Board of the Elk Grove Unified School Dist.* [6-9-04; certified for publication 7-9-04] C043306 [3d Dist.] 120 Cal.App.4th 563, 2004 DJDAR 8371.)

Local Government

Court Employees and Interpreters Added to PERB's Jurisdiction

The Public Employment Relations Board has acquired the jurisdiction to administer two additional labor relations statutes — the Trial Court Employment Protection and Governance Act and the Trial Court Interpreter Employment and Labor Relations Act. Rather than having to petition a superior court to remedy violations of these acts, PERB now is entrusted to adjudicate as unfair practices violations of these statutes and of the rules and regulations adopted by the courts.

TCEPGA

Enacted in 2000, the Trial Court Employment Protection and Governance Act marked the first time that trial court employees were placed under a comprehensive collective bargaining statute designed to govern labor relations and personnel matters in the court system. Prior to that time, there had been some confusion as to whether court employees enjoyed collective bargaining rights by virtue of the Meyers-Milias-Brown Act.

In 1988, the MMBA was amended to clarify that the definition of public employee encompassed employees of any superior or municipal court. The amendments provided that court employees would be considered employees of the county for all matters within the scope of representation. And, they designated the county labor relations office as the county's representative in negotiations with the court employees' union representative.

But in *AFSCME Loc. 3300 v. County of San Diego* (1992) 11 Cal.App.4th 506, 98 CPER 40, the Fourth District Court of Appeal ruled that the county had not violated the MMBA when it refused to meet and confer with the union over non-economic issues. The court reasoned that the amendments to the act did not give the county the authority to reach agreements on non-economic matters that were controlled by the court.

The statute covers personnel matters in addition to those typically found in other acts.

Following that ruling, the state Judicial Council adopted rules of court that gave unions representing trial court employees the right to meet and confer with the courts over matters within the court's control and within a circumscribed scope of representation. A Task Force on Trial Court Employees then was created to craft a personnel system covering trial court employees, and, based on that group's recommendations, the Trial Court Employment Protection and Governance Act was enacted as S.B. 2140.

The statute covers a broad range of personnel matters in addition to those typically found in the other acts that PERB enforces. (See *CPER* No. 144, pp. 28-30, for a complete summary of all of the act's provisions.)

The labor relations provisions of TCEPGA, found at Article 3, Government Code Secs. 71630 et seq., afford trial court employees the right to form, join, and participate in the activities of employee organizations for the purpose of representation on all matters of employer-employee relations. Trial court employees also have the right to refuse to do so and have the right to represent themselves individually in their employment relations with the court.

Section 71634 defines the scope of representation to include wages, hours, and other terms and conditions of employment, and excludes from scope such matters as the delivery of court services and the hours of operation of the trial court system. The act imposes on labor and management an obligation to meet and confer in good faith. The courts and employee organizations representing court employees are prohibited from interfering

with, intimidating, restraining, coercing, or discriminating against court employees because of their exercise of rights conveyed by the labor relations' provisions of the statute.

Like the MMBA, TCEPGA allows each trial court to adopt reasonable rules and regulations for the administration of employer-employee relations.

The newly added provisions to the act, set out in Secs. 71639.1 et seq., authorize PERB to hear complaints alleging any violation of the labor relations' portion of the statute as unfair practices. It also provides that violations of local rules and regulations adopted by the trial court are considered to be unfair practices. It prohibits the board from issuing a complaint when the charge concerns an alleged unfair practice that occurred more than six months prior to the filing of the charge except if local rules require exhaustion of a trial court's remedy prior to filing an unfair practice. The new law gives PERB the authority to order elections, adopt rules where a trial court has no rules, and enforce rules adopted by a trial court concerning unit determinations, representation, recognition, and elections.

TCIELRA

The Trial Court Interpreter Employment and Labor Relations Act, enacted in 2002 as S.B. 371, put in place a two-year transitional period during which the trial courts moved from hiring independent contractors to using court employees for interpreting services. For purposes of developing terms and conditions of employment for court interpreters and for collective bargaining with recognized employee organizations, the trial courts were divided into four regions. The state Judicial Council was charged with creating regional employment relations committees composed of representatives from within its region. Each regional committee acts as the representative of the trial courts within its region in bargaining with the interpreters' exclusive representative. And, an MOU ratified by the committee is considered a binding agreement with each trial court in the region. (See *CPER* No. 157, pp. 27-29, for a complete summary of the act's provisions.)

Like most other collective bargaining statutes, the TCIELRA gives court interpreters the right to join employee organizations and be represented by those organizations regarding their employment relations. It gives employee organizations representing court interpreters the right to represent its members, imposes an obligation to meet and confer in good faith, and defines the scope of representation in language that parallels the Trial Court Employment Protection and Governance Act. It provides the same protections against discrimination as the TCEPGA and other labor relations statutes in California.

Section 71825 empowers the board to adjudicate unfair practice complaints that allege violations of the

act or any of the rules and regulations adopted by the regional committees. It also establishes a six-month statute of limitations and sets up a tolling mechanism like the TCEPGA when exhaustion of local procedures is mandated.

Court interpreters employed by Solano and Ventura counties are not covered by the TCIELRA. They are governed by the provisions of the TCEPGA.

PERB already has enacted emergency regulations to implement these two statutes. They have been sent to the Office of Administrative Law for approval. PERB General Counsel Robert Thompson told *CPER* that once the permanent regulations are in place, the agency plans to present a workshop to acquaint the newly acquired court employees with the workings of the board. Thompson said he believes the board's enlarged jurisdiction will add 12,000 to 18,000 employees to the agency's oversight. What this means for PERB's workload remains unknown. But Thompson reported that one unfair practice charge already had been filed under the TCEPGA.

Newspapers, Cities, and Unions Tangle Over Disclosure of Salary Info

News organizations in Northern California are battling city officials and labor unions over the right to know just how much city employees are being paid. Citing provisions of the California Public Records Act, the *Oakland Tribune*, the *Contra Costa Times*, and the *San Jose Mercury News* have asked to be provided with the names and salaries of city employees. They claim that the public, which is picking up the payroll tab, is entitled to examine that information.

But the cities of Oakland and San Jose have refused to turn over the data, arguing that it would jeopardize employees' privacy rights. Union leaders have sided with the employers and have voiced concerns that releasing the names of employees along with the salary information could expose workers to harassment or even violence.

It started in May, when the Oakland city council refused the *Oakland Tribune*'s request for salary information concerning approximately 4,000 city workers. City officials got themselves in hot water when they publicly announced that the decision was made in the face of threats that two unions — International Federation of Professional and Technical Employees, Local 21, and Oakland Peace Officers Association — would sue the city to bar release of the wage data. The city had released salary information in the past, so the council's vote flew in the face of its past practice. The city agreed to make public the salary ranges attached to employee classifications and jobs, but it would not release the names of city employees.

In June, the *Contra Costa Times* asked Oakland officials to release the salaries and the names of employees paid in excess of $100,000. When the city refused to divulge this information, the newspaper sued the city.

Routine record requests were met with suspicion, defensiveness, and delays.

At the same time, the paper reported the results of a four-month investigation of public record access in 86 cities, counties, school boards, and special districts, and in 36 police departments. The 20 reporters and editors assigned to the project asked for the statements of public interest of the agency's board. This is an annual statement of economic interest that is required by the Fair Political Practices Act. The reporters also asked to see the employment contract of the agency's top official. Under the Public Records Act, every employment contract between a state or local agency and any public official or public employee is a public record. What the reporters encountered was described in the newspaper as "a wall of silence." The report revealed that rou-

tine public record requests were met with suspicion, defensiveness, and delays.

In August, the *Mercury News* asked the City of San Jose to release the salaries, overtime bonuses, and other perks of employees. The city declined.

In both cases, the cities' legal advisors have pointed to an appellate court ruling issued on April 2, 2003. In that case, Teamsters Local 856 and AFSCME Locals 829 and 2190 obtained a preliminary injunction barring the release of compensation records that disclosed the salaries received by individually identifiable employees working in the cities of Atherton, Belmont, Burlingame, Foster City, and San Carlos. The information was sought by newspapers with circulations in those cities. The court's very brief order finds "a reasonable expectation of privacy in the employees based on the confidentiality policies of the City and a failure to articulate or show the public interest in the disclosure of information linked to individuals."

The act conveys to every person a right to inspect any public record.

But, despite this language, the court's order arose out of a preliminary injunction and did not fully address the merits of the unions' position. What was contemplated was a return to the trial court in order to make a full record responsive to the claims advanced by both sides. Clearly, the court's three-paragraph ruling in no way resolves the complicated legal issue presented in the Oakland and San Jose cases.

The California Public Records Act, which appears at Government Code Secs. 6250 et seq., broadly defines a public record to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." The act conveys to every person a right to inspect any public record.

Exceptions to the statute's disclosure requirements are listed in Sec. 6254 and include such items as records pertaining to pending litigation and employee personnel and medical files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

An agency must justify the withholding of any record by demonstrating that the record in question is exempt under the express provisions of the act or that, on the facts of a particular case, "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

The statute does not allow limitations on access to a public record based on the purpose for which the record is being requested if the information is otherwise subject to disclosure. ✹

Review Granted in Second MMBA Scope Case

The California Supreme Court has granted a petition for review in *Sacramento Police Officers Assn. v. City of Sacramento*. In that case, the Third District Court of Appeal ruled that the city police department was not required to meet and confer with the association before it decided to use retired police officers to boost its ranks while it waited for new recruits to complete their training. The appellate court determined that the department's decision to respond to a shortage of rank-and-file officers by hiring retirees as limited-term appointments was a fundamental policy decision that affected public safety and was outside the bargaining obligation imposed by the Meyers-Milias-Brown Act. (For a complete summary of the Court of Appeal ruling, see *CPER* No. 166, pp. 26-29.)

In the Supreme Court's order, it announced that it was deferring further action in the *Sacramento* case until it decides "a related issue in

Claremont Police Officers Assn. v. City of Claremont." In the *Claremont* case, which the high court took up in January, the Second District Court of Appeal ruled that the city was obligated to meet and confer with the association before it enacted a vehicle stop policy that required officers to record information about the race and ethnicity of persons they detained. The court found that the policy significantly affected the officers' working conditions and was not a fundamental policy outside of the scope of bargaining under the MMBA. (The *Claremont* decision is summarized at *CPER* No. 163, pp. 36-37.)

Since the extent of management's right to act unilaterally was at the heart of both cases, the Supreme Court may be set to add to the understanding of the obligation to bargain under the MMBA. (*Sacramento Police Officers Assn. v. City of Sacramento* [petition for review granted 7-19-04], Supreme Court No. S124395.)

Public Records Act May Trump Penal Code Confidentiality Provisions

Giving a narrow interpretation to its ruling in *San Diego Police Officers Assn. v. City of San Diego Civil Service Commission* (2002) 104 Cal.App.4th 275, 158 CPER 46, the Fourth District Court of Appeal concluded that the County of San Diego Civil Service Commission was not *required* to deny public access to a peace officer's disciplinary appeal. The *San Diego* decision did not reach that issue, the Court of Appeal instructed, and in the present case, there was no actual appeal *hearing* because the disciplinary matter was settled by the parties.

As for the assertion made by Copley Press that the California Public Records Act requires the civil service commission to release the identity of the officer accused of misconduct, the Court of Appeal concluded that the act does not exempt from disclosure information relating to a disciplinary appeal derived from sources other than the peace officer's personnel file. The confidentiality extended to peace officer personnel files by operation of Penal Code Sec. 832.7 "does not cloak information in those records with the mantle of absolute privilege," said the court.

The County of San Diego Civil Service Commission denied the news organization access to an appeal conducted to examine the basis for the dismissal of a deputy sheriff. The commission relied on new interim rules, adopted after the *San Diego* case issued, which provide that if a peace officer has requested a closed appeal hearing, the commission will close the hearing and conceal the identity of the appealing peace officer. Copley Press challenged the validity of the commission's rule and made a request under the California Public Records Act for information related to the deputy's case, including documents setting out the facts surrounding the officer's termination, documents created by the commission in connection with the case, the commission's findings and decisions reached in the matter, and any tape recordings made of the appeal hearing.

After the trial court denied Copley any relief, the civil service commission gave Copley the termination order that set forth the grounds for discipline and an outline of the facts supporting each ground. The commission also gave Copley the stipulated agreement that resolved the officer's appeal. It included the officer's voluntary resignation, his admission to the factual validity of six of the seven causes underlying the discipline, and the sheriff department's agreement to withdraw the termination action against the peace officer and change his exit status to "terminated — resignation by mutual consent." However, the peace officer's identity was redacted from each of the disclosed documents.

The court sidestepped the First Amendment constitutional claim.

Unhappy with that result, Copley sought relief from the Court of Appeal. Citing cases that acknowledge the public's right of access to criminal and civil trials, Copley argued that the right should be extended to a quasi-judicial proceeding invoked by a peace officer. But the appellate court sidestepped the First Amendment constitutional claim and instead focused on state law provisions and its ruling in *San Diego*.

In that case, the court rejected the view expressed in other decisions that the confidentiality provisions in Penal Code Sec. 832.7 apply only to personnel records sought by third parties in connection with civil or criminal proceedings. The *San Diego* ruling went further, finding that Sec. 832.7 rendered peace officer personnel records confidential regardless of the context in which the documents are sought, including appeals that are brought under the Public Safety Officers Procedural Bill of Rights Act. The court instructed that "employing agencies may not freely disclose these records at public disciplinary appeal hearings if the affected officer asserts an objection." But because there was no appeal "hearing" in the present case, the Court of Appeal found the *San Diego* ruling did not control. And, it noted, the issue expressly left open by the *San Diego* court — whether disciplinary appeal hearings *must* be closed to the public unless the peace officer requests an open hearing — was not raised by the record before the court.

The appellate court also addressed Copley's contention that it was entitled to the record of the appeal proceedings under the California Public Records Act. Sections 6254 and 6255 of the CPRA permit nondisclosure if the record is expressly made exempt by another provision of law or if the public interest is better served by not disclosing the record. The court refused to read the confidentiality provision set out in Penal Code Sec. 832.7 as a vehicle for exempting a broad range of information under the guise of Sec. 6254. Section 832.7's confidentiality provision has a fundamental limitation, said the court. It applies only to files maintained by the employing agency of the peace officer. It "does not apply to information about a peace officer the source of which is other than the employing agency's file maintained under the individual's name, even if that information is duplicated in that file." "Therefore," said the court, "the only information subject to section 832.7 and incorporated into section 6254, subdivision (k), is the written material maintained in the peace officer's personnel file or oral testimony that is a recitation from material in that file."

Not all civil service records always must be produced on request.

While the court found that the public records act does not exempt from required disclosure information relating to a disciplinary appeal that comes from sources other than the peace officer's personnel file, it went on to say that not all civil service records always must be produced on request. Public records might be exempt from release by the "catch all" provision when nondisclosure clearly outweighs the public interest served by disclosure. For example, said the court, to the extent that the commission concluded that some or all of the charges levied against the deputy were baseless, the peace officer's legitimate privacy interests might be deemed to outweigh any public interest in their disclosure.

In the court's view, its construction of the interplay between the public records act and Penal Code Sec. 832.7 upholds the public's right to know about the operation of government, "an interest we apprehend becomes even more acute in the context of understanding how and why peace officers are disciplined."

The court concluded:

> We recognize that when the disciplinary appeal entails the introduction of evidence from sources independent of the personnel file, public disclosure of the appeal hearing record pursuant to a CPRA request may encompass the disclosure of information that duplicates information in records meeting Penal Code section 832.8's definitional criteria. However, section 832.7 does not cloak information in those records with the mantle of absolute privilege, but instead contemplates that although the records will retain their confidentiality, the same information derived from independent sources is not imbued with confidentiality.

The court found that Copley was entitled to the information noted in its public records act request, redacted only to the extent that information consists of documents contained in the peace officer's personnel file or testimony that recites from those documents. (*The Copley Press, Inc. v. The Superior Court of San Diego; County of San Diego, RPI* [9-16-04] D042251 [4th Dist.] ___Cal.App.4th.___, 2004 DJDAR 11687.)

State Employment

Post-Termination Resignation Does Not Cut Off Backpay for Due Process Violation

The state employer must shell out six-and-a-half years of backpay for a *Skelly* violation because it failed to honor an agreement to withdraw disciplinary action when an employee resigned in lieu of dismissal. In *Roe v. State Personnel Board*, the Court of Appeal held that a Department of Justice attorney is entitled to backpay from his termination until the State Personnel Board rendered a decision following a hearing on the misconduct charges. But, since the board erroneously decided Roe's resignation was effective and did not rule whether the termination for misconduct was justified, Roe is still due a decision on whether there was cause for his discharge.

We Fired Him, But When?

On August 25, 1992, the Department of Justice mailed Deputy Attorney General Robert Roe a notice of adverse action dismissing him for dishonesty and other charges stemming from his alleged unauthorized removal of two computer printers from his workplace. The effective date of his termination was August 31, 1992.

On August 31, Roe's attorney met with the assistant attorney general. Roe's attorney informed him of the department's failure to give Roe a pre-termination hearing to respond to the charges, as required by *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 27 CPER 37. They scheduled a *Skelly* hearing for September 24. They also discussed several resolutions of the matter that would not involve dismissal.

Roe discovered that the department had not accepted his resignation.

The assistant attorney general warned Roe's counsel that Roe would have to resign by September 24 to avoid discipline.

On September 24, Roe submitted a letter of resignation. His attorney's cover letter explained their understanding that the resignation would terminate the employment relationship and any pending disciplinary proceedings. The department did not respond. In November, Roe discovered that the department had not accepted his resignation and asserted that he was terminated on August 31.

In December, the department amended the notice of adverse action to change Roe's effective termination date from August 31 to September 24. Roe filed an answer alleging he had resigned on September 24 pursuant to an agreement with the department. The department then withdrew its amended notice and claimed that the termination was final on September 14, the last day Roe had to file an answer to the notice. It successfully argued before the State Personnel Board that the board did not have jurisdiction over the matter because Roe had not timely appealed.

Roe I — No Due Process

In Roe's first trip to court, the superior court found that the board erred in denying jurisdiction of the matter. It reinstated Roe based on its finding that the department had terminated him without due process. In 1998, the Court of Appeal agreed that the board had jurisdiction to hear the matter, but it reversed the lower court's judgment. It held the superior court should have directed the board to determine whether there was a due process violation rather than decide the question itself.

At the hearing in 1999, the board's administrative law judge admitted evidence regarding the claims of misconduct, the termination, and the resignation. The ALJ decided that the August 31 termination was invalid because Roe was not provided adequate notice. The ALJ also found that Roe's resignation on September 24 cut off his backpay

and awarded him backpay only from September 1 through 24. The board adopted this decision at its meetings on May 5, 1999, but did not decide whether there was cause for his termination.

Effect of Resignation

Roe went to court again. This time he challenged the board's finding that he resigned on September 24, and its three-week limit on backpay. The superior court overturned the board's finding that the resignation was effective. It reasoned that the department considered the August 31 dismissal in effect at the time Roe resigned. The superior court directed the board to enter an order reinstating Roe and awarding him backpay through April 30, 1999, the date of the ALJ's decision. It also ordered the board to retain jurisdiction over the matter and provide Roe pre-termination due process. Both parties appealed.

The department argued Roe had resigned and was not entitled to reinstatement or backpay after September 24.

On appeal, the department argued Roe had resigned and was not entitled to reinstatement or backpay after September 24. Roe contended his backpay continued after April 30, 1999, because the board never found that there was cause for his dismissal. The appellate court rejected both positions.

The court accepted both the superior court's finding that Roe was terminated on August 31 and the board's decision that the department had violated Roe's right to due process. The usual remedy for a prehearing due process violation is a backpay award from the date of dismissal to the date the violation is corrected. The court framed the issue as whether Roe's resignation following his August 31 termination extinguished his right to backpay after September 24.

The department argued that Government Code Section 19996.1 prevented Roe's reinstatement. That section states that a resignation cannot be set aside unless the employee files a petition within 30 days of the later of either the last day he worked or the date he tendered his resignation. The Court of Appeal rejected this contention, relying on *Lucas v. State of California* (1997) 58 Cal.App.4th 744, 127 CPER 54. In *Lucas*, a terminated employee obtained a service retirement after appealing his termination to the board, but before his hearing. When the state withdrew the disciplinary action, Lucas sought reinstatement. The Court of Appeal in *Lucas* held that Sec. 19996.1 and Sec. 19140, which allows reinstatement after resignation or retirement, were inapplicable because Lucas was separated by termination rather than by retirement or resignation. Even if the termination were improper because of the due process violations Lucas claimed, the termination was the cause of separation from employment, not Lucas' retirement. Similarly, the *Roe* court reasoned, Roe resigned only because of the dismissal, and Sec. 19996.1 did not bar his reinstatement.

The court also turned aside the department's argument that a resignation waives any right to complain of procedural errors in the course of dismissal and its reliance on *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 88X CPER 6. The *Coleman* court considered the process due to an employee whose extended absence without leave is deemed an automatic resignation by statute. But, because the *Coleman* court held that the AWOL employee, not the state, severs her employment relationship under the statute, the *Roe* court found *Coleman* inapposite.

Roe resigned only because of the dismissal, and Sec. 19996.1 did not bar his reinstatement.

At this stage of the case, the department argued that Roe's resignation was effective, even if the department did

not expressly accept it. Again pointing to the *Lucas* decision, the *Roe* court rejected the department's faulty premise that once the August 31 termination was found improper, the September 24 resignation became effective and controlling. To the contrary, the court reasoned, although improper, the August 31 termination was in effect at the time Roe submitted his resignation and remained in effect until the board set it aside in May 1999. The court held the board erred in its conclusion that the September resignation extinguished Roe's right to backpay or reinstatement.

Due Process in 1999

The court turned to the determination of the backpay period. The department argued that Roe waived the procedural violations on September 24 when he resigned rather than respond to the charges at the scheduled *Skelly* hearing. In the alternative, the department argued that backpay should end on the date the due process violation was remedied by the board's first decision in February 1994. But Roe contended that the violation had never been remedied because there had never been a determination of whether the department had cause to terminate him.

The court reviewed the decision in *Barber v. State Personnel Board* (1976) 18 Cal.3d 395, 32 CPER 76. In *Barber*, a state employee was terminated without an opportunity to address the charges against him, but the board ultimately upheld his dismissal after a post-termination hearing. The Supreme Court observed that the due process violation was not remedied until the employee had the opportunity to present his arguments against the charges. The court awarded backpay to Barber from the time of his termination until the board had rendered a decision sustaining the dismissal.

Because the department induced Roe to believe that tendering his resignation would end the disciplinary proceeding against him, the *Roe* court dismissed the department's argument that Roe waived his right to a *Skelly* hearing on September 24. It disagreed that Roe had a reasonable opportunity to respond to the accusations by September 24, relying on the *Barber* court's observation that a response must be "permitted to be made" and available to be considered before the termination. On September 24, the department already had violated Roe's *Skelly* rights. The court also turned aside the department's argument that Roe had manifested the unequivocal intent not to return to work when he resigned. As in *Barber*, the court observed, Roe was separated from employment by his termination, not his later resignation.

The court decided that the proper end date for backpay was the date the board issued a decision after a hearing on the misconduct charges. The evidence at the hearing leading to the first board decision concerned only the issue of board jurisdiction, the court observed, not any evidence regarding the facts underlying the termination. The department's reliance on *Ng v. State*

Personnel Board (1977) 68 Cal.App.3d 600, was misplaced, the court said, because the *Ng* court found that the first of two board hearings provided the employee the opportunity to respond required by *Barber.* In Roe's case, by contrast, he was not given an opportunity to address the misconduct charges until the second board hearing.

The court also was not persuaded by Roe's argument that only a board decision that he was terminated for cause could cut off backpay. "[T]he key to curing the *Skelly* violation is providing the employee an opportunity to respond to the accusations, not the nature of the eventual decision," the court said. The pre-termination procedures minimize the risk of error in the initial decision, it continued, but "*Skelly* does not guarantee the propriety of the ultimate decision." Although the second board decision that Roe had resigned was in error, it was made after a hearing on the misconduct charges and was not a violation of his due process rights. The court awarded backpay from September 1, 1992, through May 5, 1999, the date the board adopted the ALJ's decision.

In an unpublished portion of the decision, the court decided that Roe was not entitled to reinstatement before a board decision on the question of whether there was cause to terminate him. It observed that the board had conducted a full hearing and made findings of fact, and should be given the opportunity to determine in the first instance whether the record supports Roe's dismissal. The appellate court directed the superior court to order the board to determine the amount of backpay due to Roe and to make a decision whether Roe's dismissal was for good cause. (*Roe v. State Personnel Board* [7-22-04] Nos. A098067, A098624 [1st Dist.] 120 Cal.App.4th 1029, 2004 DJDAR 8957 [opin. modified and reh. den., 2004 DJDAR 10484].)

Addendum to CAHP Contract Will Affect Correctional Officers' Pay

The state and the California Association of Highway Patrolmen have agreed on an addendum to their 2001-06 contract that will save the state about $14 million in wage payments in the current year and avoid another $18 million in premium pay for meal periods in 2005-06. Because the state's agreement with the California Correctional Peace Officers Association ties correctional officers' pay to that of California Highway Patrol officers, the premium pay change may affect the salary increase due correctional officers in 2005-06.

Last summer, the CAHP was the first employee organization to agree to a one-year deferral of a portion of a 7.5 percent negotiated salary increase in return for an additional paid personal-leave day each month for 12 months. The mandatory paid-leave program now has been extended for another six months through December 31, 2004. The 5 percent pay deferral for 6,000 officers will save the state approximately $14 million in 2004-05.

CAHP also agreed to give up premium pay for officers' half-hour lunches. Wage and hour laws require compensation for meal periods if employees must remain on duty during lunch. Since 1999, officers had been compensated at regular pay rates for lunch periods. However, last year, just before the recall election, CAHP forced the state back to the bargaining table under its "most favored nations" clause when other unions garnered an agreement that the state would pick up employee retirement contributions. Because the CAHP contract already contained a retirement contribution pickup, they negotiated an equivalent benefit of one-and-a-half times the rate of pay for meal periods.

