

## *Features*

- 6 A Conscious Look at Unconscious Bias  
*Vicki Laden*
- 13 Employee Leaves of Absence  
*Karin L. Backstrom and Marie Burke Kenny*

## *Recent Developments*

### **Local Government**

- 23 Failure to Exhaust Administrative, Judicial Remedies  
Defeats FEHA Claim for Damages
- 25 Voters Reject Ballot Measure  
for Arbitration of Bargaining Impasses
- 27 Reinstatement With Backpay Warranted  
Following Dismissal for Work-Related Injury

### **Public Schools**

- 30 PERB Again Set to Rule on Legality of Union Buttons  
Worn in Presence of Students
- 34 Schwarzenegger Vetoes Family Leave Benefit  
for Educational Employees
- 34 Teachers Lose All Tax Breaks for Buying Classroom Supplies

# contents

## *Recent Developments*

continued

### **Higher Education**

- 36 CSU Doctors Gain Little Money in New Contract
- 38 U.C.'s Unilateral Change of Benefits Altered the Dynamic Status Quo

### **State Employment**

- 42 Corrections Legislation Signed
- 44 Pension Reform Faces Legal Challenge
- 44 Bonds Subject to Legal Approval
- 45 Agreements Awaiting the Governor
- 47 Supervisors' Affiliate Seeks Separation From CSEA

### **Discrimination**

- 50 California Supreme Court Rebukes Legislature for Interpreting Laws
- 53 New Bill Establishes Uniformity Among Laws Prohibiting Employment Discrimination
- 54 Demotion of Women Over 40 Not Disparate Treatment
- 55 Supreme Court to Decide Whether ADEA Prohibits Disparate Impact Discrimination
- 56 Refusal to Let Employee Attend Convention Is Religious Discrimination

## *Recent Developments*

continued

### **General**

- 59 New Law Mandates Sexual Harassment Training for Supervisors
- 60 PERB Appointment Announced

### **Public Sector Arbitration**

- 62 Firefighter Cannot Be Both Permanently Disabled and Ready to Work

## *Departments*

- 4 Letter From the Editor
- 65 Arbitration Log
- 72 Public Employment Relations Board Orders and Decisions
- 87 PERB Activity Reports
- 92 Fair Employment and Housing Commission Cases

## l e t t e r f r o m t h e e d i t o r

Dear *CPER* Readers:

As we all brace for the holiday season and get used to writing “2005,” this is a great time to reflect on some of the important stories that filled the pages of *CPER* since the calendar flipped over to 2004.

Governor Schwarzenegger began the year with his divide-and-conquer budget strategy that had him sidling up to the California Teachers Association and cutting a deal for the 2004-05 fiscal year. Legislators and other players were left sidelined and miffed at being excluded from the discussions. Next, the governor’s campaign pledge to renegotiate “expensive union contracts” and rein in “extravagances” came to a head when the legislative counsel issued an opinion questioning the legitimacy of lawmakers’ approval of multi-year agreements.

The Supreme Court, too, entered the state government fray. It agreed to review a Court of Appeal ruling that cast a constitutional cloud over MOUs that permit some state employees to bring their disciplinary appeals to an arbitrator instead of the State Personnel Board.

The high court also made an important announcement in *Schifando* that employees do not need to exhaust internal administrative remedies before filing a discrimination lawsuit. In the meantime, the Supreme Court granted review of the *McClung* decision and started down the path toward its recent declaration that the FEHA amendment overruling *Carrisales* does not apply retroactively to prohibit harassment by non-supervisory coworkers.

Another notable decision came in the *Nolan* case. There, the Supreme Court ruled that a police officer is entitled to disability retirement benefits only if he can prove he is incapacitated from performing the duties of a patrol officer for all other California law enforcement agencies, not just the local agency where he worked.

And, the landscape at PERB underwent a significant change in 2004. The board’s jurisdiction expanded to include trial court employees and interpreters and the enforcement of two new laws, the Trial Court Employment Protection and Governance Act and the Trial Court Interpreter Employment and Labor Relations Act. To help tackle the additional workload, PERB gained two new members, Chairperson John Duncan and newly appointed Member Lilian Shek.

That’s just a smattering of what went on. But, as always, *CPER*’s coverage kept pace with the vast, ever-changing public sector, and we’ll stay on it in 2005!

Sincerely yours,



Carol Vendrillo  
CPER Director and Editor

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# A Conscious Look at Unconscious Bias

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In its momentous 2003 decision, *Grutter v. Bollinger*,<sup>1</sup> upholding race as a factor in the University of Michigan's law school admissions, two members of the U.S. Supreme Court reaffirmed what we all know: race still matters. In their concurrence, Justices Ruth Ginsburg and Stephen Breyer emphasized that "conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals."<sup>2</sup> However, views on the pervasiveness of discrimination diverge by race: 49 percent of African Americans and 21 percent of whites think there is "a lot" of discrimination, and 50 percent of African Americans and 76 percent of whites think there is only "some discrimination." While one-third of whites in the mid-'90s thought African Americans had achieved equality, only one in ten African Americans agreed.<sup>3</sup> What accounts for such disparities in perception?

## ***The Evolution of Discrimination***

That racial discrimination has "evolved," is beyond argument. Early cases under Title VII of the Civil Rights Act of 1964 focused on discrimination in hiring. By the end of the '80s, the overwhelming share of cases involved employee terminations. The percentage of cases brought as class actions had substantially decreased, as had the number of disparate impact cases, attacking practices disadvantaging entire protected groups.<sup>4</sup> Over 90 percent of cases are now individual, disparate treatment cases, alleging that an employee was subjected to less-favorable treatment on the job on the basis of membership in a protected group — i.e. race, national origin, sex, religion, etc.

Legal scholars have sought to trace the evolution of racial discrimination from crude racial epithets, unambiguous barriers, and overt acts of discrimina-

tion to more “subtle,” elusive forms of unconscious bias. What they have uncovered may be counterintuitive: the discrimination that persists, though in large part “unconscious,” is both so automatic and so pervasive that its impact extends far beyond that of its older, more readily discernible counterpart, into virtually every cross-racial encounter. This article grapples with the question of what public employers should do about reflexive, unconscious racial bias.

### ***Equal Employment Opportunity Compliance: ‘Bulletproofing’ the Workplace***

Academic commentators note that most employers have adopted EEO compliance practices ensuring that “in the aggregate, there will be less evidence of discriminatory decisionmaking and practices.” According to these critics, compliance techniques enable managers to “bulletproof” decisions but do nothing to alter conscious and unconscious discriminatory impulses.<sup>5</sup> So, for example, formal promotion mechanisms, EEO complaint procedures, progressive discipline, standardized evaluations, adoption of objective-seeming evaluation criteria, and paying attention to the timing and process-related aspects of employment decisions are commonplace. Indeed, courts may find such features partial or complete insulation against liability, not only in the context of harassment,<sup>6</sup> but also in connection with the numerous routine decisions to hire, promote, and terminate that occur on an almost daily basis.<sup>7</sup> Such practices have drawn fire from the academy as empty “symbolism” that “sanitizes” the workplace and “scripts” decisions, building a “paper trail” that masks or obscures true inequality.<sup>8</sup>

But personnel practices reflect and respond to legitimate employer concerns about the cost of employment litigation, and assist employers in averting costs through the deployment of effective preventative practices. Litigation, itself, shapes employer response but has a narrow focus that omits and ignores the routine, pervasive effects of unconscious discrimination.

### ***The Narrowness of Contemporary Antidiscrimination Law***

Contemporary antidiscrimination law addresses only deliberate, purposeful discrimination, the type of discrimination that largely has been replaced (or relegated to a far smaller role) by more subtle, unconscious forms.<sup>9</sup> Indeed, Title VII’s requirement that disparate treatment plaintiffs establish that the employer acted with purposeful intent resembles nothing so much as the legal system’s requirements for imposing criminal responsibility — intentional, wrongful acts by a perpetrator who victimizes the plaintiff.<sup>10</sup> The decisionmaker must be portrayed as a “prejudiced personality” who has a bigoted or “bad character.” The employer’s

prejudiced state of mind can be shown either through direct evidence of discrimination, statements that clearly reflect a discriminatory state of mind, such as “women couldn’t handle that type of work,” or through sufficient indirect or circumstantial evidence of discrimination. Courts have recognized the difficulty employees have in acquiring direct evidence of discrimination, such as in uncovering the “smoking gun” statement about women. As a result, the circumstantial evidence model permits plaintiffs to

*Litigation has a narrow focus that omits and ignores the routine pervasive effects of unconscious discrimination.*

prevail if they can show that the legitimate, nondiscriminatory reason advanced by the employer to explain the challenged decision was actually a “pretext” for discrimination. To do this, plaintiffs need only demonstrate that the employer’s explanation was false and that the real reason for the employment action was discrimination.<sup>11</sup>

Employees also have recourse through the “mixed-motives” model that permits employees to recover by showing that at the moment an employment decision was made, the employer harbored an illicit, discriminatory motive that infected the decision. So, for example, when decisionmakers make stereotyped comments, such as that a candidate for promotion will, like other working mothers, probably take too much time off as a result of her children, an employee may proceed under the mixed-motives model. The employer

then must defend by showing that the same decision would have been made even in the absence of the proscribed motive.<sup>12</sup>

### ***Unconscious Bias: A Poor Fit With Antidiscrimination Law***

The problem with each of these discrimination theories is that none of them corresponds with the reality of contemporary discrimination. Beginning with an influential article by Professor Charles R. Lawrence III in 1987,<sup>13</sup> a solid body of scholarship has emerged that maps the rather extraordinary expanse between Title VII case law's "purposeful, conscious, intentional" model of discrimination and the actual nature of discriminatory decisionmaking. A vast and growing number of studies by cognitive psychologists show that the very premise on which Title VII case law rests — that discrimination is conscious and deliberate — is seriously flawed and emanates from a model of discrimination that is sharply at odds with scientific research from the last 30 years. These studies irrefutably demonstrate that automatic thought processes involved in receiving, sorting, encoding, and retrieving information result in wide-ranging, unconscious bias.

An example helps illustrate the point. A decisionmaker committed to equal opportunity principles is hiring an electrician. She nonetheless is likely to conjure an image of an electrician that reflects both social reality and popular culture: white and male. Having the prototypical electrician so firmly embedded may make it more difficult to accurately assess the qualifications of a candidate who does not fit the stereotype: an African-American woman. Equally alarming, when the African-American woman confronts the expectation that she may not be up to snuff as an electrician, she may be vulnerable to such an expectation, performing consistently with the interviewer's expectation of her. The interviewer, whose personal values include a commitment to

equality, likely would recoil from the notion that the hiring process was infected by bias long before the African-American woman walked through the door.

### ***How Bias Infects Decisionmaking***

There is nothing unique about the categorization and classification of individuals. Just as it sorts objects, the human mind sorts people into groups, typically on the basis of their most visible characteristics, generally some combination of gender, race, and age. Psychological research has shown that when individuals are divided into groups, such as along racial lines, "ingroup" members perceive more individuation or differentiation between themselves and other members of the ingroup, while perceiving "outgroup" members as having far more similarity than they actually do (the solidly undifferentiated "other"). As a result, their "schemas" or theories about their own group are more nuanced and complex than their schemas or theories about outgroups. The very existence of ingroups and outgroups produces bias in the form of sympathy for or favoring of one's own

ingroup and measurable antipathy toward or disfavoring of the outgroup. This set of dynamics conflates into intergroup bias.

Adding to the potential for the development of stereotypes, majority group members may have less contact with minority group members than with members of their own group, loading their contacts with minority group members with greater salience. Negative experiences are similarly more loaded with salience than positive experiences. Negative experiences with minority group members subconsciously trigger "automatic vigilance," giving them an even greater impact.<sup>14</sup> Substantial evidence demonstrates that negative views of "outgroups" develop early and are recalled in a reflexive manner throughout life.<sup>15</sup>

Ambiguous experiences tend to be interpreted in conformity with stereotypes or expectancies. In one study, when presented with visual depictions of conduct that could be

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characterized as either playful, horsing around, or as aggressive or even violent, changing the race of the individual engaged in the conduct from white to African American shifted the way in which viewers interpreted the conduct. In another study, when non-African-American viewers were exposed to an African-American face flashed subliminally on a screen while they were identifying an ambiguous object, viewers who were shown the African-American face were more likely to identify the object as a gun rather than as a tool. Moreover, experiences that conform to stereotypes or expectancies are processed, remembered, and retrieved far more readily than experiences that run counter to expectancies, attaching themselves with more glue.

### ***Unconscious Bias: How It Operates in the Workplace***

Many of the thought processes that operate on an unconscious level have particular importance for the employment setting. For example, if events unfold in line with prior stereotypes or expectancies, they are attributed to stable, internal, or constitutive factors, such as the individual's attitudes or abilities. If, on the other hand, events unfold contrary to expectation, they are attributed to situational or environmental factors outside the actor's control. The workplace has an abundance of written and unwritten rules of conduct. Just as it is difficult to commute on a daily basis without violating a single rule of traffic safety, so it is impossible to work on a daily basis without racking up some infractions. How will a supervisor construe or "frame" an infraction such as arriving at work late twice in a week? Will the late arrivals be attributed to stable characteristics — i.e. the person is a bad employee and is acting in conformity with an essential characteristic, or will they be attributed to circumstances outside the employee's control — particularly bad traffic on two occasions? Studies show that decisionmakers react with greater severity to infractions that are perceived as emanating from stable, dispositional traits, and that they impose more significant discipline in response.

### ***The 'Self-Fulfilling Prophecy' in the Workplace***

Expectations about employees can become "self-fulfilling prophecies."<sup>16</sup> The expectation that an employee will perform poorly may influence that employee's performance, particularly if the employee is from a stigmatized, "dispossessioned" group. When videotaped and later reviewed, interviews by white interviewers conducted with both white and African-American interviewees revealed a striking difference between how these groups were treated: African-American candidates were received more coldly. Interviewers maintained more distance from African-American subjects, spent less time with them, and made more errors in speaking to them. By contrast, they maintained less distance from whites, made more eye contact, leaned forward, and aligned their shoulders more directly with those of the interviewees, resulting in more "immediacy" or personal availability. Compounding the potential for erroneous judgments, individuals who were treated more coldly performed less well in the interviews and subsequently were judged to perform less well on the job, perhaps matching these nonverbal cues with diminished performance. In turn, the relatively greater performance deficiencies of African Americans who were interviewed with greater coldness, confirmed and reinforced the interviewers' prior expectancies. Most daunting to those concerned with solutions, racial and other social expectancies and stereotypes are reinforced by the world beyond the workplace, in this case continually validating the expectancies of the interviewers.

### ***How Bias Clouds Judgments in Ambiguous Situations***

Cognitive bias is likely to be heightened in certain murky situations. Bias is more freely exhibited where treatment or conduct can be rationalized due to reasons other than a protected characteristic such as race, and in situations where the actor is less likely to be stamped a racist as a result of his or

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her conduct. For example, in the context of employment, when a decision to discipline an employee can be construed as having a neutral explanation, such as stemming from a violation of the employer's absence policy, the justification for the decision averts a clash with the supervisor's personal values (assuming they include a commitment to equality). Such justification eliminates the need for reflection on personal values that could come to bear on the decision at hand.

### ***The 'Advantaging' of Ingroup Members***

One additional feature of the contemporary workplace, both constructed and maintained by cognitive bias, is the pervasive "advantaging" of ingroup members. The selective conferral of advantages is the "present that gives and gives" to ingroup employees. Advantages are conferred in myriad ways. For example, a male employee who plays squash with his male boss at lunch, absorbing the boss's knowledge, acquiring his contacts, or simply basking in the boss's reflected glory is selectively advantaged. If an opportunity for promotion occurs, the knowledge, contacts, and status he has acquired are likely to have enhanced his qualifications. If layoffs take place, his relationship may garner him a job referral to a position his boss knows about but that has not been announced to the public.

Advantaging is both more likely to escape notice and less likely to be challenged. First, individuals are less likely to recognize discrimination when it does not conform to their model. The hallmark of discrimination is negative treatment or action; advantaging does not set off the same set of alarms that a negative action does. Moreover, denial of advantages generally is perceived as less unfair than negative treatment.<sup>17</sup>

### ***Is Advantaging Lawful?***

Unlike the disadvantaging of outgroup members, Title VII does not generally bar the advantaging of ingroup mem-

bers. So, for example, case law has failed to find advantaging (outside of scenarios involving sexual favoritism) actionable, although there are occasional instances in which courts have found "word of mouth" recruiting unlawful if it operates systemically to deprive minorities or women of employment opportunities.<sup>18</sup> Nor are individuals apt to sue over advantaging. Even if the squash court dates became known to other employees, the richness of the advantaging experience would likely elude detection. Just like sexual harassment, most advantaging occurs, unwitnessed, in one-on-one encounters; the advantaging that is visible to employees is only the tip of the iceberg. Finally, what is an employee who

becomes aware of selective advantaging to do? Sue over denial of squash court dates and insider information? No plaintiff's attorney would find merit in her case or discern an economic incentive to sue.

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### ***Interrupting Automatic Thought Processes***

When individuals engage in unconscious advantaging or disadvantaging, such as forgiving tardies of ingroup members more readily by ascribing them to extrinsic causes, or refusing to grant dispensation to African-American employees who are also tardy, the supervisor's cognitive process is automatic, which makes it difficult to interrupt. One of the keys to unpacking and examining stored, reflexive processes is to highlight the role that the protected characteristic actually plays in them. For example, when white jurors participate in mock trials in which racial issues are addressed directly, they are less likely to exhibit bias when determining the fate of an African-American defendant. Bias may be thwarted by the triggering of a conscious recollection of personal antidiscrimination values or ideals that then are deployed to block the channels through which cognitive biases and their concomitant judgment distortions otherwise would flow.<sup>19</sup>

### ***Why ‘Colorblindness’ Does Not Work***

Indeed, colorblindness as a strategy permits bias to flow through thought processes, unchecked and unopposed by values.<sup>20</sup> Research limning the way out of the bias morass does point to a possible means of escape. First, a person must have an understanding of the sources of unconscious bias in normal cognitive functioning. Second, a person must want to correct the judgment errors resulting from bias. Third, a person must understand both the “direction” (positive and negative) of such biases and how much force they exert, so that bias correction is reasonably well-calibrated. Finally, a person must be a sufficiently conscious actor to impose control over his or her interior thought processes.<sup>21</sup>

Proposition 209, enacted in 1996, expressly adopted the “colorblind” model, preventing consideration of race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting.<sup>22</sup> Public employers thus are deprived of one means, however blunt, to correct the pernicious effects of unconscious and reflexive bias, and tame its impact on decisionmaking. Current human resources practices that respond primarily to the threat of litigation and emphasize the adoption of measures designed to minimize its risk are unlikely to provide an alternate means of rectifying bias. Title VII’s model of discrimination in individual cases extends only to intentional, purposeful, discriminatory acts, and an extension of Title VII doctrine to encompass acts emanating from unconscious bias is unlikely to occur, given recent Supreme Court decisions expressing a distaste for “social engineering.”<sup>23</sup>

### ***Combatting Unconscious Bias: Is There a Way Forward?***

The City of Oakland has repeatedly and unequivocally expressed its commitment to both equality and diversity in recent years, enacting ordinances that require its contractors

to provide equal benefits to domestic partners and that mandate the provision of information and services to its citizens in the languages spoken by its major language groups.<sup>24</sup> Confining its response to tracking lawsuits and “bulletproofing” the workplace runs counter to its values. Research demonstrates that only “*color consciousness*” can reduce bias, providing employees who harbor egalitarian values but who are unconsciously influenced by commonly held social and cultural stereotypes, with both the motivation and tools to counteract its effects.

For public employers such as Oakland, that want to go beyond risk management, the bad news is that there are few resources available to assist them. A search last year turned up a single tool, a 47-minute videotape from the Discovery Channel, “How Biased Are You?”<sup>25</sup> By contrast, a plethora of programs, including simulations involving ambiguous situations, is available to police departments seeking to reduce bias underlying racial profiling.

Public employers, particularly in locations where egalitarian values are strong, may be crucially situated to increase both the demand for and supply of such programs. Making race salient, even in the post-Proposition-209 era, is the only way to move closer to society’s egalitarian ideals. \*

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- 1 *Grutter v. Bollinger* (2003) 539 U.S. 306, 162 CPER 5.
- 2 *Id.* at 345.
- 3 Michael Selmi, “Subtle Discrimination: A Matter of Perspective Rather than Intent,” 34 Colum. Human Rights L. Rev. 653, 663 (2003).
- 4 Linda Hamilton Krieger, “Civil Rights Perestroika: Intergroup Relations After Affirmative Action,” 86 Calif. L. Rev. 1251, 1302 (1998).
- 5 Susan Bisom-Rapp, “Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice,” 26 Fla. St. U. L. Rev. 959, 964 (1999).

- 6 *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 131 CPER 14; *State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026.
- 7 *Barefield v. Chevron* (N.D.Cal. 1997) U.S. Dist. LEXIS 237) (criticizing subjective criteria and decisionmaking).
- 8 See Bisom-Rapp, *supra* at 1010-1016.
- 9 Martha Chamallas, "Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes," 74 S. Cal. L. Rev. 747, 748-53 (2001); Lu-in Wang, "Race as Proxy: Situational Racism and Self-fulfilling Stereotypes," 53 DePaul L. Rev. 1013 (2004); Linda Hamilton Krieger, "The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity," 47 Stan. L. Rev. 1161 (1995).
- 10 Angela P. Harris, "Equality Trouble: Sameness and Difference in Twentieth-Century Race Law," 88 Calif. L. Rev. 1923, 2003 (2000).
- 11 *McDonnell Douglas v. Green* (1973) 411 U.S. 792, as developed in *Texas Department of Community Affairs v. Burdine* (1993) 450 U.S. 248 and *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502.
- 12 *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 81 CPER 72.
- 13 Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," 39 Stan. L. Rev. 317 (1987).
- 14 Krieger, "Content of Our Categories," *supra* at 1197-98.
- 15 Clark Freshman, "Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between 'Different' Minorities," 83 Cornell L. Rev. 313, 405 (2000).
- 16 Wang, *supra*, at 1048-1062.
- 17 Krieger, "Civil Rights Perestroika," *supra* at 1309-23.
- 18 *Kraszewski v. State Farm Insurance Co.* (1981) 27 Fair Empl. Prac. Cas. (BNA) 27.
- 19 Wang, *supra* at 1033-39.
- 20 Krieger, "Civil Rights Perestroika," *supra* at 1276-79.
- 21 *Id.* at 1286-88.
- 22 *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537.
- 23 Harris, *supra* at 2012.
- 24 For example, see Oakland Municipal Code 2.32.040, Non-discrimination in the provision of benefits, 2.30.030, Equal access to services.
- 25 Now marketed by Cambridge Educational.

# Employee Leaves of Absence

*Karin L. Backstrom and Marie Burke Kenny*

***Karin Backstrom** is the founding partner of Backstrom and Heinrichs. She has extensive litigation experience and provides proactive advice on all aspects of the employment relationship. Prior to founding her firm, she practiced law at Littler, Mendelson and Sheppard Mullin. **Marie Burke Kenny** is a partner in the San Diego office of Luce, Forward, Hamilton & Scripps LLP. She represents employers in federal and state court litigation involving wrongful termination, discrimination, harassment, retaliation, unfair competition, and wage and hour claims. This paper originally was presented in November, at the 22nd Annual Meeting of the Labor & Employment Law Section of the State Bar, in Anaheim.*

Until the early 1990s, California employers generally were free to establish leave of absence policies and practices. Numerous statutes now restrict employers' options. Additionally, some statutes require an employer to return an employee to the same or a similar position he or she held before the leave. These statutes, both state and federal, prescribe conflicting obligations depending on the nature of the leave.

Under current law, when faced with an employee who requests a leave of absence, the employer must analyze the situation under a host of applicable statutes. These include:

- The California Family Rights Act
- The federal Family and Medical Leave Act
- The California Fair Employment and Housing Act and its special provisions for pregnancy disability leave and for accommodations for disabilities
- The Americans With Disabilities Act
- The California Workers' Compensation Act
- Other less significant but nonetheless important statutes prescribing special rules for military leave, jury duty leave, school visitation leave, and other forms of leaves.

In some circumstances, an employee may be entitled to the protection of more than one statute. For example, a worker who suffers a work-related illness or injury is entitled to the protections of California workers' compensation laws. The same injured worker also could be protected as a qualified individual with a disability under the ADA and the FEHA, and also might be entitled to medical leave under the FMLA and the CFRA. It is critical for an employer to evaluate the

employee's rights and the employer's obligations under each of the applicable laws.

This paper summarizes the most important statutes relating to employee leaves of absence. Reference should be made to the text for more detailed explanations of the requirements of these statutes.

### ***Laws Governing Employee Leaves of Absence***

#### ***Federal Family and Medical Leave Act and California Family Rights Act of 1991***

- Applies to employers with 50 or more employees.
- To be eligible, an employee must have been employed for at least 12 months (need not be consecutive) and to have worked at least 1,250 hours during previous 12 months.
- Provides unpaid leave for the birth or adoption of a child; care for a child, spouse or parent with "serious health condition"; or for an employee's own "serious health condition."
- Leave can be up to 12 weeks for each 12-month period.
- For women taking pregnancy disability leave, total permissible leave is up to 4 months plus 12 additional weeks.
- Employee is to provide employer with 30-days' notice if need for leave is foreseeable.
- Employee must provide medical certification in some circumstances.
- Employer must maintain employee health coverage for 12-week leave period, as if the employee were actively working.
- Employee must be reinstated to same or "equivalent" position upon expiration of the leave period.
- Employer cannot interfere with, restrain, or deny the exercise of any right provided by the FMLA/CFRA.
- Employer cannot discharge or discriminate against any individual for opposing any practice or having any involvement in a proceeding related to the FMLA/CFRA.

#### ***Pregnancy Disability Leave***

- Applies to employers with five or more employees.
- Applies to any employee disabled by pregnancy, childbirth, abortion, miscarriage, or other pregnancy-related disability.
- Duration of leave is for a reasonable period of time not to exceed 4 months; leave is unpaid.

- Employer must treat an affected employee no less favorably than other employees with temporary disabilities.
- Employer must transfer an eligible employee to less-strenuous duty, under some circumstances.
- Employer can require certification, if required of other employees with temporary disabilities.
- Employee on leave is entitled to the same benefits as employees on leave with non-pregnancy-related disabilities.
- Employee is entitled to reinstatement to the same or a "substantially similar" position, with very limited exceptions, if the employee timely returns from leave.

#### ***Fair Employment and Housing Act/Americans With Disabilities Act***

- State law covers all employers with five or more employees.
- Protects individuals who have a physical or mental disability. The definition of "disability" is broader under California law than under the ADA. California definitions include:
  - Physical disability: Any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects certain body systems and limits a major life activity. "Limits" means makes the achievement of the major life activity difficult and does not take into account mitigating measures.
  - Mental disability: Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities that limits a major life activity.
- Employer must reasonably accommodate a disabled employee unless "undue hardship" would result.
- Granting unpaid leave of absence can be part of the employer's duty to reasonably accommodate.
- There is no requirement in the statute to provide paid leave or to continue benefits, but the employer must treat disabled individuals no less favorably than non-disabled workers on other types of leaves.
- There is no express statutory duty to reinstate, but the employer cannot discriminate against an individual protected by the ADA or the FEHA, and must reasonably accommodate the individual. The Equal Employment Opportunity Commission requires "undue hardship" where the employer does not reinstate.

- Employer has affirmative duty to engage in a timely, good faith interactive process to determine effective accommodations with the disabled employee.

#### ***Workers' Compensation Leaves***

- All employers, as defined by California Labor Code Sec. 3300, are required to comply.
- Employee disabled by injury arising out of and in the course of employment is entitled to workers' compensation benefits and unpaid leave.
- Employer may require certification of the employee's ability to work.
- Employer may replace or fill the injured worker's position if required by business necessity.
- Employer must reinstate a qualified employee unless refusal is necessitated by business realities.
- Employer cannot discriminate against an individual with work-related injury.

#### ***Leave for Alcohol and Drug Rehabilitation***

- Applies to private California employers with 25 or more employees.
- Imposes affirmative duty on covered employers to reasonably accommodate employees who wish to voluntarily participate in an alcohol or drug rehabilitation program, providing the reasonable accommodation does not impose an undue hardship on the employer.
- Employees may use accrued sick leave for the purpose of entering and participating in the alcohol or drug rehabilitation program.
- Employers must take reasonable efforts to safeguard the privacy of an individual who is enrolled in such program.