The CAHP gave up the premium lunch pay in return for extra holiday and vacation leave.

Beginning July 1, 2005, the CAHP gave up the premium lunch pay in re-

turn for extra holiday and vacation leave. Until now, officers received only 112 hours of leave credit for each holiday, about eight-and-a-half hours for each of the 13 state holidays they work. Lynelle Jolley, spokesperson for the Department of Personnel Administration, explained to *CPER* that the arrangement was tantamount to being paid straight time for working on holidays. Officers will receive an additional four hours of holiday leave credit plus an additional hour of vacation leave every month. The new agreement adds a total of 52 hours of holiday leave and 12 vacation hours per year. The elimination of premium lunch-period pay will save the state about $19 million in 2005-06. The savings will be partially offset by pay to employees who opt to cash out leave, but DPA estimates that cashing out all leave would cost only about $1 million annually.

Critics charge that the extra leave will cost the state more in the long run because the state likely will need to hire more officers or pay overtime to other officers to cover for those on leave. Jolley asserts that these expenses all have been factored into the costs.

Because the decrease to regular pay for lunch periods will affect CHP officers' base salaries, the addendum will affect the calculation of salary increases for correctional officers represented by CCPOA. The association's agreement with the state requires correctional officers' salaries to come within $660 of the monthly salaries for equivalent CHP positions. CHP officers' salaries are calculated by comparison to the salaries of five large local law enforcement agencies. In accordance with CCPOA's recent contract modification, correctional officers were due to receive a 5 percent increase on July 1, 2005. DPA spokesperson Jolley told *CPER* that the department has not assessed yet how much the CAHP addendum will affect 2005-06 compensation for correctional officers.

Tinkering With the CCPOA Contract Modification

Correctional officers overwhelmingly ratified the July modification to their contract, but the legislature barely approved it. In July, the California Correctional Peace Officers Association agreed to delay pay raises in return for several items, such as additional paid leave for union chapter presidents. (See story in *CPER* No. 167, pp. 53-55.) In the current climate of increased scrutiny of state corrections, the media, the legislature, the attorney general's office, and even a federal judge examined the contract changes very carefully. United States District Court Judge Thelton Henderson, who has been presiding over a 10-year prisoner abuse case, did not criticize any particular provision of the deal, but he sent a letter to Governor Schwarzenegger threatening to take over the state prison system because the contract modification ceded too much management power to the CCPOA.

Coincidentally, just several days later, the governor's California Performance Review team issued a report urging reform of the prison system. (See story in *CPER* No. 167, pp. 57-60.) The report contained a section criticizing the amount of control over traditional management decisions that the labor contract gave to the union and employees. One of the union contract provisions that the CPR insisted should change is the ability of correctional officers to choose their assignments by exercising seniority when positions become vacant. Critics noted that the governor's new deal with the CCPOA expanded that seniority right to supervisors. The agreement also restricted management's ability to lay off correctional officers.

Most bothersome to the attorney general's office and legislators was a provision allowing CCPOA access to videotapes of violent incidents between inmates and guards inside the prisons. The attorney general's office feared the release of videotapes could tip off officers to confidential criminal investigations. Based on recent testimony that whistleblowers suffer retaliation from prison guards, legislators also worried that early release of videotapes could chill complaints about abusive officers.

In the end, the legislature passed an MOU bill that approved the CCPOA addendum but modified the

video access provision. The bill subjects CCPOA's access to the provisions of the California Public Records Act, which contains restrictions on disclosure of information that would jeopardize the safety of witnesses or the successful completion of a law enforcement investigation. CCPOA will have the same rights of access to videotapes as the media or other members of the public.

The legislature chose to sidestep another tricky provision of the governor's agreement with CCPOA. The tentative agreement had proposed binding the legislature to make appropriations in future years for promised salaries, unlike most MOU bills that make raises contingent on legislative appropriations for salary increases. (See story in *CPER* No. 167, pp. 53-55.) The legislature duly appropriated money "from any appropriate fund sources" for the economic items promised for the remainder of the contract. But it followed up the appropriation with the following warning:

> It is the intent of the Legislature that the appropriation made by this section shall not be construed to set precedent for the funding of the provisions of any future memorandum of understanding entered into pursuant to Sections 3517 and 3517.5 of the Government Code.

Time will tell whether other unions will be strong enough to squeeze such a guarantee from the governor and the legislature.

Civil Service Law Requires Interactive Process With Asthmatic Employee Before Medical Demotion

The California Department of Corrections improperly demoted an asthmatic employee under Government Code Sec. 19253.5 because it did not engage first in an interactive process to obtain "pertinent information" from the employee about her potential reassignment, the Court of Appeal has ruled. It also held that the definition of "disability" contained in Sec. 19231 at the time of the demotion applied in the case, rather than the standard that appeared in the statute at the time the State Personnel Board heard the case. Because the employee's and SPB's briefs did not adequately address the issue, the court refused to resolve the question whether SPB should have considered the extent to which medication or other measures mitigated the disabling effects of asthma in determining whether the employee qualified as disabled under the statute.

Air Quality Issues

In 1993, Dianna Henning was hired as an institution artist/facilitator for an Arts-in-Corrections program. She had had asthma all her life. The art studio was contained in the same building as a prison dry-cleaning facility but was separated by a solid wall and had a different air filtration system.

In December 1997, perchloroethylene spilled in the dry-cleaning facility and was cleaned up immediately. Henning complained that the fumes triggered a serious asthma attack. She filed a workers' compensation claim. By mid-February, her asthma had worsened, and her doctor excused her from work for several weeks. He released her to return to work in March on the condition that she not work near the dry-cleaning facility. CDC temporarily assigned her to the mailroom.

Henning did not like the mailroom assignment. She asked CDC to order a high-efficiency filter for her office, to let her bring in her own filter in the interim, and to switch her office with a separate computer room within the art facility. CDC granted her requests. The department ordered the air filter in April, but it did not arrive until May. Henning never moved into the computer room.

In April, CDC implemented air-quality improvements suggested by an industrial hygienist as part of the workers' compensation case. On April 29, the hygienist reported that the studio's air met the safety standards of the California Occupational Safety and Health Act. Henning returned to the studio on May 4, but left again two days later, claiming she felt sick. She worked from home for a while, but did not return to work after CDC told her she could not work from home any longer. CDC discontinued the arts program due to her absence.

In July, CDC sent Henning an "options" letter. Henning was told she could elect resignation, service retirement, disability retirement, or demotion. She could request reasonable accommodation or leave. If she remained unable to work in her present position, CDC told her it would pursue a medical demotion. The letter encouraged her to participate in the medical demotion process. CDC said it would provide Henning with a list of vacant suitable jobs to review and would make an effort to place her in the highest-paying job in which she was interested for which she was qualified, as long as it was not promotional and met her medical restrictions. If she did not participate in the process, the department would demote her to the vacant position for which she was qualified that paid the closest to her current salary.

Henning filed a request for reasonable accommodation. She suggested she could work in a satellite office or move the art program to another unit. CDC did not send her a list of vacant positions because its work coordinator thought she had chosen to ask for reasonable accommodation and did not want to participate in the medical demotion process.

In February 1999, before responding to her accommodation request, the work coordinator decided to medically demote Henning to business services officer at the same correctional facility at a slightly lower salary. She settled on this position without consulting Henning or asking if Henning wanted to move to another correctional facility. In March, Henning's doctor released her to work in the administration building, but she did not return. In April, he excused her from work until July 1999. On the same day, CDC sent Henning a letter denying her request for reasonable accommodation because a satellite office would limit her job functions, and the department did not have enough other space for a satellite office or art studio. In addition, Cal-OSHA had found that her work area was safe and healthy, and a medical report stated her asthma was not of an industrial nature and would exist regardless of where she worked.

Henning appealed the medical demotion and the denial of accommodation. The SPB concluded that she was a qualified individual with a disability because her asthma "limited" her ability to participate in a major life activity. While it found that CDC was not required to grant the two accommodations she requested, the SPB held that the department was obligated to engage in an interactive process with her. It found that CDC had ceased to interact with her once she filed her request for reasonable accommodation. SPB also interpreted the medical demotion statute to require an interactive process. SPB ordered CDC to engage in the interactive process and revoked the medical demotion.

CDC petitioned the trial court to review the SPB decision. The trial court sided with CDC's argument that SPB had used the wrong disability defini-

tion and failed to consider mitigating measures when determining whether Henning qualified as disabled. But the trial court agreed with Henning that the language of the medical demotion statute that mandated CDC to consider the medical report "and other pertinent information" required an interactive process. The court ordered the SPB to rewrite the decision in accordance with its rulings on the law. Both CDC and Henning appealed.

Interactive Process Required

CDC contended that SPB had added an interactive process requirement to the medical demotion law that was not contained in the language of the statute. The Court of Appeal first reiterated the rule that it would respect, but not necessarily defer to, SPB's interpretations of the civil service laws. However, in this case it gave great weight to SPB's interpretation because the board is empowered to enforce the civil service laws, the board has expertise in the area, and the record reflected SPB's careful consideration.

Section 19253.5 requires the state employer to consider "the conclusions of the medical examination and other pertinent information" before determining that an employee is unable to perform the duties of his own position and deciding to transfer or demote the employee. The appellate court found that the SPB reasonably interpreted the phrase "other pertinent information" as an affirmative requirement that the employer seek out the employee's views, not just consider unsolicited input from the employee. The SPB had read Sec. 19253.5 as imposing an affirmative obligation on an employer to minimize the impact of a medical disability on an employee's job status. The court found the SPB's interpretation within the scope of the language of the statute.

The court rejected CDC's assertion that a principle of statutory construction ruled out an interpretation that required consideration of the employee's thoughts. A general phrase that follows a list of items normally is interpreted to include only items like those in the list. But the court pointed out that Sec. 19253.5 does not contain a list of items, only "conclusions of the medical examination." Besides, said the court, CDC already conceded it would have to consider the employee's statements whether she was able to perform the job.

"We need not decide whether the term 'interactive process' must have identical meaning in all contexts."

CDC argued that, because the term "interactive process" is used in the Fair Employment and Housing Act, but not in Sec. 19253.5, the legislature did not intend to require an interactive process. The court responded, "insofar as the term generically expresses the principle of eliciting an employee's views, it is not a patented concept. We need not decide whether the term 'interactive process' must have identical meaning in all employment contexts. Whatever the parameters of 'interactive process,' the principle of engaging the employee was clearly violated here."

The court also turned aside the CDC's analogy to *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, in which the court held that SPB had improperly created a hybrid civil service classification and enlarged the statute when it decided medically demoted employees could be reinstated after a "medical probationary" period, rather than after a regular civil service probationary period. Here, SPB had not overstepped its authority. Nor did CDC's reading of a precedential SPB decision, *In re Manriquez*, which first discussed the advisability of an interactive process prior to medical demotion, sway the court.

The court also rejected the contention that this case was governed by subdivision (e) of Sec. 19253.5, which allows the employer to base its decision on statements or medical information submitted by the employee, rather than on an examination by an employer-designated doctor. Subdivision (e) does not create a separate procedure, the court said; it merely allows the employer to act without ordering its own medical examination.

In an unpublished section of the opinion, the court refused to reverse the SPB decision that CDC had failed to engage adequately in the interactive process.

Amended Definition Not Retroactive

In a cross-appeal, Henning argued that the trial court had erred in deciding that SPB used the wrong standard for determining whether Henning met Sec. 19231's definition of disabled. SPB applied the test in effect when it heard the case in 2001. CDC argued that SPB should have used the definition in the statute at the time it denied Henning's request for accommodation. Because this issue involved application of general legal principles of retroactivity rather than construction of a statute within SPB's area of expertise, the court did not defer to SPB's ruling. The court reiterated the rule that statutes are not to be applied retroactively unless it is clear the legislature intended a retroactive change in the law.

At the time the department denied Henning's accommodation requests, the statute defined disability as an impairment that "substantially limits" a major life activity. In 2000, the statute was amended to agree with the FEHA, which defines a disability as an impairment that "limits" a major life activity. Henning analogized to *Colmenares v. Braemar Country Club* (2003) 29 Cal.4th 1019, 159 CPER 52, which held that the 2000 amendments to the FEHA did not change the law, but only clarified the definition of "disability."

The *Henning* court distinguished the history of the FEHA from the prior versions of Sec. 19231. As explained in *Colmenares*, the FEHA's test for disability was always measured by the term "limits," not "substantially limits." When the FEHA was amended in 1992, the legislature did not use "substantially limits" in the definition of disability. The legislature in 1992 also conformed non-FEHA definitions of disability, such as Sec. 19231, to the federal standard of "substantially limits," although it retained the "limits" standard of the FEHA. In 2000, the *Colmenares* court said, the legislature standardized the definitions in other state civil rights laws to conform to the "limits" test of the FEHA. Unlike the FEHA amendment, therefore, the change in the language of Sec. 19231 was a change in law that must be applied prospectively.

The Henning *court distinguished the history of the FEHA from the prior versions of Sec. 19231.*

SPB also contended that it applied the definition from the law that provides the most protection for the employee because of the civil service law policy expressed in Sec. 19702. Section 19702 says the federal definition of disability prevails over Sec. 19702's definition if the federal definition is more protective. But the *Henning* court emphasized that the broad protective policy of the civil service law did not authorize SPB to rewrite the express language of Sec. 19231. Nor was it clear that Sec. 19702 applied to this case. The court also rejected an argument that Sec. 18675, which requires that hearing officers and investigators consider "current laws" applicable to the civil service, authorized application of the "limits" test that had not existed at the time CDC denied Henning's accommodation request.

The court refused to determine whether Henning's disability met the "substantially limits" test because there was an unresolved question whether measures that mitigate the disability should be considered when applying the test. As Henning and SPB had not adequately briefed the issue of mitigating measures, the court found they had forfeited the opportunity to challenge the trial court's ruling that mitigating measures should be considered.

The court affirmed the trial court's decision. (*California Department of Corrections v. State Personnel Board (Henning)* [9-3-04] C044329 [3d Dist], partially certified for publication, __ Cal.App.4th __, 2004 DJDAR 11043.)

Governor Signs Bill to Curb 'Triple Dipping'

Some state retirees used to go back to work for the state for the maximum of 960 hours allowed under the retirement laws, and then collect unemployment insurance benefits, all while receiving their retirement benefits. They will no longer be able to "triple dip" every year now that the governor has signed S.B. 1439 (Speier, D-San Francisco/San Mateo).

Senate Bill 1439 now prohibits employment of a retired annuitant if he or she has collected unemployment benefits during the previous 12 months after employment as a retired annuitant for the same state employer.

As originally written, the bill would have prohibited collection of unemployment benefits by retired annuitants. But that provision would have run afoul of federal law that requires the state to treat all unemployment claimants the same and would have resulted in a loss of federal money for unemployment benefits. The enacted bill places the onus on managers to prevent the abuse from occurring in successive years.

The bill places the focus on managers to prevent the abuse.

Expanded Scope for State Doctors, Notice to Supervisory Employees, But No Interest Arb for Firefighters

Current law authorizes a retired member of the Public Employees Retirement System to work for a state agency or other system employer for up to 960 days in a calendar year, without reinstatement from retirement or interruption of retirement benefits, as long as the retiree is needed during an emergency to prevent stoppage of public business or because the retired employee "has skills needed in performing work of limited duration." However, in the eyes of the Department of Personnel Administration, some employees have abused this right by collecting unemployment benefits after working for the maximum 960 hours. The Employment Development Department, which administers unemployment insurance, has had about 170 retired annuitants work for the department and then collect unemployment benefits. Legislative intent declarations in S.B. 1439 termed this practice "inappropriate and a violation of the public trust."

State doctors represented by the Union of American Physicians and Dentists faced a bureaucratic bottleneck if they wanted to use their annual continuing medical education stipends for conferences in another state. By the time they received prior approval from the governor and Department of Finance for the traveling expenses, the conference was over. State law requires physicians to take classes, but conferences on specialized areas of medicine often occur outside of California. In the past, the Department of Personnel Administration had told the UAPD they could not negotiate over the pre-approval requirement that is contained in the Government Code. So this year, UAPD asked Assembly Member Gloria Negrete-McLeod (D-Chino) to amend the Dills Act to allow negotiation about travel expenses.

A.B. 2681, which the governor signed last month, adds Sec. 3522 to the act. In addition to authorizing physicians in any state bargaining unit to negotiate for preauthorized travel, the bill states that a memorandum of understanding on the subject will meet the statutory requirements for preapproval of out-of-state travel reimbursements. Of course, MOU provisions that require expenditures are not effective until funds are appropriated by the legislature.

Supervisors

After whittling down their requests for changes to the Bill of Rights for State Excluded Employees, the Asso-

ciation of California State Supervisors, which represents managers, supervisors, and confidential employees in state government, finally succeeded in making amendments. But the enhancements are limited largely to supervisory employees. A.B. 1875 (Maldonado, R-San Luis Obispo) adds a requirement

Enhancements are limited largely to supervisory employees.

that the state employer give advance notice to supervisory organizations of a proposed policy or course of action that will directly affect supervisory employees. It also must give them an opportunity to meet and confer with the employer "to discuss alternative means of achieving objectives." If there is an emergency, the notice is required "at the earliest practical time." The bill emphasizes that final determinations of policy and courses of action remain the sole responsibility of the employer.

For the past two years, ACSS has tried unsuccessfully to expand the Bill of Rights to give the same rights to managerial and confidential employees that supervisors have — rights to join or refuse to join employee organizations, to be free from interference with the exercise of collective bargaining rights, to meet and confer on subjects within the scope of bargaining, and to released time under the current Bill of Rights. Two years in a row, Governor Davis vetoed the ACSS bills. A.B. 1875 dropped proposals to expand rights to other excluded employees.

Firefighters

For the second time in two years, a bill to grant interest arbitration to the state firefighters unit has been vetoed by the governor. A.B. 1362 (Wiggins, D-Santa Rosa) would have added state firefighters to the interest arbitration scheme that was made available to local police and fire unions when former Governor Davis signed S.B. 440 last year. (See story in *CPER* No.163, pp. 33-34.) Governor Schwarzenegger's veto message praises firefighters but refuses to "surrender control of budget impacts to an outside arbitrator." Perhaps unaware of the standards of interest arbitration used by arbitrators, the governor states his belief that an arbitrator "would have authority to mandate cost increases without any regard to revenue sources or streams." He also reiterates the concerns of some practitioners that, with access to interest arbitration, the parties would bargain solely to "position" themselves for arbitration rather than to strive to reach agreement.

Higher Education

Recognition Agreement Averts CSU Student Employee Strike

Although the lazy days of summer may have helped avert a strike at the California State University, labor relations never took a vacation. During final examinations last spring, the California Alliance of Academic Student Employees/United Auto Workers held a strike vote within a newly organized unit of student employees. CAASE/UAW members authorized the strike to protest CSU's objection to the proposed unit, which included 6,000 teaching associates, graduate assistants, tutors, and graders. (See CPER No. 166, at pp. 42-44.) Throughout the summer, CAASE/UAW leaders kept student employees informed of the ups and downs of the recognition struggle and warned that they should be prepared for a strike in the fall.

But the strike will not be necessary. In mid-August, CSU agreed to recognize a modified unit of student employees, and the Public Employment Relations Board certified CAASE/UAW as exclusive representative of the revised unit. However, the UAW still faces opposition from other unions representing employees at the university and has agreed to hold CSU harmless for monetary remedies if any employee or union successfully challenges the UAW's collection of agency fees on the basis of an inappropriate unit description. Eager to prevent PERB from revisiting student employee representation rights in light of a recent National Labor Relations Board decision in *Brown University* (2004) 342 NLRB No. 42, the UAW unsuccessfully invoked union solidarity to persuade the other unions to drop their unit clarification petitions.

A new classification contains only students whose grading, tutoring, or instruction constitutes the majority of their work hours.

Recognition Agreement

CSU objected to the unit in part because, it contended, some student tutors and graders also perform work that would not fall within the jurisdiction of the UAW. To meet this concern, the agreed statewide unit is composed of graduate assistants, teaching associates, and a new classification of instructional student assistants that contains only students whose grading, tutoring, or instruction constitutes the majority of their work hours in a department. If a student is employed by more than one department, each appointment is classified separately. Once classified as an instructional student assistant in a department, the student cannot be reclassified for the duration of the academic term.

The UAW agreed to disclaim interest in any teaching associates or student employees whom PERB rules properly belong in the units represented by the California Faculty Association, which represents professors and lecturers, or the Academic Professionals of California, which represents student services workers. Each of these employee organizations filed a unit clarification petition claiming that some teaching associates or student assistants perform work within its jurisdiction. PERB already has dismissed a similar petition filed by the California State Employees Association. If PERB's ruling on any of the petitions is adverse to the UAW, and agency fee challenges result, the UAW will reimburse the university for any monetary remedies (but not attorneys' fees or costs) that CSU is required to pay.

Despite UAW estimates that there will be nearly 6,000 student employees in the unit, PERB found the modified unit decreased in size by about 1,500 student assistants. Therefore, PERB verified support for the UAW within the revised unit before certifying the union as exclusive representative. The

last hurdles for CAASE/UAW are now the clarification petitions filed by other employee organizations.

Coalition of Graduate Employee Unions Petitions CFA

CFA Communications Director Alice Sunshine told *CPER* that the UAW organizing drive brought to a head a longstanding dispute with CSU over graduate students who teach classes not required by their degree program. CFA contends these students are lecturers in the faculty bargaining unit even if they are teaching a course in their discipline. CFA has no interest in representing students who teach a course because it is required by their degree program. In 1991, CFA and CSU reached a sideletter agreement that excluded from the faculty unit any temporary teacher whose teaching was solely and exclusively dependent on his or her status as a degree-seeking student in the department in which he or she teaches. A basis for the agreement cited in the sideletter is that such graduate student teachers primarily are students rather than employees of the university. CFA President John Travis claims that, since 1991, CFA has protested CSU's classification of all students as teaching associates excluded from the faculty unit.

CFA's petition to clarify the unit was dismissed by PERB's regional director early in the summer. A month later, student employee unions suffered a setback to organizing in private sector educational institutions. The National Labor Relations Board overturned *New York University* (2000) 332 NLRB 1205, a four-year-old decision that allowed graduate students to organize. In *Brown University*, the NLRB returned to the view that teaching and research assistants are primarily students and therefore are not employees under the National Labor Relations Act.

Graduate student employee unions throughout the country withdrew matters pending before public labor relations boards in the various states to avoid more decisions adverse to student employee organizing. At the annual conference of the Coalition of Graduate Employee Unions, 95 percent of the delegates, including those from CFA affiliates such as the National Education Association and the Service Employees International Union, signed a "Solidarity Petition" asking CFA not to appeal the regional director's decision. In addition to mentioning the *Brown University* case, the petition emphasized that inclusion of graduate students in the CFA unit would place them in the same group as the faculty who supervise them. Nevertheless, in August, CFA appealed to the full board the regional director's decision that teaching associates are not in the faculty bargaining unit.

CFA has no interest in representing students who teach a course that is required by their degree program.

Also pending is the APC petition to classify appropriately the student employees who perform the student services work within its jurisdiction or to add the student assistant classification to the unit represented by the APC. PERB will hold a hearing on the matter this fall.

CSU Assistant Vice Chancellor for Human Resources Sam Strafaci told *CPER* that CSU has decided "it would not be fruitful to replow the ground" by challenging academic student employee organizing on the basis of *Brown University*. In *Regents of the University of California v. Public Employment Relations Board* (1986) 41 Cal.3d 601, 69 CPER 56, a case involving medical student interns and residents, the California Supreme Court found that the legislature did not intend to incorporate NLRB precedent when it passed the Higher Education Employer-Employee Relations Act. HEERA includes students as employees when "the services they provide are unrelated to their educational objectives" or when their educational objectives are subordinate to the services they perform and coverage as employees would further the purposes of the act. Asked whether the distinction CFA seeks to draw between teaching required by a student's degree program and other student teaching calls into question the status of some teaching associates as employees under the act,

UAW representative Mike Miller points out that PERB has found University of California teaching associates covered by HEERA despite the fact some were required to teach to obtain their degree. ❁

CSU and CSEA Agree to New Salary Structure, But No Money

Reopener bargaining between the California State University and the California State Employees Association concluded in August with a mediated agreement that maintains employees' spending power but postpones any wage gains. CSEA, which represents about 16,000 employees in four units, began negotiations looking for a salary increase and a golden handshake. But it came away with neither. As bargaining dragged on for more than a year, the parties agreed to extend the duration of the 2002-05 contract through June 30, 2006, and to reopen negotiations in 2005, but only on the amount of compensation for 2005-06. By that time, CSEA hopes there will be money to implement the new service-based salary program.

Salary programs have not enabled most employees to progress through pay ranges.

Multiple Salary Programs

In the past eight years, the contracts covering CSU's health care, operations, clerical/administrative, and technical support employees have contained a variety of salary programs. In addition to general salary increases, prior agreements have included provisions for merit salary increases for satisfactory or better evaluations, market salary adjustments, performance-based payments and/or bonuses for superior performance, and in-range progressions for improved skills. Whether any salary program resulted in a pay increase to employees depended on the parties' negotiations over how to distribute money from a compensation pool that is determined mainly by the percentage increase in CSU's annual state funding. A service-based salary increase structure that was financed out of salary savings from retirements and resignations, rather than increases in state funding, has not existed since 1996.

CSEA complained that the myriad of salary programs the parties implemented have not enabled most employees to progress significantly through pay ranges established in 1996, particularly since there has been little money to increase compensation over the last several years. At the beginning of negotiations in the spring of 2003, it sought improvements in the merit salary increase and in-range progression programs. In addition, the union sought a 3 percent general salary increase for the 2003-04 year, since the California Faculty Association had negotiated 2.64 percent raises for 2003-04 and 2004-05, and the State Employee Trades Council had garnered a 2 percent pay boost for 2003-04.

Mid-year cuts to CSU's funding led CSEA to change its emphasis.