#### ***Military Leave***

- All employers are required by state and federal law to provide unpaid leaves of absence for the purpose of military service.
- Employers are required to provide returning reservists to the same or similar positions they held before they were called to active duty.
- Upon reemployment, employers are required to provide the returning employees with adjustments they would have received had they not been on leave.

- Employers are not required to continue providing health plan coverage for reservists called to active duty or their dependents. However, if coverage is terminated for these individuals, an employer must offer continuation of coverage under COBRA.

- Employers are prohibited from discriminating against the reservists on the basis that they will be taking or have taken such leave.

#### ***Jury Duty Leave***

- Employers must grant unpaid leave to employees who have been called to serve as jurors or witnesses.
- Employers are prohibited from discharging or otherwise discriminating against employees for taking time off from work to serve as jurors or witnesses, so long as the employee gives reasonable notice.

#### ***School Visitation Leave***

- Employers who employ 25 or more employees at the same location must allow parents or guardians of children in kindergarten or grades 1 through 12 time off without pay to visit their children's school.
- Employees may take up to 40 hours each school year, not exceeding 8 hours in any calendar month, to participate in activities of the school.
- Employers are prohibited from discharging or in any way discriminating against employees who take such leave, provided that the employee gives reasonable notice.

#### ***Election Officer Leave/Voting Leave***

- Under California law, employers are prohibited from terminating or suspending employees because of absence due to service as an election officer on election day.
- California law requires all public agencies and private employers to provide employees with time off to vote.

#### ***Volunteer Firefighter, Reserve Peace Officer, or Emergency Rescue Personnel Leave***

- All employers, except public safety agencies and providers of emergency medical services, must allow employees who are registered volunteer firefighters, reserve peace officers, or emergency rescue personnel to take time off with-

out pay to perform emergency fire-fighting, reserve peace officer, or emergency rescue personnel duties.

- Employers may require an employee to provide notification of his or her status as a volunteer firefighter.
- There is no limit to the duration, timing, or frequency of leaves taken for emergency fire-fighting, reserve peace officer duties, or emergency rescue personnel duties.

### **Recent Developments in FMLA/CFRA Cases**

#### ***Employees requesting family leave under the CFRA must provide sufficient notice that the leave is to care for an ailing parent.***

In *Stevens v. California Department of Corrections*,<sup>1</sup> the court held that an employee requesting leave under the California Family Rights Act must provide sufficient notice to the employer that the employee needs the leave to provide care for ailing parents. Without sufficient notice, there is no duty of the employer to inform the employee of the protections of the act. In this case, an employee requested leave to “spend the Christmas holiday” with his parents, and noted his parents’ health had deteriorated and he expected them to pass away within a year. The employer denied the request, and the employee filed suit. The court found that no reasonable employer would understand his request to be a request for leave to care for ailing parents, only a request to visit them. While notice must not be express, employers are not required to be clairvoyant, and mere notice of a parent’s illness is not enough to trigger the CFRA. Reasonable notice that the employee intends to care for the parent is required.

***Eligibility determination for “hours of service” under the FMLA may include compensation for hours not worked by the employee.*** In the case of *Ricco v. Potter*,<sup>2</sup> an employee of the United States Postal Services was terminated in December 1997 and reinstated to her job in February 1999 pursuant to an arbitration award. Shortly after her reinstatement, the employee requested FMLA leave for depression and migraines resulting from her reaction to the death of her

husband. The postal service denied her request because it concluded that she had not met the 1,250 hours-of-service requirement.

The district court dismissed her claim pursuant to the FMLA on the reasoning adopted from *Plumley v. Southern Container, Inc.*,<sup>3</sup> stating that only hours during which an employee performed actual work are included in the hours-of-service requirement, not hours for which an employee was compensated pursuant to an arbitration award. However, the Court of Appeals disagreed and concluded that the FMLA does not clearly exclude hours an employee would have worked but for her unlawful termination from an eligibility determination, and the purpose of the FMLA’s hours-of-service requirement is properly served by including such hours. The court held that denying employees credit towards the FMLA hours-of-service requirement for hours that they would have worked, but for their unlawful termination, rewards employers for their unlawful conduct.

***Employees cannot use CFRA leave to accompany and care for a family member who travels for non-medical reasons.*** In *Gradilla v. Ruskin Manufacturing*,<sup>4</sup> the court held that an employee who leaves work to travel with and care for a family member with a

serious health condition is not entitled to leave under the California Family Rights Act when the family member decides, in spite of her serious medical condition, to travel for reasons unrelated to medical treatment. In this case, an employee requested leave to accompany and care for his seriously ill wife who was traveling to Mexico City for a funeral of a relative. The court held that to consider such leave as protected by the CFRA would allow employees to take leave in order to care for an ill family member who was traveling for any reason, including personal, and that would be an impermissibly broad interpretation of the statute.

***Employee may have claim where employer failed to notify him of his FMLA rights.*** In *Conoshenti v. Public Service Electric and Gas Co.*,<sup>5</sup> an employee was subject to a last chance agreement, which required him to report to work

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everyday on time. Subsequently, he was struck by a car and seriously injured, which required surgery and left him unable to work for several months. Although the employee informed his employer of the accident, at no time did the employer notify him of his rights under the FMLA. Moreover, the employer decided to end the employee's employment on his first day back to work for violating his last chance agreement. The employee was absent a total of 92 days, which far exceeded the 12 weeks guaranteed by the FMLA. Subsequently, the employee sued his employer for violating his FMLA rights.

The employer filed a motion for summary judgment arguing that there is no right to reinstatement once FMLA leave is exhausted. The motion was granted. On appeal, however, the Court of Appeals for the Third Circuit reversed the trial court's dismissal of the employee's FMLA claim on the grounds that his employer failed to notify him of his rights under the FMLA. The court found that if the employee had received the required notice, he might have been able to structure his leave and his plan of recovery to preserve the job protection afforded by the FMLA. The court also held that an employee can show an interference with his right to leave under the FMLA if he is able to establish that the failure to advise rendered him unable to exercise that right in a meaningful way.

**Failure to notify employee does not create an exception to the FMLA's guarantee of no more than 12 weeks of unpaid leave each year.** In *Ragsdale v. Wolverine Worldwide, Inc.*,<sup>6</sup> the employer granted the employee 30 weeks of unpaid sick leave in one year when cancer kept her out of work, even though the Family and Medical Leave Act of 1993 guaranteed only 12 weeks of unpaid leave each year. When the employee's condition persisted and she failed to return to work, the employer terminated her. The employee sued, arguing that the leave did not count against her FMLA entitlement because the employer failed to comply with an EEOC regulation requiring the employer to notify her that 12 weeks

of the absence would count as her FMLA leave. The court resolved that the employee was not entitled to additional FMLA leave because the EEOC regulation impermissibly altered the statute and exceeded the Secretary of Labor's authority. The regulation was deemed invalid. Thus, the Supreme Court affirmed the appellate court's judgment in favor of the employer.

**An employee who misuses family leave can be terminated.** In *McDaneld v. Eastern Municipal Water Dist.*,<sup>7</sup> the court held that an employee who failed to return to work after the reason for which the leave was requested no longer existed, could be terminated because of evidence the em-

ployee misused the leave in other ways. In this case, an employee requested a week of family leave to care for his father. During the leave, the employee went golfing and spent time working on his lawn sprinklers. Even though his father recovered prior to the end of the leave, the employee did not return to work. The employee maintained that he did not know he had to immediately return to work, but the court upheld the earlier findings by the water district that the employee misused the leave in other ways, and it found he could be terminated.

**A person on California Family Rights Act leave is not immunized from layoff during the leave.** In

*Tomlison v. Qualcomm, Inc.*,<sup>8</sup> the court held that a person on California Family Rights Act leave was not immunized from a layoff during the leave. The employee alternatively argued that the employer's personnel handbook and policies, which stated that an employee on family leave was guaranteed employment, coupled with the guarantee given to her when she was granted leave, created an enforceable promise. However, the court concluded that the policies did not support the breach of contract claim because her express at-will contract precluded any implied agreement to the contrary. The parties had agreed to both the at-will employment relationship and to the exclusive method for amending the at-will nature of her employment, and therefore no other purported amendments (whether in written or oral form) were effective. The court found

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to take CFRA leave  
to travel for any  
reason would be an  
impermissibly broad  
interpretation of  
the statute.*

that the layoff did not breach her agreement; thus, the trial court's judgment in favor of the employer was affirmed.

***Leave of absence due to father's depression fits within the scope of FMLA.*** In *Scamihorn v. General Truck Drivers*,<sup>9</sup> the employee's father became severely depressed after his sister was murdered by her ex-husband. After discussions with his employer, the employee left his job for several months to provide assistance and comfort to his ailing father. When he sought to return to work, the employee found he had to start over as a probationary employee with no seniority. The employee argued that his circumstances fell under the protection of the FMLA, so that the employer was required to treat his absence as an unpaid leave and to reinstate him to his previous job and seniority level based on his original start date. The employer countered that the employee failed to show that his father suffered from a serious health condition, another FMLA requirement.

In reversing the district court's grant of summary judgment to the employer, the Ninth Circuit found that the employee's father's health problem fell within the scope of the FMLA. Although it was a close call whether the employee ultimately could prove he fit within the requisite FMLA criteria, the court believed that when viewing the evidence most favorably to the employee, the employee provided sufficient evidence to create triable issues of fact, which warranted a trial on the merits. The case was remanded for further proceedings.

***Firing of employee who takes FMLA leave for legitimate, non-discriminatory reason may be permissible.*** In *Skrajanc v. Great Lakes Power Service Co.*,<sup>10</sup> the employer did not violate the FMLA when it terminated an employee from a department that was being eliminated altogether. The employee was one of four employees in the pump service division. After the employee took FMLA leave, the employer decided to divest itself of that division and terminated all of those employees, including the plaintiff. The Sixth Circuit upheld this termination as non-violative of the FMLA due to the existence of a legitimate business reason for the termination.

***Unfair criticism and termination of employee after request for FMLA leave raises inference of discrimination or retaliation.*** In *Batka v. Prime Charter Ltd.*,<sup>11</sup> a terminated employee claimed that, after notifying her employer of her pregnancy, her supervisor became antagonistic, began unfairly criticizing her work, and later terminated her two weeks before she was scheduled to return from maternity leave. She sued under Title VII and the FMLA. The court denied the employer's motion for summary judgment, stating that the circumstances surrounding the employee's termination

could reasonably lead to an inference that discrimination or retaliation played a role. The court pointed to "the uncontested fact that Batka received salary increases and a promotion during her tenure at Prime Charter; Prime Charter's hiring of a full-time replacement during her absence; and the timing of her dismissal." According to the court, all of these factors undermined the employer's contention that Batka was terminated due to poor performance.

***FMLA does not protect employees who "call in sick."*** In *Collins v. NTN-Bower Corp.*,<sup>12</sup> the Seventh Cir-

cuit upheld the termination of an employee who suffered from depression because the employee did not notify the employer that she suffered from a condition that might entitle her to rights under FMLA. Rather, on various days, the employee merely told the employer that she was "sick" and would not be attending work that day. Because the FMLA requires the employee to give her employer notice of the need to take FMLA leave, the employee's termination in this case did not violate the FMLA.

***An employee's burden of proof in proving a claim for retaliation under the FMLA outlined.*** In *Potenza v. City of New York*,<sup>13</sup> an employee worked for the New York City Department of Transportation. Throughout his employment, he received highly favorable performance evaluations and was promoted to port engineer in 1998. In April 1999, he took a one-month leave of absence for knee surgery. After being removed from the port engineer position in August

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1999, the employee sued his employer, alleging national origin discrimination, disability discrimination, and violation of the FMLA. In considering his FMLA claim, the Court of Appeal noted that “there are no set guidelines to establish a prima facie case for wrongful termination under the [FMLA].” It followed the majority of Circuits in applying the *McDonnell-Douglas* burden shifting framework to analyze the employee’s claim of retaliation for taking FMLA leave. It is important to note that the Ninth Circuit does not follow the majority approach but rather simply requires the plaintiff to prove by a preponderance of the evidence that the taking of FMLA-protected leave was a negative factor in the adverse employment decision. See *Bachelder v. America West Airlines, Inc.*<sup>14</sup>

### ***New California Law Regarding Family Temporary Disability Insurance Program***

On September 23, 2002, former California Governor Gray Davis signed into law the Family Temporary Disability Insurance Program, which took effect on January 1, 2004. The FTDI program is an amendment to California’s current mandatory State Disability Insurance program. It does not provide a leave entitlement to employees. Rather, the FTDI program provides that employees who need to take leave for a seriously ill family member or to bond with a new child will be paid 55 percent of their regular wages, for a maximum of \$728 per week, beginning on July 1, 2004. Eligible employees may be paid at this rate for up to six weeks. To seek FTDI benefits, employees must file their claims directly with the California Employment Development Department.

Under current law, the disability insurance program provides disability payments to an eligible individual who is unable to perform his or her customary work due to a non-industrial injury, illness, or pregnancy. Under the new law, workers will be allowed to receive up to six weeks of FTDI payments for caring for a seriously ill child, spouse, parent, or domestic partner, or bonding with a new child. The disability insurance program is expected to be 100-percent funded by employees through the State Disability Insurance system.

The following are some limitations on an employee’s ability to receive FTDI benefits:

- There is a one-week waiting period before workers can apply for the program;
- Employers can require eligible employees to use up to two weeks of unused vacation time before receiving FTDI benefits; and
- Payments are capped at 6 weeks over a 12-month period and at 55 percent of wages, up to an annually adjusted maximum.

### ***Developments in FEHA/ADA Disability Discrimination Cases***

***Summary judgment improper when defendant’s reasons for refusal to rehire were inconsistent.*** Under the Americans With Disabilities Act, an employer may not discriminate against persons who have successfully completed or are participating in a drug rehabilitation program and are no longer using illegal drugs, or against people erroneously regarded as using drugs. In *Hernandez v. Hughes Missile Systems Co.*,<sup>15</sup> the plaintiff was discharged for drug and alcohol related issues. Subsequently, he entered into and completed a rehabilitation program. His subsequent application for rehire was rejected. The defendant employer first stated that it did not rehire plaintiff due to his history of substance abuse, but subsequently argued that it had a uniform policy of not rehiring any employee fired for misconduct. The court held a genuine issue of material fact existed as to whether the defendant refused to rehire the plaintiff because of his disability, as the defendant’s conflicting explanations could lead a jury to reasonably conclude that the unwritten policy was pretextual.

***No duty to engage in interactive process with respect to non-sedentary position where there is no information that the employee could perform non-sedentary work.*** In *Allen v. Pacific Bell*,<sup>16</sup> the employee was a service technician. His personal physician and the company’s physician concluded that his medical condition required that he perform only sedentary work. Based on these evaluations, the company concluded that the plaintiff no longer could perform the duties of a service technician, and it commenced searching for an alternative position for him.

The plaintiff asked to be reinstated into the service technician position but could not provide medical evidence that his physical condition had changed. The court concluded that Pacific Bell did not have a duty to engage in an interactive process with the employee regarding the service technician job because there was no information that he was capable of performing the tasks associated with that position. The court recognized the company's duty to interact with the employee regarding a possible alternative accommodation within the company. Because the employee failed to cooperate in the job search process by refusing to show up for a job-related test, the court rejected the employee's claim that the company failed to fulfill its duty to interact with the employee regarding reasonable accommodations.

**Individualized assessment required in order to assert direct threat defense under the ADA.** Under the ADA, an employer may defend against a disability discrimination claim by relying on a qualification standard which includes a requirement that an employee shall not pose a direct threat to the health or safety of people in the workplace, including the employee. In *Echazabal v. Chevron USA*,<sup>17</sup> the Ninth Circuit Court of Appeals held that before excluding such an individual from employment, the employer must make an individualized assessment of the employee's ability to perform the essential functions of the job. This assessment must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." The employer must consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

A good faith subjective belief in the existence of a risk or "common sense" are not enough to shield the decisionmaker from liability. A consultation with a doctor who makes an objective scientific assessment is necessary. Thus, in this case, the employer's reliance on its own company doctors, who were not experts in the relevant field, was insufficient.

*A good faith, subjective belief in the existence of a risk or 'common sense' are not enough to shield the decisionmaker from liability.*

**Employer not required under ADA to accommodate individual "regarded as" disabled.** In *Kaplan v. City of North Las Vegas*,<sup>18</sup> the Ninth Circuit Court of Appeals held that there is no duty to accommodate an employee who is simply "regarded as," but is not, disabled. The plaintiff, a former peace officer, was injured in a training exercise. His slow recovery was attributed to rheumatoid arthritis. The employer subsequently terminated the plaintiff because it believed the employee's injury was permanent. The court held that the plaintiff could not perform the essential functions of his job without an accommodation. The plaintiff later fully recovered from the injury, and the diagnosis was found to be incorrect. In an issue of first impression in the Ninth Circuit, the court therefore held that the plaintiff was not entitled to a reasonable accommodation to help him perform the essential functions, as he was only "regarded as" disabled.

**Limitation, not substantial limitation, on a major life activity is required under the FEHA.** In *Colmenares v. Braemar County Club*,<sup>19</sup> the California Supreme Court held that an individual alleging disability discrimination under the FEHA must simply make a showing of a limitation of a major life activity due to his condition, rather than a substantial limitation as required under the ADA. The Poppink Act, effective on January 1, 2001, simply clarified, rather than modified, the FEHA standard; thus, claims arising before the Poppink Act was enacted need not meet the higher federal standard.

**United States Supreme Court applies EEOC's six factor "control" test for determining whether a worker is an "employee" under the ADA.** In *Clackamas Gastroenterology Assoc. v. Wells*,<sup>20</sup> the United States Supreme Court considered the case of an employee who sued for unlawful termination under the ADA. The issue was whether the corporation employed the threshold number of workers (15) required for coverage. More specifically, the court scrutinized whether four shareholder/director physicians should be characterized as "employees."

Focusing on the issue of control, the court applied the EEOC's six-factor test for the definition of an "employee." In doing so, the court considered (1) whether the organization could hire or fire the individuals, or set the rules and regulations governing their work; (2) whether and, if so, to what extent the organization supervised their work; (3) whether they reported to someone higher in the organization; (4) whether and, if so, to what extent they were able to influence the organization; (5) whether the parties intended that they function as employees, as expressed in written agreements or contracts; and (6) whether they shared in the profits, losses, and liabilities of the organization. Noting that the four individuals under consideration controlled the clinic's operation, shared its profits, and were personally liable for malpractice claims, the court concluded that the shareholder/director physicians were not "employees" in this case. As a result, it reversed the Court of Appeals' decision and remanded the case for further proceedings. \*

1 (2003) 107 Cal.App.4th 285.  
 2 (6th Cir. 2004) 2004 FED App. 0242P.  
 3 (1st Cir. 2002) 303 F.3d 364, 367.  
 4 (9th Cir. 2003) 320 F.3d 951, 159 CPER 46.  
 5 (3d Cir. 2004) 364 F.3d 135.  
 6 (2002) 122 S.Ct. 1155, 152 L.Ed.2d 167.  
 7 (2003) 135 Cal.Rptr.2d 267, 161 CPER 75.  
 8 (2002) 97 Cal.App.4th 934, 154 CPER 84.  
 9 (9th Cir. 2002) 282 F.3d 1078.  
 10 (6th Cir. 2001) 272 F.3d 309.  
 11 (SDNY Feb 4, 2004) 2004 WL 213001.  
 12 (7th Cir. 2001) 272 F.3d 1006.  
 13 (2d Cir. 2004) 2004 WL 868707.  
 14 (2001) 259 F.3d 1112.  
 15 (9th Cir. 2004) 362 F.3d 564.  
 16 (9th Cir. 2003) 34 F.3d 1113.  
 17 (9th Cir. 2003) 336 F.3d 1023.  
 18 (9th Cir. 2003) 323 F.3d 1226.  
 19 (2003) 29 Cal.4th 1019, 159 CPER 52.  
 20 (2003) 538 U.S. 440, 155 L.Ed.2d 615.

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## Recent Developments

### *Local Government*

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#### **Failure to Exhaust Administrative, Judicial Remedies Defeats FEHA Claim for Damages**

When a plaintiff opts to pursue her employment discrimination case by filing a grievance with the county's civil service commission, she must exhaust her administrative remedy and challenge any adverse findings in court before she can pursue a lawsuit under the Fair Employment and Housing Act.

Relying on the California Supreme Court's decision in *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 164 CPER 44, the Second District Court of Appeal concluded that Marsanell Page, an employee of the Los Angeles County Probation Department, could not pursue her FEHA claim that the county failed to accommodate her disability.

Page, who worked for the department as a detention services officer, was injured while attempting to break up a fight between two wards. When she was able to return to work, the department did not offer Page a similar position and she filed a grievance with the Los Angeles County Civil Service Commission. A hearing was held, and a hearing officer issued a written decision and recommendations.

The hearing officer found that the department had attempted to provide a reasonable accommodation by offering

Page a job as an investigator aid, but she declined the offer. The hearing officer also concluded that the department had not failed to accommodate her disability because Page was unable to perform the essential functions of the detention services officer position. The hearing officer also directed that Page be allowed to reconsider the investigator aid position.

#### *Page was not free to ignore and abandon the administrative process.*

Both Page and the department objected to the hearing officer's recommendations. The commission met and discussed the matter on several occasions, but it did not issue a final decision. Nor did Page file a petition for a writ of administrative mandamus with the court.

While her administrative appeal was ongoing, she filed a discrimination complaint with the Department of Fair Employment and Housing, and received a "right to sue" letter. She then

brought a lawsuit against the department for violations of the FEHA. The department took the position that Page had failed to exhaust her administrative remedy before the commission and failed to challenge the adverse findings of the commission's hearing officer. Page argued that the commission's findings were not final and she could proceed to court armed with her right to sue letter issued by the DFEH.

The trial court sided with the department and, on appeal, the appellate court affirmed that judgment.

Central to the Court of Appeal ruling was the *Schifando* decision, which held that employees who believe they have suffered employment discrimination may choose to pursue remedies provided either by the FEHA or by internal grievance procedures, such as those granted by a city, county, or state civil service commission. *Schifando* instructed that public employees who choose to file a complaint before the DFEH are not required to exhaust the remedies provided by a civil service commission. They may elect to bypass the administrative forum and file a lawsuit to vindicate their civil rights.

However, if a public employee elects a non-FEHA administrative remedy and obtains an adverse decision, the employee must exhaust judicial remedies by filing a petition for writ of mandate in the trial court. Otherwise, the administrative decision will be binding on subsequent FEHA claims.

In this case, Page chose the civil service commission process and ob-

**When choosing between two evils, I like to try the one I've never tried before.**

*Mae West*

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tained a comprehensive decision by the commission's hearing officer. At that point, said the Court of Appeal, Page was not free to ignore and abandon the administrative process and proceed to file a FEHA action for damages. Page had to await a final commission decision and, if adverse, then file a petition to overturn that decision in the trial court.

Unfortunately, Page encountered a "procedural minefield" because the commission had not issued a final decision when she filed what the court labeled a "premature FEHA action." "Now," said the court, "confronted with a possible time bar to pursuing FEHA claims, she asks us to revive her discrimination lawsuit notwithstanding her failure to exhaust the requisite administrative and judicial remedies. That we cannot do."

Citing *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 144 CPER 33, the court explained that the findings obtained in a quasi-judicial proceeding must be given binding effect. Otherwise, proceedings before civil service commissions become "little more than rehearsals for litigation." As observed by the court in *Johnson*, requiring a party to exhaust judicial remedies by challenging an administrative agency's adverse findings accords proper respect to the agency's quasi-judicial procedures.

Here, said the Court of Appeal, Page must exhaust her administrative remedies by awaiting the commission's final decision before filing her lawsuit.

If the commission's final decision is unsatisfactory to Page, then she must exhaust her judicial remedy by filing a petition for writ of administrative mandamus in the trial court. If she does not prevail in the writ proceeding, then the commission's decision will be binding and defeat her FEHA claims. If she does prevail, she may ultimately obtain relief from the commission. Her FEHA claims may be time-barred, the court acknowledged, or may be saved by the equitable tolling doctrine.

## *Findings of quasi-judicial proceedings must be given binding effect.*

The court concluded:

Public employees have the benefit of the civil service commission process to redress discrimination, which is less costly and protracted than litigation. Though a public employee may choose to bypass the administrative process, if she pursues it through evidentiary hearings to a proposed decision, then she has the burden to exhaust administrative and judicial remedies notwithstanding the risk that a FEHA claim may no longer be viable.

*(Page v. Los Angeles County Probation Dept. [11-3-04] B171843 [2d Dist.] \_\_\_ Cal.App.4th \_\_\_, 2004 DJDAR 13521.)\**

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## Voters Reject Ballot Measure for Arbitration of Bargaining Impasses

Last month, voters in Santa Clara County rejected a local ballot measure pushed by unions representing attorneys, nurses, and correctional officers that would have authorized an arbitrator to resolve bargaining impasses over wages, hours, and other terms and conditions of employment. The electorate also brushed aside two other measures placed on the ballot by the board of supervisors. One, Measure B, would have allowed the board to demand voter approval of the arbitrator's award. The other, Measure A, would have limited charter-prescribed prevailing wage comparisons to other public entities.

These election-day contests were the most recent salvos in a labor/management conflict that has persisted for two decades.

**Historical perspective.** Way back in 1984, the Santa Clara County Government Attorneys Association and the County Counsel Attorneys Association took the position that a provision of the charter which obligates the county to pay prevailing wages meant that the county had to take into account the salaries paid to private sector attorneys, not just those working in the public sector. Superior Court Judge Peter Stone agreed with the unions and concluded that the board of supervisors had abused its discretion by not considering the pay rates of all attorneys, both public and private, when tabulating the prevailing wage.

Ten years later, government attorneys again were at loggerheads with the board over the same issue. In 1995, at the request of the two attorneys' groups, the board conducted public hearings to establish the prevailing rate of pay for the attorney classifications employed by the county counsel, the public defender,

### *These election-day contests were the most recent salvos in a labor/management conflict.*

and the district attorney. After receiving the evidence, the board concluded that the group of attorneys who perform comparable work to that of county attorneys consisted of non-supervisory, non-managerial lawyers employed by other public entities in the county. The governing board explained that differences in employment philosophies, job security, and salary progression made comparisons to public sector attorneys inappropriate.

The two unions challenged the board's rationale, and in 1996, Superior Court Judge Jeremy Fogel set aside the board's findings and concluded that

the charter requires an analysis of the prevailing rate of pay for all attorneys, public and private, who perform work comparable to that of county attorneys. Judge Fogel did not prescribe the precise statistical method the county must use to calculate the data it retrieved. However, he said the county was precluded from finding that the group of attorneys who perform work comparable to county attorneys is limited to attorneys employed by public agencies. (See *CPER* No 66, pp. 37-38, and No. 120, pp. 55-57, for further details of Judge Stone's and Fogel's rulings.)

Since then, government attorneys in Santa Clara County have received significant pay increases. In 2002, for example, base wages of employees represented by GAA and CCAA increased by 9.5 percent. Nonetheless, bargaining disagreements between GAA and the county have persisted, prompting the union to consider arbitration as a way to put an end to a long history of protracted negotiations.

**Appeal to voters.** This summer, GAA began collecting signatures to get an arbitration provision on the November ballot. It also filed a lawsuit claiming that the county was offering other unions more lucrative contract deals if they would withhold their support for the arbitration measure. For example, GAA charged that the deputy sheriff's association agreed to a three-and-a-half year contract which was coupled with a side letter signaling its commitment not to get involved in GAA's push for arbitration.

**I worry that the person who thought up Muzak may be thinking up something else.**

*Lily Tomlin*

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11th edition

**NEW EDITION**

by Dieter Demeier

**Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act**

*See back cover for price and order information*

When the ballot measure qualified for the November election, the county, for its part, filed a lawsuit challenging the constitutionality of the initiative and asked the court to remove the measure from the ballot. In line with the Supreme Court's ruling in *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 160 CPER 19, the county argued that the proposed arbitration provision would deprive the board of supervisors of its power to set wages and control county employment.

In August, Superior Court Judge William Elfving issued a two-page decision rejecting the county's bid to have the arbitration provision removed from the ballot. He found that the county had failed to make the requisite showing of the initiative's invalidity.