The university, however, had a different plan. It offered a retirement incentive of two years' service credit if CSEA would drop contract language on evaluation-based merit salary increases and parking, and abandon its demands for general salary increases and rural health care stipends.

Mid-year cuts to CSU's funding led CSEA to change its emphasis on salary demands and to focus instead on the retirement incentive and retention of current benefit levels. But in January, just after promising to seek the governor's approval for a golden handshake for the faculty, CSU withdrew its offer to seek a retirement incentive for

support employees, claiming there would be insufficient salary savings to warrant the program. Assistant Vice Chancellor for Human Relations Sam Strafaci told *CPER* that the university often must increase pay to replace employees such as information technology workers.

Although the parties had reached conceptual agreement on most issues and CSEA had agreed to refer study of the salary increase programs to a labor-management committee, the parties' differences on the golden handshake led CSEA to declare impasse in May. Despite several mediation sessions, the retirement incentive remained an intractable issue. In mid-July, however, with assistance from senior officials within CSU, the parties were persuaded to reenter discussions.

The resulting agreement contains increased pay ranges for employees and a new service-based salary program. The maximum salary in pay ranges for all classifications will be set at least 50 percent above the minimum salary rate in the range. An employee can progress 60 percent of the way through the range with service-based salary increases but must earn merit increases or obtain in-range progression awards to progress beyond the service-based salary increase maximum. In ranges where maximum salaries are greater than 50 percent higher than minimum salaries, the service-based salary increase maximum will be set at the midpoint of the range.

Service-based salary increases are not automatic. An appropriate administrator must find that an employee's job performance is satisfactory or above for the employee to receive the increase. In making the determination, the administrator must review the employee's personnel file. The employee has a right to protest a denial to the administrator, who may reverse the denial.

Like the other salary programs, however, funding for the service-based increases is subject to negotiations and must come from the compensation pool, which is dependent on increases in state funding for CSU. The union's ultimate goal in future negotiations is to obtain funded annual service-based step increases for employees with satisfactory performance.

No Escape Clause

The contract contains a provision that allows CSU to refuse to implement an economic term if the legislature has appropriated less than the amount necessary to fund that item. The university has used this provision at least twice since 1982 to renege on salary agreements. Wary of this contingency during the current state budget crisis, CSEA extracted an agreement not to invoke the provision during the 2003-04, 2004-05, and 2005-06 years. Other terms that lock in current benefits and conditions for 2003-04 and 2004-05 are:

- Maintenance of the same level of medical, dental, and vision benefits;
- No increases in parking fees until reopener negotiations;
- Continuance of the same or equivalent employee assistance programs at each campus;
- Payment of a rural health care stipend of $500 for employees in designated zip codes who are not enrolled in a health maintenance organization.

The parties also agreed to simplify discrimination and whistleblower complaint procedures by deleting alternatives in the contract and instructing employees to file complaints through the processes established in existing CSU executive orders.

EAP Not Within HEERA's Scope of Bargaining

CSEA was able to obtain language maintaining employee assistance programs at its various campuses despite a recent Public Employment Relations Board ruling that voluntary, confidential, and free EAP programs are not within the scope of bargaining under the Higher Education Employer-Employee Relations Act. (See *Academic Professionals of California v. Trustees of the California State University* in the PERB Log, p.101.)

New language specifies that the existing 30 days of maternity/paternity/adoption leave normally will be taken in daily increments that shall be consecutive unless mutually agreed otherwise by the employee and the appropriate administrator.

A sideletter agreement clarifies that the union is entitled to transmit official communications by email in accordance with an arbitration decision won by the California Faculty Association. The award specifies that CFA may send union communications through the all-faculty email list.

The parties agreed to study several issues through a labor-management committee. Three items on the agenda will be transportation incentive programs, the tax implications of various benefit and salary programs, and standardization of merit salary increases for employees with the same overall performance ratings. Reports of the committee will be used to develop proposals for reopener bargaining in 2005 and full contract bargaining in 2006.

Union-Sponsored Bills Vetoed

Governor Schwarzenegger vetoed three bills sponsored by unions that represent employees at the California State University, dismissing two of them as "unnecessary."

The California State Employees Association, which represents clerical, operational, health care, and technical support employees at CSU, asked Alan Lowenthal (D-San Pedro) to sponsor A.B. 2849. The bill would have increased the membership of the Board of Trustees of the university to include a non-faculty employee covered by the Higher Education Employer-Employee Relations Act. The board already has positions designated for one faculty member, two students, and an alumnus. The employee member would not have been allowed to sit on any subcommittee relating to collective bargaining, but CSU opposed the bill. The governor vetoed the bill after pointing out that he is authorized to appoint 16 members to the board and is not prevented from appointing a non-faculty employee.

The California Faculty Association, which represents faculty at CSU, aimed a bill at both the CSU board and the Board of Regents of the University of California. The two boards have a habit of scheduling their meetings on overlapping days every two months. CFA contended that A.B. 2339 (Negrete-McLeod, D-Chino) was necessary because four ex-officio members serve on both boards — the governor, lieutenant-governor, speaker of the Assembly, and superintendent of public instruction — and have trouble attending both meetings. There was no opposition to the bill. The governor's veto message states, "I see no reason why a bill needs to be enacted into law that dictates the coordination of meeting schedules."

CSEA also sponsored a bill that would have amended the California Whistleblower Protection Act to mandate that CSU hire an independent investigator to examine complaints of retaliation for reporting improper governmental activities. CSU opposed the bill and pointed out that each external investigation costs about $30,000. The cost, as well as the protections afforded by the act and procedures set out in a CSU executive order, led to the veto.

Discrimination

Districts Split on Retroactivity of Employer Liability for Third-Party Acts

Less than six months after the Second District Court of Appeal held, in *Salazar v. Diversified Paratransit, Inc.* (2004) 103 Cal.App. 4th 131, 166 CPER 47 (*Salazar II)*, that Sec. 12940(j)(1) of California's Fair Employment and Housing Act could be applied retroactively to impose liability on employers for harm to employees by third parties, the Fourth District Court of Appeal has held otherwise. In *Carter v. California Department of Veterans Affairs*, a unanimous Fourth District panel ruled that, though the legislature intended the statute to be retroactive, to do so would be "constitutionally objectionable."

Factual and Procedural Background

Helga Carter worked as a nurse in a veterans' residence facility operated by the Department of Veterans Affairs. Elbert Scott Brown was a resident of the facility. Brown received a penile implant, and Carter performed some nursing care for Brown in connection with the implant. Carter also took quilting lessons from Brown. During this time, Brown made several remarks to her such as, "You've got a nice ass," and "You've got nice breasts."

Carter invited Brown to her home for Thanksgiving dinner as part of the "adopt-a-resident" program for the holidays. She hoped that Brown would stop his suggestive remarks once he saw that she had a husband and children. Instead, Brown's behavior became worse. He told her he wanted to sleep with her. When she refused, he told her that he would ruin her reputation by telling everyone he had slept with her. When she continued to refuse, he did tell others in the clinic that he was sleeping with her.

The department argued it could not be held liable under the FEHA.

Carter complained to her supervisor about Brown's harassment but Brown did not stop. He chased her in the hall with his scooter and tried to ram her on several occasions. He followed her everywhere. He called her at home, and left derogatory and sexually explicit messages.

After Carter complained, the employer counseled Brown to leave her alone. Carter was issued a walkie-talkie to call security if Brown caused her problems. Brown's behavior did not change.

Carter went on stress leave twice. After the expiration of her second leave, she did not return to work, as Brown was still there and, according to her, "nothing had changed."

Carter filed a lawsuit against the Department of Veterans Affairs, her employer, alleging sexual harassment, failure to maintain a workplace free from sexual harassment, retaliation, and intentional infliction of emotional distress. The trial court dismissed the last two claims, but the case went to trial on the first two. The jury found that Carter was subjected to hostile environment harassment, the department knew or should have known of the harassment, and the department failed to take immediate and appropriate steps to correct the situation. Carter was awarded approximately $185,000 in economic and noneconomic damages.

The department appealed, arguing in part that it could not be held liable for the conduct of a client or customer under the FEHA. The Fourth District Court of Appeal agreed and reversed the judgment in *Carter v. California Department of Veterans Affairs* (2003) 109 Cal.App.4th 469, 161 CPER 71. The California Supreme Court granted Carter's petition to review the case. It already had

agreed to review the Second District's decision in the first *Salazar* case. (*Salazar v. Diversified Paratransit Inc.* [2002] 103 Cal.App. 4th 131, 126 Cal.Rptr. 475, 157 CPER 53, [*Salazar I]).* However, before the Supreme Court could consider either case, the legislature amended the FEHA to provide for employer liability for sexual harassment by nonemployees. The Supreme Court then dismissed its grant of review and sent both cases back to their respective panels of the Court of Appeal for reconsideration in light of the new legislation.

As noted above, the Second District, in *Salazar II*, determined earlier this year that the amended statute applied retroactively.

Court of Appeal Decision

The court began its analysis with a detailed review of its rationale for its earlier decision holding that the FEHA, prior to its amendment, did not impose employer liability for third-party misconduct. In essence, it found in its initial decision that "former section 12940(j)(1) did not, at least up to the 2003 amendment, require employers or other entities to assume liability for acts of harassment perpetrated by customers and clientele." Accordingly, continued the court, the department was not liable for Brown's sexual harassment of Carter and had no responsibility to correct his behavior or to protect Carter from the harassment.

The court then turned to the issue placed before it by the Supreme Court, i.e., did the amendment to Sec. 12940(j)(1) require a different result in this case? As the court noted, former Sec. 12940(j)(1) provided, in relevant part, that it is an unlawful employment practice:

> for an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to harass an employee....Harassment of an employee...by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.

The amendment added another sentence to the section, providing:

> An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees...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 declared, as part of its amendment that, "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," or *Salazar I*, in which the Second District ruled that the former Sec. 12940(j)(1) did not impose liability on the employer for the sexual harassment of its employee by a third party.

In determining whether the amendment operated retroactively to cover the situation presented in the case before it, the court summarized what it considered to be the applicable rules of statutory construction as follows:

> The normal rule is that a statutory enactment is applied prospectively only. "The presumption that legislation operates prospectively rather than retroactively is rooted in constitutional principles...." Thus, "statutes do not operate retrospectively unless the Legislature plainly intended them to do so." More specifically, the Legislature must expressly provide that it is to be retrospective; otherwise, "a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature...must have intended a retroactive application." Under this "'general prospectivity principle,'...a statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent 'some constitutional objection' to retroactivity."

A statute is said to operate retrospectively if it substantially changes the legal consequences of past events. However, "when a statute 'merely *clarifies*, rather than changes, existing law...,'" it is deemed not to operate retrospectively, even if applied to cases pending at the time of its enactment. This is because, in theory, " 'the true meaning of the statute remains the same.'" A legislative declaration concerning "the prior import of its statutes is entitled to due consideration, and we cannot disregard it." Nonetheless, "a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts."

'The majority [in Salazar II*] did not fully analyze the language and context of the amendment.'*

In support of its conclusion that the amendment is not retroactive and thus does not apply to the case before it, the court gave several reasons. First, "As is plain on the face of the amending statute, the Legislature did not expressly declare that the amendment was to apply retrospectively." Second, the amendment effected a change in the law. The court recognized that the legislature intended "to construe and clarify the meaning and effect of existing law" by enacting the amendment. However, the court rejected the legislature's characterization and determined that the amendment was *not* simply a clarification of existing law.

"The amendment differs from the other provisions of section 12940(j)(1) in two significant ways," stated the court. It does not impose liability for harassment on any entity other than an employer, and it "also provides that such liability may be imposed solely for sexual harassment." Said the court:

> If plaintiff's proferred interpretation of former 12940(j)(1) had been correct, and that provision had always contemplated liability for harassment by nonemployees, then such liability would have been provided under existing law for labor organizations, employment agencies and apprenticeship programs, as well as for employers, and liability would be imposed for such nonemployee harassment on any of the bases prohibited by the FEHA....Patently, therefore, "the true meaning of the statute" has not "remained the same" and the amendment is not merely declaratory of existing law, but has effected a substantial change in the law.

Legislative history supports this interpretation, according to the court, pointing to the different versions of the proposed amendment. It began with a very broad prohibition against harassment of any kind, and became progressively more limited in scope until the final version limited liability to sexual harassment. Quoting from the dissent in *Salazar II*, the court stated, "the existence of these starkly different substantive amendments precludes any conclusion that Assem. Bill 76 clarified and construed existing law."

The court recognized that its conclusion directly contradicts that of the majority in *Salazar II*. The reason for these diametrically opposed opinions is, according to the court, because "the majority [in *Salazar II*] did not fully analyze the language and context of the amendment." Had it done so, it would have agreed that "the peculiar restrictions of the amendment, which limit liability to instances of *sexual* harassment committed by clients, renders the assertion that section 12940, subdivision (j) 'always' imposed such a liability, patently untenable."

The court agreed that it could not end its inquiry without considering whether the legislature intended the amendment to be applied retroactively, even if it did effect a change in the law. The court concluded, agreeing with the *Salazar II* majority and disagreeing with the dissent in that case, that the legislature clearly intended a retroactive application. "The circumstances of the enactment here indicate a plain intent that, even if the amendment cannot be deemed declaratory of existing law, the Legislature nonetheless meant it to apply retroactively to this case; the amendment specifically states that its purpose is to alter the result in *Salazar I*, a parallel case."

But, the court again refused to ratify the legislature's clear purpose in enacting the amendment, finding that "applying the amendment retroactively is constitutionally objectionable." It ruled that the amendment could not be applied to the case before it or to any other case occurring prior to the enactment of the amendment, defeating the express will of the legislature and flatly contradicting the holding of the Second District in *Salazar II*:

> Constitutional considerations of due process require that citizens be fairly apprised of laws affecting their conduct. Here, the import of the amendment is to impose substantial new obligations on employers, and to impose such liability, without clear notice, for conduct which was already completed in the past.

'Applying the amendment retroactively is constitutionally objectionable.'

The court also opined that, should it be made retroactive, the amendment would be unfair to both employers and employees:

> The amendment provides that an employer must anticipate and protect its employees from workplace harassment by nonemployees, but only as to sexual harassment. Employees who are harassed by nonemployees because of any other animus generally forbidden under the FEHA, such as race, ethnicity, national origin, age, and so forth, have no protection under the amendment. On the other hand, the amendment holds employers liable for nonemployee sexual harassment, but does not impose the same obligation on other entities covered by the FEHA....

Accordingly, held the court:

> To prevent fundamental unfairness of all these kinds — imposition of substantial new liabilities without due notice, unequal treatment of employees, and unequal treatment of employers — we conclude that the amendment cannot constitutionally be applied retroactively to this case. If it is applicable at all, its effect must be prospective only.

Impact and Import of the Decision

The conflict between the appellate districts intensified when, the same day that the Fourth District issued its opinion in *Carter*, another division of the Second District issued an unpublished opinion agreeing with *Salazar II*. In *Adams v. Los Angeles Unified School Dist*. (8-17-04) No. B159310, a unanimous panel of the Second Appellate District found that, "even if the language concerning nonemployee sexual harassment is a new enactment, it may constitutionally apply retroactively to the present case."

It seems clear that the conflict will not be resolved until the California Supreme Court addresses the retroactivity issue. A petition for review filed with the Supreme Court in *Salazar II* was rejected May 20 as untimely. Terry Davis, the attorney representing Carter, told *CPER* that he is in the process of preparing a petition for review to be filed with the Supreme Court. (*Carter v. California Department of Veterans Affairs* [8-17-04] 121 Cal.App.4th 840, 2004 DJDAR 10147.)

If Supervisor's Retaliatory Motive Is Cause of Dismissal, Employer is Liable

When a supervisor initiates disciplinary action with retaliatory animus that results in the termination of an employee who has engaged in protected activity, the employer can be held liable for retaliatory discharge, held the Sixth District Court of Appeal in *Reeves v. Safeway Stores, Inc.* The employer will be held liable even if the manager who made the decision to terminate had no knowledge of the worker's protected activities.

Factual Background

William McLeod Reeves worked as a food clerk for Safeway from May 1969 until he was fired in July 1998. In late 1997, Reeves became aware of conduct he believed constituted sexual harassment directed at some of the female employees. Two of the main offenders were Brian Sparks and Steve Prodes. Reeves complained to Fred Demarest, the store manager, who seemed to him to trivialize the matter. One of the female employees testified that she had complained directly to Demarest about Sparks and Prodes, with no apparent result. As the store manager, Demarest was supposed to report any complaints of sexual harassment to the human resources department for investigation. Instead, he investigated the complaints himself.

The event that triggered Reeves' dismissal occurred on May 31, 1998. Reeves had left the workplace at the end of his shift. However, he returned immediately afterwards as he needed to use the rest room urgently. Sandy Juarez, in charge of the night crew, would not let him in. Juarez testified that Reeves pushed her and came in. Sparks confirmed her story. Reeves denied touching Juarez.

Juarez told Demarest about the incident. Demarest called security, and an investigation was conducted by security officer Darrell Harrison. Harrison recommended to district manager Hollis that Reeves be terminated. Hollis fired Reeves "for violation of company policy and/or procedures."

The court rejected the 'defense of ignorance.'

Reeves filed a lawsuit alleging that Safeway violated California's Fair Employment and Housing Act by discharging him in retaliation for his complaints about sexual harassment. The trial court found that, though Reeves had made a threshold showing of a causal link between his complaints and his discharge, Safeway had met its burden of showing that it had a legitimate, non-discriminatory reason for terminating him and that Reeves "failed to raise a triable issue of material fact in this regard." The trial court dismissed the lawsuit, and Reeves appealed.

Court of Appeal Decision

The court first addressed Safeway's argument that Reeves could not possibly show his discharge was in retaliation for his complaints of sexual harassment because Hollis, the manager who made the decision to fire Reeves, had no knowledge of the complaints. The court rejected this argument, explaining:

> This concept — which for convenience we will call the "defense of ignorance"—poses few analytical challenges so long as the "employer" is conceived as a single entity receiving and responding to stimuli as a unitary, indivisible organism. But this is often an inaccurate picture in a world where a majority of workers are employed by large economic enterprises with layered and compartmentalized management structures. In such enterprises, decisions significantly affecting personnel are rarely if ever the responsibility of a single actor. As a result, unexamined assertions about the knowledge, ignorance, or motives of "the employer" may be fraught with ambiguities, untested assumptions, and begged questions.
>
> The issue in each case is whether retaliatory animus was a but-for cause of the employer's adverse action....Logically,...the plaintiff can establish the element of causation by showing that *any* of the persons involved in bringing about the adverse action held the requisite animus, provided that such person's animus operated as a "but-for" cause, i.e., a force without which the adverse action would not have hap-

> pened. Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation.

The court gave an illustration to clarify its point:

> A supervisor annoyed by a worker's complaints about sexual harassment might decide to get rid of that worker by, for instance, fabricating a case of misconduct, or exaggerating a minor instance of misconduct into one that will lead to dismissal. Another manager, accepting the fabricated case at face value, may decide, entirely without animus, to discharge the plaintiff. It would be absurd to say that the plaintiff in such a case could not prove a causal connection between discriminatory animus and his discharge.

The court concluded that, in order for Safeway to successfully raise the defense, it would have to show that "*all* corporate actors who contributed materially to an adverse employment decision" were ignorant of the worker's protected activities or status. In this case, it was clear that "Hollis was not the only actor who materially contributed to Reeves' discharge." Hollis' decision rested entirely on Harrison's recommendation, "which was itself the penultimate event in a chain commencing with a report to Demarest from night manager Jaurez, followed by Demarest's referral to Safeway's security department…." Given these circumstances, the defense must fail.

The court next turned its attention to Safeway's second argument, "that plaintiff failed to present sufficient evidence of retaliatory animus to effectively controvert defendant's showing that his discharge rested on a genuinely held, nonretaliatory motive, i.e., a belief that he had engaged in serious misconduct warranting dismissal." As background, the court summarized the analysis set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, applicable to claims of discrimination like the one before it:

> Under that framework, the plaintiff may raise a presumption of discrimination by presenting a "prima facie case," the components of which…typically require evidence that "(1) the plaintiff was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action…and, (4) some other circumstance suggests discriminatory motive."…A satisfactory showing to this effect gives rise to a presumption of discrimination which, if unanswered by the employer,…requires judgment for the plaintiff. However the employer may dispel the presumption merely by articulating a legitimate, nondiscriminatory reason for the challenged action….[Then] the question becomes whether the plaintiff has shown, or can show, that the challenged action resulted in fact from discriminatory animus rather than other causes.

The court found that though "it is undisputed that Safeway has articulated a legitimate nondiscriminatory reason for its actions *with respect to district manager Hollis*,…Safeway has failed to make a threshold showing that *all* material contributors to the decision acted for legitimate nondiscriminatory motives." "If a supervisor makes another his tool for carrying out a discriminatory action, the original actor's purpose will be imputed to the tool, or through the tool to their common employer."

The court found support for what it termed its "cat's paw" theory in a number of federal cases cited in its opinion, most notably *Shager v. Upjohn Co.* (7th Cir. 1990) 913 F.2d 398. In *Shager*, an employee was terminated by a committee whose members appeared not to have acted with discriminatory animus. However, the termination decision was found by the court to have been tainted by the age-related animus of Lehnst, Shager's supervisor:

> A committee of this sort, even if it is not just a liability shield invented by lawyers, is apt to defer to the judgment of the man on the spot. Lehnst was the district manager; he presented plausible evidence that one of his sales representatives should be discharged: the committee was not conversant with the possible age animus that may have motivated Lehnst's recommendation. *If it acted as the conduit of Lehnst's prejudice — his cat's paw — the innocence of its members would not spare the company from liability.*

Though the court cited no California cases in support of its holding, it stated:

> We have no doubt that California law will follow the overwhelming weight of federal authority and hold employers responsible where discriminatory or retaliatory actions by supervisory personnel bring about adverse employment actions through the instrumentality or conduit of other corporate actors who may be entirely innocent of discriminatory or retaliatory animus.

The court found the present situation to be more complicated than that in *Shager*, as the process leading to Reeves' dismissal involved not two actors, but four: Juarez, Demarest, Harrison, and Hollis. "To establish an entitlement to judgment Safeway had to address the conduct, role, and motive of each of these actors; instead it addressed only the role and motives of the last, Hollis." Even if Safeway had been able to meet its burden, thereby shifting the burden to Reeves to raise an issue of material fact, the court stated, "we find that the record does raise such issues because it justifies an inference that lower level actors engaged in retaliation under circumstances justifying an imputation of their conduct and motives to Safeway."

The court found, in particular, that "the evidence presents ample basis for finding retaliatory motives and conduct on the part of plaintiff's unquestioned supervisor, Demarest." Citing a number of actions and inactions by Demarest, the court found "the evidence supports an inference that Harrison's investigation of the alleged misconduct was not truly independent, but was heavily skewed to favor the ostensibly tentative conclusions of the reporting supervisor, Demarest." The court said:

> A factfinder could conclude that Harrison saw his function not as gathering objective evidence to pass to Hollis but as lending credence to Demarest's report that "workplace violence" had occurred. From this it follows that whether or not Harrison personally felt retaliatory animus towards plaintiff, the purpose and effect of his involvement was merely to effectuate the will of Demarest. He made himself a tool, witting or unwitting, for a supervisor who might wish, as Demarest could be found to wish, to retaliate against workers for protected activities.

The court reversed the judgment of the trial court. (*Reeves v. Safeway Stores, Inc.* [7-29-04] 121 Cal.App.4th 95, 2004 DJDAR 9352.)

Utility District's Affirmative Action Program Violates Proposition 209

As *CPER* went to press, the Court of Appeal decided that an affirmative action plan used by the Sacramento Municipal Utility District to select contractors on public projects violated Article 1, Section 31, of the California Constitution, adopted by the voters in 1996 as Proposition 209. The district acknowledged that it used a race-conscious affirmative action plan but argued that its program fell within the exception of subdivision (e) of Section 31. Subdivision (e) states that Section 31 does not prohibit action that "must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State."

The district appealed from the trial court's summary judgment in the plaintiff's favor and the resulting injunction against using the race-conscious plan. The question on appeal was whether the race-based measures were necessary to maintain federal funding.

The court concluded that the state governmental agency, before imposing race-based measures, need not obtain a federal adjudication that race-based discrimination is necessary to maintain federal funding. It also concluded, however, that in order to discriminate based on race, the governmental agency must have substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize race-based discrimination.

Although the district had conducted studies that determined there had been past discrimination, the district had made no attempt to ascertain whether the program was necessary under identified federal laws. The

court found the federal Department of Energy, Department of Transportation, and Department of Defense programs allowed race-neutral affirmative action plans, but the district had not studied whether race-neutral programs would suffice. The court held ineffective a 2003 legislative attempt to change the definition of discrimination in Section 31 to match the definition set out in the International Convention on the Elimination of All Forms of Racial Discrimination (A.B. 703, Dymally, D-Compton). The court affirmed the judgment and the permanent injunction against the district. (*C&C Construction, Inc. v. Sacramento Municipal Utility Dist.* [9-14-04] C040761 [3d Dist.] ___Cal. App.4th___, 2004 DJDAR 11480.) ❁

General

PSOPBRA Covers Discrimination Complaints Filed With Affirmative Action Office

Building on prior rulings that broadly interpret the Public Safety Officers Procedural Bill of Rights Act, the First District Court of Appeal announced that two police officers employed by City College of San Francisco were entitled to inspect the discrimination complaints under investigation by the campus Office of Affirmative Action because the documents were turned over to the chief of campus police and had the potential of influencing future personnel decisions.

Relying on *Aguilar v. Johnson* (1988) 202 Cal.App.3d 241, 78 CPER 41, and *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 154 CPER 43, the court stressed that the label placed on an investigation file is irrelevant. What is critical is whether the materials in the file may affect the status of the officer's employment.

Background. Ray Castillo, one of the officers involved in the dispute, was accused by a faculty member of discrimination and harassment based on national origin and religion. The other officer, Michael Seligsohn, was accused by a student of discrimination and harassment based on race and color.

An attorney representing both officers requested copies of the complaints. When these requests were denied by the college administration, a lawsuit was filed asserting that the Bill of Rights Act guaranteed the officers an opportunity to review and comment on the accusations levied in the complaints. The trial court rejected the officers' contentions, and an appeal followed.

The appellate court began its discussion by focusing first on the purposes of the Bill of Rights Act and the provision affording public safety officers the right to view any adverse comment placed in their personnel files. Quoting from *County of Riverside*, the court noted that "peace officers…must confront the public in a way that may lead to unfair or wholly fabricated allegations of misconduct from disgruntled citizens. Law enforcement agencies must take these citizen complaints seriously but at the same time ensure fairness to their peace officer employees. The Bill of Rights Act therefore gives officers a chance to respond to allegations of wrongdoing."

The label placed on a file is irrelevant.

To this end, Government Code Sec. 3305 provides that no public safety officer "shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment…." Section 3306 affords the officer an opportunity to file a written response to any adverse comment entered into his personnel file.

Relying on the *Aguilar* and *Riverside* cases, as well as on *Sacramento Police Officers Assn. v. Venegas* (2001) 101 Cal.App.4th 916, 156 CPER 41, the court found that the disclosure requirement conveyed by Sec. 3305 is not excused merely by placing a document in a file separate from a personnel file. The act applies to personnel files "or any other file used for any personnel purposes," noted the court, so the label placed on a file is irrelevant. The Bill of Rights Act is triggered if the materials in the file may serve as a basis for affecting the officer's employment status.

Nor is the act's reach limited to those circumstances where discipline is ordered. The legislature used broad language in Sec. 3305, and it appears to have been concerned with the potential unfairness that may result from an adverse comment that is not accompanied by punitive action.

The court rejected the college's assertion that prior case law is not controlling because, in this case, the com-

plaints held by the affirmative action office are separate and distinct from files relating to the officers' employment. The court emphasized that copies of letters addressed to the officers that outlined the essence of the complaints against them were sent to their superior, the former chief of police, and the college's vice chancellor. The court also brushed aside a declaration signed by the former chief claiming he did not retain copies of this correspondence or draw an inference of wrongdoing against the officers from the fact that the affirmative action office was conducting an investigation. As the court noted, the former chief could have done both; the incumbent chief may act and feel differently.

More troubling to the court was the college's assertion that the human resources department does not receive or incorporate any part of the affirmative action files into an individual employee personnel file "*unless and until* disciplinary action is taken against the employee as a result of an independent investigation…." This claimed defense is flatly inconsistent with the holding in *Sacramento*, explained the court, which clarified that what is important is the potential unfairness in denying access to the documents. Quoting *Sacramento*, the court said: "Even though an adverse comment does not directly result in punitive action, it has the potential of creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline or punitive action."

The college's position "ignores the express holding in *Riverside*," added the court, that "the label placed on the investigation file is irrelevant." The determining factor is the potential relevance of the materials in those files to possible future action affecting an officer's employment status. The court found support for this conclusion in the language of Sec. 3305, which "makes clear that the mandates of that provision apply not only to a formal personnel file but also to 'any other file used for any personnel purposes by his employer.'" (*Seligsohn v. Day* [8-10-04] A104117 [1st Dist.] 121 Cal.App.4th 518, 2004 DJDAR 9795.)

The determining factor is the potential relevance of the materials.

Arbitration Log

• Discipline — Just Cause

Service Employees International Union, Loc. 790, and Oakland Unified School Dist. (12-30-03; 14 pp.) *Representatives:* Anne I. Yen, Esq. (Weinberg, Roger & Rosenfeld) for the union; Deborah A. Cooksey, Esq., assistant general counsel, for the district. *Arbitrator:* William E. Riker.

Issue: Was the grievant discharged for just cause?

District's position: (1) The grievant was employed as a network technician for the district for over three years. She performed a wide range of duties concerning both computer hardware and software in conjunction with coworkers.

(2) A month prior to her termination, the grievant was notified in writing that the district intended to dismiss her for her continuing violations of district policy, including tardiness, absenteeism, failure to complete assignments in a timely manner, falsification of district records, and insubordination. An administrative hearing was held to consider the allegations; the charges were found to be warranted.

(3) The grievant's performance at work was deficient in a number of areas. She was unable to perform basic repairs and routinely failed to complete assignments in a timely manner or at all. She was hostile to her supervisors and used profanity when a supervisor made a legitimate inquiry into the grievant's work projects. She had the lowest productivity level of all of the network technicians during the 45-to 90-day period before her termination. Her performance was so substandard that other departments specifically requested that the grievant not be sent to repair their computers.

(4) The grievant was given numerous oral and written warnings and was placed on performance improvement plans, but her behavior did not rise to the expected standard. Her continued conduct was in violation of Administrative Bulletin 80.10 and was just cause for her termination.

Union's position: (1) The district failed to comply with language in the collective bargaining agreement pertaining to periodic performance evaluations and with the basic principles of progressive discipline. Prior to the district's actions three months before termination, the grievant had received only reprimands.

(2) The grievant's last formal performance review, which took place over two years before her termination, rated her as satisfactory in seven of eight categories, including work performance and dependability. She later was placed on a month-long performance improvement plan but never received an evaluation at its conclusion. In situations where discipline is based on performance issues, rather than intentional, harmful misconduct, it is not necessary to proceed directly to discharge.

(3) The allegations of misconduct outlined in the notice to dismiss either were not proven or were matters where some form of discipline other than termination would be in the spirit of the terms of the negotiated agreement.

Arbitrator's decision: The grievance is sustained.

Arbitrator's reasoning: (1) The notice that the district sent to the grievant opined that the grievant did not make a concerted effort to correct what the district considered to be her unacceptable conduct, attitude, and performance. The union responded that the evidence did not support the allegations of intentional misconduct and that any infractions that did occur did not warrant dismissal. Dismissal was not appropriate especially considering that the grievant was not offered annual reviews and that the dis-

Attention Attorneys and Union Reps

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trict failed to discipline the grievant on a graduated basis.

(2) A review of the record clearly indicated gross procedural inconsistencies that were in direct violation of the collective bargaining agreement, such as a failure to have the supervisory chain of command apply the specific performance standards to which the parties had agreed.

(3) The district failed to comply with the procedures for performance evaluations. At the very least, the grievant should have had annual formal reviews that documented her strengths, weaknesses, and a tangible corrective action plan to adjust any deficiencies. The grievant had only one formal review during her 40 months of employment. No formal effort was made to manage her performance.

(4) The district also failed to comply with standards for progressive discipline outlined in the parties' agreement. While both the grievant's supervisor and the director of the technology department were dissatisfied with her performance, the grievant did not receive any formal communication in time to make a reasonable response. The grievant did receive a number of reprimands over a 20-day period after she filed a sexual harassment charge, but this only exacerbated the situation. Even if the reprimands represented a year's worth of performance issues, the manner in which they were delivered and the lack of reasonable time to pursue corrective action clearly failed to satisfy the spirit of the negotiated agreement.

(5) The lack of continuity in the grievant's supervisors further contributed to the breakdown in properly following procedures. The procedures were put into place to ensure consistency and fairness, and should be upheld in accordance with the spirit of the agreement.

(Non-binding Grievance Arbitration)

• Discipline — Just Cause

Los Angeles County Metropolitan Transportation Authority and Amalgamated Transit Union, AFL-CIO, Loc. 1277 (12-2-03; 12 pp.) *Representatives:* William Flynn, Esq. (Neyhart Anderson Freitas Flynn & Grosboll) for the union; Timothy Wykert, for the employer. *Board of Arbitration:* Bonnie G. Bogue, impartial chairperson; Neil Diamond, union appointee; Denice Findlay, management appointee.

Issue: Did the employer have proper cause to suspend the grievant?

Employer's position: (1) The grievant had been employed by MTA as a mechanic for over 21 years. The incident that precipitated his suspension occurred when a bus, carrying passengers, lost steering control and veered across several lanes of traffic before the operator brought it to a halt. No injuries or property damage occurred. Upon investigation, MTA determined that the steering gearbox driveline had separated from the drive shaft, causing the operator to lose control. The steering gearbox driveline had not been properly secured, which caused it to work loose and fall out. The grievant was assigned responsibility because maintenance records showed that he was the last mechanic to have worked on the driveline. No records showed that any other work was performed on the driveline between the time the grievant worked on it and the date of the incident.

(2) MTA concluded that the grievant should be disciplined for violation of maintenance guidebook rules concerning appropriate conduct. Section 6.02, which governs discipline, mandates that employees must refrain from "conduct unbecoming an employee," which includes gross carelessness.

(3) No other explanation can be found for the incident. The grievant must be responsible for the improper installation of the steering driveline because he was the last mechanic to have worked on it.

Union's position: (1) The grievant cannot be the person responsible. The bus could not have traveled over 6,000 miles during a two-month period with an improperly installed steering mechanism because it would have failed well before this incident.

(2) MTA's maintenance records were neither complete nor accurate. The lack of any record of work done on the driveline during the two-month period does not mean that no such work was done.

Arbitrator's decision: The employer did not have proper cause to suspend the grievant.

Arbitrator's reasoning: (1) MTA relied solely on its maintenance records to conclude that the grievant was the only person who could have been responsible for the improperly installed steering driveline. MTA's investigator found nothing in the records to show any such work done after the grievant handled the

installation. The grievant theorized that the steering driveline may have been worked on a few days before the accident when the bus was sent in for repainting, but the investigator found no corroborative evidence, including no mention in the safety report made just before the bus was released, that the steering driveline was serviced.

(2) The MTA investigator testified as to how the maintenance and repair records for each bus are kept. Defect cards are written up by the mechanic whenever a repair is made and by the bus operator on a daily basis. Cards are filed by bus number at the division to which the bus is assigned. If a bus breaks down while in service and happens to be closer to another division, the bus is taken to the closer location for repairs. That division generates a road failure card, which is supposed to be sent to the originating division to be filed. The investigator admitted that the paperwork may not always be sent, and that if a bus were not "officially transferred" to the division where the repair was made, the repair would not show up on the computerized vehicle maintenance system for that division and possibly not the home division. He also testified that it was possible that the steering driveline could have been taken off and put back on as part of a lesser job or inspection at another division. That was unlikely in this case because such a possibility had been investigated.

(3) An experienced mechanic testified that the steering driveline would have been checked during a bus's regular 6,000 mile inspection. A driveline that was improperly installed would have been evident to the mechanic. The bus maintenance records showed that the bus underwent a safety inspection after the repainting and no problem with the steering driveline was found at that time. The union contended that this meant that the improper installation occurred at some point after the inspection but before the accident.

(4) A mechanic from the bus's division inspected the bus's maintenance records, both from the cards and the computerized system. He found that a number of card entries did not have a corresponding computer entry, and vice versa. Specifically, this bus had a card from another division dated between the repainting and the accident, while there was no corresponding record at the bus's home division. MTA emphasized that it considered the computerized system merely to be a tracking device, and that the cards are the official record of repairs for each bus. Thus, it relied on the cards to establish that the grievant was the last person to work on this bus's steering driveline before the accident. The clear conclusion was that MTA's records were not infallibly comprehensive or accurate and thus could not rule out the possibility that someone other than the grievant could have been responsible for the improper installation.

(5) The union relied primarily on a "common sense" argument: that it was impossible for the bus to operate for two months and 6,000 miles on an improperly installed steering driveline. While the managers who reviewed the evidence concluded that a driveline installed in the same manner as this case "would work for a period of time," no management witness was asked to testify as to whether the driveline actually would last for two months and 6,000 miles. The grievant and another mechanic with 24 years' experience both testified that the driveline could have stayed in place only about a week.

(6) At the hearing, the union used a sample mechanism that was improperly secured in the same way as it was discovered on the bus to demonstrate that only three sharp strikes with a hammer could cause the driveline to come loose. MTA protested, arguing that normal road vibrations cause a different type of movement and stress on the steering driveline. Regardless, the evidence made it highly unlikely that the improperly secured driveline would have stayed in place for two months and 6,000 miles given the amount of movement the bus underwent in that period of time.

(7) The evidence also showed that the mechanism was relatively clean at the time of the incident, further supporting the union's theory. The steering driveline lacked the dirt that would have accumulated over two months of service.

(8) Although MTA conducted a careful and thorough investigation that failed to turn up evidence of any other mechanic working on this bus's steering driveline, MTA failed to prove that the grievant was the only mechanic responsible for the improper installation. It was more likely than not that the grievant was not the right person, given the length of time that passed, the numerous recorded and probable unrecorded times the bus was serviced, and the failure to detect the problem during the inspection that occurred just after repainting.

(Binding Grievance Arbitration)

• Contract Interpretation — Off-Duty Employment

Los Angeles Police Protective League and City of Los Angeles Police Dept. (4-9-04; 11 pp.) *Representatives:* Gary O. Ingemunson for the union; Julian Mendez, sergeant II, and Robin M. Davis, senior personnel analyst I, for the department. *Arbitrator:* C. Allen Pool.

Issue: Did the department violate its rules and regulations concerning outside employment when it denied and revoked the grievant's outside work permits?

Union's position: (1) The grievant has been a police officer with the department since 1986. He primarily was a patrol officer until 2000, when he was informed that he was the subject of a risk-management executive committee review and reassigned to a desk position. He regularly engaged in off-duty work for private security companies with the department's approval over a 10-year period.

(2) On two occasions following the grievant's reassignment, his requests for renewal of two permits for off-duty work were approved. Nine months later, his third request for off-duty work was not approved and the two off-duty work permits were revoked. The department claimed that this was because the grievant was the subject of the RMEC review.

(3) The grievant filed a grievance over the denial of his request. He contended that the proposed job did not involve a prohibited activity and that the review committee had no authority to deny the permit because assignment to a desk job was not just cause for denying and revoking the work permits.

(4) The department initially refused to arbitrate the grievance and directed the grievant to pursue the matter administratively. After his administrative appeal was denied, he obtained a court order compelling arbitration.

(5) The department does not have absolute control over an officer's outside employment. The grievant's outside employment was not incompatible with, inconsistent with, or in conflict with his principal duties as an officer.

Department's position: (1) The department did not violate its own rules and regulations concerning outside employment when it denied and revoked the grievant's outside work permits for off-duty employment.

(2) The department has adopted policy, rules, and criteria relative to outside employment that mirror the guidelines set forth in Gov. Code Sec. 1126. Based on that foundation, the department has broad discretion to impose restrictions on outside employment or to prohibit it altogether.

(3) The department was not required to notify the grievant in writing of the reasons for denying and revoking his work permits.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) Although the arbitral community has long held that an employee's off-duty time belongs to the employee and that the employee is free to use his time so long as it is not detrimental to the employer or the employee's regular duties, the employer does have the authority to place conditions on outside activity and may prohibit it altogether if the employer deems it to be incompatible.

(2) The department's policy on outside employment allows the department to determine which outside employment activities are incompatible with the duties of the department's officers and therefore are prohibited.

(3) The parties' memorandum of understanding instructs that grievances may be filed concerning disputes about the interpretation of the department's rules and regulations. Section 1/270.30 of the department manual specifies that an employee may not engage in prohibited employment activities. Such an activity is defined as "any employment, activity, or enterprise for compensation which is inconsistent, in conflict with,

or inimical to, duties as an employee…or with the duties, functions, or responsibilities of the Los Angeles Police Department." The clear intent of this language is to allow the opportunity for off-duty officers to engage in outside employment on their own time subject to the expressed restrictions. In this case, the grievant's work permits were not denied or revoked because his outside employment was incompatible with his primary responsibilities or because the time demands of the outside employment would affect the grievant's ability to work irregular schedules and have adequate rest between his shifts. Instead, the department revoked the grievant's ability to undertake outside employment merely because he was the subject of an RMEC review.

(4) The department does not have the broad discretion it claims to restrict outside employment. The denial or revocation of work permits must be based on a determination that the outside employment is incompatible in the manner described in the department manual. The denial of the grievant's requests for a work permit and the revocation of his existing work permits were not related to the criteria outlined in Section 1/270.30.

(5) Furthermore, no evidence was offered as to what constitutes an RMEC review, why the grievant was under review, and why he was removed from patrol duty. The grievant's performance evaluations were uniformly positive, and nothing in the evaluations indicated that the reassignment to desk duty was a form of discipline or a work restriction.

(Binding Grievance Arbitration)

• Contract Interpretation

City of Berkeley and Service Employees International Union, Loc. 790 (6-11-04; 8 pp.) *Representatives:* Vincent A. Harrington, Jr., Esq. (Weinberg, Roger & Rosenfeld) for the union; Sarah Reynoso, Esq., deputy city attorney, for the city. *Arbitrator:* Paul D. Staudohar (CSMCS Case No. ARB-03-1880).

Issue: Was the grievant a probationary employee at the time he was terminated? If so, does he have the right to a further appeal?

Union's position: (1) The grievant was hired on September 8, 2002, as a landscape gardener in the city's Department of Parks, Recreation and Waterfront. His employment was terminated on March 4, 2003. During the period that the grievant was employed by the city, he worked 952 hours of regular time, eight hours on holidays, and 16 hours of overtime. He also received credit for 72 hours of holiday pay. The total number of hours for which he was paid was 1,048.

(2) The parties' collective bargaining agreement specifies in section 34.1 that all employees are subject to a probationary period of "six (6) months (1,040 hours) actual work exclusive of all leave and light duty…." The grievant was terminated just four days short of the six months required to surpass the probationary period. For the purpose of the probationary period, the city calculates hours of "actual work" as including paid holidays but excluding overtime hours. This interpretation was contrary to the language of the agreement because paid holidays cannot be "actual work," but overtime hours are.

(3) In the cases of four employees who were deemed by the city to have passed the probationary period, none of them could be deemed to have worked 1,040 hours unless paid holidays were taken into account.

(4) The contractual reference to 1,040 hours first appeared in the parties' 1987 agreement. While none of the city's witnesses actually participated in the 1987 negotiations, a union witness who did participate in those talks testified that the language about the hours was included because employees were concerned that not all of their actual work was being counted and they were working longer than six months without completing the probationary period.

(5) The grievant had completed his probationary period at the time the city terminated him.

City's position: (1) The city has had a long-standing practice of requiring new employees to serve a minimum six-month probationary period. The grievant had not completed the six-month period when he was terminated and therefore was still a probationary employee at the time.

(2) The language of section 34.1 is clear and unambiguous with respect to the six-month probationary period. The city's acting human resources director testified that employees have been required to serve a minimum of six months since at least 1973. The agreement was modified in 1987 to clarify that time spent on light duty or leave would not count toward the probationary period. The reference to 1,040 hours was in-

cluded to indicate how many hours an employee normally would work during the six-month probationary period.

(3) Each of the four employees singled out by the union was characterized as having completed the six months. The grievant was not treated differently from these or other city employees in terms of calculating whether the period had been completed.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The language of section 34.1 is subject to more than one interpretation. The parties' bargaining history provided some insight. The union's witness testified that the purpose of adding the language in 1987 was to ensure that employees who worked more than 1,040 hours passed the probationary period. The city's witness testified that the change in language was intended to clarify that certain kinds of leave would not count toward the probationary period, and that employees were always required to work for six months before the end of probation.

(2) An examination of the parties' past practice confirms the city's interpretation. Evidence clearly demonstrated that the six-month language dominates and that particular attention is paid to 1,040 hours if an employee takes leave during the probationary period. The acting director of human resources testified that no employee had ever had a probationary period of less than six months.

(3) The incongruous distinction between overtime and holiday hours credited toward the probationary period is consistent with the city's long-standing practice. The union has neither previously filed a grievance over the way the probationary period was calculated nor grieved the dismissal of a probationary employee based on the number of hours worked.

(4) There is no evidence to support the contention that the four employees in question were treated differently from the grievant. All four served the full six-month probationary period without taking leave, and each was credited with working at least 1,040 hours.

(5) The grievant did not complete the full six months before he was terminated. Accordingly, he was not entitled to a further appeal.

(Binding Grievance Arbitration)

• Contract Interpretation

Amalgamated Transit Union, Loc. 1555, and San Francisco Bay Area Rapid Transit Dist. (6-26-04; 19 pp.) *Representatives:* Lynn Rossman Faris, Esq., and Jennifer A. Jambor, Esq., (Leonard Carder LLP) for the union; Matthew H. Burrows, Office of the General Counsel, for the district. *Arbitrator:* Frank Silver.

Issue: Did the district violate the agreement when it permitted two employees trained as lawyers to attend hearings which lawyers traditionally were not permitted to attend?

Union's position: (1) When the union first was recognized, it was committed to establishing a grievance procedure in which the early stages would be handled informally, without attorneys, to encourage settlement of grievances at the lowest level. Section 39.3 of the current agreement details pre-disciplinary hearing procedures for suspension and discharge cases before a hearing officer. It does not contain a specific reference to participation by attorneys. Section 39.4, which governs a 2-2-1 post-disciplinary appeal process, specifically prohibits attorneys acting as advocates with respect to suspensions of 10 days or less. Section 40.6 explicitly bars the presence or participation of attorneys in 3-3-1 hearings.

(2) The district hired Michelle Tellez as a senior labor relations representative in November 2001; 11 months later she became the principal labor relations representative. She received her law degree in 1984 and is an active member of the Indiana bar, though she is not licensed to practice in California. She has considerable experience in employment and labor law.

(3) Tellez has attended approximately eight first-level hearings. She testified that she had assisted a number of supervisors in preparing their cases, and that she understood that previous labor relations representatives had assisted supervisors in this manner and had attended first-level hearings as observers. The extent of her assistance varied with the experience level of the supervisor and has included everything from serving as a "sounding board" to helping prepare opening statements and witness questions. While she testified that she always was an observer at the hearings she attended, she also testified that both she and a union observer were admonished for passing notes in an early hearing. She has, however, signaled to

the supervisor by eye contact to take caucuses when she felt that she could assist by suggesting questions or objections. While most observers do not sit at the table with the advocates, Tellez frequently sat next to the supervisor.

(4) Since Tellez started with the district, supervisors have changed their presentations at the hearings in that their opening statements have become more formal, the grievant has been called first to testify, more prepared questions have been asked, and more objections and caucuses have been called. Union advocates have observed Tellez calling caucuses and having discussions with the charging officer during the caucus.

(5) Ron McVicker is the labor relations liaison for the transportation department. McVicker received his law degree in 1980, but has not maintained an active bar membership since 1987. He was a train operator for the district until he was hired as the liaison. He has participated in 3-3-1 hearings as the transportation department representative, and often is relied on by the advocate because of the depth of his operational knowledge from his years as an operator. He has not provided advice regarding whom to call as witnesses, the order of witnesses, or legal objections.

(6) The parties' negotiating history and contract language prohibit the use of attorneys at the early stages of the grievance procedure. Hank White, the first union president, testified that the intent of the parties always was to exclude attorneys from low-level grievances because of the union's limited resources and to ensure a level playing field. Section 40.6 expressly prohibits lawyers at 3-3-1 hearings. As such, Ron McVicker's participation at such hearings is in violation of the agreement.

(7) The parties' 30 years of past practice is protected by Section 1.5 of the agreement. No attorneys ever had attended first-level hearings until Tellez joined the district. The union always has prohibited grievants from bringing their own attorneys, and neither the train operator representatives nor union stewards have the authority to contact the union's attorneys directly. The lengthy and undisputed nature of this practice made it clear that attorney participation in first-level hearings is prohibited. Past practice also establishes that observers may not participate in hearings. Tellez, however, has actively participated in all aspects of the hearings. Union members are disadvantaged by Tellez's legal advice to the district.

(8) The two grievances were properly consolidated. The McVicker grievance is timely because it was filed seven days after the 3-3-1 hearing at which the union objected to McVicker's participation. The Tellez grievance is arbitrable despite the lack of express language in Section 39.3 because the parties' past practice may serve as a basis for implying contract terms.

District's position: (1) The agreement does not bar Tellez from attending first-level hearings. Sections 40.6 and 39.4 expressly restrict attorneys from participating in 2-2-1 and 3-3-1 hearings; Section 39.3 contains no such prohibition. According to settled principles of contract interpretation, the fact that the parties explicitly restricted attorney participation in two sections implies that they intended no such restriction in Section 39.3. The use of attorneys at first-level hearings is supported by the fact that attorneys do handle 2-2-1 termination cases unless the parties agree otherwise.

(2) The union failed to demonstrate an unequivocal past practice. The testimony of union witnesses demonstrated that they were not sure of the nature of the past practice. The parties never had agreed that a former attorney could not be hired as a labor relations representative, and the issue simply never had arisen prior to the hiring of Tellez and McVicker.

(3) In spite of her former occupation as an attorney, Tellez functions as a labor relations representative for the district, not as an attorney. She provides assistance and advice to district supervisors, which is the typical function of labor relations representatives. The union has not bargained for the right to control who is hired for the district management team. Both parties are permitted to have observers at the first-level hearings, and the rules do not apply to what goes on outside of the hearing, whether in preparation or in caucus. The contract does not prevent supervisors from being better prepared with Tellez's assistance. At most, the union's testimony established the observation of "feelings" or "secret signals." Observers are not prevented from talking with advocates during caucuses.

(4) The McVicker grievance must be dismissed as untimely, as the union was aware of McVicker's background for over a year prior to the grievance.

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

Arbitrator's reasoning: (1) The parties' early negotiating history was inconclusive as to the parties' intent to exclude attorneys at first-level, pre-disciplinary hearings. The district's argument regarding the rules of contract interpretation would imply that where no such limitation appears, attorneys would be permitted. There also was logic to the union's contention that if attorneys were barred at 3-3-1 and 2-2-1 grievance hearings, it follows that there was an expectation they also would not be permitted at pre-disciplinary hearings. The union did not present any evidence from negotiations to demonstrate a mutual understanding of this point.

(2) In practice, lawyers never have participated in first-level hearings. It is significant that Tellez, though an attorney, attended first-level hearings as an observer. However, the scope of the practice is subject to dispute. Tellez was hired as a labor relations representative, not as an attorney. Her role in first-level hearings has been to provide various degrees of assistance to supervisors and to attend hearings as an observer. Other labor relations representatives have done the same in the past; the only difference is that Tellez has been more active and assertive in assisting supervisors.