In the meantime, the county board of supervisors countered with two ballot measures of its own. Measure B, serving as a "poison pill" to the union's Measure C, injected the voters into the bargaining process. The measure would permit the electorate to approve or disapprove of any arbitration award that the board of supervisors determined would substantially interfere with its authority over the county's financial matters or its employment affairs. Voter approval also was authorized where the arbitration award would cost more than the county's last bargaining proposal.

A second board-sponsored item, Measure A, sought to amend the charter by specifying that the prevailing wage would be calculated only by a

comparison with public employees. The measure further stated that "wages" and "rate of pay" mean base pay as well as employer-paid contributions for benefits. Whether the county's retirement contributions should be made part of the prevailing wage calculation has been an issue disputed by union and management in the past.

As the November election approached, GAA and the nurses and correctional officers who joined ranks with the attorneys urged voters to support

*Some criticized the willingness to give up the important right to strike.*

Measure C, arguing that it would end the bargaining discord that has persisted for 20 years. But some members of the labor community were opposed to Measure C and criticized its supporters' willingness to give up their important right to strike in exchange for arbitration.

In October, less than a week before the election, Superior Court Judge Socrates Manoukian handed a win to GAA and ordered the county to stop spending public money to oppose the ballot initiative. Manoukian barred the county from offering other unions inducements to withhold support for Measure C and chastised Supervisor Blanca Alvarado for sending an email

to her constituents urging them to join her in opposing the measure.

In the end, however, Manoukian's ruling may have come too late. On November 2, Santa Clara County voters rejected all three measures. Measure C, the unions' bid for binding arbitration to resolve bargaining impasses, was defeated by 56.6 percent of the voters. Measure B, the county's effort to blunt the arbitration process by having the public vote on the

arbitrator's award, was turned aside by 57.9 percent. Measure A, the proposed charter amendment that would have limited prevailing wage computations to public sector comparisons, lost by a slim 51.1 percent.

Taken together, the election results may forecast that future negotiators will continue to grapple with the appropriate prevailing wage formula and that bargaining impasses will persist. \*

yond his work limitations. This caused his thumb to become swollen and painful.

Stephens complained to his supervisor, Captain Janet Perryman, about the central control room assignment. She wrote in a letter dated September 12, 1997, that the department was not able to provide Stephens with a modified work assignment. Perryman instructed Stephens he was not to return to work until he was able to work with no restrictions or until his condition improved to the point that he could perform the light-duty tasks in the central control office without further complaint or injury.

In November 1998, Stephens applied to the county's retirement board for a service-connected disability re-

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## Reinstatement With Backpay Warranted Following Dismissal for Work-Related Injury

When a county employee is dismissed from his job due to a work-related disability, and the employee subsequently is denied a disability retirement on the grounds that he is not disabled, Government Code Sec. 31725 requires the employer to reinstate the employee with backpay. The intent of the statutory provision is to avoid putting a disabled worker in the position of having neither a job nor a retirement income.

The question before the Fifth District Court of Appeal was the meaning of the word "dismissed" for purposes of Sec. 31725. In *Stephens v. County of Tulare*, the injured employee sought backpay from the date both the county and the employee determined that the modified work assignment made available to the employee would exacerbate his injury. After reviewing several cases applying Sec. 31725, the court announced that the fact that Stephens

never was formally terminated was immaterial because "dismissed" does not mean the same thing as "terminated" or "fired."

John Stephens worked for the county sheriff's department as a detention specialist whose duties included transporting prisoners and writing reports. He was required to carry a gun and a large set of keys. In 1995, he suffered a work-related injury to his right thumb. When he returned to work, he was assigned to work as a control room officer to accommodate the restrictions imposed by his doctor. As a control room officer, Stephens had to open and shut prison doors by pushing and holding down buttons. On a rotating basis, Stephens was assigned to the central control room, where he was required to open and close doors frequently and to perform even more tasks that were be-

*The department was not able to provide Stephens with a modified work assignment.*

His application was denied in 2001, and a petition seeking review of the board's decision was filed with the superior court. That petition was denied on October 23, 2002. Six days later, Stephens asked the department to reinstate him with backpay to his prior job, effective September 13, 1997, the day after the Perryman letter.

Stephens was reinstated to a modified detention specialist position on July 1, 2003. He was not required to carry a gun or the large key ring; nor was he required to write reports. The county took the position that these accommodations were the same that had been made for Stephens in 1997, when he had complained to Perryman that the assigned duties exacerbated his injury.

Although Stephens returned to work for the department, the question raised by Stephens' lawsuit was whether he was entitled to recover salary and benefits back to September 13, 1997, when, in his view, he had been dismissed by Perryman. Stephens estimated he was owed approximately \$125,000.

The trial court concluded that Stephens was not entitled to backpay under Sec. 31725 because he had never been dismissed by the county. Nor had the county ever refused a request by him to return to work. Emphasizing that Stephens' doctor never had changed his opinion as to Stephens' ability to perform modified duties, the trial court reasoned it was Stephens who always had the option of returning to work.

Government Code Sec. 31725, which is part of the County Employees Retirement Law of 1937, mandates reinstatement where the employer has "dismissed [an employee] for disability." This section has been the focus of several cases to which the Court of Appeal turned to assess Stephens' claim of entitlement to backpay.

In *McGriff v. County of Los Angeles* (1973) 33 Cal.App.3d 394, for example,

the court instructed that the purpose of Sec. 31725 is to eliminate the severe financial consequence to an employee resulting from inconsistent decisions between an employer and the retirement board as to whether a particular employee is incapacitated and unable to perform the duties of his position. The employee in *McGriff* was "terminated" or "released" from her job and later returned to work based on a court order pursuant to Sec. 31725.

*Sec. 31725 mandates  
reinstatement where  
the employer has  
'dismissed [an  
employee]  
for disability.'*

In *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985, in contrast to *McGriff*, the employee had been taken off active duty and later was returned to work without a court order.

Based on these two rulings, the *Stephens'* court concluded that "one may be 'dismissed' within the meaning of section 31725 without being 'terminated' in the sense of being fired."

In *Phillips v. County of Fresno* (1990) 225 Cal.App.3d 1240, the court granted reinstatement to a deputy sheriff who had voluntarily taken a medical leave

of absence before returning to work. In response to the county's claim that Sec. 31725 did not apply, the court said: "Eligibility for disability retirement benefits does not turn upon whether the employer has dismissed the employee for disability or whether the employee has voluntarily ceased work because of disability." Likewise, said the court in *Phillips*, the availability of the remedy provided by Sec. 31725 "does not depend upon whether the employee has been forced by the employer to cease work because of a disability or has voluntarily stopped working for that reason." There is no language in Sec. 31725 that limits its application to employees who are ready and willing to return to work, said the court in *Phillips*, or which conditions reinstatement on the employer's finding that the employee is capable of performing the job. In *Phillips*, the court concluded:

The employer cannot deny disability retirement on the basis of there being no disability and then claim disability in order to deny employment income. If the employer and Retirement Board do not agree that the employee is entitled to disability retirement, the employer's recourse is to seek judicial review of the Retirement Board's decision. If review is not pursued, the employee must be reinstated. Section 31725 recognizes no middle ground.

Reviewing these and other cases, the Court of Appeal concluded that "dismissed" does not mean the same thing as "terminated" or "fired." An employee may be effectively dismissed

if the county takes him or her off active duty or the employee voluntarily places himself or herself on a disability leave. This is so, said the court, even if the employee eventually returns to work because the disability is temporary, because the employee has been retrained or rehabilitated, or because the employer is able to make the appropriate accommodations.

Moreover, said the court, an out-of-work employee is no less “dismissed” because the county has no position available that is compatible with

ment determined he was unable to perform the functions of a control room officer in the central control room. In the court’s view, the fact that Stephens was capable of performing, and did perform, work required in other assignments within the same general job classification did not establish that he had been absent from work as a result of his own choice. There was no evidence that he had worked in the central control room after his reinstatement. The court ordered that he be reinstated effective September 13, 1997. (*Stephens v. County of Tulare* [10-29-04] F044123 [5th Dist.] \_\_\_ Cal.App.4th\_\_\_, 2004 DJDAR 13356.)\*

*‘The fact Stephens was never formally terminated is immaterial to our analysis.’*

the employee’s work restrictions, or even because the employee is, or appears to be, disabled notwithstanding the retirement board’s contrary conclusion. In short, said the Court of Appeal, “the fact Stephens was never formally terminated is immaterial to our analysis.”

The court found no evidentiary basis to support the county’s position that Stephens had not been dismissed, but had taken himself off work from 1997 to 2003. Rather, the court concluded, Stephens had been placed on what amounted to an involuntary medical leave in 1997 because the depart-

## Public Schools

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### PERB Again Set to Rule on Legality of Union Buttons Worn in Presence of Students

In an unusual move, the Public Employment Relations Board ordered oral argument in a case involving the right of teacher union members to wear bargaining-related buttons in instructional areas while students are present. The board sought oral argument in *East Whittier Education Assn. v. East Whittier*

*The district seeks to establish a precedent that was not accomplished in Turlock.*

*School Dist.* after Administrative Law Judge Thomas Allen issued a proposed decision directing the district to “cease and desist from prohibiting employees from wearing buttons related to collective bargaining,” and to rescind or revise its board policies. PERB took the case under submission last summer, and a final decision is expected at any time.

*East Whittier* is important because the school district seeks to establish a precedent that was not accomplished in *Turlock Joint Elementary School Dist.* (2002) PERB Dec. No. 1490, 156

CPER 28, another decision involving the legality of wearing bargaining-related, union buttons during work time. In that case, PERB held that buttons worn during school hours cannot be banned as “political activity” under Education Code Sec. 7055. In addition, PERB reaffirmed its conclusion in *State of California (Dept. of Parks and Recreation)* (1993) PERB Dec. No. 1026-S, 104 CPER 55, that the right to wear union buttons is protected under the Educational Employment Relations Act unless “special circumstances,” including safety, discipline, and disruption, can be shown. The district appealed PERB’s decision in *Turlock* solely on the ground that wearing buttons violated Ed. Code Sec. 7055.

Siding with the district, the Fifth District Court of Appeal held that teachers’ wearing of union buttons during instructional times constitutes “political activity” that may be prohibited under Sec. 7055. The court ruled, however, that a ban on union buttons will violate EERA unless an employer can prove special circumstances to justify the restriction. The court found that the district presented no evidence that “the buttons were in *anyway* disruptive to the educational process or other spe-

cial circumstances.” (*Turlock Joint Elementary School Dist. v. PERB*, previously published [2003] 5 Cal.Rptr.2d 308, 315, rev. denied and ordered not published [2004]).

After the appellate court opinion in *Turlock* was published, the Supreme Court ordered it depublished, which means that the decision has no legally binding effect on anyone other than the parties to the lawsuit. And, because the Court of Appeal ordered PERB to vacate its decision, the earlier PERB decision also is no longer good law. Consequently, there is no precedential ruling on the question of whether wearing

*East Whittier likely will take up where Turlock left off.*

union buttons violates Ed. Code Sec. 7055 or EERA, which leaves *Department of Parks and Recreation* as the only instructive case on point.

#### District Seeks to Prove ‘Special Circumstances’

PERB’s forthcoming decision in *East Whittier* likely will take up where *Turlock* left off because in this case, the district presented evidence in an attempt to establish “special circumstances” that would justify a ban on bargaining-related buttons.

Here, the button battle arose out of a dispute between the district and the

East Whittier Education Association over teachers' efforts to obtain a 10 percent salary increase. In October 2000, some members wore to work buttons inscribed with the message, "It's Double Digit Time!" In response, in January 2001, the district's governing board adopted a policy stating, "all matters related to collective bargaining negotiations shall be kept out of the classroom and other instructional areas in the presence of students." The board also approved an administrative regulation prohibiting employees from initiating any discussion with students related to collective bargaining negotiations or to wear or display "in the classroom or in other instructional areas in the presence of students any signs, buttons or other objects that favor or oppose any matter that is the subject of negotiations" between the district and the union.

According to the assistant superintendent, there were two special circumstances justifying adoption of the policy and regulation. First, the district sought to "protect instructional time" by minimizing any distractions from the curriculum that was supposed to be taught. Second, the district wanted "to protect the sensitivities of students" because buttons could create confusion and anxiety among students about their teachers' feelings and intentions.

At the hearing, most of the witnesses testified that the buttons yielded little or no reaction from students. The association president had advised teachers that if students asked questions, they

**All of us do not have equal talent but all of us should have an equal opportunity to develop our talent.**

*John F. Kennedy*

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**Pocket Guide to the Educational Employment Relations Act**

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should respond by saying, "it was a teacher thing," and promptly getting back to the lesson. A middle school principal saw a "Double Digit" button on the desk in an alternative learning center classroom and then observed a student ask the teacher about the button. The teacher told the student not to worry about it and to sit down, and then put the button away. In another instance, students questioned a middle school assistant principal about the button and if teachers were going on strike. From those interactions, the administrator inferred that the students had discussed the buttons during class time.

*Witnesses testified that the buttons yielded little or no reaction from students.*

The year before, some classified employees, including instructional assistants, had worn buttons with the message, "A Fair Contract Now." One elementary school principal testified that a student going to the cafeteria asked her why she was so mean to teachers (meaning instructional aides). When the principal told the student she could not discuss it, "He was very concerned. He had a kind of anxiety look. His little eyebrows were frowned." The principal

assumed some discussion had taken place in the classroom. Afterward, the principal spoke with the assistant superintendent about the “Fair Contract” button, but neither took any action to ban the buttons.

### **Board Reexamines Evidence Rejected by Board**

To determine whether the district’s ban on union buttons unlawfully interfered with employees’ rights protected by Sec. 3543(a) of EERA, the ALJ analyzed the facts under tests articulated

## *There was no expert psychological testimony about potential harm to students.*

in *Carlsbad Unified School Dist.* (1979) PERB Dec. No. 89, 41 CPER 58, and *Turlock*. In *Carlsbad*, PERB concluded that a charging party must prove that the employer’s conduct tends to or does result in some harm to rights granted under EERA. Where the harm to employees’ rights is slight and the employer’s justification is based on “operational necessity,” the competing interests of the parties will be balanced and the charge resolved accordingly. But where the harm is “inherently destructive of employee rights,” the

employer’s conduct will be excused only if it is caused by circumstances beyond its control and no alternative course of action is available. Finally, an employer’s conduct will not be excused under any circumstances if it is shown that the employer would not have engaged in the “complained-of conduct for an unlawful motivation, purpose or intent.” In this case, the ALJ ruled out the last test and considered whether the association proved a violation on any other basis. Turning to *Turlock*, the ALJ noted that while that decision did not explicitly rely on the *Carlsbad* test, its requirement of proof of “special circumstances” is entirely consistent with the earlier precedent.

Based on evidence presented at the hearing, the ALJ concluded that the district did not meet its burden of proving special circumstances under *Carlsbad* and *Turlock*. The district’s rationale that the policy and regulation were necessary to prevent distractions and to protect student sensitivities were not sufficient to justify a ban on union buttons. He pointed out that there was no expert psychological testimony about potential harm to students exposed to bargaining-related buttons. No parents had expressed concern about their children’s anxiety, and the principal’s description of one frowning student “seems an inadequate justification for banning all bargaining-related buttons from the classroom.” The ALJ noted that the association had not challenged

a ban on bargaining-related classroom discussions, and that if school principals were worried about the effects of classroom discussions on student anxiety, they could address their concern by enforcing the policy and regulation in that regard.

Priscilla Winslow, assistant chief counsel for the California Teachers Association, argued the case before PERB on behalf of the East Whittier Education Association; Alan Friedman of the Los Angeles office of Munger, Tolles & Olson represented the district. According to Winslow, “The level of involvement of the PERB members evidenced close attention paid to the record and a very thoughtful approach to the legal issues at hand.” To Winslow, it appeared that the three board members, Al Whitehead, John Duncan, and Ted Neima, were struggling with the quantum of proof that is necessary to show disruption of the educational process under EERA. Little attention was paid to the question of whether wearing union buttons constitutes political activity under Ed. Code. Sec. 7055, she said. (*East Whittier Education Assn. v. East Whittier School Dist.*, PERB No. LA-CE-4264-E.) ❁

# Pocket Guide to K-12 Certificated Employee Classification and Dismissal

By Dale Brodsky

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

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## Schwarzenegger Vetoes Family Leave Benefit for Educational Employees

A.B. 1918, authored by Assembly Member Cindy Montanez (D-Mission Hills), would have amended the Education Code to conform with the definition of the new State Disability Insurance benefit enjoyed by most Californians. The amendment would have authorized education employees the use of up to six weeks of already existing differential pay or half leave pay to care for a seriously ill family member or domestic partner, or to bond with a new

child through the family temporary disability insurance program. However, education employees do not participate in the state's disability plan and therefore do not receive any compensation when they take family care leave. As a result, many of these employees cannot afford to take advantage of the leave. This bill sought to rectify that situation. It was anticipated that young teachers would have been the main beneficiaries of this family leave, using the paid leave after the birth of a child, rather than unpaid leave, as is now the case.

Even though the bill passed both houses of the state legislature, Governor Schwarzenegger refused to sign it, stating:

*Education employees do not receive compensation when they take family care leave.*

child. Under this bill, the employee would receive the difference between his or her regular pay and the cost of the replacement employee (substitute), meaning that there would be no cost to the school district or to the state. Districts could elect, in the case of certificated employees, to use half pay instead of the differential.

The majority of California workers are able to take family care leave because they receive partial compensa-

I am returning Assembly Bill 1918 without my signature. This bill would require school districts to provide additional disability compensation benefits to school employees, without requiring employees to contribute for the costs of those benefits. These benefits are currently subject to collective bargaining and are appropriately determined at the local level. Requiring all districts to provide this benefit could increase benefit costs and may not be of the highest priority for districts or their employees. For these reasons, I cannot sign this bill, but would encourage districts to work with their collective bargaining representatives to determine the need for this benefit. \*

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## Teachers Lose All Tax Breaks for Buying Classroom Supplies

The average teacher in California spends \$1,050 a year of her own money on classroom supplies, according to a survey conducted by the United Teachers of Los Angeles. Most of the money is used to buy puzzles, decorations, and supplemental books. Many teachers consider these items basic, but school districts are not expected to supply them.

Teachers received some relief from the California Teacher Retention

Credit, introduced in 2000, which gave them up to \$1,500 to compensate for these expenditures. However, the tax credit was a victim of the budget cuts enacted last summer. The legislature voted to suspend the tax credit for a period of two years. It is estimated that the suspension will save the state \$210 million for 2004-05 and slightly less the next year.

Suspension of the tax credit was the second blow to teachers, adding to the

expiration this year of the \$250 federal income tax deduction for teacher tax relief. “The end of the tax benefits is effectively a tax increase for teachers — people who spend thousands of their own dollars each day for their classrooms and who don’t deserve a tax increase,” said California Teachers Association President Barbara Kerr.

*Rich districts get  
what they need while  
poor ones do not.*

Teachers buy supplies to make their classrooms more interesting, say educators, and students can suffer academically when they do not have basic educational supplies. Only some students are assisted by donations of money or supplies from parent and private groups. As with so many other things, the rich districts get what they need while the poor ones do not.

Only a few other states provide relief for teachers who buy supplies using funds from their own pockets: Arkansas requires that school districts reimburse teachers for up to \$500 a year for out-of-pocket expenses, while Texas teachers can get up to \$400 in reimbursements.

While many unions and other teacher organizations support tax credits and state or federal reimbursements, others do not. In each of the last two years, the Arizona teachers’ lobby op-

posed a tax break for teachers who bought their own supplies, arguing that the solution to the problem is more state funds for education. “Tax credits are bad public policy, even if they are a benefit to our members,” said John Wright, president of the Arizona Education Association. “If teachers are spending their own money for supplies, then that’s an indication of unmet needs. We should be providing schools with funds needed rather than reimbursing teachers.”

The National Education Association and some legislators are working to reinstate the federal income tax deduction for teachers, hoping to make a \$400 deduction permanent. The House passed the legislation last year and similar legislation has been introduced in the Senate. \*

# Higher Education

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## CSU Doctors Gain Little Money in New Contract

California State University physicians and veterinarians represented by the Union of American Physicians and Dentists have ratified a new three-year agreement that contains no salary increases for 2004-05. The contract, which will expire June 30, 2007, does provide new life insurance and rural health care benefits for this year only. The union also persuaded the university to convert five temporary employees to probationary or permanent status. The parties may reopen the contract to negotiate salaries and benefits for 2005-06 and 2006-07.

### Benefits Instead of Salary Increases

For the first time, CSU's eligible physicians and veterinarians will receive a rural health care subsidy that has been provided in agreements with the California Faculty Association and the California State Employees Association since July 1, 2003. Full-time employees in rural areas who are not enrolled in a health maintenance organization will receive a \$500 stipend for health care expenses in 2004-05; CSU will pay a pro-rata amount to part-time employees. Like CFA, CSEA, and the State Employees Trades Council, which

obtained an agreement for this benefit in May, the UAPD will have to negotiate for this benefit to have it continue beyond June 30, 2005.

The UAPD also won a new life insurance benefit. The university will pay the premiums for one year of \$25,000 coverage. This benefit also will not continue without renegotiation.

### *The UAPD won a new life insurance benefit.*

Although there will be no salary increases for 2004-05, the parties did agree to range increases that the UAPD hopes will enhance salaries over the long run. The minimum rates in the physicians' schedules will be boosted by 10 percent, and the maximum rates will increase 20 percent. UAPD Regional Administrator and negotiator Joe Bader told *CPER* that new language in the contract allows CSU campuses to hire new doctors at the upper end of

the ranges. The union believes that new doctors will be paid higher salaries than comparable current employees. Physicians who already are employed by the university then will be entitled to receive equity increases to reach the higher end of the range. Bader acknowledged, however, that equity increases are dependent on funding. For example, the agreement authorizes, but does not require, campus presidents to exercise their discretion to grant equity increases out of campus funds this year.

### Other Provisions

The parties negotiated an increase in funeral leave from two to five days. Employees now have the right to use funeral leave for the death of a domestic partner or the partner's significantly close relatives and to use family care leave for the serious health condition of a domestic partner. CSU also agreed to provide leave for organ or bone marrow donors.

The agreement clarifies that campuses may authorize physicians to meet continuing medical education requirements through home study and may pay for employees' medical license fees. The parties also agreed to standard procedures for renewal of physicians' medical board certifications that are required by the CSU policy on University Health Services. \*

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# Pocket Guide to the Higher Education Employer-Employee Relations Act

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

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

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## U.C.'s Unilateral Change of Benefits Altered the Dynamic Status Quo

In a case involving application of the principle of “dynamic status quo,” the Public Employment Relations Board found the University of California violated its duty to bargain when it changed benefit levels and premium contributions without providing notice or an opportunity for bargaining to the University Council American Federation of Teachers. Adopting the decision of Administrative Law Judge Fred D’Orazio, PERB found that U.C.’s discretion in choosing health plan designs and its departure from a method for determining employer contributions obligated the university to negotiate with UC-AFT.

U.C. disagrees with the board’s determination and has petitioned for review of the decision. It also has refrained from making significant changes to the plans or employee premium contributions for 2005 while negotiating with other unions that have expired contracts.

### Past Changes Without Bargaining

UC-AFT represents lecturers and non-tenure-track faculty who are not members of the Academic Senate. UC-AFT and the university were parties to a contract that expired in 2000. That contract and prior contracts between the parties included a provision that allowed the university to change cover-

age, benefit schedules, carriers, university contribution rates, and eligibility criteria “during the term of this Agreement,” as long as the same changes applied to senate faculty.

The university offers a comprehensive health benefits package to all eligible employees. Employees in the bargaining units have the same options to choose among several types of health plans and pay the same costs as all other

*Since 1993, the university had set its contribution to health benefit premiums according to a ‘benchmark.’*

participants in the health benefits system. Employees have a chance to change plans for the following calendar year during an open enrollment period each November.

The benefits and costs of the plans change every year. Health plan vendors present proposals for premium rates and plan designs in May, and the university negotiates with the vendors until final decisions are made in August

or September. U.C. is free to negotiate higher copayments or other plan design changes to limit premium increases. The university calculates how much it will contribute to premiums and chooses the details of the benefits package based on marketplace demands and its financial resources. In making the decision, U.C. consults the academic senate’s welfare committee and other groups, which sometimes include union representatives.

The university’s resources are partly dependent on state funding. Although U.C. presents a budget to the governor and the legislature that explains how it proposes to use the money, the university legally is free to allocate the money differently once it receives the funds. For several years, U.C. had a pact with former-Governor Gray Davis that the state would increase the university’s funding 4 percent annually. The university decided how it would allocate that increased funding among salaries, benefits, and other rising costs.

Since 1993, the university had set its contribution to health benefit premiums according to a “benchmark.” Each year the university increased its contributions by an amount that would fully cover the premium for the lowest-cost health maintenance organization plan.

### Benefits Changed After Contract Expiration

For nearly three years, while the parties negotiated for a successor contract, U.C. made annual changes to its health plan system. In 2000, UC-AFT did not receive notice of the benefit

changes for 2001, but decided not to challenge them because they were minimal and consistent with the university's benchmark methodology.

In 2001, again without notice to UC-AFT, the university announced plan changes for 2002. It doubled the copayments for office visits, eye and hearing examinations, allergy treatments, and other services. It increased the emergency-room copayment by 43 percent and nearly doubled prescription drug copayments. It also established a new \$250 hospitalization copayment for inpatient care. When UC-AFT asked to meet and confer, the university responded that it was not required to negotiate the changes because of its past practice of making annual modifications to health plans. At the hearing, the U.C. negotiator justified the university's failure to bargain by claiming the union's demand for negotiations was untimely because the changes already had been "finalized."

In 2002, UC-AFT negotiators attended a meeting at which the university mentioned it might cease offering a health plan that was free to employees. UC-AFT warned that specific health benefit modifications had to be negotiated. Nevertheless, U.C. later announced, without ever presenting its specific proposal to UC-AFT, that it would no longer peg its contribution rate to the lowest-priced HMO plan. Instead U.C. determined its contribution based on budgetary constraints. It adopted a "transitional allowance," making higher contributions for em-

ployees whose annual salaries were under \$40,000 than for those with higher salaries. In addition, it established a health care reimbursement account.

### **No Bargaining Waiver After Expiration**

PERB found that the clause in the expired agreement which allowed U.C. to make health benefit changes "during the term of this agreement" did not give the university license to modify benefits after the contract expired. Fed-

## *The university had made various kinds of changes to its health benefits system for years.*

eral labor law establishes that "a contractual reservation of managerial discretion does not extend beyond the expiration of the contract unless the contract provides for it to outlive the contract." Relying on *California State Employees Assn. v. PERB* (1996) 51 Cal.App.4th 923, 122 CPER 55, PERB held that the phrase, "during the term of this agreement," did not constitute a clear and unmistakable waiver of the union's right to bargain over health benefits after the contract containing the management discretion clause expired. Upon expiration of the contract, the university was required to maintain

the status quo established by the prior contract or by past practice.

### **Identifying the Status Quo**

U.C. contended that it was entitled to apply to lecturers the same changes in benefit levels and premiums that it had made for other employees. The university pointed out that it had made various kinds of changes to its health benefits system for years, and, based on past practice, all employees expect to have the same benefits and costs. UC-AFT countered that the status quo was not that the benefits were changed every year, but that changes were made to the employer's premium contribution according to a fixed criterion. In other areas, the university's vast discretion made the dynamic status quo defense inapplicable, and therefore it had the duty to bargain.

PERB explained how to identify the status quo. "The status quo against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment, and changes consistent with such a pattern are not violations of the status quo." For example, in *Pajaro Valley Unified School Dist.* (1978) No. 51, 38 CPER 41, PERB found the dynamic status quo defense allowed the district to change employee premium contributions in conformity with its past practice of passing on premium increases pending negotiations.

The board distinguished modifications made in accordance with a past

pattern of changes from modifications where the employer exercises discretion without criteria and without conforming to any established pattern. To illustrate this distinction, PERB quoted *Regents of the University of California* (1983) No. 356-H, 60 CPER 65, where U.C. enjoyed vast discretion in determining who would pay for increased parking costs:

Where the employer has traditionally exercised a large measure of discretion in making such changes, it is impossible for the exclusive representative to know whether or not there has been a substantial departure from past practice, and therefore the exclusive representative may properly insist that the employer negotiate regarding such changes.

### **Premium Contributions Departed From Pattern**

The board concluded that the university's failure to offer a free health plan in 2003 was a change in the status quo. U.C.'s past practice was to base its contribution on the cost of the lowest-priced HMO or specific plan's premium. There was no dispute that the university had abandoned this criterion and instead relied on "budget requirements."