(3) Tellez's participation in first-level hearings has violated the rules applicable to observers in significant respects. Observers are not to communicate or participate in the presentation of the hearing. Both union witnesses and Tellez testified that she had signaled supervisors to take caucuses and then would use the caucus to help them refocus their thoughts and to assist in the presentation. Such signaling is an attempt to communicate during the hearing and violates the rules for observers. Similarly, her single note-passing infraction and the incident where she used her laptop to prompt a supervisor, when combined with her seat next to the supervisor, were infractions that demonstrated her inappropriately active role in the hearings. This is a violation of the parties' past practice and is subject to remedy.

(4) The other assistance that Tellez provided in preparation for hearings did not represent direct participation and is a normal and appropriate role for a labor relations representative. It was true that before Tellez was hired, no other attorney had held the position. But the fact that it had not happened before did not mean that it was a past practice. A past practice involves conduct that has been clearly enunciated and acted on over a long period of time, so that both parties may be said to have acknowledged and acquiesced to the practice. As no attorney has held the position before, there cannot be a past practice by definition. Thus, her assistance in hearing preparation did not violate the contract or a past practice.

(5) A charging supervisor may call an unprompted caucus and confer with an observer during that time. Normally, what the parties do during a caucus is not subject to control by a hearing officer. Caucuses are conversations to which the opposing party is not privy. There cannot be a mutually recognized past practice pertaining to conduct that is private and not mutual.

(6) The consolidation of the two grievances for hearing was proper. The McVicker grievance was timely because it was filed approximately one week after the union objected to McVicker's participation in a 3-3-1 hearing, within the contractual time limit.

(7) Although McVicker has a law degree, it was undisputed that his participation in 3-3-1 hearings solely was to provide assistance on operational issues based on his experience as a train operator. He had not advised the labor relations representative during those hearings with respect to legal tactics or objections. This participation did not violate the contract because it was not in the role of a lawyer. His intervening work as a train operator led directly to his current position. His status as a lawyer has no impact on his participation in 3-3-1 hearings.

(Binding Grievance Arbitration)

Resources

Resource for K-12 Teachers

Teachers will benefit from a new title in CPER's popular Pocket Guide Series, ***Pocket Guide to K-12 Certificated Employees Classification and Dismissal***, by attorney Dale Brodsky. The guide helps certificated K-12 employees and their representatives, and public school employers — including governing board members, human resources personnel, administrators, and their legal representatives — navigate the often-convoluted web of laws, cases, and regulations that govern or affect classification and job security rights of public school employees.

Covered are such important topics as dismissal, suspension, leaves of absence, layoffs, pre-hearing and hearing procedures, the Commission on Professional Competence, the Commission on Teacher Credentialing (CTC), the credential revocation process, and more. This information pertains to any individuals who have certificates, credentials, or permits issued by the CTC that allow them to hold instructional positions or provide services in public schools. These include teachers, counselors, psychologists, school nurses, librarians, special education specialists, and others.

Brodsky is an attorney with the law firm of Beeson, Tayer & Bodine, headquartered in Oakland, California. She practices exclusively in the area of education law representing certificated employees in employment-related matters. As a former associate editor of CPER, Brodsky covered public schools.

Pocket Guide to K-12 Certificated Employees Classification and Dismissal is valuable as both a current source of information and a training tool. Copies are $15 each. Order directly through the CPER website, http://cper.berkeley.edu/ or download an order form, or call 510/643-7092. Visa and Mastercard are accepted

MMBA in a Nutshell

A new edition of CPER's ***Pocket Guide to the Meyers-Milias-Brown Act*** is now available for anyone who needs a quick guide through the tangle of cases affecting local government employer-employee relations. It is an inexpensive and efficient tool for those involved in local government employer-employee relations. The guide contains the full text of the MMBA, an easy-to-read description of the act and the state's other employment relations statutes, a subject guide and brief summaries of all major cases, glossary, table of cases, and index of terms. The 2004 12th edition incorporates all recent legislative changes to the law and to PERB regulations.

Pocket Guide to the Meyers-Milias-Brown Act (12th edition, 2004), by Bonnie G. Bogue, Carol Vendrillo, and Marla Taylor. Copies are $15 each. Order directly through the CPER website, http://cper.berkeley.edu/ or download an order form, or call 510/643-7092. Visa and Mastercard are accepted

The New 'Normal'

One employee always wears the same outfit to work. Another talks to herself all day. Another moonlights as a stripper, another has fierce body odor, and still another adorns his cubicle with hateful messages about his boss. As a manager, what should be done about such behavior? The best answers are not obvious! The most innovative and productive people often are the strangest, and while weirdness can be rooted in brilliance, it also can be a real annoyance that serves no purpose.

Like it or not, as modern culture embraces the individual, "weirdos" — which often mean anyone different from each of our ideas of what is normal — become more commonplace. In ***Weirdos in the Workplace,*** top human resources consultant John Putzier explains how managers can harness the natural weirdness often found in high performers at every level, while curbing behavior that is disruptive. Putzier presents 32 real-world case studies to illustrate the legal, human resources, and business ramifications of unusual behavior in the workplace, and which solutions are most effective.

This book explains how to manage unconventional people by understanding why they behave as they do, and what to do about it. It explains how to migrate toward a high-performing organization built around the individual, and how to foster an environment that attracts, motivates, and retains the best and brightest. Putzier discusses how to tap

into our own natural weirdnesses and find a niche by integrating our abilities, interests, and the market.

Weirdos in the Workplace: The New Normal — Thriving in the Age of Individual, by John Putzier (2004) 224 pp. Financial Times Prentice Hall, http://vig.prenhall.com/. Softcover, $17.95.

American vs. Canadian Views on Unions

Why have Americans, who by a clear majority approve of unions, been joining them in smaller numbers than ever before? To answer that question, this book compares the American experience with that of Canada, where approval for unions is significantly lower than in the United States, but where since the mid-1960s workers have joined organized labor to a much greater extent. Given that the two countries are outwardly so similar, what explains this paradox?

The authors explain that the relative reluctance of employees in the United States to join unions, compared with those in Canada, is rooted less in their attitudes toward unions than in the former country's deep-seated tradition of individualism and laissez-faire economic values. Canada has a more statist, social democratic tradition, which is in turn attributable to its Tory and European conservative lineage. Canadian values therefore are more supportive of unionism, making unions more powerful and thus, paradoxically, lowering public approval of unions. Public approval is higher in the United States, where unions exert less of an influence over politics and the economy.

The Paradox of American Unionism, by Seymour Martin Lipset; Noah M. Meltz; Rafael Gomez; Ivan Katchanovski; Thomas A. Kochan (Foreword) (2004) 240 pp. Cornell University Press, http://www.cornellpress.cornell.edu/. Hardcover, $32.50.

Free Online Reports

Some excellent reports produced by research funded by U.C.'s Institute of Labor and Employment (ILE) are available online at no cost. Those of interest to public sector labor relations practitioners include:

Union Density Rises in California. Ruth Milkman and Daisy Rooks use data from the ILE's 2001–02 California Union Census and selected Current Population Survey data to analyze recent trends in union membership in California. The focus is the recent divergence of California from the United States as a whole. While union density has continued its long decline nationwide, in California density has increased over the past few years

State and Local Labor Legislation. The effective stalemate over national labor law reform that began in the 1970s has prompted both employer groups and organized labor to increasingly shift their attentions to legislation at the state and local levels, especially in California

UC Admissions Policy. The University of California is a pathway into many of the most coveted jobs in the California economy, and the promise that all Californians will have the equal opportunity to acquire a U.C. education is a core part of California's social contract. This report describes U.C.'s admissions policy and explores inequalities in the access that California secondary schools provide to U.C. — inequalities associated with the race and socioeconomic status of the student bodies of these schools.

These reports and others are available at http://www.ucop.edu/ile/guide/ index.html/.

A Human Rights Standard

Until recently, the international human rights movement and nongovernmental organizations, human rights scholars, and even labor organizations and advocates have given little attention to worker rights as human rights. Editor James Gross finds, however, that employers, not just governments, have the power to violate workers' rights. *Workers' Rights as Human Rights* provides a new perspective on the assessment of U.S. labor relations law by using human rights principles as standards for judgment. The authors also present innovative recommendations for what should and can be done to bring U.S. labor law into conformity with international human rights standards. This volume constitutes a beginning toward the promotion and protection of worker rights as human rights in the United States.

Workers' Rights as Human Rights, edited by James A. Gross, Cornell University Press, http://www.cornellpress.cornell.edu/. Hardcover, $35.

Electronic Resources in Labor Studies

The Digital Book Index provides links to more than 90,000 title records from more than 1,800 commercial and non-commercial publishers, universities, and various private sites. About 52,000 of these books, texts, and documents are available for free, while many others are accessible at a modest cost. Subjects range from the highly scholarly to the contemporary and popular. This index is intended as a "meta-index" for most major eBook sites, along with thousands of smaller specialized sites. In some subject categories, the resources found here are more comprehensive than those of all but the largest of research libraries, due to the budget and space constraints of smaller institutions. The Digital Book Index can be accessed at http://www.digitalbookindex.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.

EERA Cases

Unfair Practice Rulings

Retaliation not found where no adverse action occurred: Oakland USD.

(*Ferguson v. Oakland Unified School Dist.*, No. 1645, 6-17-04; 7 pp. dec. By Chairman Duncan, with Members Whitehead and Neima.)

Holding: The unfair practice charge was dismissed because the transfer of the charging party from high school to middle school was not an adverse action according to the reasonable person standard.

Case summary: James Ferguson filed an unfair practice charge against the Oakland Unified School District alleging that the district retaliated against him for filing a grievance regarding his teaching assignment. Ferguson was a teacher at Castlemont High School. During the 2000-01 school year, he taught U.S. history and multicultural studies. In 2001-02, he taught five physical education classes for ninth graders. In 2002-03, he was assigned three physical education classes and two study skills classes. Within the first two weeks of the school year, both study skills classes were removed from his schedule, leaving him with only three classes. One month later, he was assigned to teach two U.S. history classes. Ferguson was unhappy that he was assigned the new classes instead of keeping the vacant periods.

In October 2002, Ferguson filed a grievance alleging that his current schedule violated the collective bargaining agreement between the district and the Oakland Education Association. The relevant article states that if a teacher is reassigned to another grade level or subject area, the teacher shall not be assigned to another grade level for at least two years.

The district and OEA arranged two meetings to negotiate a solution acceptable to all parties. At the first meeting, the district agreed to place Ferguson at a middle school and to assign him to teach only physical education. Both the district and OEA representatives stated that this arrangement would resolve the agreement. Ferguson believed that he would be able to choose the middle school to which he would be assigned.

The district later determined that only one position was open for a middle school physical education teacher, which was at Cole Middle School. Ferguson was given that assignment. He then told the district that the grievance was not resolved because he believed he would be able to choose the middle school for his new assignment. The district informed him that at the second meeting between the parties, it was agreed that the middle school assignment would resolve the grievance. Ferguson then filed a new grievance in September 2003, alleging that his previous grievance remained unresolved. After the OEA representative told him

that the grievance in fact was resolved, he filed unfair practice charges against the district and OEA.

The board found that Ferguson was the only person present at the second meeting who did not believe the grievance was resolved by his transfer to teach at a middle school because he had been denied the right to select the school to which he would be transferred. Both the district and OEA representatives believed the grievance had been settled at the second meeting because the parties agreed that Ferguson would be transferred to a middle school, a resolution that Ferguson himself said he wanted.

No evidence demonstrated that the district's action was in retaliation for the filing of the grievance. Both the district and OEA considered the transfer to be a settlement of Ferguson's charges, and therefore it was not adverse in nature. And, while there was some dispute as to whether he would choose his middle school assignment, OEA may bind him to the agreement even if he is unhappy with the outcome.

To determine whether Ferguson's assignment to the only middle school position available was an adverse action, the board relied on the objective reasonable person standard outlined in *Compton Unified School Dist.* (2003) PERB No. 1518, 161 CPER 88. Ferguson was paid the same salary before and after the transfer, and taught the classes to which he was assigned. Ferguson never stated why he did not want to teach at Cole. He failed to provide any information to demonstrate why a reasonable person would find that assignment adverse.

No nexus existed to connect the filing of the original grievance with the transfer to Cole, and as such, the board could not conclude that Ferguson was transferred in retaliation for his grievance. The charge was dismissed.

Results of election set aside due to unlawful interference: Chula Vista ESD.

(*Chula Vista Elementary Education Assn., CTA/NEA v. Chula Vista Elementary School Dist.*, No. 1647, 6-23-04; 27 pp. + 34 pp. ALJ dec. By Member Whitehead; Member Neima, concurring and dissenting; Chairman Duncan, dissenting.)

Holding: The election result was set aside because the school principal interfered with the teachers' rights to vote freely and without coercion.

Case summary: The Chula Vista Elementary Education Association filed an unfair practice charge alleging that the Chula Vista Elementary School District interfered with the protected rights of certificated employees at Mueller Charter School and the association, the exclusive representative of those employees. The administrative law judge found that the principal of MCS unlawfully interfered with the rights of certificated employees; that the principal was an agent of the district, making the district responsible for his conduct; and that as a remedy, the district should cease and desist from not promptly investigating allegations of interference at MCS and, upon determination of such conduct, take appropriate steps to curtail it. The ALJ further found that because MCS was not named as a party to the charge, the board lacked authority to require MCS to comply with a board order. The board affirmed the decision in part and reversed it in part.

MCS is a charter school that was formed by the district in 1994 pursuant to the Charter Schools Act of 1992. The original charge was filed in 1999, but was placed in abeyance in October 1999 until March 31, 2000, because of the passage of the Migden Amendment, A.B. 631. The primary intent of the amendment was to apply EERA to charter schools and to require charter schools to declare whether the charter school or the chartering entity would be the employer for purposes of EERA. The charge was reactivated in August 2000.

The amended charge alleged that the MCS principal, Bill Collins, and others interfered, coerced, and threatened reprisal against unit employees related to an election held to determine the identity of the public school employer as prompted by A.B. 631. The charter petition required a two-thirds vote of the full-time, on-site certificated staff to amend or revoke the charter. The election resulted in MCS being named as the public school employer over the district. Ex-

actly two-thirds of the eligible voters were in favor of MCS. The association argued that the district's conduct compromised the election, and it requested that the board overturn the result.

Teachers at MCS were divided over how to vote in the election. Association supporters wanted the district to be designated as the employer for collective bargaining purposes; opponents wanted MCS to be designated. Teachers openly discussed the issue. Bill Collins, the MCS principal at the time, was highly controversial. Teachers either thought he fostered a hostile workplace or believed that he created a "wonderful, caring educational environment." Collins was a strong advocate of having MCS designated as the employer and allegedly was forceful when stating his opinion.

The association presented evidence about conversations between Collins and three teachers. Armando Vidales was a probationary teacher at the time of the election and went to Collins' office to discuss a multi-cultural festival he was organizing. At the meeting, Vidales testified that Collins asked him how he planned to vote in the election. Vidales told Collins he had not decided, when in fact he had, because he was afraid of being subjected to intimidation afterward. Collins also asked if Vidales knew how two other teachers planned to vote; Vidales said he did not know. According to Vidales, Collins spent approximately 40 minutes trying to convince him to vote against the association. Gilda McAllister testified that she had many conversations with Collins prior to the election, during which he asked for her support and told her that "the union would stop us from being a charter school and doing what we needed to do to be a charter school."

The ALJ deemed that the most serious comments attributed to Collins were offered in testimony by Patti Neill. She said she already was afraid of him due to an earlier incident unrelated to the election. On the day of the election, Collins approached Neill on the playground during recess and tried to convince her that she "needed to vote the union out." She testified that he also told her that if she really wanted the union, he would help her transfer to another school. Finally, he threatened her by stating that if she did not vote against the union, he would tell the assistant superintendent, Tom Werlin, that she had sex with another teacher in a classroom; he acknowledged that this was a lie. He also told her that he had friends who wanted to come to the school and break arms, but he had not yet let them come. The sex-in-the-classroom accusation was rooted in an incident where a male teacher was discovered engaging in a sexual act with a parent in a classroom. Neill was known to have dated the male teacher, and she testified that after the incident, Collins told her he personally had to go talk to Werlin to save her job. Werlin testified that Neill's name never was brought up during the investigation of the incident.

Neill testified further that Collins told her that as the principal, he had the power to make her life miserable. He predicted he could keep it up for a year until the district found out and made him stop. Her testimony was uncontradicted, and the ALJ found her to be credible.

The board agreed that Collins was an actual agent of the district. The district asserted that Collins did not act with the apparent authority of the district when he engaged in the unlawful conduct, and that even if he did, Werlin's actions constituted repudiation. Apparent authority may be found where an employer reasonably allows employees to perceive that it has authorized the agent to engage in the conduct in question. The board found that Collins did act with the apparent authority of the district. In a letter dated December 15, 1999, the district was informed by some MCS teachers that Collins' conduct was creating a hostile work environment. In addition, Werlin testified that he knew that Collins was discussing the election with teachers. He met privately with Collins and advised him not to pressure teachers. Werlin did not investigate further when Collins denied acting coercively. Werlin also spoke to MCS teachers twice, including on the date of the election, to advise them to vote their consciences. Werlin testified that MCS was the only school he had visited twice on this issue, and that he had returned to MCS because he had received reports of heavy electioneering. However, he did not investigate the reports or repudiate Collins' actions when speaking to the teachers.

Even after the election, when Neill told Werlin of Collins's threats of physical harm, he merely advised her to contact campus security. Shortly after the election, six teachers filed a grievance under the MCS charter, questioning the validity of the election because of Collins's undue influence. No evidence demonstrated that the district conducted an investigation into Collins's conduct or its effect on the school staff, or otherwise responded to the teachers' complaints. Instead, the district approved the charter petition amendment and declared MCS the public school employer.

The board held that Collins's conduct tended to coerce or interfere with employee choice, thereby creating a probable impact on the election result, noting that only one vote would have changed the outcome. Although the district was on notice regarding his conduct, the district failed to take any public action to disavow it or to reassure the staff of a fair election. Thus, sufficient evidence existed to invalidate the election.

The ALJ ordered the district to cease and desist from not investigating interference allegations and to take appropriate action as necessary. But the ALJ did not order the district to overturn the election because he found that the district lacked the authority to do so under the Charter Schools Act. MCS was not ordered to overturn the election because the school was not named as a party.

With respect to the ALJ's conclusion that the board lacked the authority to order the district to set aside the election, Member Whitehead reasoned that MCS' status as a party was irrelevant because the unlawful conduct occurred before MCS was named as the public school employer. The district retained responsibility for unlawful conduct by its agent at MCS between January 1, 2000, when A.B. 631 went into effect, and March 28, 2000, when the charter petition amendment was adopted. Moreover, although independent operation of a charter school is a key objective, charter schools remain under the authority and jurisdiction of the public school system. The MCS charter provides for MCS accountability to the district and for district authority over MCS. The appropriate remedy under board precedent is to rescind the election.

Member Neima concurred in the portion of the opinion that found the district interfered with the MCS teachers' protected rights under EERA, and that it was proper to order the district to cease and desist from further interference. He dissented to the portion holding that PERB has the jurisdiction to order the district to set aside the election.

Chairman Duncan dissented, concluding that the legislature has placed charter school creation and operation outside of PERB's jurisdiction.

Employer may not discipline employee after denying right to union representation in an informational interview: Lake Elsinore USD.

(*Lake Elsinore Teachers Assn., CTA/NEA v. Lake Elsinore Unified School Dist.*, No. 1648, 6-23-04; 11 pp. dec. By Members Whitehead and Neima; Chairman Duncan, dissenting.)

Holding: The board agent's partial dismissal of the charge was reversed because the charging party was denied union representation when the district told her that an interview was merely investigatory but later it actually resulted in discipline.

Case summary: The Lake Elsinore Teachers Association filed an unfair practice charge against the Lake Elsinore Unified School District alleging that the district denied teacher Darla Ausman the right to union representation during a purportedly investigatory interview. The situation arose when Ausman informed her coworker, Christine Mann, of a comment made by another teacher, Cheri Smith, pertaining to anonymous and demeaning notes and pranks. The activity had the effect of victimizing Mann. Ausman was asked to attend a meeting regarding Mann's complaint, but the request specifically said that the meeting did not involve discipline or a union issue.

When Ausman met with the assistant superintendent and the district's attorney, she believed that the meeting might lead to discipline and requested union representation. Her request was denied and she was instructed to speak with the attorney. The association alleged that her requests continued throughout the meeting, and that the attorney intimidated Ausman by arguing with and berating her. At one point

during the interview, it became apparent that Ausman was the focus of the investigation. Ausman contended that she was not offered the opportunity to obtain union representation at that time. She later was disciplined and received a counseling memorandum resulting from the meeting.

The district alleged that the charge lacked specificity. The district stated that Mann filed a harassment complaint against Smith alleging that several items had been placed in her mailbox anonymously, causing her distress. Mann believed that Smith was responsible based on Ausman's comments. The attorney interviewed a number of individuals to investigate Ausman's claim. Smith, in contrast to Ausman, was told she was entitled to union representation because discipline might result from her interview. Ausman was denied representation at the beginning of her interview because no disciplinary action was being considered against her; when the focus shifted, claimed the district, Ausman declined the district's offer to have representation present for the remainder of the interview.

The board agent, explaining that neither standard requiring the opportunity for union representation was met, dismissed the allegation that Ausman unlawfully was denied representation during the meeting. The *Weingarten* rule, as adopted by the board in *Rio Hondo Community College Dist.* (1982) PERB No. 260, 55 CPER 65, requires that the charging party show that (1) the employee requested representation, (2) for an investigatory meeting, (3) which the employee reasonably believed might result in disciplinary action, and (4) the employer denied the request. The B.A. found that the association did not provide sufficient facts to support the claim that Ausman had a reasonable belief that the meeting might result in disciplinary action. Further, her failure to request representation once the meeting's focus shifted to her conduct defeated the claim. The B.A. also noted that the extended standard articulated in *Redwoods Community College Dist. v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617, 63 CPER 36, allowing union representation in highly unusual circumstances absent an employee's reasonable belief in disciplinary action, was not met by the facts alleged.

But the board cited *State of California (Dept. of Parks and Recreation)* (1990) PERB No. 810-S, 86 CPER 68, as a case where a right to representation was found under similar factual circumstances. In that case, the employee was called into an informational meeting that the employer insisted would not result in disciplinary action. The employee requested and was denied union representation, and then later received a disciplinary memorandum. In the instant case, the district argued that Ausman could not have reasonably believed that discipline would result from the interview at the time she requested representation. The board disagreed and found that Ausman's belief was reasonable, given the "highly charged atmosphere" surrounding the Mann situation, the formal nature of the investigation, and the hostile attitude from the district attorney.

Regardless of whether the discipline element existed at the onset of the interview, the board said, the district may not discipline Ausman after assuring her that no discipline would result from the interview. While the employer is not required to inform an employee of her *Weingarten* rights, once the employee has been denied her request for union representation during an interview on the basis that no discipline will result, the employer cannot impose discipline anyway. Otherwise, the employee must repeatedly ask for representation, as the association alleged, or place herself in the difficult situation in which the union's ability to represent her is weakened. Consequently, the board reversed the B.A.'s partial dismissal.

Chairman Duncan dissented, arguing that Ausman never stated any reasons why she thought she would face discipline as a result of the meeting. Without any facts to support her reasonable belief, she has not met all the elements of the *Weingarten* test. She failed to state the claim with specificity, meaning that it should have been dismissed. Moreover, when the tone of the meeting changed, Ausman never made a new request for representation, as was her responsibility. The district denied her initial request because it was not aware of facts that would lead to discipline against Ausman. Her claim is mere speculation. The partial dismissal should have been upheld.

District retaliated against three teachers for protected activities: Empire USD.

(*Empire Teachers Assn. v. Empire Union School Dist.*, No. 1650, 6-29-04; 7 pp. + 61 pp. dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

Holding: Both the district superintendent and the school principal were motivated by unlawful animus when three teachers suffered retaliation for their protected activities.

Case summary: The Empire Teachers Association filed an unfair practice charge against the Empire Union School District alleging that three teachers, who were active in ETA, were given negative personnel documentation as a direct result of their protected activities. All three teachers were employed at Teel Middle School, served in numerous advocacy rules, and had several run-ins with the administration.

Melva Rush became the principal at Teel in 1994. ETA co-president, Dave Loucks, testified that she began to irritate the teaching staff almost immediately with what they believed was an autocratic, uncommunicative management style. The teachers became so frustrated with Rush after a number of failed attempts to communicate with her that they asked the ETA leadership to permit them to take a vote of no confidence during her first year. Loucks discouraged the no-confidence vote but did tell Rush that the teachers felt she was disorganized and a poor communicator. The comments did not affect Rush's management style. An ETA survey of Teel teachers conducted the following year reflected widespread concern over her management and communication styles.

Rush took other actions that caused ETA to feel directly attacked. Near the end of the 1998-99 school year, she held a full-day meeting with department heads to set the calendar for the following year. Most of the department heads were ETA members who had been selected by their peers. However, the following week, while the eighth-grade teachers were on a field trip with their classes, Rush announced that she was abolishing the department-head system. Instead, she appointed liaisons, who would represent teaching teams. Most of the liaisons were not ETA members and not representative of their peers.

At the beginning of that same school year, ETA approached Rush about the possibility of setting up monthly meetings with the Teel ETA representatives. The meetings would enable the parties to discuss employee concerns at the local level. The idea was conceived in part because many ETA members were afraid to speak to Rush individually, and because a similar series of meetings at the district level seemed to resolve disputes quickly and informally. Rush declined to do so. She wanted to meet with ETA representatives only on an as-needed basis. She told ETA she did not want it speaking for the Teel teachers because she did not believe that ETA represented the interests of all teachers. In July 1999, Loucks complained to the school board about Rush. He later transferred to another school.