PERB further observed that the university had discretion to determine a different premium contribution level. That amount is not dictated or negotiated with the health insurance vendors. Nor is it set by the legislature. As the evidence showed, U.C. decides how much money it requests from the legis-

lature for an item and how it spends the money it receives. It is free to determine how funds will be allocated between salaries and other kinds of employee compensation. In fact, in 2002-03, when its state funding increased much less than expected, the university decided its priority was to pay for merit increases. It cut back from 10 percent to 6.7 percent the amount of new funding it originally earmarked for higher benefit premiums and raised student fees to increase the money available for merit increases. PERB noted that the

*The board rejected the university's defense that a business necessity justified its failure to negotiate.*

decrease in the amount U.C. contributed for health benefit premium increases was not proportional to the decrease in expected state funding.

### **Benefit Levels Negotiable**

PERB also held that the copayment increases for 2002 did not conform to the dynamic status quo. Testimony established that the university could deal with higher premiums by boosting its contribution, increasing copayments, or altering plan designs. Plan vendors agreed with the university to decrease

premiums for 2002 by raising copayments.

U.C. contended that the mere fact it had exercised discretion in setting copayment levels should not defeat the dynamic status quo defense because such a ruling would render meaningless the very concept of dynamic status quo. But PERB dismissed this argument, observing that U.C. followed no discernible pattern when it decided to allocate costs to employee copayments.

The board also rejected the university's defense that a business necessity justified its failure to negotiate. Although PERB recognized the complexity and rigid time line of negotiations with vendors, the board found it was possible to develop a procedure that would include timely negotiation about changes in the health benefits system. It emphasized that negotiation of premium contributions would not involve the plan vendors. In fact, in 2002, U.C. engaged in negotiations about premium contributions with another employee organization, the University Professional and Technical Employees.

PERB distinguished the present case from *Regents of the University of California* (1996) No. 1169-H, 120 CPER 73. U.C. argued that the board in that case had allowed changes in its health benefits system based on its past practice of making modifications to benefits and costs. PERB found, though, that the board had considered only premium contribution changes, which U.C. successfully had defended based

on the fact it had adhered to its benchmark methodology.

Here, U.C. had departed from that methodology. That departure obligated it to negotiate the changes with UC-AFT, which it failed to do.

### No Waiver by Conduct

U.C. argued that UC-AFT did not object to the university's failure to negotiate the health benefit modifications for 2001. It also contended that UC-AFT did not truly attempt to negotiate over health benefits for 2002 and 2003; the union only demanded to bargain as a tactical maneuver to obtain other agreements it wanted.

But PERB agreed with UC-AFT's arguments that it did not protest the 2001 changes because they were minor, had a positive impact for employees, or conformed to the university's methodology. The board reiterated the principle that a union's "acquiescence in a previous unilateral change does not operate as a waiver of the right to bargain for all times" and does not establish a new status quo.

PERB found the university did not notify UC-AFT of the health benefit changes for 2002 until late October, when meaningful negotiations were impossible. An earlier university benefits newsletter sent to all employees did not constitute notice to UC-AFT because it did not call the proposed changes to the union's attention. And when the union demanded to bargain, U.C. declined on the basis that no duty to bargain existed. The board criticized

the university's claims that the union's demand to bargain was untimely, since it was the obligation of U.C., not UC-AFT, to present timely proposals on negotiable items it wished to change.

PERB also held that a university official's communication that U.C. might not offer a free plan in 2003 was not sufficient notice of the specific changes that U.C. eventually made. This was particularly true since UC-AFT's negotiator told the university that it could not agree to modifications sight unseen, and U.C. never complied with its promise to provide more specific information. U.C.'s June presen-

*The university did not notify UC-AFT of the health benefit changes until meaningful negotiations were impossible.*

tation to the union of the specific dollar amounts it would contribute toward premiums did not allow it to announce different terms in October, when it was too late to negotiate. Nor did it permit implementation of the rates in January without bargaining to impasse.

PERB was not persuaded by U.C.'s argument that the union waived its right to negotiate by failing to make proposals for specific benefit changes. The

thrust of UC-AFT's proposals was to accept the benefit changes in exchange for salary increases. PERB found that these were an attempt at substantive bargaining. But, even if the union's conduct could be deemed acquiescence, the board added, there can be no waiver where a union's acquiescence occurs during negotiations for a complete contract and negotiations have not concluded before the unilateral change is made.

### Changes Had Significant Effect

PERB found that health benefit modifications had a sufficiently material and significant impact on actual benefits or their cost to employees to require negotiations. Here, premiums for the no-cost plan in 2002 increased at least \$10 for a single employee and up to \$52 for family coverage. Copayment increases also were sufficiently significant to require negotiations.

The board issued an order that U.C. cease and desist from refusing to negotiate, denying UC-AFT's right to represent its employees, and interfering with the employees' right to be represented. Because the parties had reached a later agreement on health benefits for 2004, PERB limited its remedy to premium and copayment reimbursements for 2002 and 2003. (*University Council American Federation of Teachers v. Regents of the University of California* [2004] No. 1689-H.) \*

# State Employment

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## Corrections Legislation Signed

A year of legislative scrutiny and threats of a judicial takeover of the California correctional system have culminated in new laws designed to ensure consistent consequences for correctional officer misconduct. New provisions also strengthen and expand the responsibilities of the Office of the Inspector General, an independent agency that oversees the entities operating under the Youth and Adult Correctional Agency.

### Code of Conduct

In response to reports of inconsistent discipline for similar offenses and a code of silence that impedes investigation of wrongdoing, Senators Jackie Speier (D-San Francisco/San Mateo) and Gloria Romero (D-Los Angeles) introduced S.B. 1431. The bill requires that the California Department of Corrections and the California Youth Authority adopt a disciplinary matrix which lays out recommended punishments for an array of offenses. The new law requires that the matrix take into account factors that aggravate or mitigate the seriousness of the offense, and therefore increase or lessen the severity of the penalty. The provisions make clear that aggravating or mitigating factors may result in a greater or lesser

penalty than otherwise required by the matrix. CDC already has begun to implement this mandate.

In addition, the new law requires the directors of CDC and CYA to adopt a code of conduct for all employees of the department. The code must be

*The bill requires that  
CDC and CYA  
adopt a  
disciplinary matrix.*

posted and sent annually to employees by email. The department also must email employees concerning the duty to report misconduct, the duty to cooperate in investigations, and assurances against retaliation for reporting misconduct.

### Office of the Inspector General

Three other bills signed by the governor address the powers and responsibilities of the Office of the Inspector General, an independent agency that audits the management of correctional agencies and conducts investigations of correctional agency employees. The Inspector General now

will be appointed to a definite term of six years and will not be subject to removal except for cause.

Senate Bill 1400 (Romero, D- Los Angeles) establishes a Bureau of Independent Review within the Office of Inspector General. The BIR will oversee the internal investigations of CDC and CYA. It will publish reports concerning investigations of complaints against correctional officers and staff, its assessment of the quality of the investigation, its recommendations about discipline, and its assessment of the appropriateness of the department's disciplinary action in the case. The BIR also will report settled cases and the extent to which discipline was modified. The reports will not identify the employees accused of misconduct.

Senate Bill 1342 requires the Office of the Inspector General to investigate a complaint involving allegations of management reprisal for reporting governmental wrongdoing, cooperating with investigations, or refusing to perform an illegal act if the complaint presents a "legally cognizable cause of action." The IG may refer cases of non-management reprisal to the employing entities for investigation, but if the employing entity declines to investigate the complaint, the IG must do so.

If the IG determines through its own investigation or its review of an employer investigation that an employee has been subjected to retaliation, the director of the employing entity is required to take corrective action. The minimum penalty is 30 days suspen-

sion without pay, but the employer may find a lesser penalty appropriate and provide written justification for the lesser penalty to the IG. If the employer declines to discipline a retaliating employee, it must notify the IG, who must forward a copy of the investigative report and relevant underlying materials to the SPB so that the complaining employee can file charges with that agency.

The bill requires the SPB and the IG to notify each other of retaliation complaints. It allows the SPB to toll any investigation or proceeding while the IG or employer investigates the complaint. The limitations period for an employee to file a complaint with the SPB is tolled until the IG or employer issues an investigative report, or rejects or dismisses the employee's complaint.

S.B. 1342 provides that the IG must publish quarterly reports summarizing the conduct investigated, recommended discipline, and discipline actually imposed.

Another bill by Senators Romero and Speier, S.B. 1352, requires further reports concerning management audits and other investigations. The IG must furnish its complete audit reports to the secretary of the Youth and Adult Correctional Agency, the employing entity director, the governor, and the legislature.

Investigative reports, on the other hand, are confidential but must go to the same recipients except the legislature. The IG must publish on its website a quarterly investigative report, with redactions of identifying information, and provide it to the legislature. The

report must include information concerning any settlement of disciplinary cases, the employer's rationale for any decision not to discipline an employee, and, for those cases referred for criminal prosecution, any decision not to prosecute a matter. The IG can delay publication of an investigative report when the matter is referred for criminal prosecution, but must publish the report when the accused receives the information from the investigation.

*If the employer declines to discipline a retaliating employee, it must notify the IG.*

The bill makes confidential all notes and documents pertaining to internal discussions of employees of the Office of the Inspector General, but otherwise expands public access to its records, papers, and correspondence. Records of interviews are no longer confidential, but the IG may redact information under certain criteria. Disclosure of materials generally is subject to the provisions of California's many privacy laws, including the Public Safety Officers Procedural Bill of Rights Act.

**CCPOA's Objections to S.B. 1352**

The California Correctional Peace Officers Association opposed the bill because it gives the IG access to records and materials that previously would have been protected from disclosure by the collective bargaining agreement between CCPOA and the state. The current collective bargaining agreement requires a subpoena or court order for anyone outside of the employing department to inspect the employee's personnel, training, medical, or citizens' complaint files.

CCPOA protested that the bill diminishes the due process rights officers are entitled to receive. Prior to this bill, the IG was required to honor all provisions of the Bill of Rights Act. Now, the IG must follow only the sections relating to interrogations, lie detectors, use of photographs, release of financial information, and locker searches.

CCPOA also objected that the bill might limit the documents and information to which an officer is entitled when subject to discipline. S.B. 1342 requires the employing entity to "provide the subject [of a retaliation investigation] with all materials required by law." But S.B. 1352 does not contain similar wording for subjects of other kinds of investigations. By its terms, it only requires the IG to provide the subject of the investigation with the public version of the report; the IG can decline to produce the underlying investigative materials in the public report. However, nothing in the bill precludes

giving the employee materials to which he would be entitled under other laws, and state law does not override the pri-

mary sources of due process rights — the state and federal Constitutions. \*

program. (See story in *CPER* No. 167, pp. 56-57.) Under the agreement, the state makes no contributions to the Public Employees Retirement System until the employee's second anniversary of employment. Employees make contributions to an interest-bearing account. After two years of employment, the employee has the option of transferring the funds into PERS and receiving two years of PERS service credit.

The Senate Committee on Budget and Fiscal Review codified the agreement into statutory language in S.B. 1105. A companion bill, S.B. 1106, authorized issuance of up to \$2 billion of pension obligation bonds, but only after the Department of Finance determines that pension obligations "are an-

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## Pension Reform Faces Legal Challenge

The governor did not check in with the California Association of Professional Scientists when he reached agreement with the California State Employees Association, SEIU Local 1000, to reform the public employee retirement system. Now CAPS has filed suit to force the state to comply with the retirement provisions of its memorandum of understanding. It is not expected that the CAPS suit will have any effect on

the legal validation action the state filed in preparation for selling \$935 million in pension obligation bonds next spring. (See box, below.)

### Statutory Conflict with MOU

In late June, Governor Schwarzenegger reached an agreement with CSEA, SEIU Local 1000, that placed new miscellaneous and industrial employees into an alternate retirement

## bonds subject to legal approval

The alternate retirement program grew out of a call for pension reform that the governor asserted was necessary to enable the state to sell pension obligation bonds. After state workers' retirement benefits were enhanced and stock markets fell, the state's employer contributions to PERS skyrocketed from \$159 million in 1999, to \$2.2 billion in 2003-04. The 2003-04 budget included a plan to sell \$2.2 billion in bonds to cover the state's obligation to make retirement contributions. But those bonds were blocked by a court decision finding that the state Constitution prohibits the state from incurring more than \$300,000 in long-term debt without the approval of California voters.

The 2004-05 budget also includes a plan to sell pension obligation bonds. In October, the Department of Finance filed a legal validation action as the first step in its plan to sell \$935 million in bonds. The administration argues that these bonds do not transgress borrowing limits because the

savings that will come from the alternate retirement program for new hires will offset the debt. But the legislative analyst, the state treasurer, and the legislative counsel have warned that the new bond provisions could be vulnerable to the same constitutional limits. State Treasurer Phil Angelides also argues that the bonds do not meet the new Proposition 58 exceptions for deficit borrowing. He explained, "The pension bonds are proposed for a term of 20 years, so they would not be considered a short-term borrowing, and they would not finance debt accumulated prior to June 30, 2004."

Department of Finance legal counsel does not expect a lawsuit by the California Association of Professional Scientists to affect the legal validation action. (See accompanying story.) The union is not challenging the legislation, only making a contract claim, noted department spokesperson H.D. Palmer.

ticipated to be reduced” as a result of the pension reforms that reduce state retirement contributions. The administration estimates the pension system changes would save the state employer \$2.9 billion over the next 20 years.

The CAPS MOU, however, states that “new employees that meet the criteria for CalPERS membership would be enrolled in the First Tier plan and have the right to be covered under the Second Tier plan within 180 days of the date of their appointment. If a new employee does not make an election for Second Tier coverage during this period, he/she shall remain in the First Tier plan.” The Second Tier PERS retirement plan requires no employee contributions, but it pays a lower pension benefit upon retirement.

CAPS asserts that the Department of Personnel Administration representatives initially told the union that inclusion in the alternate retirement program was not mandatory and was subject to negotiation. But the bill implementing the agreement makes participation in the alternate program mandatory and does not provide that the program is subject to negotiations with employee unions. CAPS’ legal action asks the court to compel the governor and DPA to comply with the MOU.

DPA does not deny that it may have made statements that the program was subject to negotiation in the early days after the governor reached his conceptual agreement with CSEA, SEIU Local 1000. But DPA did not enter into negotiations about the program with any of

the employee organizations representing state employees. DPA spokesperson Lynelle Jolley points out that DPA did not negotiate the alternate program.

“It was a political agreement, a compromise with the governor.” DPA’s legal counsel declined to comment on the lawsuit. \*

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## Agreements Awaiting the Governor

Several unions representing state employees that thought they had reached tentative agreements with the state have been surprised by recent developments. Others are waiting for negotiations to resume.

The one union that everyone concurs has a tentative agreement is the California Union of Safety Employees. CAUSE reached a tentative deal with the Davis administration last year, but the legislature has never approved it or rejected it. As CAUSE recently told its members, technically the parties are not at impasse because they have a tentative agreement. But the union is trying to find a way to break the deadlock that has its contract in limbo. Informal negotiations with the Department of Personnel Administration have been taking place, although union negotiators are wary of dealing with DPA without knowing where the governor stands on proposals. The union has asked to meet with the governor, but he has refused.

### Ratification Before Tentative Agreement?

The Union of American Physicians and Dentists was so sure it had a tentative agreement that it conducted a

ratification vote. Ninety-five percent of the voting members ratified the re-opener pact. The agreement included a \$200-a-month increase in recruitment and retention differentials for physicians, dentists, and podiatrists. But, the union suddenly learned that the increase had not been accepted by the governor. The union plans to file an unfair practice charge if the governor does not approve the agreement.

DPA claims there never was a tentative pact. “The agreement was a conceptual agreement,” DPA spokesperson Lynelle Jolley told *CPER*. So was an agreement with IUOE for Unit 12 operating engineers.

### Unit 12 Waiting

In February, the International Union of Operating Engineers sunshined its proposals for a successor agreement to the contract that expired June 30, 2004. But, due to the delay in appointing a DPA director and the distractions of the budget crisis, negotiations did not begin until June.

In mid-July, negotiators were not optimistic about reaching an agreement quickly, since the state was proposing benefit takeaways. On August

27, however, the union announced to its members that it had reached an agreement for a two-year contract. The hitch is that the agreement is subject to approval by the governor.

In some areas, the agreement is reminiscent of some that other unions reached with the Davis administration last year. A 5 percent raise effective July 1, 2004, would be deferred while employees participate in a mandatory personal leave program for two years. The state's contribution to health insurance premiums would increase to 80 percent effective July 1, 2004, and would be boosted to 85 percent of the employee's portion of the health plan premiums in January 2006. The agreement also con-

*The governor has not responded to requests for his approval.*

tains a waiver of the monetary portion of an arbitration award and a stipulation to withdraw another case from arbitration.

The governor has not responded to requests for his approval. IUOE's Larry Dolson says DPA told him that the department has spoken to the governor twice about the agreement. DPA spokesperson Jolley told *CPER* that the union should not read anything into the delay. The governor was busy with the elections, she says, and this kind of delay is not unusual when a new governor

**The most exciting phrase to hear in science...is not 'Eureka (I found it)! ...but 'That's funny!'**

*Isaac Asimov*

**State** employees, discover something interesting and important about your collective bargaining rights. *CPER's Dill's Act Pocket Guide* includes a concise description of the act, how it works, its history, and how it fits in with other labor relations laws. Also included are an up-to-date text of the act, summary of all key cases that interpret the act (with complete citations and references to *CPER* analysis), summary of PERB regulations, case index, and glossary of terms.

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*See back cover for price and order information.*

is going through the first round of negotiations.

Nevertheless, Dolson says IUOE sent DPA a letter in mid-November asking to resume bargaining. Dolson would not be surprised to see DPA present the same kind of takeaways the department presented to the California Association of Psychiatric Technicians last month.

### **CAPT at Impasse**

Bargaining between the state and CAPT for a successor contract began in May 2003. The contract expired on July 1, 2003, after a 5 percent raise went into effect. CAPT refused to agree to the same deal that other unions reached to defer the raise for a year while receiving an extra personal leave day monthly. (See story in *CPER* No. 162, pp. 42-45.)

After Governor Davis was recalled, there were no negotiations for nine months. Then, in May, the new governor announced eight goals for collective bargaining, such as restructuring the method of calculating overtime and changing health benefits to reduce the state's overall costs. The state began bargaining with CAPT again in June. The governor's pension reform agreement with the California State Employees Association in late June included an increase of 5 percent for registered nurses in state bargaining unit 17. CAPT demanded a similar raise for psychiatric technicians. By early August, negotiations had bogged down over salaries and health benefits. Later

that month, the parties reached impasse.

The state mediator appointed to help the parties reach agreement met with them in late August. Another session set for early October was postponed. In early November, the parties met again to consider proposals CAPT had made in August. CAPT negotiators thought the parties were near agreement when the DPA representative suddenly put two more proposals on the table. One proposal would stop the current practice of counting paid leave hours for purposes of determining when an employee becomes entitled to overtime pay. Under the other proposal, the state would halve its contributions toward health benefit premiums for new employees. Contributions would increase for each year of service, but rates would not match the contributions paid to cover existing employees until an employee has worked for five years.

DPA says that similar overtime and health benefit proposals had been on the table. CAPT, however, believes the state engaged in regressive bargaining, and the association is preparing to file an unfair practice charge.

### **Talks Stalled for Nurses and Teachers**

Two units represented by the Union of California State Workers, SEIU Local 1000, have been in negotiations but have not seen any progress for months. Prison teachers and librarians in Unit 3 did not sign on to the agreements that other units represented

by SEIU Local 1000 reached last year because the deal did not address the teachers' major issues — pay parity with public school teachers and a 184-day school year. Prison teachers claim they are paid 40 percent less than other teachers even though they are required to teach a full year. No negotiations on the contract have occurred since October 2003. The parties have been negotiating over layoffs and a new program that required teachers to instruct inmates through cell doors instead of in classrooms.

While state nurses in Unit 17 wait out a perceived lack of authority at the bargaining table, the parties are skirmishing over whether nurses engaged in a sick-out in September. The parties began negotiations this summer for a successor to the contract that expired on June 30. The nurses are seeking a 26 percent increase in wages so that their pay is competitive with the health care industry, and they are demanding

an end to mandatory overtime. When negotiations stalled in August, the union wrote a letter asking that the state let negotiators know "when, and if, you do receive the authority to negotiate an agreement."

Ten days later, large numbers of nurses called in sick at correctional facilities throughout the state. The union denied that it had sanctioned any job action. The union has challenged the Department of Corrections' requests for physicians' notes from the nurses, claiming the demand for verifications violates the collective bargaining agreement. To support its claim, it has requested numerous documents.

Jolley says that delays in negotiations are not due to DPA staffing problems which existed last spring. There are six negotiators assigned to deal with the exclusive representatives of state bargaining units and one that represents DPA in dealings with the excluded employees. \*

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## **Supervisors' Affiliate Seeks Separation From CSEA**

The next big step in the evolution of the California State Employees Association may be the loss of the Association of California State Supervisors, the affiliate that represents supervisors in state government. An emerging agreement between ACSS and CSEA could lead to a CSEA bylaws change that would allow ACSS to separate from CSEA without having to leave behind

its members and assets. Meanwhile, the retiree and California State University divisions of CSEA are following in the footsteps of the former civil service division, now known as the Union of California State Workers, which last year won a long and bitter legal battle to incorporate as an affiliate of CSEA. (See story in *CPER* No. 163, pp. 61-64.)

### Dispute Over Embezzled Funds

CSEA has three categories of members in addition to the state supervisors represented by ACSS. Rank-and-file state employees are represented by the newly incorporated Union of California State Workers, SEIU Local 1000. California State University employees are represented by the CSU division of CSEA. CSEA also includes a division that represents retired state and CSU employees. Both the rank-and-file state employees and CSU employees are in bargaining units covered by collective bargaining contracts.

*Supervisors have long been uncomfortable with being part of a union that represents other employees.*

According to ACSS President Tim Behrens, supervisors have long been uncomfortable with being part of a union that represents other employees who have collective bargaining rights. The Dills Act, which granted rank-and-file employees bargaining rights, did not give supervisors the same rights to negotiate the terms and conditions of their employment.

But it was a dispute over embezzled funds that caused this festering discomfort to boil over into a movement to

disaffiliate from CSEA. In 2003, CSEA discovered that a staff member had been embezzling funds for nearly seven years. At the same time, ACSS and CSEA were negotiating a new service agreement. ACSS claims that \$700,000 of the embezzled money belonged to ACSS, but that CSEA refused to reimburse it for the loss. The parties halted negotiations for a new service agreement when ACSS sued CSEA for the money. After CSEA forced the claims into arbitration, as required by the prior CSEA service agreement, the parties agreed to enter mediation before arbitrating the dispute.

This fall, ACSS added another element to the conflict, which had been mostly about money. In September, ACSS delegates voted to separate from CSEA by a margin of 26 to 3. However, under the current CSEA bylaws, ACSS cannot leave CSEA and keep its members and assets. Those familiar with the former civil service division's decade-long battle to incorporate as an affiliate of CSEA might expect a nasty fight to keep ACSS, which incorporated in 1992, from becoming fully independent. But so far CSEA has not thrown up a road block to disaffiliation. CSEA President J.J. Jelincic told *CPER* that the parties are discussing a procedure that could lead to ACSS' departure along with its members and some of its cash.

### Roadmap to Potential Autonomy

First, however, the parties need to agree on the amount that ACSS owes CSEA for unfunded pension and post-

retirement health benefits of ACSS staff. Although the unfunded pension amount is not in substantial dispute, ACSS is contending CSEA's evaluation of the unfunded health benefits is too high.

If the parties are able to agree on the amount of the unfunded liability in a mediation session this month, the CSEA board of directors will vote in January on a bylaws amendment that would allow ACSS to disaffiliate and take the cash ACSS claims was embezzled, after subtracting the amount it owes in unfunded retirement liabilities. Assuming the board approves the

*ACSS claims that \$700,000 of the embezzled money belonged to ACSS.*

bylaws amendment, CSEA delegates must vote in favor of disaffiliation. The bylaws amendment will not pass unless two-thirds of the delegates vote, and two-thirds of those voting favor the amendment.

Whether the bylaws will be amended is difficult to predict. Behrens asserts ACSS has the support of the leadership of the Union of California State Workers, SEIU Local 1000. However, the leadership of the retiree division is against the disaffiliation, as is President Jelincic.

Jelincic says the ACSS complaint about being part of a union no longer applies to the current CSEA structure. CSEA will cease its involvement in collective bargaining by early 2005, he explained to *CPER*. CSEA general council delegates already have approved the CSU division's motion to incorporate as a separate affiliate. Incorporation, issuance of a charter, and ratification of a service agreement are anticipated by the end of this month. The retiree division also has incorporated and will have its own charter effective January 1, 2005. When these divisions become affiliates, CSEA will be a sepa-

rate legal entity which will offer only services that are separate from collective bargaining. Jelincic points out that its services, such as a print shop, computer services, legal and legislative departments, and member benefits sections, can be provided to its affiliates more cheaply and efficiently than any one group could obtain on its own. He asserts that affiliation is in the best interests of ACSS and CSEA.

*CSEA will cease its involvement in collective bargaining by early 2005.*

vote, Behrens asserts ACSS will continue to push for independence. In the short run, the parties would negotiate a new service agreement. But when the general council meets again in October 2005, ACSS would present a new bylaws amendment for autonomy. \*

Although the bylaws amendment could lose either the board or delegate

# Discrimination

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## California Supreme Court Rebukes Legislature for Interpreting Laws

The California Supreme Court, in a sternly worded decision, defended its territory against encroachment by the state legislature, citing “fundamental principles of separation of powers,” in *McClung v. Employment Development Dept.* The court overturned the Court of Appeal’s finding that a coworker could be held liable for hostile work environment sexual harassment under the Fair Employment and Housing Act, even though the actions complained of occurred prior to the effective date of the legislature’s amendment to that act imposing personal liability on coworkers.

### Factual and Procedural Background

Leslie McClung and Manuel Lopez both worked as auditors for the state’s Employment Development Department. The allegations of sexual harassment arose from a business trip the two took together in January 1997. (For a detailed discussion of the facts of the case, see *CPER*No. 164, pp.73-76.) Three months after the trial court dismissed McClung’s claims against Lopez, the California Supreme Court issued *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1038, 140 *CPER* 49, holding that former Sec. 12940 (h)(1) of the FEHA did “not im-

pose personal liability for harassment on nonsupervisory coworkers.”

Shortly after the *Carrisales* decision, the legislature amended the FEHA to include a new provision, overturning its holding. Section 12940(j)(3) now provides: “An employee...is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the

*The court cited  
‘fundamental  
principles of  
separation of powers.’*

employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”

Even though the effective date of the amendment was more than a year after the trial court’s decision, the Court of Appeal found that it should be applied retroactively in this case. The court determined that retroactive applicability was appropriate because the legislature inserted the amendment into

a subdivision of Sec. 12940 which contained a statement that “[t]he provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.” “An express provision that an amendment is ‘declaratory of existing law’ supports the conclusion that it merely clarifies the meaning of the prior statute.”

The California Supreme Court granted Lopez’ petition for review.

### Supreme Court’s Decision

Setting the tone for the rest of its decision, the court opened with a quote from *Marbury v. Madison* (1803) 5 U.S. 137, one of the earliest cases in American jurisprudence: “It is, emphatically, the province and duty of the judicial department, to say what the law is.”

The court unequivocally rejected the argument that the legislature’s assertion that the amendment to the act was “declaratory of existing law” shows the amendment did not change, but merely clarified, existing law:

Under fundamental principles of separation of powers, the legislative branch of government enacts laws. Subject to constitutional constraints, it may *change* the law. But *interpreting* the law is a judicial function. After the judiciary definitively and finally interprets a statute, as we did in *Carrisales*, the Legislature may amend the statute to say something different. But if it does so, it *changes* the law; it does not merely state what the law always was. Any statement to the contrary is beyond the Legislature’s power.

The court was presented with two separate questions: “(1) Did the amendment extending liability in subdivision (j)(3) change or merely clarify the law? (2) If the amendment did change the law, does the change apply retroactively?”