JoAnne DeMattos has taught reading and language arts at Teel since 1984 and was described as an excellent teacher by Robert Price, the district superintendent. She serves as ETA's site representative at Teel, a position that requires her to represent the teachers in their dealings with Rush. She also served as a Teel representative to the "Price Club," the name given to the informal monthly meetings held at the district level. Teachers' concerns always were to be discussed at the local level before being brought to the Price Club. The district cited four instances in which it contended DeMattos did not discuss matters with Rush prior to bringing them to the Price Club. The facts revealed that DeMattos either had done so or had relied on the assertions of fellow teachers. DeMattos read a letter to the school board during its March 11, 1999, meeting in which she described the feelings of frustration and dissatisfaction expressed by others. Thirty-three Teel teachers signed a statement in support of her comments and delivered it to the board shortly thereafter. Price and Rush both contended that they had not received a copy of her remarks prior to her address, but DeMattos testified without rebuttal that every issue she discussed already had been raised at the Price Club.

Rush evaluated DeMattos in May 2000, and gave her a "does not meet" rating in the area of professional relations. Rush testified that DeMattos' lowered rating was due to her school board statement and her failure to follow the "prior

notification" Price Club rule. In October 2000, DeMattos was notified that because of her "does not meet" professional relations rating, she would be evaluated again in all areas. In order to avoid a second low rating, DeMattos asked Rush to explain why she had been given the rating. In her response, Rush said DeMattos took issues to the Price Club and to ETA meetings before going through site channels. DeMattos later received a very positive evaluation from the assistant principal with no negative ratings or comments.

Rush made her feelings toward ETA apparent at an October 31, 2000, meeting with DeMattos, another Teel ETA representative, a California Teachers Association staff director, and the Teel vice principal. ETA had typed up a list of various issues in an agenda format, which upset Rush because she did not think it was necessary to put "these things" in writing. Rush insisted that some of the issues were DeMattos' personal concerns and commented that "this is an example of why you were marked down." Rush then accused the representatives of "stirring up conflict," and insisted that teachers should come to her individually rather than having their concerns presented by their union. The CTA staff director's notes confirmed this representation of events.

Kim Davis taught English at Teel from 1994 to 2001, and has been active in ETA from 1993 onward. In March 2000, she requested a transfer to any of the district schools other than Teel. Prior to her transfer request, she accompanied her students to a week-long outdoor education camp. While there, she took a "no-tell" day as authorized by the parties' collective bargaining agreement to attend a job interview. When an employee takes a "no-tell" day, she is required to provide notice to the district in the same manner as if she were calling in sick. The purpose of the rule is to ensure proper substitute coverage. When Davis took the "no-tell" day, she arranged for a colleague to replace her during her five-hour absence. No written rules, contract language, or district policy govern the proper procedure for taking a "no-tell" day while at camp. Davis did not notify Rush of her plans and received a letter of reprimand as a result. The letter was not one of the allegations set forth in the unfair practice charge because it was issued more than six months before the charge was filed, but the administrative law judge considered it as evidence of whether a pattern or practice of union animus existed at Teel.

Davis was interviewed by a reporter in regard to ETA's vote of no confidence against Rush in May 2000. ETA decided to leaflet parents attending Teel's open-house night to inform them of the action, and the reporter in attendance was referred to Davis. She was quoted as saying that Rush did not listen to her staff and did not accept questioning of her decisions. Following the article, Rush marked Davis as "does not meet" in the area of professional relations on her evaluation. Rush testified this was due to the camp incident, though she allegedly told Davis she did not appreciate her staff talking to the newspaper. Davis also was removed from her honors class assignment at the end of the school year, a class she had taught for the previous three years. Rush claimed this was because there were insufficient students to populate two honors classes. In fact, Teel had its largest-ever incoming class of sixth graders. Two honors classes were offered to these students when they reached seventh grade. The Teel school psychologist testified that for the past five years Teel always had had two honors classes in both sixth and seventh grade, with the only exception being the year Davis was removed from teaching her class. Finally, Davis twice requested to be a partner-teacher in fall 2000, a position she had held for the three previous years, but Rush rejected the request without explanation. Rush testified she rejected Davis because of her reprimand letter and her pending transfer request. Rush told Davis that new sixth-grade teachers were not going to be assigned to the classroom area near her because Rush believed she was a negative influence.

Marj Whinery has been a Teel physical education teacher for 26 years. She has been active in ETA since the early 1980s. In May 2000, she received an evaluation that contained negative comments, though no negative rating for professional relations. One of the assistant principals was instructed by Rush to insert language describing displeasure with how Whinery raised issues during staff meetings. Whinery had asked questions about student discipline dur-

ing a staff meeting because it was an item on Rush's agenda. After the meeting, Rush sent a memo informing teachers that they could not raise an item at a meeting without discussing it with her first. The evaluation was not timely for inclusion in the charge but was accepted into evidence for determining whether union animus existed.

On May 31, 2000, Whinery sent a letter to the school board president. The letter expanded on and personalized many of the complaints that ETA had expressed on May 4, 2000, during the board meeting. The complaints included her belief that Rush retaliated against teachers who criticized her, dispensed discipline on a disparate basis, and caused teacher morale to decline.

Whinery unofficially acted as the head of the P.E. department, and her colleagues were comfortable with her speaking on their behalf. In late-October 2000, a conflict arose between the cafeteria staff and the P.E. teachers over use of the multipurpose room, which is used both as a cafeteria and a gymnasium during inclement weather. The periods immediately before and after lunch created a problem on those days because of the need to set up and break down the furniture. Whinery spoke with the other teachers in the department and exchanged a series of emails with the assistant principal about the problem. The text of the messages revealed that she was speaking on behalf of the other teachers and that the assistant principal understood this. A solution to the problem was worked out; however, when Rush learned of the email exchange, she issued Whinery a letter of reprimand. At the hearing, the district pointed out that the other members of the department were not copied on any of the emails. Whinery testified that she consulted every teacher prior to every response. Teel's P.E. teachers retroactively prepared a document that confirmed Whinery had spoken on their behalf.

The ALJ found that the district discriminated against all three teachers by taking negative personnel actions because of their protected activities and that it denied ETA rights guaranteed by EERA. DeMattos, Davis, and Whinery all engaged in protected activities through their respective ETA roles. Rush and Price, the primary decisionmakers in this case, clearly were aware of such activities. The remaining question was whether a nexus existed between the administrators' knowledge of these activities and the negative personnel actions taken.

The Price Club was created by the contract and obligates the superintendent to meet each month with the ETA president and specified teacher representatives. Price is allowed to negotiate certain ground rules for the meetings and to complain should ETA fail to follow these rules. However, he may not allow these rules violations to negatively impact an individual representative's employment records. This includes lowered evaluation ratings or negative letters from the board.

Three actions by Price supported an inference of unlawful motivation on his part. First, he complained to the ETA executive board about its no-confidence vote of Rush in May 2000. He said the use of concerted activities regarding Rush was unprofessional, unethical, and possibly illegal. However, taking such a vote and publishing its results were legal union actions. Nor did the evidence support the charge that the teachers had acted unprofessionally or unethically. Second, Price wrote a letter to DeMattos in response to her March 11, 1999, address to the school board in which he accused her of "owning the expressed pain of others." As an ETA representative, DeMattos' job is precisely that. Unions serve as a collective voice of employees that attempt to improve the terms and conditions of employment. Third, Price's response to Louck's July 1999 board presentation chastised him for speaking about another employee and included a veiled threat of legal action. Price told Loucks that there were other avenues of complaint open to him, except that these alternatives referred to a policy that did not allow employees to make complaints until 2000.

The record was replete with evidence concerning Rush's negative attitude toward ETA and its representatives. She discouraged ETA from speaking on behalf of all teachers when it wanted to set up informal monthly meetings with her. At an ETA meeting, she referred to the issues ETA was raising as DeMattos' personal issues. Rush wrote a letter to DeMattos in November 2000, telling her to go "through

channels" before raising issues at ETA meetings. In the ALJ's opinion, this letter demonstrated a complete lack of understanding of the rights granted to employees by EERA.

The district contended that DeMattos' charge regarding her negative evaluation was untimely because it was signed by DeMattos on May 9, 2000; the charge was not filed until February 21, 2001. The ALJ ruled that because Rush told DeMattos on November 17, 2000, her reasons for the low rating, that date activated the six-month period for filing a charge. The board disagreed. DeMattos testified at the hearing that on May 9, she knew of the negative evaluation. In November, she discovered evidence that her low mark may have been motivated by her protected activities. But board precedent holds it is the discovery of the conduct, not the legal significance of the conduct, which triggers the limitations period. Accordingly, the allegation was dismissed as untimely. However, the board noted that the ALJ had not addressed the interference issue raised in the charge, and it found that the district had still interfered with DeMattos' protected rights under EERA Sec. 3543.5(a).

The ALJ found that the district discriminated against Davis by removing her from the honors class assignment. Rush testified as to her reasons for reassigning Davis, but the ALJ noted numerous evidentiary facts that undermined Rush's credibility. When combined with Davis' letter of reprimand and her negative evaluation, the ALJ concluded that Rush's reasons were merely pretextual. The ALJ reached the opposite conclusion with respect to Rush's denial of a partner-teacher position for Davis. Although the letter of reprimand after camp was the direct result of Davis' protected activities, the second reason regarding Davis' pending transfer request was valid. A partner-teacher is responsible for guiding a new teacher in her activities throughout the school year. If the senior partner were not available for a substantial part of the year, the value of the partnership would be seriously diminished. ETA argued in its brief that Davis' transfer request was rejected before the fall, but it offered no evidence to support that timing. The allegation was dismissed.

The ALJ ruled that the letter of reprimand given to Whinery was the direct result of her protected activities. Rush's strong animus toward ETA representatives carried over into her assertions that Whinery's emails in the multipurpose room situation were not on behalf of the entire P.E. department. This was despite the tenor and phraseology of the assistant principal's responses, which clearly indicated he knew Whinery was speaking on behalf of the department.

Finally, ETA suffered a denial of rights separate and apart from those of the involved employees. ETA has a protected right to elect leaders and have them communicate with their fellow employees. If a leader is subjected to discrimination, in any manner, it thwarts the union's ability to have its members voluntarily step into leadership roles. Thus, discrimination against a union's leader is a denial of its right to properly represent the members of its bargaining unit, which is a right expressly guaranteed by EERA.

With the one noted exception, the board agreed with the ALJ and adopted his opinion.

Change in wage calculation policy was unilateral and unlawful: Lost Hills Union ESD.

(*California School Employees Assn., Chap. 802 v. Lost Hills Union Elementary School Dist.*, No. 1652, 6-30-04; 4 pp. + 10 pp. ALJ dec. By Chairman Duncan, with Members Whitehead and Neima.)

Holding: The district was ordered to restore its previous policy on calculating wages for employees with composite classifications because the change was implemented without offering the union the opportunity to negotiate.

Case summary: The California School Employees Association, Chapter 802, filed an unfair practice charge against the Lost Hills Union Elementary School District alleging that the district unilaterally changed its practice of calculating the wages of employees in composite classifications without affording CSEA prior notice or the opportunity to negotiate. Prior to the implementation of the new wage formula, the pay of employees who spent part of their workday as bus drivers, and the remaining portion in other classifications, was based historically on pro-rata wages of both classifications. This practice continued even during the summer, winter, and spring school breaks when the em-

ployees were not driving buses. After the parties entered into a new collective bargaining agreement, bus driver wages no longer were calculated into the employees' pay during the school-break periods. This resulted in a pay decrease because bus driver wages were considerably higher than the wages of other classifications.

Appendix A of the CBA provided for an 8 percent wage increase across all classifications. The CBA makes no reference to a wage scale or formula for composite classifications. District witness Susan Hamilton testified that at a negotiation session on April 10, 2001, the parties discussed several issues, including "pay for services performed." Hamilton testified that the district bargaining representative, Anthony Leonis, stated that an employee should get paid for the work performed in a specific classification only. The CSEA representative at the meeting appeared to understand this statement. No agreement was reached at this meeting.

Harrison Favereaux, the district's director of business services, who implemented the new pay formula, testified that the change came about because of his understanding of the agreement and through discussions with Leonis. He testified that in December 2000, prior to when the new wage scale was introduced, he told Jeff Hart, the CSEA chapter president, that "some adjustments" would need to be made to the salary schedule, but not until January. The district contended that these statements are evidence that CSEA understood and accepted the new pay formula, and that it is consistent with the negotiated agreement, which made CSEA further aware of the change.

The administrative law judge disagreed with the district's construction of events. Leonis' statement at the April 10 meeting, and the conversation between Favereaux and Hart in December 2000, hardly were sufficient notice to CSEA that the district intended to change the pay scale. The parties' CBA made no specific reference to wages for composite classifications. Leonis' statement at the April 10 meeting could not have informed CSEA of the intent to change the pay calculation; if anything, it referred directly to the past practice of calculating wages for composite classifications, except for bus driver wages during school-break periods. The ALJ found that this statement could not lead CSEA to reasonably understand that the district intended to discontinue the formula. And Favereaux's statement about adjustments to the salary schedule could not have reasonably referred to the district's intent to change since the parties had been discussing the impending 8 percent wage increase specified in the CBA. These two instances did not provide CSEA with reasonable notice or an opportunity to bargain prior to the implementation of the change.

The board adopted the opinion of the ALJ in full, and ordered that the district restore the status quo and provide notice to CSEA regarding any further proposed changes in the formula for calculating wages.

Appeal denied for failure to state a prima facie case: Compton CCD.

(*Malik v. Compton Community College Dist.*, No. 1653, 6-30-04; 2 pp. + 6 pp. R.A. dec. By Chairman Duncan, with Members Whitehead and Neima.)

Holding: The appeal was rejected because the charging party failed to provide any information as to dates or conduct giving rise to his charge.

Case summary: Abdullah Malik filed an unfair practice charge alleging that the Compton Community College District reclassified employees to deprive "certain unwanted union members" of seniority and vacation, and to favor other employees hired through nepotism. Malik did not provide any dates or facts to support these allegations.

PERB Reg. 32615(a)(5) requires that an unfair practice charge include a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. Mere legal conclusions are insufficient to state a prima facie case. Moreover, as the regional attorney commented, the dates of the alleged employer violation are necessary to determine whether a charge is timely filed, as PERB may issue complaints only for charges filed within six months of the violation. Additionally, an employer's reclassification of employees is not a per se violation.

On appeal, Malik stated that he was appealing the dismissal of his charge only "to keep pursuing his case," despite

his failure to fulfill the requirements of PERB Reg. 32635(a), which governs appeals. Accordingly, the board denied his appeal.

Revocation of form detailing commitment to school not protected conduct: LAUSD.

(*United Teachers of Los Angeles v. Los Angeles Unified School Dist.*, No. 1657, 7-8-04; 15 pp. + 6 pp. R.A. dec. By Chairman Duncan, with Member Neima; Member Whitehead dissenting.)

Holding: The charging party's revocation of his commitment form was not protected conduct because the form was a valid term or condition of employment.

Case summary: The United Teachers of Los Angeles alleged that the Los Angeles Unified School District retaliated against teacher Scott Miller for the revocation of his commitment form by refusing to hire him elsewhere in the district. Miller was employed at Mann Middle School during the 2001-02 school year as a temporary teacher. Under LAUSD's Ten Schools program, teachers at Mann were required to sign a commitment form in which they agreed to additional conditions related to their employment, including a dress code and four weeks of additional staff development programs. Mann was the only school in the district to require such a form. Miller signed the form in April 2002.

Miller later attended a UTLA meeting at which he was notified that teachers who did not sign the form still would be eligible to work at other district schools. UTLA advised the attendees that the district would assist them with finding jobs elsewhere in the district. Following the meeting, Miller asked the principal to return his signed form. In early August 2002, Miller contacted the school to find out when he should report to work, only to learn that he was no longer employed at Mann. On September 3, Mann's principal told the UTLA representative that Mann would have a job at the school if he signed the commitment form. The following day, a district personnel specialist told the UTLA representative that the district would not allow a temporary teacher to change schools. Miller interviewed at other schools within the district without procuring employment. Two schools offered him jobs and then rescinded the offers. A third school initially declined to interview him, stating that he was not eligible, but later scheduled an interview and then hired someone else for the position.

The board agent dismissed the unfair practice charge for failure to state a prima facie case of discrimination, finding that the revocation of the commitment form was not protected activity and that no case law existed to support Miller's position. UTLA did not demonstrate motive through the denial of positions at other schools. Finally, Miller, as a temporary teacher, had no right to continued employment with the district.

The board agreed that UTLA failed to demonstrate a prima facie case of retaliation based on Miller's revocation of the commitment form. According to UTLA, his refusal to provide the form was protected because he was following the advice of the union representative. However, the board emphasized that no case law supported this position. No evidence was presented to show that the district and UTLA had an agreement permitting employees to refuse to sign the form.

Member Whitehead dissented from the board's decision. UTLA held several meetings to explain the commitment form as representing an additional term and condition of employment, and to inform teachers that the district would assist those who did not sign in relocating to other schools. The district was aware of these meetings because they took place at Mann. Attendance at these meetings constituted participation in union activities for purposes of representation. Those teachers who acted in response to UTLA's advice by their refusal to sign or by revocation of their signatures were engaging in protected activity. UTLA insisted that the parties agreed to allow employees not to sign the form; Miller's choice to take advantage of the agreement also constituted protected conduct. Miller relied on the district's representation that it would not retaliate against any teacher who declined to sign, but he suffered retaliation nevertheless through the loss of his job at Mann and his inability to gain employment elsewhere in the district.

It was UTLA's understanding that the teachers had the choice of signing the form or receiving the district's assistance in relocation to other schools. Signing the form was a voluntary act on the part of the Mann teachers. Under *Modesto City Schools* (1983) No. 291, 59 CPER 88, the refusal to perform a purely voluntary duty is protected conduct. Moreover, it was clear that at least some items included on the commitment form, such as four extra weeks of paid staff development, are matters within the scope of representation under EERA. The district also was not allowed to treat Miller unlawfully merely because he was a temporary teacher with no guarantee of continued employment within the district. On this basis, Member Whitehead would have found sufficient evidence of retaliation to state a prima facie case.

Charter school deemed public school employer of its teachers: Ravenswood City ESD.

(*Ravenswood Teachers Assn. v. Ravenswood City Elementary School Dist.; Ravenswood Teachers Assn. v. Edison Brentwood Academy*, No. 1660, 7-14-04; 5 pp. + 25 pp. ALJ dec. By Member Neima, with Chairman Duncan; Member Whitehead concurring.)

Holding: Edison Brentwood Academy was found to be the public school employer of its teachers for purposes of collective bargaining under EERA.

Case summary: The Ravenswood Teachers Association filed an unfair practice charge against the Ravenswood City Elementary School District alleging that the district terminated three teachers at its charter school, Edison Brentwood Academy, because of their protected conduct. The district moved to dismiss the complaint, arguing that it was not the employer of the terminated employees; the district asserted that Edison Brentwood was the employer for EERA purposes. RTA then filed an unfair charge against Edison Brentwood that contained essentially the same allegations of discrimination involving the same teachers. In its answer to the complaint, Edison Brentwood denied all allegations but admitted that it is the employer of the charter school teachers under EERA Sec. 3540.1(k). RTA continued to argue that the district was the employer. The administrative law judge bifurcated the issues raised in the complaints and held a hearing to determine the matter of employer status.

A.B. 631 went into effect on January 1, 2000. The law makes EERA applicable to charter schools. The law requires that the charter of a charter school contain a declaration as to whether the school will be deemed the exclusive public school employer of the charter school employees for EERA purposes. If no such declaration is made, the district that issued the charter shall be the exclusive employer. In addition, A.B. 631 modified the Education Code to give all existing charter schools until March 31, 2000, to declare whether they would be deemed a public school employer in accordance with the new law. As such, Martha Navarette, principal of Edison Brentwood, prepared a declaration on school letterhead stating that the school was the exclusive employer of employees at the school. The declaration was delivered to the district on March 30, 2000.

Both the district and Edison Brentwood took the position that Edison Brentwood was the employer of the teachers. RTA argued that Navarette's declaration was facially invalid. The ALJ disagreed with RTA, finding that Edison Brentwood complied with the requirements of A.B. 631 when it exercised its discretion to declare itself the public school employer. This determination was consistent with the purposes of the Charter School Act and its legislative history.

RTA also argued that the declaration was materially inconsistent with the charter. Again, the ALJ disagreed, finding that mere references in the charter, the management agreement, or employment documents that charter school teachers are employees of the district do not render the declaration materially inconsistent with the charter. Charter schools remain subject to the control of the public school system at all times. References to Edison Brentwood teachers as district employees were outweighed by Edison Brentwood's control over actual working conditions. Edison Brentwood retained authority over the most fundamental terms and conditions of employment that are traditional indicators of employment status, such as hours, compensation, performance-based promotions, class size, pension contributions, discipline, and evaluations. Furthermore, the man-

agement agreement provided that Edison Brentwood has the authority to "select and hold accountable" teachers, and to dismiss teachers from the charter school. The agreement also states that the district will play some role in the selection and evaluation of teachers, and that the district will provide due process protections in the event of a termination, but this authority is not derived from the charter. The charter gives ultimate authority to Edison Brentwood.

The board agreed with the ALJ's determination that Edison Brentwood was the public school employer of the teachers at issue. Member Whitehead's concurrence cautioned against the adoption of a general rule interpreting A.B. 631. The legislation did not describe the process by which a charter school declares itself to be the public school employer. Accordingly, what a particular school does to comply with the rule may vary significantly from school to school. Each case should be judged on its own merits to determine whether the declaration was made in a manner that satisfies the legislature's requirements.

Charge dismissed for mootness: Edison Schools, Inc.

(*Ravenswood Teachers Assn., CTA/NEA v. Edison Schools, Inc.*, No. 1661, 7-15-04; 4 pp. + 7 pp. R.A. dec. By Member Neima, with Chairman Duncan. Member Whitehead, concurring.)

Holding: The charge was dismissed because the board already had determined the proper public employer in two other charges filed regarding the same incident.

Case summary: The Ravenswood Teachers Association filed an unfair practice charge against Edison Schools alleging that Edison discriminated against three teachers at the Edison Brentwood Academy, a charter school within the Ravenswood City Elementary School District. The allegations in this case were identical to those filed in cases against Edison Brentwood and the district.

The board noted that the other two cases were resolved in *Ravenswood City Elementary School Dist.* (2004) PERB No. 1660, above. In that decision, the board held that Edison Brentwood, and not the district, was the proper public school employer for EERA purposes. As such, the charge was dismissed.

Member Whitehead's concurrence in this case was identical to that in *Ravenswood*, No. 1660, above.

Duty of Fair Representation Rulings

Misunderstanding does not rise to level of breach of duty of fair representation: OEA.

(*Ferguson v. Oakland Education Assn.*, No. 1646, 6-17-04; 6 pp. dec. By Chairman Duncan, with Members Whitehead and Neima.)

Holding: The charge was dismissed because the union representative acted reasonably and without bad faith in pursuing a settlement of the charging party's grievance.

Case summary: James Ferguson filed an unfair practice charge against the Oakland Education Association alleging that OEA acted arbitrarily, discriminatorily, and in bad faith. Ferguson was a teacher at Castlemont High School. During the 2000-01 school year, he taught U.S. history and multicultural studies. In 2001-02, he taught five physical education classes of ninth graders. In 2002-03, he was assigned three physical education classes and two study skills classes. Within the first two weeks of the school year, both study skills classes were removed from his schedule, leaving him with only three classes. One month later, he was assigned to teach two U.S. history classes. Ferguson was unhappy that he was assigned the two new history classes instead of keeping the vacant periods.

On October 2002, Ferguson filed a grievance alleging that his current schedule violated the collective bargaining agreement between the district and OEA. The relevant article states that if a teacher is reassigned to another grade level or subject area, the teacher shall not be assigned to another grade level for at least two years.

The district and OEA arranged two meetings to negotiate a solution acceptable to all parties. At the first meeting, the district agreed to place Ferguson at a middle school and to assign him to teach only physical education. Both the district and OEA representatives stated that this arrangement would resolve the agreement. Ferguson believed that he would be able to choose the middle school to which he would be assigned.

The district later determined that only one position was open for a middle school physical education teacher, which was at Cole Middle School. Ferguson was given that assignment. He then told the district that the grievance was not resolved because he believed he would be able to choose the middle school for his new assignment. The district informed him that at the second meeting between the parties it was agreed that the middle school assignment would resolve the grievance. He corresponded extensively over the summer with the OEA representative, but the assignment remained in place.

Ferguson filed a new grievance in September 2003, alleging that his previous grievance remained unresolved. The second grievance was rejected because of the agreement already in place. He alleged that OEA refused to process the second grievance in bad faith. After he was informed that the grievance in fact was resolved, he filed unfair practice charges against the district and OEA.

The duty of fair representation does not mean an employee organization is barred from making an agreement that may have an unfavorable effect on some members. According to the standard set forth in *Los Rio College Federation of Teachers, CFT/AFT (Violett et al.)* (1991) PERB No. 889, 90 CPER 66, the mere fact that a charging party was not satisfied with the agreement is insufficient to demonstrate a prima facie case. Ferguson requested an assignment at a middle school. The OEA representative contacted several people within the district to confirm that the Cole position was, in fact, the only open position that conformed with what Ferguson wanted to teach and the credential he held.

Ferguson contended that OEA should have taken his grievance to arbitration when he did not receive the opportunity to choose the school to which he would transfer, and he pointed out other transfer-related grievances that went to arbitration. Those cases, the board observed, involved teachers who were told they were being transferred without any choice in the matter. In the instant case, Ferguson participated in the decisionmaking process and reached a settlement that was acceptable to him until he was informed he would be teaching at Cole.

The core of the dispute was that Ferguson misunderstood the finality of the settlement agreement. In the opinion of both the board agent and the board itself, this did not rise to the level of a breach of the duty of fair representation. As such, the charge was dismissed.

Charge dismissed for failure to state a prima facie case: CFT.

(*Malik v. California Federation of Teachers*, No. 1662, 7-16-04; 2 pp. + 6 pp. R.A. dec. By Chairman Duncan, with Members Whitehead and Neima.)

Holding: The charge was dismissed because it provided no facts or evidence to support the allegations contained therein.

Case summary: Abdullah Malik filed an unfair practice charge against the California Federation of Teachers alleging that CFT violated its duty of fair representation. According to the charge, the union agreed with the employer to a reclassification for "certain unwanted union members." The charge further alleged that the agreement deprived this group of employees of seniority and vacation benefits, and that the union made the agreement to favor employees hired through nepotism.

No dates or facts were provided in support of these allegations. PERB Reg. 32615(a)(5) requires that an unfair practice charge include a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. Without this information, the regional attorney was required to dismiss the charge for failure to state a prima facie case.

The R.A. noted that the general rule is that an exclusive representative enjoys a wide range of bargaining latitude and cannot be expected or required to satisfy all members of the unit it represents. As such, the union has not breached the duty of fair representation merely because some members are dissatisfied with an agreement.

The board dismissed the charge.

HEERA Cases

Unfair Practice Rulings

Charge dismissed for failure to state a prima facie case: CSU.

(*Academic Professionals of California v. Trustees of the California State University*, No. 1642-H, 6-15-04; 4 pp. + 11 pp. R.A. dec. By Chairman Duncan, with Members Neima and Whitehead.)

Holding: The unfair practice charge was dismissed because the decision to implement the employee assistance program at the Sonoma and Long Beach campuses was outside the scope of representation and thus not an unlawful unilateral action.

Case summary: The Academic Professionals of California filed an unfair practice charge against the California State University Trustees alleging that CSU violated HEERA when it unilaterally implemented employee assistance programs at Sonoma State University and CSU Long Beach. Pursuant to HEERA Secs. 3562(q) and (r) and 3562.2, the scope of representation is limited generally to wages, hours, and other terms and conditions of employment. The regional attorney dismissed the charge for failure to state a prima facie case because the EAP programs at both campuses are voluntary, confidential, and free of charge, and thus have no direct impact on wages and hours, and are outside the scope of representation.

In *Anaheim Union High School Dist.* (1981) PERB No. 177, 52 CPER 64, the board reviewed similar language in EERA Sec. 3543.2 and set forth a test to determine whether a subject is within the scope of representation. A non-enumerated subject is negotiable if (1) it is logically and reasonably related to wages, hours, or an enumerated term and condition of employment; (2) the subject is of such concern to management and employees that conflict is likely to occur; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of the organization's mission. The R.A. relied on this test and *San Diego Unified School Dist.* (1982) PERB No. 234, 55 CPER 37, in which the board found the EAP to be outside the scope of representation.

At SSU, the unfair practice charge originated from SSU's change in how it administered the EAP program, which switched its service provider from on-campus to off-campus. APC considered this to be a unilateral implementation of an EAP program. APC contended that the EAP is not voluntary, that an employee has no right to keep confidential information regarding the use or non-use of EAP services if the employee goes to the EAP office on a supervisor's recommendation, that SSU may release confidential documents without employee consent, that the employee must pay for continued treatment once the free visits are exhausted, and that employees working less than half time may not participate.

The R.A. found these allegations failed to state a prima facie violation using the *Anaheim* analysis. The program is fully voluntary, confidential, and free to participants. If a participant chooses to continue beyond the free visits, it is on a voluntary basis. An employee does not suffer a penalty for not participating in the program. Even if the EAP were within the scope of representation, SSU's conduct did not constitute a change in policy because the parties' collective bargaining agreement calls for the establishment of an EAP, and SSU was within its rights to establish such a program.

At CSU-Long Beach, APC claimed that the change from an EAP to a faculty and staff assistance program constituted a unilateral change. The R.A.'s investigation found that the EAP at CSULB existed for at least 20 years without any substantive changes, and that APC was aware of the program from at least 1996. CSULB changed the name to FSAP in 1998 and expanded the program. The R.A. dismissed the complaint for untimeliness, but noted that even if the complaint were timely, CSULB's choice to implement the EAP is not a matter within the scope of representation.

The board agreed with the R.A. that APC failed to state a prima facie case and dismissed the charge.

Non-agency fee payers have no standing to challenge agency fee payer rights: CNA.

(*O'Malley v. California Nurses Assn.*, No. 1651-H, 6-29-04; 2 pp. + 6 pp. B.A. dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

Holding: The charge was dismissed because the charging party was not a union member or agency fee payer and therefore could not suffer harm for misuse of agency fees.

Case summary: Robert J. O'Malley filed an unfair practice charge against the California Nurses Association alleging that CNA committed six specific HEERA violations in reporting, calculating, and auditing the agency fees of nurses employed by the University of California. O'Malley was not a member of CNA.

O'Malley's first allegation stated that CNA violated HEERA Sec. 3583.5 by refunding his agency fees. The board agent noted that this allegation already had been reviewed by PERB in *O'Malley v. California Nurses Assn.* (2004) No. 1607-H, 166 CPER 74. In that case, the board had found that Sec. 3583.5 should not be interpreted to require either mandatory membership or agency fees. In situations like O'Malley's, no violation has occurred because the employee organization has no interest either in collecting dues or fees or in pursuing termination for non-compliance. The allegation was dismissed.

Allegations two through six concerned the misuse of agency fees. The B.A. stated that the board already had reasoned that the procedural guarantees in place to prevent the misuse of agency fees have no realistic impact on an employee who pays no fees or dues to the union. As such, the B.A. found that O'Malley lacked standing to pursue these claims.

O'Malley also claimed that agency fee members could be harmed by CNA's misuse or miscalculation of agency fees. However, O'Malley is not a member of a class of employees who may have suffered harm and therefore does not have standing to make claims on those employees' behalf before PERB.

The board upheld the B.A.'s dismissal in full.

Request for reconsideration denied for failure to state a valid ground: CSU.

(*Webb v. Trustees of the California State University (San Bernardino)*, No. 1609a-H, 6-30-04; 3 pp. dec. By Chairman Duncan, with Members Whitehead and Neima.)

Holding: The request for reconsideration was denied because it did not state either of the appropriate grounds for the board to reconsider a case.

Case summary: Maurice Webb filed an unfair practice charge alleging that he was retaliated against by the administration at California State University, San Bernardino, for filing a grievance and that he was denied a fair grievance hearing. The board found that his charge did not state a prima facie case and dismissed it.

Webb's request for reconsideration stated his belief that his case was dismissed prematurely without sufficient investigation of the evidence. He then referred to evidence that already was reviewed as part of his original case. PERB Reg. 32410 requires that requests for reconsideration be limited to situations either where the board's decision contained prejudicial errors of fact or where previously unavailable evidence has been discovered. The policy behind this regulation is to avoid relitigation of issues that already have been decided. As Webb's request was not based on either of these grounds, the board dismissed it.

Modification of fee waiver program not unlawful unilateral change: CSU.

(*Academic Professionals of California v. Trustees of the California State University*, No. 1654-H, 6-30-04; 2 pp. + 8 pp. R.A. dec. By Chairman Duncan, with Members Whitehead and Neima.)

Holding: The modification that made the fee waiver program applicable to mandatory employee training courses was not an unlawful unilateral change because no actual change in the parties' policy occurred.

Case summary: The Academic Professionals of California filed an unfair practice charge alleging that the California State University-San Bernadino campus unilaterally changed the fee waiver program by making it applicable to

courses mandated by the employer. APC stated that it first learned on January 27, 2003, that CSU posted a new fee waiver policy on its website. The program allows the waiver of certain fees for two courses per term for unit employees enrolled in classes at CSU. APC alleged that prior to this date, the fee waiver program did not apply to courses mandated by the employer, and that because employees are limited to two courses per term, this change limited the benefits available to employees. CSU had issued two human resources brochures, in 1997 and 2001, that included the same statement as the website policy regarding mandatory courses.

APC claimed that it did not receive any notice before either brochure was issued, that it had no knowledge of the brochures' existence prior to the filing of the charge, and that the brochures never were distributed to either APC or the employees. APC contended that no APC-represented employee had been required to use the fee waiver program for a mandatory course and therefore APC had no reason to know of the change prior to January 2003. Finally, APC argued that the parties' collective bargaining agreement did not grant CSU the authority to mandate employees to take courses using the fee waiver benefit and that CSU had broadened the definition of "training" in the agreement.

The regional attorney found that the charge did not state a prima facie case of an unlawful unilateral change. The charge did not demonstrate that applying the fee waiver program to required courses changed any policy on CSU courses. The charge did not present facts demonstrating that CSU required an employee to take a course using the fee waiver program in a manner inconsistent with the parties' practice. There was no showing that CSU broadened the CBA's definition of "training" by including mandated courses in the fee waiver program. The application of the fee waiver program to required courses did not alter the fee waiver benefit; the employee still receives the opportunity to take up to two courses per semester. Without more information, the R.A. said, the charge failed to demonstrate a prima facie violation and must be dismissed.

The board adopted the R.A.'s decision in full and dismissed the charge.

Unilateral implementation of non-discrimination policy not unlawful change: CSU.

(*Academic Professionals of California v. Trustees of the California State University*, No. 1656-H, 7-8-04; 2 pp. + 8 pp. R.A. dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

Holding: No unlawful unilateral change was found because the non-discrimination policy applied to students and unrepresented employees, and thus did not fall within the scope of union representation.

Case summary: The Academic Professionals of California filed an unfair practice charge alleging that California State University-Humboldt made an unlawful unilateral change to the parties' agreement when CSU implemented a non-discrimination policy. In September 2002, CSU sent a revised copy of its non-discrimination policy to all exclusive representatives, including APC. CSU noted that it did not believe the policy impacted any matters within the scope of representation, but it agreed to meet and confer if any organization wished to discuss the policy. The policy governs student complaints of unlawful discrimination and those of some unrepresented employees.

APC notified CSU that it believed the topic to be within the scope of representation, but that APC could not be required to bargain the decision or the effects of the new policy because the parties' memorandum of understanding contained a zipper clause which allowed either party to avoid further negotiations until the expiration of the agreement. None of the other exclusive representatives objected to the policy or requested negotiations. CSU offered further opportunities to APC to meet and confer over the decision and the impact of the policy, but APC declined to do so.

The regional attorney dismissed the charge for failure to state a prima facie violation. The charge failed to demonstrate that the decision to adopt the policy was within the scope of representation. While *Jefferson School Dist.* (1980) PERB No. 133, 46 CPER 28, established that policies which protect employees from unlawful discrimination are within the scope of representation, the policy in this case sought to protect students and unrepresented employees.

The R.A. proceeded to analyze the case under *Compton Community College Dist.* (1990) PERB No. 798, 84X CPER 71. In that case, the district unilaterally adopted a grievance policy that allowed students to file complaints against certificated employees. The outcome of these complaints was placed in the employees' personnel file. The board held that the complaint procedure was within the scope of representation because it set up a mechanism by which an employee's performance in a particular situation was evaluated. Thus, for the policy in this case to be a negotiable subject under *Compton*, the initial complaint and/or administrative determination must be placed in the employee's personnel file. The policy here indicated that the complaint and corrective action plan would remain confidential, with no mention of anything placed in the employee's personnel file. Thus, the adoption of the policy did not meet the standard of an unlawful unilateral change.

Although APC did not raise the issue, the R.A. pointed out that APC could argue that the discrimination policy is negotiable because it could result in discipline to a bargaining unit member. CSU's adoption of the non-discrimination policy was federally mandated, and merely is a recitation of state and federal anti-discrimination law. The state and federal statutes are not pre-empted by HEERA. Though the adoption of a federally mandated policy may not be negotiable, the R.A. said, the impact of the procedure could be. The charge did not present any negotiable disciplinary impact, however, as the policy states that any discipline arising from the policy will follow contractual guidelines, and as the policy does not subject employees to a new work rule.

The board adopted the R.A.'s decision in full and dismissed the charge.

Whistleblower policy does not constitute unilateral change: CSU.

(*Academic Professionals of California v. Trustees of the California State University*, No. 1658-H, 7-13-04; 2 pp. + 8 pp. R.A. dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

Holding: The new CSU whistleblower protection policies were not unlawful unilateral changes because they did not change existing disciplinary policy.

Case summary: The Academic Professionals of California filed an unfair practice charge against the California State University Trustees alleging that the implementation of Executive Orders 821 and 822 constituted unilateral changes in the parties' disciplinary policy. EO 821 requires CSU to give a "whistleblower" complainant information on what actions were taken by the employer against someone found to have violated the policy. EO 822 involves investigations into the "Allegations of Retaliation Under the California Whistleblowers Protection Act" and provides that employees are required to cooperate in the investigation and be honest in giving information to investigators.

APC contended that EO 821 unilaterally permits CSU to determine whether an allegation of misconduct has been substantiated; if so, CSU may give the complainant confidential personnel information, including proposed disciplinary action. APC argued that the parties' past practice was that information regarding proposed discipline from allegations of misconduct was maintained as confidential until the matter was appealed to the State Personnel Board.

EO 821 provides that "[c]are shall be taken to protect the privacy interests of those involved." APC was unable to provide specific examples of instances where CSU decided that charges were substantiated and then released confidential personnel records of proposed discipline to the complainant. The EO is vague in its requirement to provide the complainant with information on what action was taken against the charged employee. Without examples of information that actually was released, APC failed to demonstrate that CSU will, in fact, release specific information about any proposed disciplinary action to the complainant. Accordingly, the regional attorney dismissed the allegation.

APC argued that EO 822 also amounted to a unilateral change. It requires employees to answer questions where the statements made or information obtained may become a basis for discipline. The EO does not expressly guarantee the employee's right to representation. The amended charge

cited the parties' past practice under which accused employees were advised that they were suspected of misconduct and were required to answer questions. The accused employee was able to request representation, causing CSU to delay or cancel the meeting.

The R.A. disagreed that EO 822 demonstrated a change in policy. It always is presumed that an employee should participate by cooperating and giving honest answers. The EO does not attempt to supplant collective bargaining. APC did not provide any evidence demonstrating that CSU would refuse a valid request for representation in a whistleblower investigation. The R.A. was not aware of any legal authority that requires an employer to set forth representational rights when a new investigatory procedure is established. This allegation also was dismissed.

The board adopted the R.A.'s opinion in full and dismissed the charge.

Partial abeyance granted pending outcome of arbitration: CSU.

(*State Employees Trades Council United v. Trustees of the California State University [Stanislaus],* No. 1659-H, 7-13-04; 12 pp. + 18 pp. R.A. dec. By Member Whitehead, with Chairman Duncan and Member Neima.)

Holding: The remaining portion of the charge was placed in abeyance and deferred to arbitration because the parties' agreement requires final and binding arbitration of grievances.

Case summary: The State Employees Trade Council United filed an unfair practice charge against the Trustees of the California State University-Stanislaus. The charge alleged that CSU violated the act when it unilaterally laid off Unit 6 employees at the CSU-Stockton Center without meeting and conferring with SETC, transferred bargaining unit work from Unit 6 to the newly created Stockton Center Site Authority, failed to provide information relevant to representation by its members, bargained in bad faith, and discriminated against Unit 6 members. The regional attorney dismissed the bad faith bargaining and discrimination allegations for failure to state a prima facie case.

CSUS has a satellite facility in Stockton known as the CSU Stockton Center. The parties entered into a settlement agreement in July 2000. Pursuant to this agreement, CSUS hired 10 temporary Unit 6 employees to perform Unit 6 work at the Stockton Center. Each employee was notified that the appointment would expire between February and June 2002. In May 2001, CSU and the City of Stockton established a joint authority to oversee redevelopment of the Stockton site. The joint-powers agreement specified that its governing body would be composed of both CSU and city officials. SETC stated that it was unaware of the authority until rumors emerged regarding the possibility of layoffs of Unit 6 employees in October 2001. At the parties' meeting to discuss the issue, CSU notified SETC that the appointment of eight Unit 6 employees would end January 15, 2002. While SETC characterized these as layoffs, the notices made reference to the termination of the employees' temporary appointments. SETC filed a grievance on behalf of the eight employees. Two of the employees continued working through April 2002, though the grievance remained unresolved. After the temporary appointments ended, two employees were hired by the authority to continue the same type of work.

On numerous occasions, SETC requested information from CSU regarding the layoffs. Four sections of the parties' collective bargaining agreement allow SETC and/or the employee to obtain information from CSU for the purposes of bargaining, grievances, and personnel matters. CSU provided some of the requested information but told SETC that because CSU and the authority had a landlord-tenant relationship, much of the information should be requested directly from the authority in its landlord role. When SETC filed the grievance, it also presented CSU with signed employee authorizations to inspect the personnel files of seven Unit 6 employees. CSU refused to allow access despite the written authorizations. The R.A. found that this conduct was covered by the collective bargaining agreement and thus was subject to arbitration under Article 9.

SETC contended that the authority was merely a cover for CSU to violate the contract and the parties' July 2000 settlement agreement. However, as a threshold matter, the

R.A. noted that SETC must state facts demonstrating that the two entities are either a joint or a single employer. SETC did not provide any such evidence. The authority is a public entity entirely separate from the city and CSU, though representatives of both sit on the governing board. Without evidence to demonstrate that the authority's actions were those of CSU, the R.A. dismissed that portion of the charge.

No unilateral change with regard to the Unit 6 layoffs was found. The contract directs CSU to negotiate the impact of layoffs, but the Unit 6 employees at issue here were designated as temporary employees. Article 29.5 provides that the non-reappointment of a temporary employee does not constitute a layoff. The termination of the Unit 6 employees did not constitute layoffs, and thus there was no change in policy about which to meet and confer. Similarly, no transfer of bargaining unit work occurred because there was no transfer of work from one unit to another. Instead, the two employees went to work for the authority, a new employer, after their appointments with CSU ended. Even if a unilateral change or other violation did occur, it was still appropriate to defer the matter to arbitration.

Article 9 of the CBA provides for final and binding arbitration of grievances. The National Labor Relations Board has articulated standards under which deferral is appropriate in pre-arbitral situations: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to arbitration, and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute. The board found that all three standards were met in this case. No evidence was produced to indicate that the parties are not operating within a stable collective bargaining relationship. CSU indicated through its representative that it is willing to proceed to arbitration and waive its procedural defenses. And, the issues raised by this charge required interpretation of at least five articles of the contract. The board affirmed the R.A.'s decision to place the charge in abeyance and defer it to arbitration.

MMBA Cases

Unfair Practice Rulings

Insufficient evidence to show alleged promotion delay was retaliation: City of Milpitas.

(*Lopez v. City of Milpitas*, No. 1641-M, 6-14-04; 2 pp. + 36 pp. ALJ dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

Holding: The charging party did not meet the burden of proving he suffered retaliation because of his protected activities.

Case summary: Michael F. Lopez became a firefighter with the City of Milpitas in 1982 and was successfully promoted through the ranks until he became a fire captain in 1991. In 1997, the department created a new position, public education/public information officer, at the captain's rank. The union and the city came to an agreement, memorialized in a 1997 side letter, on the specifics of the position, which included a provision that appointment to the position was for a minimum of three years and that incumbents could not promote or transfer during that time.

Lopez was appointed to fill the Pub Ed/PIO captain position in 1998. A 1998 side letter designated the Pub Ed/PIO position as a 40-hour-week job, in contrast to the other 56-hour-week fire captain positions, and provided that the position was not subject to the bidding process until the incumbent vacated the position. In the event that the position became vacant prior to a bid cycle, incumbent personnel would fill the position.

Lopez filed a number of complaints while serving in the Pub Ed/PIO position. First, he claimed that he expected a pay increase when he filled the new post, though his transfer was lateral. In fact, his pay was lowered because he began accruing benefits at a 40-hour-week rate instead of the previous 56-hour-week rate. He asserted that the previous Pub Ed/PIO captain accrued benefits at the higher rate. Prior to the creation of the Pub Ed/PIO position, the department rotated lieutenants into 40-hour administrative positions but allowed them to continue to accrue benefits at the 56-hour

rate because the rotation was considered a temporary assignment. Lopez claimed that the Pub Ed/PIO position was a temporary, biddable position according to the language of the 1997 side letter and thus was entitled to accruals at the 56-hour-week rate. The city disagreed and informed him that the Pub Ed/PIO position was a permanent job and separate from the regular bidding process. Other 40-hour positions similar to Lopez's position accrued benefits at the 40-hour-week rate.

Lopez later claimed that he was not being paid at the 56-hour rate because of racial discrimination, and he filed a complaint with the Department of Fair Employment and Housing in February 1999. During the DFEH investigation, the city produced personnel forms from the previous Pub Ed/PIO officer which showed that he was paid at the same rate but received his benefits at the 56-hour-week rate. This meant that the previous officer was paid $67.68 more per month. However, the city also claimed that this was an administrative error which was corrected after several months. The discrimination complaint ultimately was dismissed for lack of evidence.

Other complaints abounded. Lopez filed an internal race discrimination claim with the city in April 2000, again based on the higher pay rate received by the first officer filling the Pub Ed/PIO position. The city rejected his grievance because the higher rate had been an administrative error that was corrected. In November 2000, Lopez complained when the city changed its flex-scheduling policy. The change was initiated due to complaints from the public that inspection services often were unavailable on Mondays and Fridays because of the 4/10 schedule. The schedule was changed to a 9/80 schedule under which employees worked 80 hours over nine days during a two-week period. Lopez grieved the change, but his complaint was rejected at all levels. The city informed him that this particular grievance could be considered frivolous and an abuse of the city administrative process in violation of a provision in the parties' MOU.

Lopez filed a grievance in January 2001 over the fire chief's intention to hold him to the three-year commitment for the Pub Ed/PIO position. The grievance was rejected at all levels. Lopez was told that although he had to remain in the position for the full three years, he was not precluded from competing for promotional opportunities for which he was fully qualified. If he were successful, he would be placed on an eligibility list and would be considered for promotion after he had fulfilled the minimum commitment.

Lopez applied for the battalion chief position on three occasions before he succeeded, and he filed several complaints during the process. After Lopez took the examination for the second time, he requested the opportunity to participate in the city's acting-battalion-chief program, which allowed eligible firefighters to serve in the capacity of battalion chief in order to gain out-of-class work experience. Lopez testified that the program had been casual in the past, but that when he applied, the fire chief told him he would have to complete a formal training regimen before he could participate. Lopez was the first applicant subject to the new program. The training program did not begin until 18 months after Lopez applied for it, and he testified that the program required knowledge not demanded by the competitive examination. Lopez further complained that he was not allowed to complete a training course that was required as part of the formal training, and never actually served as an acting battalion chief, though he did serve as an acting fire marshal at the battalion-chief level.

In 2001, the department sought applicants to fill a battalion chief position through internal promotion. Lopez and another fire captain were chosen after qualifying through the examination. The other fire captain started as a battalion chief earlier than Lopez, despite Lopez's higher seniority, because of the three-year minimum commitment as the Pub Ed/PIO officer. Lopez complained that in the event of a reduction-in-force, he would lose out to the other battalion chief because his appointment was delayed. Lopez demanded to be released from his commitment, claiming that the 1997 side letter was invalid because it never received city council approval in the form of a written resolution. The ALJ disagreed because the city regulations require that the city council approve only the parties' written agreement. Additional

credible testimony supported the notion that the commitment was enforceable.

Lopez filed the instant unfair practice charge in July 2001, alleging that the current fire chief harbored animus toward him and was responsible for the delay in promotion. The fire chief asserted he simply was adhering to the terms of the side-letter agreement. He noted that he made two special recommendations that resulted in public commendations for Lopez and had graded Lopez's performance highly in his most recent employee evaluation.

Section 3506 of the MMBA and PERB Reg. 32603(a) prohibit retaliation against an employee because of protected activities. To establish a prima facie case of discrimination under these provisions, the charging party must show that (1) the employee exercised rights under the MMBA; (2) the public agency had knowledge of the exercise of those rights; and (3) the public agency discriminated against the employee, or threatened to discriminate, because of the exercise of those rights. Lopez bore the burden of demonstrating his engagement in protected activity, that the city knew of his activity, and that the protected activity was a motivating factor in the decision to postpone his promotion. If protected activity is established as a motivating factor, the burden shifts to the city to demonstrate that the same action would have been taken even in the absence of the protected conduct.

Lopez established his engagement in protected activity. By his own count, he filed complaints concerning at least 17 different matters over a 20-year employment period. The fire chief admitted that he was aware of Lopez's history of complaints. Lopez contended that the city engaged in a pattern of disparate treatment against him, evidenced by the denial of the 56-hour benefit rate, the threat of discipline over his filing of grievances, the institution of the formal battalion-chief training program just when he qualified for it, the insistance on the three-year commitment when it no longer applied to him, the disregard of his seniority when it was to his benefit, and the rejection of other legitimate complaints.

The ALJ found insufficient evidence that the city consciously departed from established procedure when other fire captains were granted 56-hour benefits. When the previous Pub Ed/PIO captain received 56-hour benefits, it was through an administrative oversight that was corrected after it was brought to the city's attention. Lopez argued that he suffered disparate treatment when he did not receive benefits at the incorrect rate for the same period of time. The ALJ disagreed and rejected the claim, especially as the city never led Lopez to believe that he was entitled to anything other than the 40-hour benefit rate.

The scheduling change from the 4/10 work week to the 9/80 workweek did not support Lopez's claim that the change was undertaken to affect him adversely. Lopez also claimed that the city manager threatened him with discipline for abuse of the city administrative process. The ALJ did not find this to be evidence of unlawful animus because the warning was limited to one instance of an alleged repeated filing of a grievance and did not refer to Lopez's high frequency of complaints in general.

The ALJ found the timing of the formal training program for new acting battalion chiefs to be somewhat suspicious. The fire chief testified that the timing dealt with increased technical knowledge requirements for the position, but he was not particularly specific in that regard. Lopez argued that the requirements for the program were higher than those demanded by the examination. Lopez was allowed to begin some informal training because of the delay in implementation, and the fire chief asserted that Lopez's schedule was the primary reason why he was not able to complete the training in a more timely fashion. Overall, the ALJ found that the timing of the program was only marginal evidence of unlawful intent.