As to the first question, as indicated in its opening salvo, a unanimous court determined that the amendment changed the law. It interpreted the statu-

*The court found  
nothing to overcome  
the strong  
presumption against  
retroactivity.*

tory language in *Carrisales* as *not* imposing personal liability for harassment on nonsupervisory coworkers, and no other body had the power to decide otherwise. “This interpretation was binding on lower state courts, including the Court of Appeal,” said the court. And, because the court “had already finally and definitively interpreted section 12940, the Legislature had no power to decide that the later amendment merely declared existing law.”

The court pointed to another occasion where the legislature had the temerity to overturn one of its decisions by enacting legislation and purporting “to state that the new legislation merely declared what the law always was....”

In *People v. Harvey* (1979) 25 Cal.3d 754, the court interpreted a section of the Penal Code as not permitting a certain consecutive sentence enhancement. The legislature promptly amended the statute to allow the enhancement, stating its intent was “to clarify and reemphasize what has been the legislative intent” since the original enactment of the statute. In that situation, “the judicial response was swift and emphatic,” said the court. Because the Supreme Court had “finally and conclusively” interpreted the statute, a “legislative clarification in the amended statute may not be used to overrule this exercise of the judicial function of statutory construction and interpretation. The amended statute defines the law for the future, but it cannot define the law for the past.”

The court rejected McClung’s contention that it should look to decisions predating *Carrisales* which held that nonsupervisory coworkers were personally liable under the statute. While it recognized that two administrative decisions previously had interpreted the statute to provide for coworker liability, it said those decisions were wrong. “It is the court’s duty to construe statutes, even though this requires the overthrow of an earlier erroneous administrative construction.” As for the fact that *Carrisales* was decided after the present case arose, the court said: “a judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.”

**A great many people  
think they are think-  
ing when they are  
merely rearranging  
their prejudices.**

*William James*

**Improve** your thinking about what’s fair. Do you know what action constitutes an unfair practice under California laws governing public sector employer-employee relations? What conduct signifies bad faith bargaining? When are strikes illegal?

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

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

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information*

Turning to the second question as to whether a statute may be applied retroactively, the court recognized that it could “if it contains express language of retroactivity *or* if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.” However, the majority of the court found “nothing here to overcome the strong presumption against retroactivity.”

McClung and Justice Moreno, in his dissent, argued that the statement in Sec. 12940(j)(2) that its provisions merely declared existing law, showed an intent to apply the amendment retroactively. In support of their argument, they cited the court’s own language in *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, quoting from *California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210:

Where a statute provides that it clarifies or declares existing law, it is obvious that such a provision is indicative of legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto.

The court was not persuaded by its prior reasoning and distinguished its earlier cases, stating that neither “holds that an erroneous statement that an amendment merely declares existing law is sufficient to overcome the strong presumption against retroactively applying a statute *that responds to a judicial*

*interpretation.*” (Emphasis added.) Because its decision in *Carrisales* “was a final and definitive judicial interpretation of the FEHA,” the amendment in this case “*did* change the law,” explained the court.

As further proof that the legislature did not intend to make the amendment retroactive, the court pointed out that the language at issue, i.e., “the provisions of this subdivision are declaratory of existing law,” was added to the section long before the *Carrisales* deci-

*‘In general, we take it  
that the Legislature  
means what it says.’*

sion and the legislature’s amendment overruling it. “Any inference the Legislature intended the 2000 amendment to apply retroactively is thus far weaker than if the Legislature had asserted, *in the 2000 amending act itself*, that the amendment’s provisions declared existing law.”

The court further bolstered its rejection of retroactivity by finding no indication in the legislative history of the amendment that the legislature “even thought about giving” the amendment retroactive intent. In addition, it determined that “retroactive application also would raise constitutional implications” by “retroactively creating liability for past conduct.” The court admitted, however, that neither it

nor the United States Supreme Court has so held.

### The Dissent

Justice Moreno filed a concurring and dissenting opinion, agreeing with the majority that the legislature could not, by amending the statute, clarify its meaning in a manner inconsistent with the court’s decision in *Carrisales*. However, he concluded that, “by purporting to clarify its original intent, the Legislature clearly intended to apply this statutory change retroactively,” and that the court “must honor this legislative intent, unless prevented from doing so by constitutional concerns.”

Justice Moreno found the reasoning of the court in *Western Security Bank* and *California Emp.* persuasive and applicable. “In the present case, as in *Western Security Bank* and *California Emp.*, we cannot give effect to the Legislature’s statement that the amendment to section 12940, subdivision (j) was declaratory of existing law, but we can give effect to the Legislature’s clear expression of its intent that this amendment be given retroactive effect.”

He disagreed with the majority’s reasoning that the legislative language regarding the amendment being “declaratory of existing law” should be ignored as it was included earlier, pointing out that “a statute that is amended is ‘re-enacted as amended.’”

The circumstance that the same statement had been made in reference to an earlier amendment of the same statute does not lessen the plain

meaning of this statutory language. In general, we take it that the Legislature means what it says. In the present case, it is difficult to imagine how the Legislature could have more clearly expressed its intention that the 2000 amendment to subdivision (j) of section 12940, like the earlier amendment, was declaratory of existing law.

As to the “constitutional concerns,” Justice Moreno noted the absence of any authority establishing that retroactive application of the amendment would violate the Constitution. “Given the ‘modest’ constitutional im-

pediments to retroactive civil legislation, and the circumstance that harassment by nonsupervisory coworkers was tortious prior to the statutory amendment imposing liability for such conduct under the FEHA, I conclude that there is no constitutional obstacle to the retroactive imposition of personal liability for harassment on nonsupervisory coworkers, as the Legislature intended.” (*McClung v. Employment Development Dept.* [11-4-04] Supreme Ct. S121568, \_\_\_ Cal.4th \_\_\_, 2004 DJDAR 13516.) \*

## New Bill Establishes Uniformity Among Laws Prohibiting Employment Discrimination

The California legislature passed, and Governor Schwarzenegger signed, new legislation that expands the rights of Californians to be free from discrimination in employment. A.B. 2900, introduced by Assembly Member John Laird (D-Santa Cruz), amended a multitude of statutes prohibiting employment discrimination on different bases so as to conform with the Fair Employment and Housing Act and to prohibit discrimination on the same bases as those found in the FEHA, i.e., race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.

The new legislation amends various sections of the Education Code, the Government Code, the Labor Code,

the Military and Veterans Code, the Public Utilities Code, the Unemployment Insurance Code, and the Welfare and Institutions Code — 35 sections in all. As stated in the legislative analysis, “This bill incorporates, in various code provisions that prohibit discrimination in employment on the basis of specified characteristics, a reference to the bases enumerated in FEHA, as those bases may be defined under that act.”

Because the FEHA is the most comprehensive anti-discrimination statute in the state, this legislation increases the protections and remedies for those employees who experience discrimination in the workplace. For example, prior to the amendment, Sec. 130 of the Military and Veterans Code prohibited discrimination on the basis

## Life is a very imperfect arrangement.

*Robert Maddock*

**For information** on rearranging, here's a clear and concise guide that covers both the federal Family and Medical Leave Act and the California Family Rights Act. Useful to employees who are eligible for benefits, union officials questioned about employee entitlements, and labor relations managers charged with implementing the act. Useful as a training tool or for resolving practical, day-to-day questions.

The Pocket Guide spells out who is eligible for leave, increments in which leave can be used, methods of calculating leave entitlements, record keeping and notice requirements, and enforcement. The rights and responsibilities of both employers and employees under each of the statutes are discussed. Includes a summary of the acts' provisions that emphasizes the differences between the two laws and advises which provision to follow.

## Pocket Guide to the Family and Medical Leave Acts

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of race, national origin, ancestry, or color. Now, that same section has been broadened to include all of the other protected classes listed in the FEHA.

As the California State Conference of the National Association for the Advancement of Colored People stated, in support of the bill, "As the nation's

oldest civil rights organization, the NAACP supports this measure to create a consistent non-discrimination statutory scheme that also would give California the most comprehensive civil rights protections of any state in the country for workers and employers." \*

of \$420,861. Carter refused, and the company appealed.

### Court of Appeal Decision

The court began its analysis by discussing the difference between *disparate treatment* and *disparate impact*.

Disparate treatment is *intentional* discrimination against one or more persons on prohibited grounds. Prohibited discrimination may also be found on a theory of "disparate impact," i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class.

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## Demotion of Women Over 40 Not Disparate Treatment

The Fourth District Court of Appeal overturned a jury verdict awarding over \$1 million to a woman who had been demoted as part of a companywide reorganization. The court determined she had failed to show disparate treatment of women over the age of 40 and, accordingly, that the jury's finding of sex and age discrimination in violation of California's Fair Employment and Housing Act must be reversed.

### Factual Background

Helen Carter worked for CB Richard Ellis, Inc., for over 30 years. She began as a secretary and was promoted to administrative manager in 1984. Beginning in 1991, she, along with the other administrative managers, became eligible to participate in the company's profitability bonus plan. In 1998, her base salary was \$55,000 and her profit-based bonus was \$38,450. In that year, all but one of the 57 administrative managers were women and more than half were over 40.

The company reorganized in November 1998, and Carter was demoted to the position of office services administrator with the same base salary but no right to a bonus. Only 15 of the former administrative managers eventually were promoted to one of the new regional director positions. The rest, like Carter, were demoted. Those promoted were all women and most were over 40. Carter left the company in November 1999.

Carter filed a lawsuit alleging age and sex discrimination and breach of an employment contract agreement not to demote without good cause. She argued that the reorganization had a disparate impact on women and on those over 40. The jury found Ellis liable on all counts and awarded Carter approximately \$421,000 in compensatory damages and \$600,000 in punitive damages. The court denied the company's motion to disregard the jury's verdict. However, the court conditionally granted a new trial unless Carter agreed to a reduced total award

*Carter had a  
fundamental  
misunderstanding  
of the meaning  
of disparate  
impact.*

The court explained that Carter had a fundamental misunderstanding of the meaning of disparate impact. Carter argued that because most of the administrative managers were women over the age of 40, the demotion of all of the administrative managers impacted women over the age of 40 disproportionately. Her reasoning was faulty, said the court, because she did not show that women as a group were

affected or that employees over 40 as a group were affected. The evidence presented proved only that administrative managers were affected as a group. "And the law does not prohibit discrimination against administrative managers."

Plaintiff's entire case proceeded on the erroneous premise that administrative managers were a "protected group" because administrative managers were almost all women and about half were over the age of 40....We are reminded of a false syllogism. Gnatcatchers (a protected class) are brown (consists of women). The horses in the corral (the administrative managers) are brown (women). Therefore, the horses in the corral (the administrative managers) are gnatcatchers (a protected class)....If a plaintiff can proceed with a disparate impact case on this basis,

employers will necessarily hire by quotas in all job categories as the only means by which to avoid repeatedly justifying in a court of law the business necessity of every decision adversely affecting a segment of its workforce.

Relying primarily on *Watson v. Fort Worth Bank and Trust* (1988) 487 U.S. 977, 78 CPER 67, and *Katz v. Regents of the University of California* (9th Cir. 2000) 229 F.3d 831, the court further explained, "the mere fact that each person affected by a practice or policy is also a member of a protected group does not establish a disparate impact." Here, Carter failed to meet her burden of proof "because her data set was incomplete...."

Defendant employed close to 10,000 people. There was no evidence as to the gender and age composition of the entire work force. But assuming, for purposes of illustration, all of the administrative managers were adversely affected (which they were not), and assuming roughly half of the entire work force were either women or persons over 40 years old, and accepting the evidence that no group in the company other than administrative managers was adversely affected by the reorganization, we conclude a mere 1.14 percent of the women or persons over 40 suffered an adverse impact. Even if we assume only 25 percent of the total employee population was female or over the age of 40, a trifling 2.28 percent of the protected classes was affected. And, even more fundamentally, plaintiff did not present evidence of the total impact on women or those over 40. Without that evidence, a prima facie case is not established.

## supreme court to decide whether aede prohibits disparate impact discrimination

In early November, the U.S. Supreme Court heard argument in a case that will determine whether the Age Discrimination in Employment Act prohibits discrimination against older workers that results from an employer's facially neutral policy. The court's upcoming decision in *Smith v. City of Jackson, Miss.*, will resolve the current conflict in the lower courts as to whether claims of disparate impact discrimination are tenable under the ADEA.

In *Smith*, the Fifth Circuit dismissed a suit filed in 2001 by 30 police officers and dispatchers, all over 40, claiming the city had discriminated against them in enacting a pay schedule that gave much larger salary increases to officers and dispatchers under 40. That court found that "the ADEA was not intended to remedy age-disparate effects

that arise from the application of employment plans or practices that are not based on age." In doing so, the Fifth Circuit joined the First, Seventh, Tenth, and Eleventh Circuits. The Second, Eighth, and Ninth Circuits all have held that a disparate impact claim may be brought under the ADEA. See, for example, *Frank v. United Airlines Inc.*, (9th Cir. 2000) 216 F. 3d 845.

Reports of the oral argument before the Supreme Court indicate that the decision is likely to favor the broader reading of the act, thereby bolstering the ability of those 75 million workers over the age of 40, about half the workforce, to obtain damages for age discrimination without having to prove intent.

The court further found that there was insufficient evidence to establish a contract, either express or implied. The court ruled Carter's testimony regarding a conversation that she had at the time of hire, 33 years previously, "insufficient to establish the alleged oral contract not to demote for good cause." It also held that there was no evidence presented to support an implied contract, agreeing with the decision in *Guz*

*v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 145 CPER 57, that "longevity, raises and promotions are their rewards for the employee's continuing valued service; they do not, *in and of themselves*, additionally constitute a contractual guarantee of future employment security." (*Carter v. Richard Ellis, Inc.* [10-4-04] GO31724 [4th Dist.], \_\_\_Cal.App.4th\_\_\_, 2004 DJDAR 12339.) \*

When he returned to work, he was given notice of a 10-day suspension for failing to show up the previous Friday and Saturday. Young told Kaufman that the suspension was unfair because he felt obligated to go to the convention. A few days later, Young asked Kaufman for a copy of the written request he had submitted to the committee and told him that he was going to the "labor board." Kaufman reported this to the committee, and Young was fired.

Young filed a complaint of religious discrimination with the Department of Fair Employment and Housing. The Fair Employment and Housing Commission issued a decision finding that Gemini had discriminated by failing to accommodate Young's religious beliefs, that it had failed to prevent discrimination, and that it had retaliated against Young for protesting the discrimination in violation of the Fair Employment and Housing Act.

Gemini appealed the matter to the superior court, and the court overturned the commission's decision. Both Young and the department appealed.

### Court of Appeal Decision

**Prima facie case.** Under the FEHA, explained the court, it is unlawful for an employer "to discriminate against the person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement," quoting from Government Code Sec. 12940(l). The court empha-

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## Refusal to Let Employee Attend Convention Is Religious Discrimination

The California Court of Appeal, Second District, has found that an employer's refusal to allow an employee time off to attend a Jehovah's Witness convention constitutes religious discrimination. The fact that the employee was not required to attend the conference by the tenets of his religion did not excuse the employer's failure to accommodate the employee's religious belief. The court reasoned in *California Fair Employment and Housing Commission v. Gemini Aluminum Corp.* that employers must reasonably accommodate an employee's *desire* to participate in a religious observance.

### Background

Lester Young had been employed by Gemini for 15 months when he told his supervisor, Jack Kaufman, that he wanted two days off to go to the convention. Kaufman told him to submit the request in writing to the manage-

ment committee, of which he was a member. The committee denied the request initially on the grounds that Young had not specified a reason. But, when Young submitted another request

*Employers must  
reasonably accommodate an employee's  
desire to participate.*

stating that he wanted the time to go to the convention, it again was denied. After the second denial, Young discussed his religion with Kaufman, explaining that it was his responsibility to attend the convention those two days. He told Kaufman he would go to the convention despite the committee's denial.

Service to others is  
the rent you pay for  
your room here on  
earth.

*Mohammad Ali*

**Workplace rights** are one type of currency. CPER's Pocket Guide gives a clear and concise explanation of the rights of public employees – which are many and varied. The Guide includes an overview of rights granted to individual employees by the U.S. and California Constitutions, and by a variety of federal and state statutes.

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

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sized that, under the code section, "Religious belief or observance...includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance."

To establish a prima facie case of religious discrimination, the employee must demonstrate a sincerely held religious belief, that the employer was aware of that belief, and that the belief conflicted with an employment requirement. The court found that Young satisfied this test. "Our review of the record reveals substantial evidence that Young possessed a sincerely held religious belief as a Jehovah's Witness and that his attendance at the convention fell within the scope of the FEHA as a religious observance."

Gemini argued that Young had not established that he had a sincerely held religious belief. It pointed to evidence that Young had missed one convention to go on a family vacation and that he did not testify that he was required to attend the convention. Gemini reasoned that this proved "it was Young's personal *preference*, and not a 'temporal mandate' of his religion, that required his attendance at that particular convention."

The court disagreed with Gemini's logic:

Under California law, an employer is required to accommodate not just a religious *belief*, but also a religious *observance*, if reasonably possible without undue hardship.... There is nothing in the language of the statute that

obligates an employer to accommodate only those religious practices that are required by the tenets of the employee's religion, or that amount to a "temporal mandate" of the religion.

The court also rejected Gemini's claim that its decisionmakers did not know Young had a religious reason for requesting the time off until just hours before he left. It found that Kaufman knew two weeks ahead that Young was a Jehovah's Witness and wanted the time off to attend the annual religious

*Notice to the  
employer does not  
require a complex  
explanation.*

convention. "A supervisor is the employer's agent for purposes of vicarious liability for unlawful discrimination," said the court. Kaufman had a duty to communicate Young's request to the management committee.

Gemini also argued that it was not required to accommodate Young's request "until he explained his religious beliefs to his employer and provided enough information about his religious needs for Gemini to understand the *significance* of the convention and how his attendance was tied to his religious beliefs." The court again disagreed, stating, "Notice to the employer does not

require a complex explanation. The employee needs only to cite a religious connection.”

The court likewise dismissed Gemini’s argument that Young failed to prove his attendance at the convention conflicted with an employment requirement. “If there was no conflicting employment requirement, how does Gemini explain its imposition of a suspension on Young for missing work Friday and Saturday?”

Because Young had proved religious discrimination, the burden shifted to Gemini to “establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship.” Gemini failed to meet this burden since it never even initiated an effort to accommodate Young’s request. The court also refused to blame Young for failing to follow the company’s written policy requiring “documentation” for leave requests. Young was never told about this procedure. Moreover, the court commented, the case did not turn on whether Young complied with any such policy. “An individual’s religious beliefs must be accommodated even where it means making an exception to a rule which is reasonably applied to other individuals with different beliefs.”

**Retaliation.** The court found substantial evidence to uphold the commission’s finding that Gemini retaliated against Young for protected activity. “Informal complaints to management about discriminatory employment practices are considered sufficient opposition to trigger the prohibition

against retaliation.” “Threatening to file a discrimination complaint is a protected activity,” explained the court. Young’s protest of his employer’s failure to reasonably accommodate his religious observance, his complaint that the suspension was unfair, and his statement that he was going to go to the “labor board” were all protected activities.

Young needed only to show a causal connection between this protected activity and his suspension and firing. He did this by “demonstrating that the

### *Threatening to file a discrimination complaint is a protected activity.*

employer was aware of the protected activities and the adverse actions followed each within a relatively short time.”

The court was not persuaded by Gemini’s assertion that it terminated Young not because of his protected activity but because he “had been blatantly insubordinate and failed to comply with its attendance policy by not providing documentation of his June absences.” In support of its finding that the company’s explanation was pretextual the court found the timing of the discharge was “suspiciously quick” and that Young’s job performance before the

termination was stellar. “The bottom line is that the perceived disobedience was triggered by Gemini’s failure to attempt to accommodate Young’s religious belief. Gemini cannot justify terminating an employee for perceived disobedience triggered by its own violation of the FEHA.” (*California Fair Employment and Housing Commission v. Gemini Aluminum Corp.* [9-30-04] B165771 [2d Dist.], \_\_\_ Cal.App.4th \_\_\_, 2004 DJDAR 12140.) \*

# General

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## New Law Mandates Sexual Harassment Training for Supervisors

One of the new laws signed by Governor Schwarzenegger adds a provision to the Fair Employment and Housing Act that mandates sexual harassment training for all supervisory employees. The new law also imposes minimum standards for the content, duration, and frequency of sexual harassment training.

Currently, the FEHA requires employers to “act to ensure a workplace free of sexual harassment.” It also makes

*Training must include practical examples.*

it an unfair employment practice for an employer to fail to take “all reasonable steps necessary to prevent discrimination and harassment from occurring.”

A.B. 1825, introduced by Assembly Member Sarah Reyes (D-Fresno), will require all employers with 50 or more employees to provide two hours of classroom “or other effective interactive training and education” to all supervisory employees within one year of January 1, 2005, unless the employer has provided such training to employees after January 1, 2003. The bill also

mandates that all covered employers provide sexual harassment training once every two years after January 1, 2006.

Codified as Government Code Sec. 12950.1, the law specifies that training and education imposed by the new provision must include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against, and the prevention and correction of, sexual harassment and the remedies available to victims of sexual harassment in employment. Training also must include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation. The training must be provided by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.

The bill defines “employer” to mean any person regularly employing 50 or more persons or regularly receiving the service of 50 or more persons pursuant to a contract. “Employer” also encompasses any person acting as an agent of an employer, the state, or any political or civil subdivision of the state, and cities. “Political or civil subdivisions of the state” include counties, K-

12 school districts, and community college districts.

The new law does not define “supervisor,” but the FEHA definition of the term, set out in Sec. 12926(r), encompasses any individual having the authority to “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively recommend that action, if...the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” Nothing in the law requires that subordinate non-supervisors receive the training.

*A.B. 1825 is intended to establish a minimum threshold.*

The training and education required by A.B. 1825 is intended to establish a minimum threshold. The act expressly states that it “should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination.”

## Work is a necessity for man. Man invented the alarm clock.

*Pablo Picasso*

**And man** wrote the FLSA. CPER's Pocket Guide explains the act's impact in the public sector workplace and the complicated provisions of the law, like the "salary basis" test and deductions from pay and leave for partial-day absences. Great as a training tool and for public sector practitioners who need a working knowledge of the law.

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

### Pocket Guide to the Fair Labor Standards Act

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The penalty for violating the new law is that the Fair Employment and Housing Commission will issue an order requiring employer compliance.

A claim that the training and education required by the section did not reach a particular individual will not, in and of itself, result in the employer's liability to any present or former employees in an action alleging sexual harassment. Conversely, an employer's compliance with the new requirement does not insulate the employer from liability for sexual harassment. However, as attorney Anthony Oncidi remarked in a recent column in the *San Francisco Daily Journal*, one of the greatest benefits to an employer of providing training to its employees is that it is compelling evidence that the employer exercised reasonable care to prevent and correct sexually harassing behavior.

In *Burlington Industries Inc. v. Ellerth* (1998) 524 U.S. 742, 138 CPER 14, and *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 131 CPER 14,

the U.S. Supreme Court announced that, to state an affirmative defense to a sexual harassment claim, the employer must be able to show that it exercised reasonable care to prevent and correct sexual harassment, and that the employee unreasonably failed to take advantage of those opportunities.

The *Ellerth/Faragher* affirmative defense available to employers under Title VII has been adopted by the California Supreme Court for sexual harassment cases arising under the FEHA. In *State Department of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal.4th 10256, 164 CPER 69, the court added the requirement that the employer's procedures would have prevented some of the harm the employee suffered.

At a minimum, compliance with the requirements of A.B. 1825 may play a role in formulating an employer's affirmative defense to future sexual harassment claims. \*

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## PERB Appointment Announced

On November 2, 2004, Governor Schwarzenegger appointed Lilian S. Shek to the Public Employment Relations Board. Since 1992, Shek served as an administrative law judge with the Unemployment Insurance Appeals Board. In 1994, she was appointed by Governor Pete Wilson to the Governor's Advisory Selection Com-

mittee, Regents of the University of California.

Before this public service, Shek was an attorney in private practice, and an assistant professor and lecturer of business law at California State University, Sacramento.

Shek also has served as a hearing officer for the Sacramento County Civil

Service Commission and as a judge pro tem for the Small Claims Department of the Sacramento County Superior and Municipal Courts. She also was an assistant counsel for the California Farm Bureau Federation. Shek was the recipient of a Reginald Heber Smith Community Lawyer Fellowship to serve as a staff attorney for the San Francisco Neighborhood Legal Assistance Foundation and Legal Services of Northern California.

Shek has been actively involved in several professional organizations, including service as a barrister of the Anthony M. Kennedy Inns of Court, chair of the California State Bar Committee on Women in the Law, president of Women Lawyers of Sacramento, and a member of the American Women Judges Delegation to the People's Republic of China.

She earned her Bachelor of Arts degree in sociology from U.C. Berkeley, a J.D. degree from Hastings College of the Law in San Francisco, and an MBA degree from California State University, Sacramento.

Shek is a Republican. Her appointment to PERB requires confirmation by the Senate. If confirmed, her three-year term will run to December 31, 2007. Compensation for the position is \$114,191.

Shek joins Members Ted Neima, whose term ends December 31, 2004, and Al Whitehead, whose appointment runs until December 31, 2005. John Duncan, appointed by Governor Schwarzenegger last March, now serves

as the board's chairperson. Duncan's tenure at PERB extends to December 31, 2008. One of the five board member positions is vacant. \*

## *Public Sector Arbitration*

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### **Firefighter Cannot Be Both Permanently Disabled and Ready to Work**

Citing the grievant's acceptance of a permanent disability award, arbitrator William Riker ruled that the City of San Jose was not required to allow an injured firefighter to return to work.

The grievant suffered a back injury while on the job in May 1998. Two years later, he returned to modified duty, but his inability to continue working became evident. The grievant's doctor declared his injury to be permanent and stated that the grievant could not return to his prior occupation.

The grievant participated in a vocational rehabilitation program but withdrew after three months. He was treated for depression that was directly attributable to his injuries. He also applied for a service-connected disability retirement. A different physician evaluated him in conjunction with his application, found that his injury was permanent, and determined he was unaware of any treatment that would allow the grievant to resume his employment as a firefighter. The grievant failed to appear at both of his scheduled retirement board hearings and never completed the disability retirement process.

In November 2001, the grievant and his attorney accepted a workers' compensation award based on a 47 per-

cent permanent disability rating. The award described the grievant as a "qualified injured worker," a designation that permanently precludes him from returning to work as a firefighter with the city.

The grievant then was released by his doctor to modified duty. He requested temporary modified duty from the city, but the city denied his request. It notified him that other job options existed within the city. The grievant's doctor issued a second certificate again releasing him to return to work. Again, the city declined the grievant's request, citing the doctor's earlier determination that the grievant's injury was permanent. The city also noted that the grievant had voluntarily accepted a permanent disability settlement of his workers' compensation claim and had failed to appear at either of his retirement hearings. Undaunted, the grievant continued to express his desire to return to work without restrictions, claiming complete recovery from his back injury.

Following the end of a one-year unpaid leave of absence, the city notified the grievant that he was formally separated from service. The city said the grievant could not agree to a permanent disability award under the

workers' compensation system and, at the same time, contend that he is physically and mentally able to work as a firefighter without any restrictions. It charged that the grievant cannot assume two inconsistent positions and seek to gain from each of them.

The city also argued that it was justified in invoking Article 21, which allows an employee to return to his former position if he still is qualified; the grievant was not by virtue of his acceptance of the permanent disability award. The grievant received two successive leaves of absence and accepted the permanent disability award during

*The grievant  
cannot assume  
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positions.*

that time, thereby acknowledging his inability to perform his duties as a firefighter.

The association contended that the grievant could not be declared unfit for duty solely on the basis of his acceptance of the permanent disability award. An injured employee should be accommodated with restrictions where appropriate. The city should have considered the grievant's recovery claims in good faith based on his subsequent medical examination and evaluated his fitness independently. The grievant's acceptance of the permanent disability award

was not a per se statement that he was unfit for duty.

The association also reasoned that the grievant's two positions were not totally inconsistent with each other. The workers' compensation stipulation stated that the grievant had a need for medical treatment to cure or relieve the effects of the injury, indicating that recovery was not out of the question. The stipulation also stated that the grievant was classified as a qualified injured worker, suggesting that he was still able to perform the essential functions of a firefighter.

Arbitrator Riker denied the grievance. He found that the grievant had been offered appropriate compensation and remedies through the permanent disability award.