Lopez admitted he believed that he was bound by the three-year minimum commitment when he applied for the Pub Ed/PIO position, and he did not claim that the city attempted to conceal this fact. At the hearing, Lopez testified that he felt the 1998 side letter superseded the 1997 side letter. The ALJ found that the 1998 side letter could not be read to affect the already existing Pub Ed/PIO position because the language of the letter specifically identified the Pub Ed/PIO position as a distinct position established un-

der the prior agreement. Lopez tried to demonstrate an inconsistency between the language and the city's actions, but the ALJ found the minimum commitment to be fundamentally enforceable.

The ALJ also considered whether the timing of the city's decision to require a three-year commitment was suspicious. Though the timing was facially suspect, it carried little weight in consideration of Lopez's long history of complaints. Lopez's protected activity was virtually continuous throughout his employment, and the city actually found in his favor on several occasions. Lopez was steadily promoted through the ranks and was selected for the Pub Ed/PIO position over three other candidates despite Lopez's lawsuit over the selection of the first Pub Ed/PIO officer. The ALJ found that Lopez's claim of adverse action was relatively mild given his history with the department and the willingness of the fire chief to promote him into a management position. If the city truly were motivated to retaliate against Lopez, the ALJ wrote, it was highly unlikely that it would have ignored his repeated challenges to department management and awarded him membership in that select group.

The board adopted the ALJ's decision as its own and dismissed the complaint.

Charge dismissed a second time for untimeliness: City and County of San Francisco.

(*Montgomery v. City and County of San Francisco*, No. 1643-M, 6-15-04; 2 pp. + 6 pp. R.A. dec. By Chairman Duncan, with Members Whitehead and Neima.)

Holding: The unfair practice charge was dismissed because it was untimely and virtually identical to the charge in a prior case that already had been dismissed.

Case summary: Robin Montgomery filed an unfair practice charge alleging that the City and County of San Francisco violated the MMBA when her employment was terminated. The regional attorney dismissed the charge for untimeliness and noted that this charge was substantially similar to a case Montgomery filed in 2001, which was dismissed as lacking merit.

Montgomery was employed as a public safety and communications dispatcher assigned to the Emergency Communications Division. On March 27, 2000, she informed her supervisor that she would not report to work effective March 30 because of health and safety concerns regarding asbestos abatement. On April 5, the ECD advised her that the air quality in her workplace had been tested and was free of asbestos; she was instructed to return to work on April 6. On that day, she reported to work 90 minutes late, which caused her supervisor to issue a written reprimand. Montgomery contended that this action violated the parties' memorandum of understanding, but she did not specify in what way.

On April 14, Montgomery again informed the ECD that she would not report to work due to asbestos abatement and requested that the city pay her for the time she refused to report to work. On April 17, the city provided her with a CAL/OSHA report indicating that the air in her workplace was asbestos free, but she again refused to report to work. On May 15, the city informed her that it would not pay her for her time off and that she was considered absent without leave. Montgomery contended that the city refused to pay her because she had filed a safety grievance. However, the R.A. observed that language in the parties' contract indicates that she was entitled to payment only if she executed an agreement stating that she would repay the city if her complaint was invalid. No such agreement was executed by the charging party.

On June 19, the city ordered Montgomery to return to work on June 22. On that day, she informed the city that she was taking family medical leave, although she failed to file the necessary paperwork. On September 15, the city again instructed her to return to work, but she refused, citing health and safety concerns.

Finally, on October 30, the city notified Montgomery of its intent to terminate her employment due to her AWOL status. On November 2, she received notice of her termination hearing, which was conducted on November 8 and which she failed to attend. Her termination became effective on November 9, 2000.

The R.A. dismissed the complaint for untimeliness. A three-year statute of limitations currently applies to MMBA charges, and the statute of limitations begins to run when the charging party knows, or should have known, of the conduct underlying the charge. Montgomery was aware of the city's conduct in November 2000 but did not file the charge in the instant case until February 2004.

The board agreed with the R.A. and noted that the refiling of charges identical to those already dismissed can be an abuse of process, and as such, Montgomery should have been warned that continuing to file charges after they have been dismissed may lead to sanctions.

Request for reconsideration denied for failure to state a valid ground: Alameda County Medical Center.

(*Kimbrough v. Alameda County Medical Center*, No. 1620a-M, 6-29-04; 3 pp. dec. By Member Whitehead, with Chairman Duncan and Member Neima.)

Holding: The request for reconsideration was denied because it did not state either of the appropriate grounds for the board to reconsider a case.

Case summary: Judith Kimbrough charged that the Alameda County Medical Center violated the MMBA when management refused to meet and confer with her over her desire to arbitrate her grievance. The board adopted the board agent's dismissal, which found that an employer's duty to meet and confer under the act is owed to the exclusive representative, not to an individual employee.

Kimbrough's request for reconsideration sought clarification on two points: first, whether her charge stated a prima facie case; second, whether she had standing to pursue her charge under the MMBA. However, PERB Reg. 32410 requires that requests for reconsideration be limited to situations either where the board's decision contained prejudicial errors of fact or where previously unavailable evidence has been discovered. As Kimbrough's request was not based on either of these grounds, the board dismissed it.

No retaliation where employer would have taken same action regardless: San Joaquin County.

(*Union of American Physicians and Dentists v. County of San Joaquin [Health Care Services]*, No. 1649-M, 6-29-04; 3 pp. + 47 pp. ALJ dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

Holding: The charge was dismissed because evidence demonstrated that the county would have terminated the charging party even absent any protected activity.

Case summary: The Union of American Physicians and Dentists filed an unfair practice charge against San Joaquin County Health Care Services alleging that the county retaliated against Dr. David Gran by terminating his employment in response to his protected activities. Gran was employed in the Obstetrics and Gynecology Department at the San Joaquin Community Hospital, which provides acute care and fills the county's obligations as a health care provider of last resort.

Gran's protected activities extended back to 2000, when he first was asked to facilitate an effort to unionize the hospital workforce. The employees eventually chose UAPD to represent them in August 2001. During the period of organization and soon thereafter, UAPD filed two unfair practice charges on Gran's behalf after he was disciplined in conjunction with union-related activities. The first charge was settled in his favor. The administrative law judge found for Gran on all counts of the second charge. Gran was an active and vocal member of the bargaining team that participated in the parties' initial contract negotiations, which culminated in the parties' first memorandum of understanding. The hospital was well aware of these activities.

Complaints from patients and staff members began to mount against Gran as early as April 1998. Dr. Lee Adams was the chairperson of the OB/GYN department from 1994 through 2000. As chairman, he had occasion to relay some staff complaints about Gran to the county medical director. Two department doctors complained that Gran's check-out procedures were insufficient to properly inform the next rotation of all current patients. Adams received a complaint from one of his own patients that Gran made a series of

remarks that were offensive and of a sexual nature. Other patients made similar complaints in later years. Doctors both in OB/GYN and in the family practice departments complained that he was slow to respond to pages and requests for assistance. Several doctors complained that Gran made comments or gestures toward them that were offensive or racist.

Controversy arose when the department could not come to a consensus as to who should be nominated as the new department chair. Some physicians believed that Gran, as president of the medical staff, was trying to polarize the department. Gran requested a meeting with the administration to discuss the nominations controversy. This resulted in a heated discussion and the issuance of a counseling memorandum directed at Gran. Among other things, the memorandum asked him to foster more positive relationships among the staff, to be more sensitive to patient needs, and to be less divisive in his role as president. The memorandum was issued because previous informal counseling sessions had not proved effective.

Staff members reported that Gran spread rumors among the staff. Nurse practitioners complained that Gran told them they would be excluded from a staff conference. Midwives reported that Gran told them they would not be invited to the welcoming dinner for a new doctor. The medical staff secretary told her supervisor that Gran had accused her of interference with the union election by steaming open ballots; no evidence ever was offered to substantiate the claim. The secretary also reported she had encounters with Gran where she felt offended by his remarks. Gran said only that he was trying to be humorous.

Gran was referred to the medical executive committee twice. The first referral was prompted by complaints that he was not checking out patients properly to physicians on the following shift. Department chairperson Adams convened two staff meetings, demanding that Gran explain his treatment of two patients. The ALJ found the manner of questioning and the timing of the investigation to be highly irregular. Adams referred his concerns to the MEC, but it found that Gran had rendered competent care to the patients in question. However, counseling was ordered, and Gran's activities were monitored for 90 days. The successor department chairperson, Dr. Stanley, did not report any issues during the 90-day period, which ended in November 2001.

The second MEC referral arose out of an April 2002 incident where a patient had experienced significant bleeding and had not delivered the placenta following childbirth. Gran was the supervisor during the shift in which the patient gave birth, though a midwife was in charge of the actual delivery. The doctor whose shift followed alleged that Gran did not check out the patient properly; as a result, the patient nearly died. The "morbidity and mortality" review of the case reported that Gran had been paged three times before responding to the patient, but he refused to accept any responsibility. Gran was removed from the rotation. The MEC ultimately found the patient's case did not warrant disciplinary action based on substandard care. However, the MEC did identify a list of concerns that Gran needed to address: inadequacy of patient work-ups, excessive reliance on staff to alert him of patient care issues, lack of responses to pages, poor supervision of residents, and insensitivity toward patients. Chairperson Stanley testified that at the time of this incident, she no longer wished to have Gran in the department and would not refer a loved one to his care. Moreover, she refused to accept patients from him because of his inadequate check-out procedures; she feared a malpractice claim resulting from insufficient information.

Gran received a 90-day notice that his contract with the hospital would not be renewed when it expired on August 12, 2002. No explanation was provided to him with the notice. The county director of health care services made the decision based on the number of complaints about Gran, even though the MEC did reinstate his medical privileges following the April incident.

The ALJ found that Gran engaged in protected activities and that the county, through the director of health care services, was aware of those activities. UAPD argued that a prima facie case of retaliation was supported by several indicia of unlawful animus. The two patient care referrals to MEC were suspect. The justifications for the termination offered at the hearing were shifting and contradictory be-

cause the director relied on complaints by other physicians despite MEC's restoration of medical privileges. Gran suffered a pattern of animosity when he became active in the union organizing campaign. UAPD also asserted that the county failed to carry its burden of demonstrating that it would have terminated Gran but for his protected activities. The complaints against Gran were hearsay, and many were never investigated.

The county contended that Gran's contract would have been terminated regardless of his involvement in protected activities. Stanley, as the department chair, completely lost confidence in him, and the MEC was concerned about much of his behavior. These concerns had arisen before, but Gran never rectified them.

While the ALJ agreed with UAPD that the manner in which complaints against Gran were processed suggested unlawful animus, he ultimately concluded that the county was justified in terminating Gran's contract. Though Stanley had been supportive of Gran during his other actions before PERB, her role had shifted when she became department chairperson. In that role, she became aware of a number of complaints about Gran's lack of diligence in treating patients. Though physicians do have to place strong reliance on the supporting staff, ultimate accountability rests with the physician who is in charge. Gran refused to accept responsibility for the patient with the retained placenta and failed to bring his practices into line with those of his fellow physicians. The fact that MEC restored Gran's hospital privileges did not vindicate Gran against Stanley's claim of incompetence. Moreover, Gran had a predilection for making sexual comments, which was highly inappropriate given the sensitivity required in the OB/GYN department of a public hospital. The complaints against Gran were highly consistent over a long period of time, and they started before he began to organize the employees. The decision to terminate his employment was based on Stanley's opinion and the general sentiment that Gran simply was not a good employee.

The board affirmed the opinion of the ALJ and dismissed the charge.

Redecoration of book shelving cart not protected activity: Marin County Law Library.

(*Geismar v. Marin County Law Library*, No. 1655-M, 7-2-04; 2 pp. + 10 pp. R.A. dec. By Chairman Duncan, with Members Neima and Whitehead.)

Holding: The retaliation charge was rejected because the charging party's actions did not rise to the level of protected activity.

Case summary: Elizabeth Geismar filed an unfair practice charge against the Marin County Law Library alleging that she was fired in retaliation for her protected activities and that the library violated its local rules by having only five members on its board of trustees. Geismar had been employed as an assistant librarian for over 15 years. The library is a distinct public agency separate from the county and is governed by its own set of rules.

The library hired a new director in June 2000, with the approval of Geismar and the other librarian. Geismar claimed that she began to experience hostility from the director the following year. In March 2002, the other librarian resigned from her position. Geismar met with the director and accused him of forcing the resignation. The director became angry, and Geismar claimed to have left the meeting in fear.

In the fall of 2002, Geismar claimed that the director and the new librarian began a surveillance campaign. Geismar produced excerpts from her personnel file which indicated that the other librarian reported allegedly inappropriate or suspicious behavior by Geismar on a number of occasions. Geismar complained to the director about her job assignments. She also complained about her employment to a number of library patrons; however, there were no facts to demonstrate these patrons ever informed the director of her complaints.

The director sent Geismar a letter in February 2003 that asked her to remove her decorations from the book shelving cart. In May, the director responded to Geismar's request for a scheduling change. She was notified of her termination on June 20, 2003. The letter did not provide a reason for her termination. Geismar then sent two letters to the director seeking the reason behind her termination. On Au-

gust 1, the director responded, stating that her conduct had become increasingly incompatible with library operations due to the need for the library to become more technologically oriented.

Geismar appealed her termination to the library's board of trustees, arguing that she was technologically proficient and thus should not have been terminated, and that the director was favoring some employees over others. The appeal was denied.

The regional attorney found that none of Geismar's actions rose to the level of activity protected under the MMBA. Decorating a library cart with artwork and requesting a change in schedule do not constitute protected activities. Complaints to patrons regarding working conditions may constitute protected activity, but the charge did not demonstrate that the director was aware of these complaints. Even if Geismar engaged in protected activity when she complained about the previous librarian's resignation, the charge failed to state the requisite nexus because Geismar's own factual allegations indicated that the director's hostility started well before the adverse employment action.

Geismar contended that the library violated local county rules by failing to have six trustees. The library operates as a special district and is a separate and distinct employer from the county, making county rules inapplicable. The charging party did not produce any local library rules regarding the number of trustees.

The board agreed with the R.A. and dismissed the charge.

Employer violated duty of neutrality between employee organizations: Monterey County.

(*Service Employees International Union, Loc. 817 v. County of Monterey*, No. 1663-M, 7-16-04; 6 pp. + 34 pp. ALJ dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

Holding: The county's application of its rules regarding union recognition disparaged the incumbent exclusive representative and demonstrated unlawful support of one union over another.

Case summary: The Service Employees International Union, Local 817, filed an unfair practice charge against Monterey County alleging that it allowed the Monterey County Dispatchers Association to register as an employee organization and that in doing so, the county demonstrated a preference for MCDA over SEIU. The charge further alleged that by processing the request under the parties' Employer-Employee Relations Resolution, the county enforced an unreasonable local rule or regulation. SEIU filed a second unfair practice charge containing substantially similar allegations with regards to the Monterey County Park Rangers Association. Both MCDA and MCPRA were joined in the action, and the administrative law judge consolidated the actions for hearing.

SEIU represents nearly 1,900 county employees within Unit J, which included the county's communication dispatchers. On March 11, 2002, MCDA's attorney notified the county that it sought to form an employee organization to be recognized as the exclusive bargaining agent for non-supervisory dispatchers. The letter included documents identified as the "Registration and Petition for Recognition for Employee Organization." The letter also alleged that the dispatchers maintained a community of interest vastly different from those currently represented by SEIU and that the petition would necessitate severance of the dispatch positions from the unit. The petition contained signatures for 40 dispatchers, almost the entire group.

Esteban Codas, one of the county labor relations representatives, determined that the petition sought both registration and recognition. The EERR requirements with respect to registration were met, but those for recognition were not. Section IV(D) of the EERR requires that an employee organization seeking to register must represent at least 3 percent of county employees. If not, the organization must demonstrate to the county that the employees seeking representation are a unique group whose distinct community of interest makes it highly unlikely that they could receive adequate representation from any of the currently registered organizations. Codas concluded that the dispatchers met this requirement based on analyzing their separate location, their

duties, with whom they worked, and to whom they reported. The county registered MCDA as an employee organization on April 1, 2002.

The county notified MCDA that it could not be recognized as the exclusive representative because the county and SEIU had a multi-year memorandum of understanding in place. Section VI, para. E, of the EERR specifies that a unit may not petition to decertify the incumbent union until September of the last year of a multi-year MOU. SEIU received a copy of the letter sent to MCDA but was not provided with prior notice of the petition or an opportunity to state its position on the matter.

Unit J also includes a series of park ranger classifications. On September 11, 2002, MCPRA submitted a petition to be registered and recognized as the exclusive representative for all sworn park rangers. The petition acknowledged that the MCPRA's membership did not comprise 3 percent of county employees; however, as peace officers, the park rangers are entitled to be in a bargaining unit composed solely of peace officers. The petition contained the signatures of all but one of the group.

Codas reviewed MCPRA's petition. He found the petition met the requirements for registration under the EERR. The EERR specifically provides that peace officers shall be represented by an organization composed solely of peace officers. When Codas notified MCPRA that it was registered as an employee organization, he also stated that a petition for recognition needed to be supplemented with a decertification petition. Again, SEIU was not provided an opportunity to state its position.

PERB Reg. 32603(d) provides that it is an unfair practice for an employer to dominate or interfere with formation or administration of any employee organization, or in any way encourage employees to join any organization in preference to another. In *Santa Monica Community College Dist.* (1979) No. 103, 43 CPER 89, the board set out a threshold test to determine whether the employer has unlawfully dominated or assisted. It requires a showing that the employer's conduct tends to influence free choice or provide stimulus in one direction or another. The employer's intent in taking the challenged actions is irrelevant. The administrative law judge also noted that *Santa Monica* often is cited for the proposition that an employer owes a strict duty of neutrality in the face of competing organizational campaigns between two employee organizations. The board recently affirmed this in *Santa Clarita Community College Dist.* (2003) No. 1506, 158 CPER 33.

In reliance on *Santa Monica*, SEIU contended that when the county said the independent associations met the criteria to be registered as employee organizations, the county necessarily was editorializing that SEIU's representation was inadequate. SEIU further argued that the county violated the EERR because it failed to make the findings necessary for the under-3-percent rule and neglected to conduct an investigation in which SEIU could have an opportunity to be heard.

The county denied that it had expressed a preference for MCDA or MCPRA simply by granting registration under its lawful and reasonable EERR provisions. The petitions could not have affected employee choice because they were accompanied by nearly unanimous support when they were filed. This occurred before the county's decisions to register the two organizations. The act of registration did not confer any rights on either organization.

The county argued it was required to grant the MCPRA petition because the MMBA requires that a separate bargaining unit be granted to a unit composed solely of peace officers, like the county's park rangers. As for the MCDA petition, the county said it remained neutral by refraining from making a subjective determination as to the adequacy of SEIU representation and simply accepted the petition at face value — as signifying the dispatchers' unanimous discontent with SEIU's representation.

The ALJ found that the county's attempt to be neutral by following its own regulation did not absolve it from liability with respect to MCDA. However, he found that the county's letter granting registration to MCDA did not, by its own words, express a preference toward MCDA as opposed to SEIU. The letter simply stated that MCDA's petition fulfilled the requirements of Sec. IV(D). The mere act of registration is a benign act without reference to the EERR. More-

over, the precise language of Sec. IV(D) would not lead a reasonable employee to understand that the county believed the incumbent was providing poor representation.

Whether the county's decision had a tendency to influence employee choice turned on its timing. The ALJ agreed with SEIU on this point. The county's tentative finding of a lack of community of interest without having obtained input from SEIU forces SEIU to argue back to the status quo when it challenges the severance petition. Even a tentative finding may compromise the neutrality of the decisionmaker because of the investment of factfinding and reasoning in the original decision. *Santa Clarita* reaffirmed that an employer is prohibited from any kind of action which reasonably may be construed as an expression of support for one of two competing employee organizations. The county's action in this situation satisfied that standard.

The ALJ applied the same analysis to the MCPRA petition but found that because park rangers are peace officers under the Penal Code definition, they are entitled to placement in a separate bargaining unit. The registration decision did not constitute any implied disparagement of SEIU's quality of representation. MCPRA's registration also would not have any practical impact on employee free choice because the county is legally required to recognize a separate bargaining unit.

The allegation that the county engaged in an unfair practice by maintaining or enforcing an unreasonable regulation was an issue of first impression for PERB. SEIU asserted that the enforcement of an unreasonable regulation violates MMBA Sec. 3507, which allows employers to adopt reasonable local rules, and PERB Reg. 32603(f), which makes it an unfair practice to adopt or enforce a rule not in conformance with lawful authority under the MMBA. A local rule that infringes on employee organization rights under Sec. 3503, or employee rights under Sec. 3506, thus would constitute an unreasonable regulation.

The ALJ held that the Sec. IV(D) regulation did not reasonably further the purposes of the MMBA because it had the tendency to influence employee free choice by providing a presumptive unit determination prior to the filing of a proper representation petition. The regulation also frustrated the public agency's duty of strict neutrality and thus infringed on employee and employee organization rights. The ALJ noted that the regulation was unreasonable only where the registration constituted a premature, tentative determination on the merits of the community of interest question, as it did in this case with regard to MCDA's petition.

The board affirmed the opinion of the ALJ and adopted it as its own.

Untimely appeal to file amended charge dismissed: Marin County Law Library.

(*Geismar v. Marin County Law Library*, No. Ad-338-M, 7-2-04; 2 pp. dec. By Chairman Duncan, with Members Whitehead and Neima.)

Holding: The board denied the charging party's appeal of an administrative decision denying her the right to file an amended charge.

Case summary: Elizabeth Geismar's unfair practice charge against the Marin County Law Library was dismissed by a board agent for failure to state a prima facie case. After the charge was dismissed, she filed a motion to amend her charge, which was dismissed as untimely.

The board affirmed the dismissal, noting that amendments must be filed before the complaint is issued or dismissed.

Duty of Representation Rulings

Charge dismissed a second time for untimeliness: City and County of San Francisco.

(*Montgomery v. SEIU Loc. 790*, No. 1644-M, 6-15-04; 2 pp. + 6 pp. R.A. dec. By Chairman Duncan, with Members Whitehead and Neima.)

Holding: The charge was dimissed because it was untimely and virtually identical to a charge in a prior case that already had been dismissed.

Case summary: Robin Montgomery filed an unfair practice charge alleging that SEIU breached its duty of fair representation, which resulted in the termination of her employment. The regional attorney dismissed the charge for

untimeliness and noted that this charge was substantially similar to one Montgomery filed in 2001, which was dismissed as lacking merit.

Montgomery was employed as a public safety and communications dispatcher assigned to the Emergency Communications Division. On March 27, 2000, she informed her supervisor that she would not report to work effective March 30 because of health and safety concerns regarding asbestos abatement. On April 5, the ECD advised her that the air quality in her workplace had been tested and was free of asbestos. She was instructed to return to work on April 6. On April 6, she reported to work 90 minutes late, which caused her supervisor to issue a written reprimand. Montgomery contended that this action violated the parties' memorandum of understanding, but she did not specify in what way.

On April 14, Montgomery again informed the ECD that she would not report to work due to asbestos abatement, and she requested that the city pay her for the time she refused to report to work. On April 17, the city provided her with a CAL/OSHA report indicating that the air in her workplace was asbestos free, but she again refused to report to work. Montgomery alleged that SEIU failed to intervene in this matter. On May 15, the city informed her that it would not pay her for her time off and that she was considered absent without leave. She contended that the city refused to pay her because she filed a safety grievance. However, the R.A. noted that language in the parties' contract indicates that she was entitled to payment only if she executed an agreement stating that she would repay the city if her complaint was invalid. No such agreement was executed by the charging party. Montgomery contacted an SEIU representative at that time, but the representative was unavailable.

On June 19, the city ordered Montgomery to return to work on June 22. On that day, she informed the city that she was taking family medical leave, although she failed to file the necessary paperwork. On September 15, the city again instructed her to return to work, but Montgomery refused, citing health and safety concerns.

Finally, on October 30, the city notified Montgomery of its intent to terminate her employment due to her AWOL status. On November 2, she received notice of her termination hearing, which was conducted on November 8 and which she failed to attend. SEIU did not represent her at this hearing because she did not contact them. Her termination became effective on November 9, 2000. She filed a small claims action against SEIU at this time for repayment of her union dues, but the case was dismissed because PERB has exclusive jurisdiction over such matters.

The R.A. dismissed the complaint for untimeliness. A three-year statute of limitations currently applies to MMBA charges, and the statute of limitations begins to run when the charging party knows, or should have known through reasonable diligence, that further assistance from the union was unlikely. Montgomery was aware of SEIU's alleged failure to represent her in November 2000, but she did not file the charge in the instant case until February 2004.

The board agreed with the R.A. and consequently dismissed the charge.

Request for reconsideration denied for failure to state a valid ground: IAFF.

(*Waqia v. International Association of Firefighters, Loc. 55,* No. 1621a-M, 6-17-04; 4 pp. dec. By Member Whitehead, with Chairman Duncan and Member Neima.)

Holding: The request for reconsideration was denied because the complainant failed to present new evidence.

Case summary: Delmont Yusif Waqia filed an unfair practice charge alleging that the International Association of Firefighters violated the MMBA by failing to take a grievance to arbitration. The board found that under the circumstances of the case, IAFF was not obligated to pursue Waqia's grievance to arbitration, and therefore it did not breach the duty of fair representation.

Waqia's request for reconsideration reargued the same issues that were raised in his appeal. He alleged that the board misstated certain facts in its decision on appeal and that the facts relied on to support the board's decision regarding the original charge were irrelevant. Waqia also stated in his request that IAFF did not take his case to arbitration because of racial and religious bigotry. IAFF responded that

Waqia's request did not meet the requirements of PERB Reg. 32410 and failed to show that extraordinary circumstances existed to warrant reconsideration.

IAFF asserted it was not required to pursue the grievance in this situation because the memorandum of understanding specifies that failure to follow the timelines will nullify the grievance. Waqia missed the deadline by more than a month.

The board agreed that Waqia merely was rearguing issues that he already had raised on appeal. He did not provide any new evidence and brought forth the accusation of bigotry for the first time in his reconsideration request without supporting facts or evidence. The request for reconsideration was denied.