The city treated the grievant fairly. The grievant was offered the opportunity to return to work with modified duties, but when he did so, he was unable to continue because of his injury. He began a vocational rehabilitation program but chose not to complete it. He applied for a disability retirement but failed to attend his scheduled retirement hearings and complete the process. The grievant received two successive leaves of absence. The city fully supported the 47 percent permanent disability award. Even after declining his request to return to work, the city proposed that the grievant pursue other opportunities within the city workforce.

Riker also highlighted the city's obligation to maintain a high standard for those employees who serve as

firefighters. The city has a duty to ensure that workers returning from injuries are assessed against appropriate standards of readiness due to the physically and mentally demanding nature of the firefighter position. An individual who is not fully capable of performing his duties cannot be reinstated because of the potential harm to the worker himself, his coworkers, and the community. The grievant received two clear assessments as to the permanence of his injuries. His quick recovery following the permanent disability award reasonably elevated concern as to the true nature of his physical and mental state, and given that other opportunities were offered to the grievant, the city was not required to reinstate him. (*International Association of Firefighters, Loc. 230, and City of San Jose* [4-10-04] 18 pp. *Representatives*: Christopher E. Platten, Esq. [Wylie McBride Jesinger Platten & Renner] for the union; Richard Doyle, Esq., Nora Frimann, Esq., and Michael J. Dodson, Sr., Esq., for the city. *Arbitrator*: William E. Riker [CSMCS Case No. ARB-02-0771].) \*

New Edition  
Pocket Guide to  
Public Sector Arbitration:  
California

(Third edition, 2004)

By Frank Silver and Bonnie G. Bogue

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# Arbitration Log

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## • Discipline

**Deputy Sheriffs Assn., Rank and File Unit, and Contra Costa County** (2-11-04; 12 pp.) *Representatives:* Todd Simonson, Esq. (Rains, Lucia & Wilkinson LLP) for the union; Silvano B. Marchesi, county counsel, and Kelly M. Flanagan, deputy county counsel, for the county. *Arbitrator:* Melvyn D. Silver.

*Issue:* Was the grievant discharged for just cause?

*County's position:* (1) The grievant, employed as a deputy sheriff in the Contra Costa County Sheriff's Department, made a routine traffic stop on a vehicle with several equipment violations. The driver, Corey Murray, was the ex-husband of a woman who also was a deputy sheriff in the department. The grievant, who had met Murray on several prior occasions, released him with only a warning.

(2) Several months later, Murray confronted the grievant, telling him he was going to file a complaint against him and threatening to kill the grievant and his family. On several subsequent occasions, Murray made negative and threatening comments to officers about the grievant. Murray told officers that he believed the grievant had burglarized his home, was having an affair with Murray's ex-wife, and was the father of Murray's children. The grievant reported these incidents to the police department.

(3) When Detective Ernie Rodrigues investigated the case, the grievant told him that he had had a one-time sexual encounter with Murray's ex-wife, but there was no ongoing relationship between the two. Rodrigues claimed he told the grievant that he should be prepared to testify about that encounter at Murray's trial.

(4) During trial, the grievant said he had never had "intimate relations" with Murray's ex-wife. After trial, the grievant told the district attorney that he had had a sexual encounter with Murray's ex-wife. The district attorney allowed Murray to plead to a misdemeanor, rather than a felony.

(5) An internal affairs investigator determined that the grievant had lied under oath at trial and during the internal affairs investigation when he denied that Rodrigues had warned him he might have to testify about his sexual encounter with Murray's ex-wife. The grievant's conduct constituted a violation of several sections of the sheriff's

department manual and the parties' memorandum of understanding, and were sufficient cause for the grievant's dismissal.

*Union's position:* (1) Rodrigues never told the grievant that he might have to testify about the sexual encounter. Alternatively, his emotional state was in such disarray that he did not hear it. A failure to recollect such a statement is not dishonesty.

(2) The grievant truthfully denied he had an "intimate relationship" with Murray's ex-wife because an intimate relationship, in the grievant's mind, means a long-term relationship. The grievant had never engaged in such a relationship. In the grievant's opinion, the trial transcript inaccurately reported the grievant was asked if he had "intimate relations" with the ex-wife.

(3) The grievant disclosed the precise nature of his sexual relationship between himself and the ex-wife to the district attorney, and offered to return to court to clarify the issue. The decision to allow Murray to plead to a misdemeanor was the decision of the district attorney alone.

*Arbitrator's decision:* The grievance was sustained.

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*Arbitrator's reasoning:* (1) The discharge was the result of the department's internal investigation and the ensuing report by Detective Rodrigues. The county failed to produce any corroborative evidence to support Rodrigues' claim that he had informed the grievant that he might have to testify during the internal investigation.

(2) Different persons had somewhat conflicting recollections of the precise question asked during the trial. The grievant, the public defender, and the trial judge believed the district attorney had asked the grievant about an intimate relationship with Murray's ex-wife. The trial transcript recorded the question as referring to intimate relations. The district attorney thought he had asked whether the grievant had any intimate relations with the ex-wife. Witnesses also differed on what they believed an "intimate relationship" to be. The arbitrator found the grievant's interpretation of the question, given the confusion over what was actually asked, to be a reasonable and truthful response.

(3) The arbitrator rejected the county's argument that the grievant cannot return to work because his reputation was irreparably damaged as a result of the internal investigation. If this were true, the just cause standard for discharge would be meaningless because merely charging an officer with misconduct would be sufficient for discharge.

*(Binding Grievance Arbitration)*

#### • Discipline

**County of Sacramento and United Public Employees, Loc. 1** (3-25-04; 20 pp.) *Representatives:* Mechele Dews, for the union; Timothy Weinland, Office of the County Counsel, for the county. *Arbitrator:* Bonnie G. Bogue.

*Issue:* Has the county met its burden of proving that the grievant engaged in the conduct for which he was charged? If so, was the decision to discharge the grievant an abuse of discretion under the collective bargaining agreement?

*County's position:* (1) The grievant was employed as an office assistant in the Department of Health and Human Services. He had no prior disciplinary actions on his record, and his performance evaluations indicated that he met or exceeded overall expectations.

(2) The County Information Technology and Security Policy prohibits employees from using county information technology resources to access "offensive material," including websites with sexual content. Evidence demonstrated that the grievant accessed sites containing offensive material in violation of this policy between April and August 2002. The user activity detail showed the Internet sites were visited by someone using the grievant's login name and password. The browse time activity detail, which showed the amount of time spent on the Internet, revealed that the grievant's login used the Internet for over 35 hours. A second user activity detail showed access to sites containing adult content. The

county produced printouts of several sites to demonstrate the nature of the content. The county IT manager testified that the grievant's computer contained records of visiting these sites.

(3) The grievant was dishonest when he denied using his computer for personal business and acknowledged only his use of the Internet for personal email and sports websites, and only when his supervisor presented him with access records for his login name and password. The grievant said he knew what constituted an inappropriate site under the county's policy, but he denied ever visiting such a site.

(4) The grievant was familiar with the policy he was charged with violating, and the county undertook a full and fair investigation.

(5) The grievant's discipline was appropriate when compared to other employees who violated the same policy because the grievant's use encompassed a longer online time and involved repeated hits, including a Saturday when the grievant was paid for overtime. Other employees' violations were less egregious. They also admitted wrongdoing promptly.

*Union's position:* (1) The county did not meet its burden of proving that the grievant violated the county's policy. None of the county employees called as witnesses could identify which of the inappropriate websites the grievant himself actually had accessed. The grievant regularly gave out his login name and password to new employees.

(2) The grievant was treated disparately when he was discharged.

While other employees have been disciplined for violations of the county Internet policy, the grievant was the only one to be discharged. The grievant received no prior counseling regarding inappropriate use of his computer. Dismissal for Internet abuse without conclusive proof constituted an abuse of the county's discretion.

*Arbitrator's decision:* The grievance was denied.

*Arbitrator's reasoning:* (1) The county met its burden of proving that the grievant violated the county's policy governing employee use of county-owned computers for Internet access. This was clearly demonstrated by the user activity detail and browser time activity detail reports.

(2) Although no witness testified that the grievant's screen had ever displayed inappropriate material and other employees had access to his login name and password, it was more likely than not that the extensive use, over 35 documented hours on the grievant's assigned computer, was only by the grievant. The grievant's supervisors acted reasonably in concluding that it was he, and not another employee, accessing the inappropriate sites. The fact that no one noticed his access was insufficient

to overcome the overwhelming evidence against the grievant.

(3) The grievant reasonably assumed that use of the Internet was not prohibited, given the un rebutted evidence that such access was a common practice in his working area. However, the grievant was dishonest when he initially denied all personal use of the Internet to his supervisor. Even after being confronted with the evidence of his extensive use, he still only acknowledged accessing three sites, and made no explanation as to the inappropriate sites. Given the weight of the evidence against him, his denials constituted dishonesty and formed additional grounds for discipline.

(4) Disparate treatment of the grievant was not demonstrated. Eight other employees were found to have unauthorized Internet access, with some accessing inappropriate sites. The grievant was the only employee who was dismissed; the others received suspensions ranging from 5 to 30 days or letters of discipline in their personnel files. However, employees who were suspended rather than dismissed generally had made significantly fewer visits to inappropriate sites or had done so for much shorter periods of time, as com-

pared with the grievant's recorded access. Clearly, the most significant factor to the county was the grievant's refusal to admit his wrongdoing. Though the other employees were disciplined rather inconsistently, the grievant's dishonesty made his termination a reasonable exercise of the county's discretion.

*(Binding Grievance Arbitration)*

#### • Discipline

**Fairfield Police Officers Assn. and the City of Fairfield** (4-1-04; 20 pp.) *Representatives:* S. Edward Slabach (Mastagni, Holstedt & Amick) for the association; Paul Coble (Jones & Mayer) for the city. *Hearing officer:* Christopher D. Burdick.

*Issue:* Did the grievant violate department policy when he pursued a suspect by traveling in the wrong direction on the freeway?

*City's position:* (1) The grievant, a police officer for the City of Fairfield, stopped a driver for speeding. As the grievant was writing the citation, the driver put his car in reverse, hit the front of the grievant's patrol car, then made a U-turn and drove the wrong way up the nearby freeway off-ramp. In spite of having suffered a minor facial injury, the grievant pursued the driver by driving the wrong way up the ramp and into oncoming traffic. The driver, with the grievant following him, continued to drive the wrong way on I-80.

(2) The grievant claimed that before he traveled very far, he advised dispatch he was discontinuing pursuit. He turned off his siren but left his emergency lights on, and continued travel-

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ing the wrong way on the shoulder of the freeway at a speed that he estimated to be between 5 and 10 miles an hour. Shortly thereafter, he arrived at the scene of a serious accident involving the driver. An analysis of the time between when he called dispatch and the time he arrived at the accident scene showed his actual speed was somewhere between 45 and 50 miles an hour.

(3) The recording of the grievant's call to dispatch and the grievant's testimony contradict his claim that he immediately ceased pursuit of the driver and slowly continued on the shoulder of the freeway.

(4) The grievant violated Department Policy 4750 in his pursuit. Driving on the shoulder of the freeway in the wrong direction is a per se violation of the policy and is inherently unsafe. The grievant had the opportunity to minimize the dangers by exiting the freeway, but did not do so. The two-day suspension was appropriate.

*Association's position:* (1) Policy 4750 refers only to pursuits. Because the grievant had terminated his pursuit before he got onto the freeway shoulder, he could not have violated the policy. The Internal Affairs panel reached the same conclusion.

(2) If the grievant's actions are deemed a pursuit, Policy 4750 applies only to acts duplicative of the pursued vehicle. The grievant did not act in such a manner.

(3) The two-day suspension is too severe where the grievant committed only a technical violation of Policy 4750.

*Hearing officer's decision:* The grievance was denied.

*Hearing officer's reasoning:* (1) The grievant was in pursuit of the driver as he drove along the shoulder of the freeway and was subject to Policy 4750.

(2) The grievant falsely believed that a "pursuit" is started and stopped by the subjective intent of the pursuing officer, not his actions, and that Policy 4750 is violated only when an officer engages in conduct which duplicates the pursued vehicle's unsafe acts. This interpretation fails to consider the policy as a whole and is contrary to the understanding of other witnesses from the department who testified that driving the wrong way on the freeway always is prohibited.

(3) The grievant, who had no prior history of misconduct, contended alternatively that his misconduct was reasonable and committed in good faith, entitling him to a lesser sanction that is consistent with the principles of progressive discipline. However, the police chief, who adheres to the concept of progressive discipline, felt the gravity of the misconduct and the inability of the grievant to comprehend his errors warranted the suspension.

(4) Had the grievant accepted responsibility for his actions, the chief would have imposed a lesser sanction. He wanted to ensure other officers knew that such behavior would not be tolerated.

(5) The suspension was proper discipline, and the chief did not abuse his discretion in imposing it. Given the nature of the administrative hearing, the

hearing officer extended some degree of deferral to the chief's views.

*(Advisory Administrative Hearing)*

#### • Discharge — Just Cause

**Federal Education Association and Department of Defense Dependent Schools, Pacific Region** (4-19-04; 16 pp.) *Representatives:* Michael Bauernfeind, Pacific general counsel, for the union; Victor T. Cooper, Sr., management representative, for the employer. *Arbitrator:* C. Allen Pool.

*Issue:* Was any law, regulation, or negotiated agreement violated when the grievant was removed from his position as the head coach of the girls' varsity basketball team?

*Employer's position:* (1) The Department of Defense operates and manages a K-12 school system for dependents of United States military personnel in Okinawa, Japan. The grievant had been a teacher and a basketball coach for 13 years, and had an agreement that he would be the head coach of the girls' varsity basketball team through the 2002-03 season. Thereafter, he understood that he would have to submit an application and be considered along with other candidates.

(2) The department maintains a large interscholastic athletic program with eligibility criteria designed to maximize student participation.

(3) Following tryouts for the girls' varsity basketball team in November 2002, the grievant and the two assistant coaches agreed on the composition of the team, with one exception. The grievant believed a certain tenth grade

student should not be on the team and used his authority to keep her from participating on either the varsity or the junior varsity teams. The grievant believed that the student had attitude and behavioral problems, and claimed that she had falsely accused him of drinking alcohol.

(4) When confronted by the student's father, the grievant explained that her failure to make the team was because of her behavior during the previous year. At a meeting convened by the assistant principal, the grievant admitted he had excluded the student on the basis of her behavior the previous year, and asserted he had complete authority as head coach to select the students for the team. The assistant principal recommended to the principal that the grievant be removed from his position as head coach.

(5) At a subsequent meeting, the grievant told the principal he was unwilling to allow the student onto the team. Shortly thereafter, the principal terminated the grievant's extracurricular duty as head coach.

(6) A coach does not have absolute authority in the selection of team members and may not deny a student the opportunity to participate in an activity based on behavior from prior years. The grievant was removed from his coaching position based solely on his abuse of authority and breach of his responsibility as an educator and coach. The grievant's claim of racial discrimination has no basis in fact. The decision was proper, within the spirit of the parties' agreement, and for just cause.

*Union's position:* (1) The department

violated the parties' agreement by removing the grievant from his position without just cause. The head coach is charged with the responsibility and authority to select team members without interference from the school administration. The grievant made his choices for the varsity team based on the known criteria of ability, academics, and attitude.

(2) The department also violated the Civil Rights Act of 1964 because the decision to remove the grievant from the coaching position was based on race.

*Arbitrator's decision:* The grievance was denied.

*Arbitrator's reasoning:* (1) The record was completely devoid of any documentation supporting the charges that the student's behavior was unacceptable.

(2) Nor did the record support the grievant's allegation that the student had accused him of having liquor while at school.

(3) The opportunity for all students to participate in the IAP is broad and inclusive; all students shall have an equal opportunity to participate. The grievant was told by the principal, the assistant principal, and the union representative that he could not use prior behavior to exclude a student. Other coaches at the school testified they did not use prior behavior to exclude a student from a team. Every student starts out with a clean slate each year and is deserving of a fair opportunity to make the team.

(4) While coaches have broad latitude in selecting team members, IAP

policy requires that coaches exercise that latitude fairly. The grievant breached his responsibility by allowing his personal bias toward the student to intentionally exclude her from the varsity team. Furthermore, the grievant made inappropriate remarks to the student's parents, which was a further abuse of the trust given to him as a coach.

(5) No evidence was presented to support the grievant's allegation that his rights under the Civil Rights Act of 1964 were violated. He claimed sex discrimination on the basis that his supervisors were mostly female, age discrimination on the basis of his age of 60, and race discrimination on the basis that the African-American community at the school pressured the principal to remove him. To the contrary, his removal was based on his inappropriate remarks and his violation of the IAP regulations. When combined with his unwillingness to reach a reasonable solution to the problem, the action was appropriate under the circumstances.

*(Binding Grievance Arbitration)*

• **Contract Interpretation — Salary Riverside Unified School Dist. and Riverside City Teachers Assn.** (9-7-04; 19 pp.) *Representatives:* Marianne Reinhold, for the association; J. Michael Summerour, for the district. *Arbitrator:* Joseph J. Woodford (CSMCS Case No. ARB-03-2214).

*Issue:* Did the district violate the parties' agreement when it excluded the anniversary increment in its calculation of the hourly rate for additional hours of service?

*Association's position:* (1) The grievant is employed by the district as a school psychologist assigned to work 193 days during the 2003-04 school year. She is paid at step nine on the salary schedule, which equals a base rate of \$80,075. With over 27 years of service, she is entitled to an additional 7.5 percent (\$6,006) anniversary increment as set forth in the parties' collective bargaining agreement. Her total annual salary was \$86,081.

(2) At the district's request, the grievant worked an additional 10 days during the 2003-04 school year. She was paid for each hour of additional work at an hourly rate calculated by dividing \$80,075 by 193 days, divided by 8 hours.

(3) The plain meaning of the contract language requires the calculation for additional hours or days of work to include the additional \$6,006 anniversary increment. An internally consistent interpretation of the CBA requires this result.

(4) Education Code Sec. 45041 requires inclusion of anniversary increments in the calculation of salary deductions for an incomplete work year. Following this logic, the anniversary increment also must be included when calculating the regular daily rate for extra days worked.

*District's position:* (1) The grievant was properly paid for her additional 10 days of work. Article X, Section 4, of the contract must be interpreted in light of appendix sections A1-B and A1-C, which by their silence exclude anniversary increments from daily rate computations for teachers. During collective bargaining, these two sections spe-

cifically were reviewed, discussed, and negotiated between the association and the district.

(2) For at least the past 14 years, the district never has paid any certificated employee for extra work based on a daily rate formula that included longevity stipends or any other type of stipend. The association is trying to add contract language that was not agreed upon during negotiations.

*Arbitrator's decision:* The grievance was denied.

*Arbitrator's reasoning:* (1) Article X, Section 4, requires the district to pay an employee required to work additional days in excess of their regular workday either by assignment to a different salary schedule or by paying the employee her regular daily rate for each excess day. If the grievant had been assigned to a 208-day schedule, rather than a 193-day schedule, she would have been covered by a different salary schedule that includes the anniversary increment, despite the fact that the appropriate pay schedule does not mention the anniversary increment. Similarly, the grievant's assignment to a 193-day schedule also does not mention the anniversary increment. Other salary schedules attached as appendices to the contract also do not mention the anniversary increment as part of the computation of an employee's daily rate. Appendix A3 covers anniversary increments. The amount paid is designated as a stipend. Other portions of the contract cover other types of stipends. But no mention is made of whether stipends are included or excluded in the calculation of the "regular daily rate." Thus,

when the language of Article X, Section 4, is read in conjunction with other relevant contract provisions it reasonably supports either party's interpretation. As such, the issue turned on internal consistency of the contract language, bargaining history, and the parties' past practice.

(2) Because the grievant was entitled to her anniversary increment regardless of her salary schedule, the association argued that it would be inconsistent for an employee not to receive the same rate of pay, including the anniversary increment, for working additional days. The arbitrator disagreed with this interpretation of the language. He found that the grievant would have been compensated for additional days on either schedule at a rate that did not include the anniversary increment.

(3) Consistent with Ed. Code Sec. 45041, the district uses a daily rate formula inclusive of the anniversary increment to compensate an employee who does not complete the work year. The same formula is used to reimburse the district for the regular work year of the association president. Again, the arbitrator found these arguments for internal consistency to be unpersuasive. Testimony revealed that an employee who does not complete a full school year does not receive the anniversary increment. This salary deduction calculation applies only to a regular work year, and not to the grievant's extended work year.

(4) The issue of excluding anniversary increments from the calculation of an employee's regular daily rate never

was raised during the parties' negotiations. The district's negotiator testified that at least since 1991, the district always has paid employees working beyond their regular work year a regular daily rate that excluded anniversary increments. This past practice was questioned for the first time in late 2003 when this grievance was filed. The association claimed it only recently became aware of the practice and it therefore lacked mutuality. The arbitrator disagreed and found that the district's exclusion of anniversary increments hardly was isolated or infrequent, and had occurred on numerous occasions over the past 14 years. During that time, salaries were negotiated on a yearly basis and stipend amounts have changed, but the underlying language supporting the district's practice has remained constant.

*(Binding Grievance Arbitration)*

# 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.*

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## Dills Act Cases

### *Unfair Practice Rulings*

**Request for writ of prohibition is insufficient on its own to support a finding of discrimination: State of California.**

*(International Union of Operating Engineers v. State of California [State Personnel Board], No. 1680-S, 8-20-04; 2 pp. + 8 pp. R.A. dec. By Member Neima, with Chairman Duncan and Member Whitehead.)*

**Holding:** The charging party failed to demonstrate that SPB's legal challenge to a pending PERB case constituted a prima facie case of discrimination.

**Case summary:** The International Union of Operating Engineers filed an unfair practice charge alleging that the State Personnel Board violated the Dills Act by petitioning the Court of Appeal for a writ of prohibition and/or a stay in proceedings in Case No. SA-CE-1295-S. In that case, IUOE alleged that SPB refused to approve settlement agreements for employees who participated in the Board of Adjustment disciplinary review procedure which was a result of the negotiated agreement between IUOE and the state. This dispute also was the subject of litigation between the parties.

On January 10, 2003, SPB petitioned the Court of Appeal for a writ of prohibition and/or a stay in proceedings in both the PERB case and the related litigation, pending the result of an appeal filed in a third case. The court denied the petition.

IUOE contended that merely filing the petition constituted discrimination under the Dills Act. Although no additional facts were offered to support the claim that SPB filed the petition with retaliation in mind, IUOE charged that the purpose of the SPB filing was to impose the costs of litigation on IUOE and was part of a larger scheme to harm the union and interfere with employees' rights.

The regional attorney found no evidence of either retaliatory motive or the lack of a reasonable basis underlying the lawsuit as required by *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board* (1983) 461 U.S. 731. The R.A. was unpersuaded by IUOE's assertion that SPB's actions justified a finding of unlawful motive. Moreover, the fact that SPB's stay request was denied was insufficient on its own to prove the existence of an unlawful motive. The charge also failed to allege specific facts to establish that SPB's purpose in filing the petition lacked a reasonable basis.

The board adopted the opinion of the R.A. and dismissed the charge.

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## EERA Cases

### *Unfair Practice Rulings*

#### **Allegation of forced retirement dismissed: LACCD.**

(*Mrvichin v. Los Angeles Community College Dist.*, No. 1667, 7-27-04; 2 pp. + 7 pp. R.A. dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

**Holding:** The charging party did not provide sufficient facts to demonstrate that improper motivation influenced his termination.

**Case summary:** George Mrvichin filed an unfair practice charge against the Los Angeles Community College District alleging that the district president forced him to retire as the culmination of a long history of discrimination against him. His original charge claimed that he suffered reprisals, even after taking retirement, but he failed to provide details regarding these incidents. His amended charge alleged that the district's denial of his grievance was a form of interference with the terms and conditions of employment, and was prohibited by the agreement between the union and the district. He also alleged that the district president put material into his personnel file without his approval, also in violation of the collective bargaining agreement.

The regional attorney dismissed the allegations. He was unaware of any legal authority that made the denial of a grievance a per se violation of EERA. The contentions regarding reprisals and the forced retirement were made without sufficient specificity. The board adopted the R.A.'s opinion as its own and dismissed the charge.

#### **No adverse action where employer did not know of protected activity: LACCD.**

(*Astrachan v. Los Angeles Community College Dist.*, No. 1668, 7-28-04; 2 pp. + 7 pp. ALJ dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

**Holding:** The charging party failed to demonstrate that the district knew he had contacted his union and retaliated against him by failing to give him certain teaching assignments.

**Case summary:** Bryan Astrachan filed an unfair practice charge alleging that the Los Angeles Community College District retaliated against him for seeking the assistance of his union. Astrachan contacted the union with respect to his employment relationship with the district in June 2002. He did not receive any teaching assignments throughout the 2003 winter and spring terms. Astrachan's charge alleged that his lack of assignments was in retaliation for contacting the union.

At the hearing, Astrachan testified that the union representative said he would contact the college dean. But neither the union representative nor the college dean testified. No evidence demonstrated that the district actually learned about Astrachan's union contact. Astrachan's testimony also did not reveal what teaching assignments, if any, he was denied or what reasons were given for those denials. He claimed in his opening statement that the college division chair had told him he would receive a teaching assignment if he did not file a complaint, but the division chair did not testify.

The administrative law judge found that Astrachan unquestionably had exercised his rights under EERA by contacting the union. However, the evidence failed to demonstrate that the district ever learned about this contact. Failure to produce any evidence demonstrating a connection between the protected activity and the adverse action was fatal to his case.

The board adopted the opinion of the ALJ in full and dismissed the charge.

#### **Unfair practice charge dismissed for lack of standing: Orange USD.**

(*Rossmann v. Orange Unified School Dist.*, No. 1670, 7-28-04; 3 pp. + 6 pp. R.A. dec. By Chairman Duncan, with Members Neima and Whitehead.)

**Holding:** The charging party lacked standing to assert that the district bargained with the exclusive representative in bad faith.

**Case summary:** John Rossmann filed an unfair practice charge against the Orange Unified School District alleging that the district knowingly provided an exclusive rep-

representative with inaccurate information regarding the district's financial resources. EERA Sec. 3543.5(c) makes it a violation to bargain in bad faith with the exclusive representative. As of January 1, 2004, that section also prohibits a public school employer from knowingly providing an exclusive representative with inaccurate information regarding its financial resources.

Rossmann alleged he had standing because he, as a citizen, had a civic obligation to assert charges in defense of the law. The regional attorney rejected this argument because PERB has determined that individual employees do not have standing to allege violations of Sec. 3543.5(c) that protect the collective bargaining rights of employee organizations. The obligation to bargain does not extend to individual employees or "any citizen."

The R.A. also noted that while a discrepancy appeared to exist between information provided by the district and that from other sources, Rossmann did not indicate in the charge whether the information was presented to an exclusive representative or how the district knowingly provided inaccurate information. These facts were key to a violation of the section.

The board adopted the opinion of the R.A. and dismissed the charge.

**No retaliation found where discipline was justified: Fullerton ESD.**

(*Perez v. Fullerton Elementary School Dist.*, No. 1671, 7-28-04; 6 pp. + 10 pp. ALJ dec. By Chairman Duncan, with Members Neima and Whitehead.)

**Holding:** The charging party was not retaliated against for his participation in protected activity because his inappropriate conduct justified the discipline.

**Case summary:** Jose Perez filed an unfair practice charge alleging that the Fullerton Elementary District retaliated against him for his participation in an informal settlement conference. The conference concerned an unfair practice charge filed in May 2001 alleging that Perez was denied union representation at an investigative meeting. The case was settled at a conference on August 27, 2001. The district

placed Perez on paid administrative leave on November 5, 2001, and imposed an unpaid five-day suspension on December 5, 2001. Perez alleged that these actions were in retaliation for his participation in the conference.

The district placed Perez on paid administrative leave pending the outcome of an investigation into comments he made about a coworker. At the conclusion of the investigation, a memorandum was issued, identifying five specific charges against Perez. It advised Perez that he could dispute the allegations and proposed discipline by filing an appeal within five days after service of the document. The document was served by certified mail on November 21, but Perez claimed that he did not retrieve the letter from his mailbox until December 6. He then waited until December 13 to file an appeal, which the district advised him was untimely.

Perez's exercise of his protected rights by participating in the settlement conference was undisputed. The district's knowledge of his participation also was undisputed. The timing of the adverse action was only a few months after the conference took place, but that was insufficient on its own to establish retaliation. The discipline Perez received clearly was due to his conduct. Because he failed to show evidence of a nexus between his protected activity and the adverse action, the board dismissed his charge.

**Late filing allowed for good cause: Fullerton ESD.**

(*Perez v. Fullerton Elementary School Dist.*, No. Ad-339, 7-28-04; 3 pp. dec. By Chairman Duncan, with Members Neima and Whitehead.)

**Holding:** The late filing of the district's response to the charging party's exceptions was permitted because it was caused by an honest clerical error.

**Case summary:** The Fullerton Elementary School District asked the board to allow the late filing of its response to the charging party's statement of exceptions to the administrative law judge's proposed decision.

PERB Reg. 32135 provides that a filing is considered timely if it is received by the last day for filing. The district mailed its response on the last day for filing, but it was not received until after the deadline. If the document had been

sent to the appeals office via facsimile, it would have been received on time. The affidavit of the secretary who sent the document confirmed the error.

The board found the error to be in good faith and that it had not caused prejudice to the charging party. Accordingly, the board accepted the response as timely filed.

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

(*Ferguson v. Oakland Education Assn.*, No. 1646a, 8-6-04; 2 pp. dec. By Chairman Duncan, with Members Neima and Whitehead.)

**Holding:** The request for reconsideration was denied because the charging party merely reargued his case, which is not a valid ground for reconsideration.

**Case summary:** James Eric Ferguson filed a request for reconsideration of the board's decision in *Ferguson v. Oakland Education Assn.* (2004) No. 1646, 168 CPER 99, because he believed the decision ignored material facts of his case and was based on prejudicial errors of fact. PERB Reg. 32410 permits reconsideration where the board's decision contains prejudicial errors of fact or the party has newly discovered evidence not previously available. Here, Ferguson failed to meet the requirements for reconsideration because he argued the same facts that already had been presented to the board on appeal. The board found that his request met neither statutory ground for reconsideration.

**Teachers suffered retaliation for protected activities: Fresno County Office of Education.**

(*Fresno County Office Schools Educators Assn. v. Fresno County Office of Education*, No. 1674, 8-19-04; 22 pp. + 81 pp. ALJ dec. By Member Whitehead, with Chairman Duncan and Member Neima.)

**Holding:** The respondent made an unlawful unilateral change to the collective bargaining agreement and transferred two teachers in retaliation for their protected activities.

**Case summary:** This decision involved two consolidated cases concerning the Fresno County Office of Educa-

tion. COE operates court schools that provide educational instruction to minors who are either in penal custody or institutionalized as wards of the court. The first unfair practice charge alleged that COE unilaterally changed the involuntary transfer provision of the collective bargaining agreement without notice to the Fresno County Office Schools Educators Association. The second charge alleged that teachers Tim Nolt and Tim Allison were involuntarily transferred in retaliation for engaging in protected activities. Nolt and Allison were involved in a number of conflicts over the years with the COE administration and Superintendent Peter Mehas.

Nolt has been a COE teacher for 30 years and was president of the association for 13 years. He filed a number of grievances and unfair practice charges during Mehas' tenure. One unfair practice charge led to the removal of a letter of reprimand from Nolt's personnel file. Another charge concerned COE's illegal assistance to a group of employees who were attempting to decertify the association. That charge was withdrawn after Nolt and Allison resigned their leadership positions. Nolt and Allison conflicted with COE over the use of Forest Reserve Fund monies, which Nolt and Allison believed should have been used for a teacher salary increase instead of being given to several local charitable groups. The media, a local taxpayer's association, and the FBI all became involved over the allegedly illegal expenditures. Nolt also played a significant role with respect to negotiations between the association and COE.

Allison has been a COE teacher for 12 years and first became active in the association when Mehas attempted to withdraw tenure from veteran teachers who already had attained that status. He later became the association vice president and negotiating chair. Allison also filed numerous unfair practice charges and grievances. His opinions often clashed with COE during negotiations. Mehas claimed he was unaware of both Nolt's and Allison's differences of opinion with COE, at least with respect to negotiations.

COE claimed that Nolt and Allison acted inappropriately. Two incidents occurred in the staff lounge concerning a female employee and allegations of inappropriate sexual

gestures. Ken Campbell, the COE administrator for the court schools, asserted that the two teachers had a tendency to spread rumors, and had done so regarding these incidents. COE also claimed that Nolt and Allison had interrogated staff members seen leaving Campbell's office; other employees charged that Nolt had engaged in name-calling and had made insensitive remarks. The incidents became known as the "oral and canine sex" incidents. Nolt and Allison denied the allegations, but Campbell did not investigate the situation fully.

The administrative law judge found that COE made an unlawful unilateral change by transferring Nolt and Allison against their wishes. Both teachers suffered a reduction in compensation as a result. Article 9.3 of the parties' agreement outlines the process for involuntary transfers and bars COE from transferring an employee involuntarily for reasons of incompatibility or performance without first holding an employee/supervisor conference.

No such conference was held before the transfers occurred. The agreement also requires that a transferred employee must not suffer a loss in compensation. COE argued that the transfer was not a "transfer," but a "reassignment," and did not fall under Article 9. In the opinion of COE, a transfer concerns a complete change of duties from one position to another, such as a change in academic discipline. The ALJ found these explanations to be disingenuous when compared with the language of the agreement, and the board agreed.

The ALJ found that COE discriminated against Nolt and Allison. Both teachers clearly engaged in protected activities. Campbell and Mehas acknowledged their awareness of most of the activities. COE was unable to substantiate its claim that Nolt and Allison were spreading rumors. Campbell's failure to follow up with an investigation demonstrated an inconsistency in the explanation of his treatment of Nolt and Allison. The ALJ further found that COE deliberately misrepresented an employee's statements about Nolt and Allison's actions, and that Campbell blindly accepted the statements of other employees without further investigation. Campbell also refused to set up a meeting to

resolve labor relations-related tensions. The weight of these facts demonstrated a clear case of unlawful animus against Nolt and Allison.

The board agreed that the association had established a prima facie case of discrimination. Nolt and Allison were involuntarily transferred to positions with less-favorable working conditions and a reduction in income. From a reasonable person's perspective, the changed working conditions resulted in a lengthier commute and a move to a school with a higher rate of violence. Unlawful intent was also clearly demonstrated because Nolt and Allison were the only association activists to be involuntarily transferred from continuing programs and positions for non-disciplinary reasons.

Although COE filed 100 separate exceptions to the ALJ's decision, the board found that none had merit or had a bearing on its decision. Accordingly, the board ordered Nolt and Allison to be compensated and returned to their more-desirable teaching positions.

**Charge dismissed for failure to state a prima facie case of discrimination: Oxnard ESD.**

(*Ybarra-Grosfield v. Oxnard Elementary School Dist.*, No. 1679, 8-20-04; 2 pp. + 8 pp. R.A. dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

**Holding:** The charging party failed to state a prima facie case of discrimination.

**Case summary:** Evelyn Ybarra-Grosfield filed an unfair practice charge alleging that the Oxnard Elementary School District violated EERA Secs. 3543.2 and 3543.5 by forcing her to use family medical leave, canceling her disability insurance, and denying her legal representation.

Section 3543.2 defines the scope of representation and requires the employer and the exclusive representative to negotiate. The regional attorney dismissed this portion of the charge because Ybarra-Grosfield is an individual employee without standing to pursue a charge alleging a failure to negotiate.

On December 12, 2003, Ybarra-Grosfield provided the district with a letter from her doctor indicating she was unable to work and could not return until she could be placed

in an environment with fewer allergens. Although she informed the district she would return to work on December 18, she had not done so by January 23, 2004. The district then informed her that she would be considered on family care and medical leave, based on the collective bargaining agreement. After further confusion and inconsistent statements on her part, the district notified Ybarra-Grosfield of its concern that either a reasonable accommodation could not be made or that she was actually able to work during her period of absence. She then was placed on paid administrative leave pending a resolution of the situation.

Ybarra-Grosfield, her attorney, a union representative, and the district attorney met to discuss a salary grievance with a mediator on September 8, 2003. The mediator considered the union to be her exclusive representative. Ybarra-Grosfield contended that this designation denied her the right to utilize her own legal representation. Eventually, the district offered to settle, but she rejected the offer. The union then determined that her grievance would not prevail at arbitration.

Ybarra-Grosfield's disability insurance was suspended by the district while she was on unpaid leave. However, her insurance was reinstated after she informed the company of her pending workers' compensation appeal.

EERA Sec. 3543.5 provides a remedy for employees who successfully demonstrate that they exercised rights under EERA, the employer had knowledge of the exercise of those rights, and the employer interfered with or discriminated against the employee because of the exercise of protected rights. In her unfair practice charge, however, Ybarra-Grosfield did not state why she believed the district was taking action against her, or provide information regarding any relationship between the district's actions and her exercise of protected activities. Reading the charge to assert that the district was discriminating against her for filing the grievance, she failed to demonstrate that any adverse action was taken against her. It also was unclear how the district was responsible for denying her legal representation at the mediation, as the district cannot be responsible for the actions of the union.

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

### ***Representation Rulings***

#### **Violations found where classifications were improperly designated as management: LAUSD.**

*(Associated Administrators of Los Angeles v. Los Angeles Unified School Dist., No. 1665, 7-27-04; 5 pp. + 91 pp. ALJ dec. By Member Neima, with Chairman Duncan and Member Whitehead.)*

**Holding:** The district improperly designated eight classifications as management and committed an unlawful unilateral change with respect to two of the classifications.

**Case summary:** The board consolidated two cases concerning the Associated Administrators of Los Angeles and the Los Angeles Unified School District. The first of these was an unfair practice charge filed by AALA alleging that the district unilaterally and improperly designated 25 employee classifications as managerial. AALA also filed a unit modification petition requesting that the board determine whether the classifications at issue were properly excluded from the unit.

AALA is the exclusive representative of a unit of LAUSD's certificated supervisors. LAUSD is one of the few California school districts to have an established bargaining unit and a recognized exclusive representative for its certificated supervisors. The central issue in this case was whether each of the disputed classifications was managerial or supervisory. The classification is crucial because management employees have no rights under EERA, and thus no right to representation by AALA.

EERA Sec. 3540.1 defines both management and supervisory employees. Section 3540.1(g) defines a management employee as any employee in a position having significant responsibilities for formulating district policies or administering district programs. Section 3540.1(m) defines a supervisory employee as any employee, regardless of job description, who has authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge,

assign, reward, or discipline other employees, or the responsibility to assign work to and direct them as long as the exercise of that authority requires the use of independent judgment.

PERB established the test to determine management employee status for purposes of EERA in *Oakland Unified School Dist.* (1981) No. 182, 52 CPER 68. Under this test, a management employee must possess significant responsibilities both for the formulation of district policies and the administration of district programs. Formulation of district policy entails the discretionary authority to develop or modify institutional goals and priorities. Administration of programs involves the authority to implement district policies through the exercise of independent judgment. Thus, the key distinction between management and supervisory employees is that management employees have significant responsibilities for the formulation of district policies, including discretionary authority to develop or modify institutional goals and priorities, while supervisory employees do not.

The administrative law judge evaluated each of the 25 disputed classifications using these standards, looking at both the official job classification and the actual functions and responsibilities of each position. He found that 17 of the 25 classifications were properly designated as management within the meaning of EERA.

The ALJ then considered whether the district had committed an unlawful unilateral change by improperly designating the classifications as management. Timeliness was a threshold issue here because those in some of the positions had been classified as managerial employees prior to the six-month statute of limitations period. Only those classifications that were listed on one of two district classification plans met the threshold for timeliness; some of those classifications were new or vacant positions the district had created for the first time. Ultimately, the ALJ found that the district had made a unilateral change with respect to two of the disputed classifications. One, the administrative coordinator for special education employment opportunities, had been correctly designated as managerial; the other had been improperly so designated.

The board adopted the opinion of the ALJ and ordered the district to cease and desist from unilaterally designating supervisory employees as management, and from interfering with the rights of AALA and the employees in the certificated supervisor unit.

**Classifications were within existing bargaining unit when new request for recognition was filed: CSEA.**

(*Delano Joint Union High School Dist., Association of Student Affairs Support Specialists, and California School Employees Assn. Chap. 79*, No. 1678, 8-20-04; 3 pp. + 9 pp. B.A. dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

**Holding:** Newly created classified positions were part of the existing classified unit at the time the Association of Student Affairs Support Specialists filed its request for recognition with PERB concerning those classifications.

**Case summary:** On September 8, 2003, the Association of Student Affairs Support Specialists filed a request for recognition with PERB seeking to establish a unit of five employees in the classifications of Student Affairs Specialists, Student Affairs Community Specialist, and SB65 Coordinator within the Delano Joint Union High School District. On October 7, the California School Employees Association responded to the request, contending it was untimely filed because CSEA and the district already had reached agreement on August 8 regarding the addition of the classifications named in the request. CSEA also asserted that the unit, as petitioned for, was not an appropriate unit.

The district, in its response dated October 28, stated it did not agree that the proposed unit was inappropriate and asserted that no agreement had been reached with CSEA to add the disputed classifications to the existing bargaining unit. The district requested a PERB investigation of whether the unit was appropriate. The association filed its own response on November 14, arguing that the classifications had been in existence for several years and that CSEA had never attempted to represent them.

The agreement between CSEA and the district provides that all newly created positions, except those that are

certificated, management, confidential, or supervisory, shall be assigned to the bargaining unit. CSEA did not express a desire to meet and negotiate with the district on behalf of these positions until the summer of 2003. On July 14, 2003, CSEA made known its intent to represent these classifications. At a follow-up meeting on August 8, the district stated that the positions were classified employees. The associate superintendent commented that CSEA was fortunate to have the addition of such educated and motivated people into its unit. A third meeting was scheduled for September 8, when the district informed CSEA of the petition.

PERB precedent set forth in *San Ysidro School Dist.* (1997) No. 1198, 124 CPER 78, and *El Monte Union High School Dist.* (1980) No. 142, 48 CPER 66, established that when a bargaining unit exists covering all classified employees, and a classified position is newly created, the newly created position automatically is placed in the classified unit. The board agent found the facts in the present case fell within the general rule, concluding that the classifications became part of CSEA's unit on August 8, 2003.

### ***Duty of Fair Representation Rulings***

#### **Union representative can ask employee questions at disciplinary meeting: SEIU.**

(*Hein v. Service Employees International Union, Loc. 790*, No. 1677, 8-20-04; 3 pp. + 8 pp. R.A. dec. By Chairman Duncan, with Members Neima and Whitehead.)

**Holding:** The charging party failed to allege conduct that constituted a breach of the duty of fair representation.

**Case summary:** Peter Hein filed an unfair practice charge alleging that the Service Employees International Union, Local 790, breached the duty of fair representation by failing to file a complaint with the Civil Service Commission and failing to file a grievance over a contract violation. Hein was a library assistant with San Francisco Community College District.

Hein complained of a number of actions and inactions on the part of SEIU. On October 20, 2003, he was called into a disciplinary meeting with the library administrator.

Hein was represented by two SEIU representatives at this meeting. He asserted that one of the representatives questioned him during the meeting, which ultimately led to a disciplinary letter. In February 2004, Hein complained that he was not notified of a promotional examination. He claimed that the Local 790 president was obligated to provide him with this information. He also contended that SEIU would not file grievances regarding an alleged violation of the Americans With Disabilities Act, a sign-in policy at one campus library, and a reprimand that Hein received in May 2003. Finally, Hein alleged that SEIU discriminated against him by noting in an email message that he had filed a complaint against the Local 790 president. The email instructed Hein's union steward to act with caution in handling the matter and suggested that Hein's complaint be assigned to another union representative.

The regional attorney dismissed the allegation regarding the May 2003 reprimand for untimeliness. The R.A. found that Hein's remaining allegations did not constitute a breach of the duty of fair representation. It was unclear why it was improper for a union representative to question an employee during a disciplinary meeting, and the R.A. found no cases to support this contention. Hein also did not demonstrate how the union caused him to be disciplined as a result of its representation at the meeting. As to the allegations concerning the ADA and the Civil Service Commission, SEIU owed no duty to Hein to represent him in a forum over which the union did not exclusively control the means to a remedy. SEIU was not obligated to represent him in these matters, and as such there could be no EERA violation. Finally, Hein did not present any evidence demonstrating how the email was a breach of the duty of fair representation because he was not denied representation for his complaint and was not treated any differently as a result of his complaint.

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

## HEERA Cases

### *Unfair Practice Rulings*

#### **Allegation of unilateral change failed without evidence of past practice: CSU.**

(*California Faculty Assn. v. Trustees of the California State University*, No. 1672-H, 8-6-04; 2 pp. + 7 pp. R.A. dec. By Member Whitehead, with Chairman Duncan and Member Neima.)

**Holding:** The charging party did not demonstrate that the newly enacted policies were a break from past practice.

**Case summary:** The California Faculty Association filed an unfair practice charge alleging that the California State University made a unilateral change by enacting two executive orders regarding the investigation of improper government activities.

In the board's recently issued decision in *Academic Professionals of California v. Trustees of the California State University* (2004) No. 1658-H, 168 CPER 104, it held that the same executive orders did not constitute a change in policy. APC also failed to demonstrate any specific instances in which employee privacy rights or the right to union representation were violated.

CFA contended the executive orders were new policies that fell within the scope of bargaining. Both the regional attorney and the board disagreed. The R.A. found that CFA did not provide evidence of CSU's past practice, which was necessary to demonstrate that a change in policy had occurred, regardless of whether the policy was within the scope of bargaining. The board affirmed on the basis of its decision in *CSU*.

#### **Return of agency fees cures Hudson violation: CNA.**

(*O'Malley v. California Nurses Assn.*, No. 1673-H, 8-6-04; 8 pp. + 10 pp. ALJ dec. By Member Whitehead, with Member Neima; Chairman Duncan, dissenting.)

**Holding:** No unfair practice occurred because the charging party received a refund of his agency fees.

**Case summary:** Robert O'Malley filed an unfair practice charge alleging that the California Nurses Association collected annual agency fees before sending a *Hudson* notice to O'Malley, a non-member. He charged that CNA deducted an agency fee from his paycheck on a semi-monthly basis from July to November 2003. Fees for July through September 2003 were refunded to him on September 15, 2003. The CNA treasurer submitted a declaration stating that he sent O'Malley a check on December 31, 2003, for his fees paid from October through December, as well as an advance for fees to be paid in January through March 2004. O'Malley did not dispute these facts. O'Malley further stated that his *Hudson* notice was not mailed to him until October 30, 2003. He asserted that CNA's practice interfered with his right to refrain from union participation.

Before the administrative law judge issued his ruling in this case, the board issued its decision in *O'Malley v. California Nurses Assn.* (2004) No. 1607-H, 166 CPER 74. In *CNA (O'Malley)*, the board held that O'Malley could not assert agency fee objections on behalf of other unit employees. O'Malley argued that that decision was inapplicable to the instant case because it addressed only the part of the process requiring a challenge and escrow procedure. In this case, he contended that *Hudson* requires both timely and adequate notice, and the opportunity to challenge the fee after receiving the notice.

The ALJ found the distinction to be unpersuasive, reasoning that *CNA (O'Malley)* and *Hudson* established certain safeguards to prevent the exclusive representative's wrongful use of agency fees. However, once the union has returned the agency fees to the nonmember, the procedural guarantees no longer apply.

The ALJ ruled that O'Malley suffered no harm to his rights under HEERA. The board found that CNA made every possible effort to accommodate him, and that CNA was proactive in attempting to arrange with the university to have the deductions halted. O'Malley's fee payments were refunded with interest. PERB agency fee regulations presume the exclusive representative's possession of agency fees. Accordingly, the board dismissed the charge.

Chairman Duncan dissented, finding CNA provided no evidence that O'Malley's money, deducted even after he protested, was held in escrow as required by *Hudson*. The failure to do so was a violation of PERB Reg. 32992, and therefore was an unfair practice under Reg. 32997. Continuing fee deductions when the employee has indicated otherwise, even if inadvertent, is clearly unlawful.

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

(*Sarka v. Regents of the University of California*, No. Ad-337a-H, 8-19-04; 3 pp. dec. By Member Whitehead, with Chairman Duncan and Member Neima.)

**Holding:** The request for reconsideration was denied because the charging party's request did not state either of two statutory grounds for reconsideration.

**Case summary:** George Sarka sought reconsideration of the board's decision in *Sarka v. Regents of the University of California* (2004) No. Ad-337-H, 167 CPER 95, which denied Sarka's request to appeal a board agent's refusal to disqualify herself from investigation of his unfair practice charge. Sarka sought reconsideration on two grounds: one, the board failed to explain the basis for its denial; and two, the board failed to address his reasons for requesting the removal of the B.A. from his case. Sarka's stated purpose for the request was to ensure that no conflicts of interest existed.

However, Sarka did not meet either statutory ground for reconsideration under PERB Reg. 32410. Accordingly, the board denied his request.

**U.C.'s unilateral change of benefits altered the dynamic status quo: U.C.**

(*University Council American Federation of Teachers v. Regents of the University of California*, No. 1689-H, 9-17-04; 4 pp. + 57 pp. ALJ dec. By Chairman Duncan, with Members Neima and Whitehead.)

**Holding:** The University of California violated its duty to bargain when it changed benefit levels and premium contributions without providing notice or an opportunity for bargaining to the University Council American Federation of Teachers.

**Case summary:** The ALJ found that the clause in the expired agreement which allowed U.C. to make health benefit changes "during the term of this agreement" did not give the university license to modify benefits after the contract expired. The ALJ concluded that the university's failure to offer a free health plan in 2003 was a change in the status quo. U.C.'s past practice was to base its contribution on the cost of the lowest-priced HMO or specific plan's premium. U.C.'s June presentation to the union of the specific dollar amounts it would contribute toward premiums did not allow it to announce different terms in October, when it was too late to negotiate. Nor did it permit implementation of the rates without bargaining to impasse.

The ALJ was not persuaded by U.C.'s argument that the union waived its right to negotiate by failing to make proposals for specific benefit changes. He also held that the copayment increases for 2002 did not conform to the dynamic status quo because U.C. had exercised discretion in setting copayment levels and followed no discernable pattern when it decided to allocate costs to employee copayments. The ALJ found the university did not notify UC-AFT of the health benefit changes for 2002 until late October, when meaningful negotiations were impossible. The board also rejected the university's defense that a business necessity justified its failure to negotiate. The health benefit modifications had a sufficiently material and significant impact on actual benefits or their cost to employees to require negotiations. The board agreed with the ALJ's decision and adopted it as the decision of the board itself. (See Higher Education section in this issue of *CPER* for a complete summary of the board's decision.)

## MMBA Cases

### *Unfair Practice Rulings*

**Partial dismissal affirmed for failure to state prima facie case: San Francisco City and County.**

(*Service Employees International Union, Loc. 790 v. City and County of San Francisco*, No. 1664-M, 7-27-04; 15 pp. +

11 pp. R.A. dec. By Member Whitehead, with Chairman Duncan and Member Neima.)

**Holding:** The charging party failed to state a prima facie case of discrimination, interference, or unilateral change.

**Case summary:** Service Employees International Union, Local 790, filed an unfair practice charge against the City and County of San Francisco alleging that it discriminated and retaliated against Sin Yee Poon for her union activities, interfered with the protected rights of Poon and other employees, and unilaterally changed the terms and conditions of employment without affording the union prior notice or an opportunity to bargain.

Poon was employed as an administrative analyst with the city Department of Health Services. She also served as the Local 790 chapter president and as a job steward. In February 2001, the DHS executive director called a meeting of management staff involved in monitoring a contract with a local family resource center. Poon was the only person involved in the project who was not informed of the meeting. When Poon protested her exclusion, her supervisor, Robin Love, instructed her to cease all internal correspondence on the issue and informed her that her outside correspondence would be subject to review. After the two met, Poon was allowed to initiate internal correspondence regarding the tasks to which she was assigned.

In late-February and early-March 2001, Love suspended various staff meetings and asked staff to email their schedules, rather than provide the information verbally. Poon's schedule included time set aside for her union obligations. SEIU's charge stated that Love placed restrictions on the use of union released time. At the end of March, Poon and the SEIU field representative met with Love to discuss these scheduling issues. Love would not discuss the matter and refused to schedule a future meeting. Love later left on medical leave and allegedly cut off communication with Poon.

During February, March, and April 2001, the city refused to send its grievance responses filed by Poon on behalf of Local 790 to Poon's work address. Instead, responses were sent to Local 790's official mailing address. SEIU alleged

this practice created timeliness issues and uncertainty with respect to numerous grievances filed by Poon. The parties had addressed this issue in 2000, and DHS had made clear its position that grievance responses would be sent to Poon at the Local 790 office.

The charge alleged that the city made several unilateral employment changes. In late-March 2001, the city formed a temporary Emergency Response Unit to cover for employees on vacation or other types of leave. Unit members were asked to volunteer to serve on the team. SEIU contended that this conduct violated existing seniority rules. The city relocated a number of work units and their respective employees without notice to SEIU. The city also planned to move the Adult Protective Services Program from DHS to the jurisdiction of the Commission on Aging, but did not inform SEIU of the decision or provide SEIU with any relevant information. The charge alleged that the city ignored SEIU's protests against this change and failed to provide an opportunity to meet and confer.

Poon was involuntarily transferred from her position in the Family and Children's Division to the Administration Division because of a combination of insufficient work in the former and a large workload in the latter. The charge claimed that an involuntary transfer should have remained confidential, but non-management personnel were aware of the transfer before Poon was. The charge also claimed that the purpose of the transfer was to limit and restrict Poon's union activities. SEIU further alleged that DHS refused or failed to meet and confer concerning the structure of the DHS Labor/Management Health and Safety Committee. Finally, the charge contended that DHS selected a job steward during an investigation without consulting the employees involved, which interfered with the employees' right to a union representative of their own choosing.

The board affirmed the R.A.'s partial dismissal of the charge. First, the city contended that the allegation regarding the job steward should be dismissed because SEIU failed to specify a date as to when this conduct occurred. SEIU was notified of this shortcoming in the regional attorney's warn-

ing letter, but failed to submit an amended charge with the missing information. The allegation was dismissed.

SEIU argued that the series of incidents directed at Poon constituted a prima facie case of discrimination and interference for her participation in protected activities. The board agreed that Poon's activities were protected conduct, but found the charge failed to demonstrate that the action taken against Poon was adverse in nature because it did not appear that Poon suffered actual harm. The charge failed to state a prima facie case of interference because the decision to transfer Poon was justified by a legitimate business reason, according to the city, and SEIU failed to dispute that contention.

The board also dismissed the unilateral change allegation. The claims regarding the Emergency Response Unit, the relocation of work units, and the Adult Protective Services Program were not alleged with specificity as to the impact on the terms and conditions of employment or any attempts by SEIU to demand to bargaining over the impact. With respect to the Labor/Management Health and Safety Committee, the city claimed that SEIU was invited to comment on the proposed committee structure, but failed to do so. This fact was not disputed by SEIU, and the allegation was dismissed as a result.

**Charge challenging validity of decertification petition dismissed: Golden Gate Bridge Highway and Transportation Dist.**

*(International Federation of Professional & Technical Engineers, Loc. 21, AFL-CIO v. Golden Gate Bridge Highway and Transportation Dist., No. 1669-M, 7-28-04; 2 pp. + 10 pp. R.A. dec. By Member Neima, with Chairman Duncan and Member Whitehead.)*

**Holding:** The charging party failed to demonstrate that the district's acceptance of a decertification petition violated the MMBA.

**Case summary:** The International Federation of Professional & Technical Engineers, Local 21, AFL-CIO, filed an unfair practice charge alleging that the Golden Gate Bridge Highway and Transportation District unlawfully as-

sisted employees in the filing of a decertification petition, failed to offer represented employees the same layoff package as non-represented employees, and violated a local rule.

In February 2003, the district laid off 31 employees, some of whom were unrepresented and some of whom were represented by Local 21. The district approved an enhanced layoff package for the non-represented employees, which offered additional severance pay in exchange for the employee's waiver of recall rights. The enhanced package was to serve as a guideline for district negotiations with Local 21 and the other unions.

In March, the district received a decertification request from a group of employees represented by Local 21. The petition included the signatures of more than 30 percent of the represented employees but was not filed within the 90-day period preceding expiration of the parties' agreement. The district and Local 21 then met and conferred regarding the effects of the layoff decision. The district offered the enhanced layoff package to Local 21 members, and also modified the selection process for several employees at the union's request.

In April, the district notified the unit members seeking decertification that the petition was deficient. The employees promptly re-filed their petition. Local 21 urged the district's attorneys not to accept the petition because it was not signed under oath and did not contain the addresses of the signatories. The district again notified the employees of the deficiencies of the petition, and it was re-filed. Local 21 complained that this document was deficient because the signatory employees' intent was unclear as to whether they sought to decertify Local 21 or merely to modify the unit. The district went ahead with the decertification election.

The regional attorney rejected Local 21's allegation that the district engaged in bad faith bargaining concerning the layoff negotiations. She found that the district met with Local 21 to discuss the effects of the layoff, and offered the enhanced layoff package to Local 21 members. The district did deny additional COBRA benefits to Local 21 members, but this denial did not constitute bad faith bargaining.

Local 21 also contended that the district provided unlawful assistance to the employees who signed the decertification petition by informing them of the deficiencies and providing them with the rules governing such petitions. The R.A. found it was unclear how the district's conduct influenced the employees, given that they had begun the decertification process on their own. Moreover, the R.A. said, merely providing the rules hardly is unlawful assistance.

Finally, Local 21 argued that the district violated a local rule by ordering a secret ballot decertification election. The R.A. found that the district had correctly applied the local rule.

The board adopted the opinion of the R.A. and dismissed the charge.

**Unlawful retaliation found where employee reported illegal activity: Rainbow Municipal Water Dist.**

(*Goddard v. Rainbow Municipal Water Dist.*, No. 1676-M, 8-19-04; 3 pp. + 15 pp. ALJ dec. By Member Whitehead, with Chairman Duncan and Member Neima.)

**Holding:** The district unlawfully retaliated against the charging party for reporting illegal anti-union activity.

**Case summary:** Jan Goddard filed an unfair practice charge alleging that the Rainbow Municipal Water District discharged him for reporting that the district general manager had offered promotional opportunities to another employee if that employee would help prevent the union from affiliating with a certain labor consulting firm. The Rainbow Employees Water District Association had retained the services of the City Employees Association as its labor consulting firm. The district refused to recognize CEA or deal with it as an authorized representative of the association.

Goddard, who had been employed at the district as a custodian on a temporary basis, applied and was hired for a new, permanent position. Goddard had been active with the association during his employment, although he was not part of the bargaining unit because of the temporary nature of his custodian position.

Before Goddard officially began training for the new position, he was completing his regular custodian duties

outside the office of district general manager Greg Ensminger. Goddard testified that he overheard Ensminger speak about CEA in a disparaging fashion and offer district employee Chris Heincy career assistance in exchange for help in preventing the association from affiliating with CEA.

Goddard believed what he heard was illegal and contacted both CEA and the association. He also related what he had heard to his supervisor. Goddard further testified that Ensminger often discussed the association-CEA relationship at staff meetings and said that the employees had no right to associate with CEA.

At the hearing, Heincy denied that Ensminger had offered him a promotion, but he could not recall what he and Ensminger had discussed. Ensminger did not testify as to whether he offered Heincy a promotion during the conversation.

Goddard later was called to an investigatory meeting with the human resources director, Rene Bush. Bush told Goddard he was not allowed to disclose confidential information, which Goddard acknowledged, though he maintained his belief that Ensminger acted illegally. Bush never spoke with Ensminger about the incident.

Bush concluded from her investigation that Goddard had broken the confidentiality code and had spread an untrue story. Based on Bush's recommendation and his own misgivings, Ensminger terminated Goddard. None of the other employees who had circulated the rumor were disciplined.

The administrative law judge first considered whether Goddard's report of the conversation constituted protected activity. She rejected the district's contention that Goddard had committed a serious breach of confidentiality by telling others about the conversation he overheard. The ALJ found the conduct was protected activity undertaken in furtherance of union interests. She concluded that Ensminger's offer to Heincy would tend to interfere with Goddard's right to participate in the association and with the association's ability to represent the employees.

The district argued that even if Goddard's conduct were protected, he lost that protection by engaging in misconduct. Protection is lost when an employee acts in bad faith or

with knowledge of the falsity of his remarks. Here, the ALJ found, Goddard reported the conversation truthfully, and, even if he had misconstrued what he had heard, the district had not demonstrated that he acted in bad faith.

The ALJ also declined to find misconduct because Goddard had repeated a conversation spoken behind a closed door. While private communications between management officials or between union officials are entitled to respect, the conversation here was between a manager and a unit employee. Though Ensminger did have an expectation of privacy, it would be contrary to the purposes of the MMBA to protect an illegal offer of promotion. Goddard also was acting in the regular course of his duties when he overheard the conversation. Bush acknowledged that no rule regarding confidentiality existed, and any such rule that prevented employees from reporting MMBA violations would be illegal on its face.

Accordingly, the ALJ found that the district violated the MMBA by discharging Goddard. The board ordered the district to reinstate Goddard and to make him whole for any losses suffered.

### ***Duty of Fair Representation Rulings***

#### **Denial of representation allowed where grievance lacks merit: SEIU.**

(*Lowery v. Service Employees International Union, Loc. 790*, No. 1666-M, 7-27-04; 2 pp. + 8 pp. R.A. dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

**Holding:** No breach of the duty of fair representation was found where the union provided the charging party with a detailed explanation of why his grievance lacked merit.

**Case summary:** Raymond Lowery was employed by the City of San Ramon as a maintenance worker, a position requiring the possession of a valid California driver's license. On May 25, 2002, he received a citation for driving under the influence of alcohol. His license was suspended for an unknown length of time. On December 2, 2002, the city terminated Lowery for the failure to possess a valid license,

and thus failing to meet the minimum qualifications for employment.

On February 13, 2003, SEIU rejected Lowery's request for representation at his hearing appealing his termination. The field representative notified him that the clear basis of his termination was his lack of a driver's license, one of the qualifications for his position. Based on the information, the field representative believed that further appeal was not warranted and would not alter the city's decision. Lowery's termination later was upheld.

Lowery filed a charge alleging that SEIU breached its duty of fair representation by denying representation. The regional attorney determined that SEIU had not acted arbitrarily or been devoid of honest judgment in its denial of representation because the charge did not present any facts demonstrating bad faith.

The board adopted the R.A. decision in full and affirmed the dismissal.

#### **No breach of duty of fair representation when grievance lacked merit: SEIU.**

(*Jeffers v. Service Employees International Union, Loc. 616*, No. 1675-M, 8-19-04; 2 pp. + 17 pp. ALJ dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

**Holding:** The charging party failed to demonstrate that the union had denied him representation in bad faith.

**Case summary:** Andrew Jeffers filed an unfair practice charge alleging that Service Employees International Union, Local 616, breached its duty of fair representation by failing to inform Jeffers about the status of his grievance, failing to process the grievance during arbitration, and failing to respond to his inquiries regarding the grievance.

Jeffers was employed as an activity therapist with the Alameda County Medical Center. In December 1999, he learned that his supervisor's position, the chief of occupational therapy, was going to become vacant, and decided to seek a promotion to that position. The minimum qualifications for the position included a certification or license in occupational therapy, which his supervisor lacked. Jeffers did not meet this requirement and decided to complain be-

cause he perceived this to be a bias toward occupational therapists. His complaint went unresolved, and he filed a grievance.

Jeffers had been active in SEIU and had served as a job steward, a role that increased his familiarity with the grievance process. He did not review the parties' collective bargaining agreement when he filed his grievance, and instead relied on a "mutual respect" provision that Jeffers claimed required the medical center to deal with employees "openly, honestly, righteously, and justly."

Jeffers filed the grievance without SEIU's assistance and processed it through all four preliminary steps prior to arbitration. Throughout the process, Jeffers was in contact with the SEIU field representative, Alvaree Swayne. Jeffers asserted that Swayne repeatedly assured him she was working on finalizing the arrangements for arbitration. Meanwhile, Swayne asked an attorney who represented SEIU to evaluate the grievance. The attorney determined that the grievance lacked merit because Jeffers did not meet the license requirement and because the agreement lacked any language on which to base a successful grievance. Furthermore, the supervisory position was outside of the bargaining unit and the hiring decision was completely within the discretion of the employer. The attorney advised Swayne to inform Jeffers that his grievance lacked merit and would not be pursued to arbitration.

The case presented the novel issue of whether the duty of fair representation applied because medical center employees may pursue a grievance in arbitration without the union's consent. In prior PERB cases, where the union did not have exclusive control over the pursuit of a remedy for an aggrieved employee, PERB has held that the duty does not apply. Finding that the board had not addressed the precise issue raised in this case, the administrative law judge held that the duty did apply.

The ALJ clarified that the charge did not concern SEIU's failure to process the grievance through the initial steps or its failure to request arbitration. The theory of the case centered around the fact that Swayne had led Jeffers to

believe that SEIU would provide representation in the arbitration and then refused to do so without informing him.

Jeffers relied heavily on his belief that his grievance was meritorious, but he offered no evidence or testimony to support his claim. Even with evidence to support his claim, merely establishing the merits of a grievance is insufficient to find a breach of the duty of fair representation. Acting negligently with respect to a grievance also is insufficient to find a breach.

The ALJ also analyzed the claim pursuant to Jeffers's theory that SEIU acted deliberately in denying him representation. SEIU asserted that its refusal to provide representation was due to its reasonable belief that the grievance lacked merit. After reviewing the factors that played a role in the attorney's thorough assessment that the grievant lacked merit, the ALJ concluded that Jeffers failed to establish that SEIU abused its discretion. The ALJ found that there was insufficient evidence to demonstrate that SEIU deliberately had denied the grievance.

As such, the board dismissed the charge.

## Activity Reports

### ALJ Proposed Decisions (by Region), July 1 - October 31, 2004

#### Sacramento Regional Office — Final Decisions

*Operating Engineers, Loc. 3 v. Fresno Irrigation Dist.*, Case SA-CE-181-M. ALJ Allen R. Link. (Issued 9-3-04; final 9-29-04; HO-U-857-M.) Union witnesses who testified at a PERB hearing were not entitled to regular wages. The ALJ rejected the union's arguments that (1) the employees were entitled to pay because they have a protected right to testify at a PERB hearing, and (2) the district pays for witnesses to attend other types of legal proceedings. Also, the ALJ found no evidence of past practice that would justify payment.

*Butte County Employees Assn., Loc. 1 v. County of Butte*, Case SA-CE-186-M. ALJ Donn Ginoza. (Issued 9-3-04; final 9-28-04; HO-U-858-M.) The county was not required to produce emails of management staff in order to help prove disparate treatment in a grievance appealing the termination of an employee who was charged with forwarding sexually explicit material. The ALJ found that while the information was presumptively relevant, employees acquired a reasonable expectation of privacy and thus their constitutional right of privacy was implicated by the disclosure demanded by the union. Balancing the employees' privacy interests against the benefit to the processing of the grievance, the ALJ found the scale tipped in favor of non-disclosure.

#### San Francisco Regional Office — Final Decisions

No proposed decisions became final during this period.

#### Los Angeles Regional Office — Final Decisions

*Bassett Teachers Assn., CTA/NEA v. Bassett Unified School Dist.*, Case LA-CE-4529-E. ALJ Thomas J. Allen. (Issued 7-6-04; final 8-4-04; HO-U-856-E.) The district breached its duty to bargain when it unilaterally changed the class-size provision in the collective bargaining agreement where the agreement required negotiations if the district proposed changes in negotiable matters. The ALJ found that the union did not waive its right to negotiate by agreement or by conduct at the bargaining table.

*American Federation of State, County and Municipal Employees v. City of Ontario*, Case LA-CE-112-M. ALJ Thomas J. Allen. (Issued 9-24-04; final 10-25-04; HO-U-859-M.) In a "just cause" arbitration, an arbitrator found that two employees were not terminated for retaliatory reasons. The union could have but did not ask the city council to review the arbitrator's decision. The ALJ found elements of collateral estoppel existed and dismissed the complaint on that basis.

#### Sacramento Regional Office — Decisions Not Final

*California State Employees Assn., CSU Div./California Faculty Assn. v. Trustees of the California State Univ.*, Cases SA-CE-191-H and SA-CE-194-H. ALJ Allen R. Link. (Issued 7-9-04; exceptions filed.) The university requested that two unions reopen contract negotiations over parking in newly constructed facilities, and the unions refused. When the parking facilities opened, the university restricted employee access. The ALJ found that the university breached its duty to negotiate in good faith with the unions when it unilaterally prohibited employees from parking along with students in the newly constructed facilities, despite the fact that employees still were permitted to park in facilities where they had parked in the past. Previously, employees had been permitted to park in the same facilities as students. The ALJ also found that the university unlawfully bypassed the union and consulted with an ad hoc task force on parking fees and location. The ALJ rejected a claim that the university refused to provide information to the union about parking facilities.

*California School Employees Assn. and its Lodi Chap. No. 77 v. Lodi Unified School Dist.*, Case SA-CE-2081-E. ALJ Allen R. Link. (Issued 9-15-04; exceptions filed.) The allegation that the employee suffered discrimination in denial of overtime assignments, denial of vacation, issuance of letters of reprimand, issuance of unsatisfactory evaluations, and other similar acts was dismissed. The ALJ concluded that these and other actions directed at the employee were based on poor job performance and not on his protected activity.

*American Federation of State, County and Municipal Employees, Loc. 2620 v. State of California (Department of Personnel Administration)*, Case SA-CE-1386-S. ALJ Donn Ginoza.

(Issued 10-13-04; time running for appeal.) The ALJ found that employer comments at the bargaining table which were interpreted by the union as a “me too” clause, did not require the employer later to provide the same benefits as those negotiated by other unions. The alleged “me too” agreement was not reduced to writing as required by ground rules, nor was it included in the final agreement, which included a zipper clause. Also, the ALJ found that the employer did not make false representations to the union for the purpose of inducing the union to settle, despite some evidence that the employer’s negotiator conveyed the idea that it would do more than simply attempt to rectify the disparity in the future and would actually “make it right.”

#### **San Francisco Regional Office — Decisions Not Final**

*University Council American Federation of Teachers v. Regents of the University of California (Davis)*, Case SF-CE-587-H. ALJ Fred D’Orazio. (Issued 8-9-04; exceptions filed.) The university unilaterally changed a provision in the collective bargaining agreement that requires appointment of post-six-year lecturers when an instructional need exists and the lecturer is rated excellent. Prior PERB decisions interpreting the same contractual provision held that the MOU limits the university’s discretion in making post-six-year appointments. The ALJ found PERB decisions controlling and held that the university may not determine appointments by extra-contractual criteria such as academic plans and categories of lecturers. The remedy was to offer lecturers a so-called excellence review and consideration for a future appointment in accord with contract terms, and compensation for courses they would have taught if the contract had been applied correctly.

*Oakland Education Assn. v. Oakland Unified School Dist.*, Case SF-CE-2283-E. ALJ Donn Ginoza. (Issued 8-31-04; exceptions filed.) The ALJ found that a probationary teacher’s non-reelection was in retaliation for protected activity including, but not limited to, participation in shared governance and school-site reform committees, complaints about student fights, and representation by the union. The teacher’s protected conduct was known to the district, and there was a history of veiled threats and comments by the district repre-

sentative that protected activity was not acceptable. The sequence of events leading to the non-reelection decision created a strong case of suspicious timing. The district’s performance-based justification for non-reelection was found to be unconvincing, exaggerated, and contradicted by the teacher’s evaluations.

#### **Los Angeles Regional Office — Decisions Not Final**

*Lynn v. College of the Canyons Faculty Assn., CCA/CTA/NEA*, Case LA-CO-1127-E. ALJ Allen R. Link. (Issued 7-30-04; exceptions filed.) The ALJ found no breach of the duty of fair representation where the employee’s grievance was not meritorious and the employee had a responsibility under the collective bargaining agreement to file the grievance. The ALJ also found that although the union had an obligation to provide advice and expertise, its actions in responding to the employee were not arbitrary, discriminatory, or taken in bad faith.

*California State Employees Assn. v. Trustees of the California State Univ.*, Case LA-CE-714-H. ALJ Thomas J. Allen. (Issued 8-2-04; exceptions filed.) The ALJ found that the university’s decision not to rehire an employee who had resigned was not based on her protected activity. The ALJ credited testimony of university decisionmakers that the decision not to rehire was based on the employee’s negative attitude toward the job immediately after announcing her resignation and that protected activity was not a factor.

*Academic Professionals of California/California Faculty Assn. v. Trustees of the California State Univ.*, Cases LA-CE-616-H and LA-CE-779-H. ALJ Ann L. Weinman. (Issued 9-20-04; exceptions filed.) The ALJ found the university unlawfully implemented computer use policies at three campuses. Some policies provided for employee discipline if the terms of the policy were violated, while other policies could interfere with and restrict communications between unit employees and their unions. Because these are matters within the scope of representation, the university was required to provide notice and an opportunity to bargain the decision and its effects. The ALJ rejected the university’s claim that the unions waived their right to negotiate by raising the zipper clause as a bar to negotiations. The ALJ also found no viola-

tion in the implementation of the policy in the chancellor's office because no unit employees work in that office, no vacant unit positions were in that office, and the policy in that office applies to network affiliates and not to individual employees.

The ALJ found the university did not bypass the unions in dealing with the Academic Senate because HEERA exempts the senate from the prohibition against direct dealing. The ALJ found the allegation that the university unlawfully consulted with the information technology committee was barred by the statute of limitations. The union had constructive notice of the consultation through the chapter president, a member of the committee.

The ALJ found the university did not unlawfully change the telephone policy at one campus. The policy was found to be virtually identical to practices established by faculty/staff telephone directories since 1974.

*California State Employees Assn. v. Trustees of the California State Univ.*, Case LA-CE-660-H. ALJ Ann L. Weinman. (Issued 9-23-04; exceptions filed.) The university did not unlawfully change the subcontracting policy reflected in the collective bargaining agreement when it formed an auxiliary at the campus site and entered into an agreement with it for financing, construction, and maintenance of student housing. No bargaining unit employee worked at the auxiliary, was displaced, lost wages, or was otherwise affected by the action. The ALJ found the auxiliary was not a public employer, and that there was no common ownership between the university and the auxiliary; thus, the auxiliary was neither a joint employer nor an alter ego of the university.

*Banning Unified School Dist. v. California School Employees Assn. and its Chap. 248*, Cases LA-UM-717-E and LA-UM-721-E. ALJ Ann L. Weinman. (Issued 10-8-04; time running for appeal.) Petitions to reclassify positions as non-confidential and add them to the bargaining unit were dismissed by the ALJ. The executive secretary to the assistant superintendent types negotiation memoranda and bargaining proposals, and attends meetings and prepares minutes covering negotiations. The credentialing secretary formats and transcribes negotiations proposals, gathers information for proposals, and attends negotiation strategy meetings. The

chief business officer's secretary attends meetings where negotiations strategy is discussed, types proposals on health benefits, and prepares documents related to the investigation of employee misconduct.

*California School Employees Assn. and its Chap. 759 v. San Diego Unified School Dist.*, Case LA-CE-4676-E. ALJ Thomas J. Allen. (Issued 10-29-04; time running for appeal.) The ALJ found the district's right to schedule student days and its right under the collective bargaining agreement to reduce the hours of employees did not exempt it from the duty to negotiate about a new schedule of workdays and the contractual duty to negotiate about effects of a reduction in hours. Therefore, the district breached its duty to bargain when it unilaterally implemented a new schedule for paraeducators and reduced their hours. The ALJ also found the district unlawfully bypassed the union when it asked paraeducators to modify their schedules on an individual basis.

## Report of the Office of the General Counsel

### Injunctive Relief Cases

Four requests were filed between July 1 and October 31, 2004.

*Witke v. University Professional and Technical Employees*, IR No. 471, Case LA-CO-103-H. Issue: Witke sought an injunction to prohibit the union from collecting agency fees prior to employees receiving their *Hudson* notices. On 8-10-04, Witke filed the request for injunctive relief. On 8-24-04, the board denied the request without prejudice.

*Santa Clara County Government Attorneys Assn. v. Santa Clara County*, IR No. 472, Case SF-CE-266-M. Issue: The association sought to enjoin the county's bad faith bargaining. The association filed the request on 8-10-04. The request was denied on 8-24-04.

*Professional Registered Nurses Assn. v. County of Santa Clara*, IR No. 473, Case SF-CE-29-M. Issue: The association sought to enjoin the county's bad faith bargaining. The association filed the request on 8-10-04. The request was denied on 8-24-04.

*Correctional Peace Officers Assn. v. County of Santa Clara*, IR No. 474, Case SF-CE-228-M. Issue: The association

sought to enjoin the county's bad faith bargaining. The association filed the request on 8-10-04. The request was denied on 8-24-04.

*Keiser v. Lake County Superior Court*, IR No. 475, Case SF-CE-1-C. Issue: Keiser sought to have her termination restrained. On 10-7-04, Keiser filed the request. On 10-18-04, the board denied the request.

### Litigation Activity

Six new cases opened and three cases closed between July 1 and October 31, 2004.

The following cases opened during this period.

*Sacramento Municipal Utility Dist. v. PERB*, Docket No. 04-A-0353, Superior Court of Sacramento County, Case Number 04 SC00864 [Case SA-CE-137-M]. Issue: SMUD filed a petition for writ and received a hearing date of 9-24-04. On 7-6-04, SMUD filed a request for stay of PERB proceedings. On 7-9-04, Judge Ohanesian denied the stay request. On 7-30-04 the court granted the plaintiff's request for dismissal.

*Alameda County Medical Center v. Hospital and Health Care Workers*, Docket No. 04-358, Superior Court of Alameda County, Case Number RG 04-172347 [Case SF-CO-56-M]. Issue: The county sought to enjoin its employees' union from striking without seeking injunctive relief through PERB. On 8-25-04, a complaint for injunctive relief was filed by the medical center with the court. On 8-26-04, PERB appeared with the parties in Alameda Superior Court. On 8-27-04, the court issued an order denying the plaintiff's application for a temporary restraining order.

*Jeffers v. Public Employment Relations Board*, Docket No. 04-353, Court of Appeal, First Appellate District, Case Number A107722 [No. 1675-M, Case SF-CO-23-M]. On 9-17-04, Jeffers filed a civil writ seeking to overturn the board decision. On 10-04-04, the court issued an order to extend the time to file the administrative record until 11-7-04.

*Fresno County Office of Education v. Public Employment Relations Board*, Docket No. 04-352, Court of Appeal, Fifth Appellate District, Case Number FO463266 [No. 1674, Cases SA-CE-2004-E and SA-CE 2005-E]. On 9-17-04, the county education office filed a petition for writ of extraordi-

nary relief. On 9-27-04, the court granted an order to extend the time to file the administrative record until 11-14-04.

*State of California (Department of Veterans Affairs) v. Public Employment Relations Board*, Court of Appeal, Third Appellate District, Case No. C047982, Docket No. 04-354 [No. 1686-S, Case SF-CE-220-S]. On 10-7-04, the State of California (Department of Veterans Affairs) filed a petition for writ and a request for immediate stay. On 10-18-04, the court granted PERB an application for an extension of time to file the administrative record until 11-12-04.

*Regents of University of California v. Public Employment Relations Board*. Court of Appeal, First Appellate District, Case No. A0108001, Docket No. 04-357 [No. 1689-H, Case SF-CE-611-H]. On 10-15-04, the university filed a petition for review. On 10-18-04, the court granted the application for an extension of time to file the administrative record until 12-9-04.

The following cases closed during this period.

*Waters v. Samsel, Thompson et al.*, Ninth District Court of Appeal, U.S.D.C. Northern District, Case C-02-4589 EDL, Docket No. 04-O-0350. Issue: The plaintiff alleges that his civil due process rights, guaranteed by the U.S. Constitution, were violated in his dealings with the PERB employees named as defendants. On 9-21-04, the court affirmed the district court's dismissal of the case.

*Laborers International Union of North America and Davis v. State Employees Trades Council United et al.*, San Bernardino County Superior Court Case No. SCVSS 094642 Docket No. 02-O-0332 (Cases LA-AC-58-H and LA-CE-709-H). Issue: LIUNA requested that PERB file an amicus brief with the San Bernardino Superior Court "explaining that superior courts — not PERB — have jurisdiction to determine the contractual propriety under a union's constitution of an alleged union restructuring and the disposition of assets as a consequence thereof." On 10-7-04, the court granted LIUNA's request for dismissal.

*Fresno Irrigation Dist. v. Public Employment Relations Board/Fresno Irrigation District Employees Assn.*, Fifth District Court of Appeal, Case No. F044698, Docket No. 04-O-0349 [No. 1565-M, Case SA-CE-29-M]. Issue: Did PERB err when it decided that the district violated the association's

right of access to district facilities for its meetings? A petition for writ of review was filed by the district on 1-14-04. On 9-15-04, the court issued an unpublished decision reversing the board's decision.

#### **Regulation Adoption and Modification**

On August 30, 2004, PERB received the Office of Administrative Law's notice of approval of regulatory action. The approval covered emergency regulation changes proposed in response to the enactment of PERB jurisdiction over the Trial Court Employment Protection and Governance Act and the Trial Court Interpreter Employment and Labor Relations Act.

## ***Fair Employment and Housing Commission***

*California Code of Regulations Title 2, Sec. 7435, authorizes the Fair Employment and Housing Commission to designate as precedential, any decision, or part of any decision, that contains a significant legal or policy determination of general application that is likely to recur. Once the commission has done so, the agency may rely on it as precedent and the parties may cite to it in their arguments to the commission and the courts.*

*One of the commission's decisions designated as precedential is summarized below.*

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### **No sexual harassment found where no relationship existed between parties: Mohsen Hossienipoor and Magic Spray.**

*(DFEH v. Mohsen Hossienipoor and Magic Spray, No. 04-02-P, 9-14-04; 1 p. + 7 pp. H.O. dec.)*

**Holding:** The respondent's actions did not violate the FEHA because no employment or business relationship existed between the parties.

**Case summary:** This complaint arose from a series of sexual harassment incidents that occurred at the complainant's workplace. Raul Vega Mendoza is employed as a technician assembler at Airtronics. Mohsen Hossienipoor owns Magic Spray, through which he provides painting services to various companies, including Airtronics. Hossienipoor was frequently on the premises at Airtronics from 2000 through 2002 to provide painting services.

On August 26, 2002, Mendoza was working on a step-ladder when Hossienipoor came up behind him and grabbed his buttocks, nearly causing Mendoza to fall off his ladder. Mendoza reported the incident to his supervisor and also mentioned that Hossienipoor had touched him and had made a number of comments to him over the past year. The supervisor investigated the complaint and warned Hossienipoor not to harass Mendoza.

Over the next week, Hossienipoor verbally harassed Mendoza, calling him a "crybaby" and telling other em-

ployees not to touch him because he was a "fucking crybaby." Other incidents of verbal harassment followed, including an incident on September 4 where Hossienipoor called Mendoza a variety of derogatory names in Spanish. Mendoza complained again to Airtronics' Human Relations Department, and thereafter Hossienipoor was not allowed to be on the Airtronics premises unescorted.

The Department of Fair Housing and Employment brought forth an accusation on Mendoza's behalf, alleging that Hossienipoor sexually harassed Mendoza in violation of Gov. Code Sec. 12940, subdivisions (j)(1) and (j)(4)(A), and Sec. 12950, and the Unruh Act, as incorporated into the Fair Employment and Housing Act at Sec. 12948.

While Hossienipoor is an employer under the FEHA, and Mendoza is an employee under the FEHA, Mendoza was not Hossienipoor's employee at the time of the harassment. The department contended that Hossienipoor still is liable as an employer. The hearing officer disagreed, finding no employment relationship between Mendoza and Hossienipoor. Without the employment relationship, Hossienipoor cannot be liable under the FEHA as an employer.

The department argued that Hossienipoor is liable as an FEHA-covered "person" per Gov. Code Sec. 12940, subdivision (j)(1). Again, however, the department did not establish that Hossienipoor, as a "person," had any employment relationship with Mendoza. Hossienipoor was not shown to

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be an agent or supervisor of Airtronics, or a coworker of Mendoza. The lack of a demonstrated employment relationship precluded liability under this section.

The department also alleged that Hossienipoor was liable under the Unruh Act, which prohibits businesses from discriminating in business transactions on the basis of race, color, ancestry, or national origin. "Business" is construed in the broadest sense possible, and Magic Spray fits the definition with its fixed business location, regularly employed workers, and clientele. However, the Unruh Act does not cover employment discrimination. Moreover, while Hossienipoor had a business relationship with Airtronics, Mendoza's employer, the same could not be said for his relationship with Mendoza himself. The department did not establish that Mendoza was in a business relationship with Hossienipoor or that Mendoza was a client or customer of Hossienipoor. Accordingly, this allegation also was dismissed.

The commission adopted the H.O.'s opinion as its own and dismissed the accusation.