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

Dear *CPER* Readers:

As I'm sure you're aware, the public sector workforce in California has found itself in the governor's crosshairs. What started out as a pledge to "blow up the boxes" of existing state government has escalated into the battle cry to "starve the monster," not a supportive or complimentary characterization of the state workforce. Several boards and commissions already have been targeted, and the governor has sunshined proposals calling for furloughs and takeaways in leave and benefits in anticipation of bargaining with 14 of the state's 21 bargaining units.

The education community has fared no better. The governor has turned his back on the budget deal he struck last year, prompting teachers and administrators alike to express something less than trust in the state's chief executive. The governor's call to replace teachers' existing salary system with a performance-based model has, to say the least, rankled the state's teachers unions. But, hey, those groups have become the "poster child" for the dreaded "special interests" that Schwarzenegger repeatedly blames for the state's myriad problems.

All segments of the public sector are feeding at the well-stocked pension trough, according to our governor, who hopes to replace the system with a 401(k) plan that gives employees the chance to craft their own investment portfolios. Schwarzenegger claims these highly paid pensions were doled out by former-Governor Davis at the urging of labor unions, and that the deals are responsible for breaking the bank in many local governments.

CalPERS has stepped up to dispel this and other myths about the merits of the proposed self-directed system, including how much money it will save the state in the long run and how well it will serve future public employees and the public at large.

As in the past, the governor has threatened to take these matters "to the people" if the legislature refuses to play ball. Some groups speaking out against Schwarzenegger's goals have pledged to do the same thing. As battle lines are forming, it remains to be seen what part of the governor's agenda will succeed.

But, even now, one thing seems clear. By targeting the entire public sector — and placing a large part of the blame for the state's budgetary difficulties at its feet — Governor Schwarzenegger may unwittingly have helped forge a common ground among a diverse, broadly based group who will come together to fend off an attack perceived to be unfairly directed at the state's dedicated public employees.

Sincerely yours,



Carol Vendrillo  
CPER Director and Editor

# Choosing Between Administrative Remedies: A Procedural ‘No Brainer’

*C. Christine Maloney*

Aggrieved employees may find the road to the courthouse has become a lot shorter following two recent California court decisions. Employees claiming discrimination under the Fair Employment and Housing Act are not required to exhaust their employer's internal administrative remedies on FEHA claims or, apparently, on non-FEHA claims that have issues in common with a FEHA claim. Once an employee with a FEHA discrimination claim obtains a right-to-sue letter, the employee has the right-of-way to the courthouse and cannot be slowed down by the employer's internal dispute resolution processes.

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Of course, employees still may *choose* to proceed with an employer's internal appeal process, but doing so may imperil their ability to bring FEHA and related claims in a court action if the administrative decision does not go their way. This is because the rule conferring finality on administrative decisions — unless the decision is set aside in a mandamus proceeding — remains intact. The potential for preclusion in subsequent litigation makes it an easy decision for an employee with a viable FEHA claim to forgo the employer's internal process.

## ***Exhaustion Doctrine***

The rule requiring exhaustion of administrative remedies is firmly rooted in California case law.<sup>1</sup> It provides that where an adequate administrative remedy is offered, relief must be sought from the administrative body and that remedy exhausted before a court can act.<sup>2</sup> Most California courts have held that the exhaustion requirement is a jurisdictional prerequisite to filing a judicial complaint.<sup>3</sup> In other words, the failure to exhaust administrative remedies is not just a correctable procedural defect; it requires the action to be dismissed.<sup>4</sup>

The exhaustion requirement is the product of a number of compelling societal and governmental policies. First, the doctrine encourages mitigation of damages by allowing an agency to correct its own mistakes before being hauled into court. Second, based on separation of power principles, the doctrine recognizes the autonomy of an administrative agency and the expertise of its quasi-judicial decisionmakers. Third, the doctrine promotes more economical and less formal means of dispute resolution. Finally, the doctrine serves judicial economy and eases the burden on the court system by providing an alternative forum for relief.<sup>5</sup>

California courts have applied the exhaustion rule to internal grievance or appeal processes provided by public employers for their employees.<sup>6</sup> Employees who have failed to use such processes have been precluded from maintaining judicial actions against their employers. The application of the exhaustion rule to public employers fulfills all of the policies behind the doctrine. It allows financially challenged public entities to review decisions and correct their mistakes before incurring the expense of litigation. It gives proper recognition to the constitutional autonomy of a public employer to regulate all aspects of public employment including appointment, compensation, tenure, discharge, and removal.<sup>7</sup> It also facilitates dispute resolution in a cheaper and faster forum and, consequently, reduces the burden on the courts.

Exhaustion is not an inflexible doctrine and certain exceptions have developed. For example, exhaustion is excused in circumstances where the plaintiff establishes that exhaustion would be futile, or would cause an irreparable injury, or where the controversy lies outside the agency's jurisdiction.<sup>8</sup> In 2003, the California Supreme Court fashioned a new exception to the requirement that employees exhaust their employer's internal remedies: a blanket exception for FEHA claims.

*Schifando held that  
public sector employees  
should have no greater  
exhaustion burden  
than private sector  
employees.*

### **Schifando Decision**

In *Schifando v. City of Los Angeles*,<sup>9</sup> the California Supreme Court held that a public employee was not required to exhaust his employer's internal administrative remedies before filing a claim under the Fair Employment and Housing Act. Requiring a public employee to exhaust both his

internal and external administrative remedies, the court found, would frustrate one of the legislative purposes behind the FEHA: to give public employees the same tools in the battle against employment discrimination as private sector employees. In other words, the *Schifando* court held that public sector employees should have no greater exhaustion burden than private sector employees — at least with regard to statutory discrimination claims.

Steve Schifando's job duties as a storekeeper for the Los Angeles Parks and Recreation Department were changed over his objection. In a meeting with his supervisors to discuss those objections, he alleged that his supervisors intentionally argued with him to cause him stress and medical difficulty because they knew that Schifando suffered from hypertension which made him dizzy and lightheaded in stressful situations. Schifando claimed the supervisors' provocation worked and he resigned on the spot because he just could not "take it anymore." Schifando obtained a right-to-sue letter from the Department of Fair Employment and Housing and sued the city on a single theory of disability discrimination.

The trial court sustained the city's demurrer on the ground that the complaint failed to allege that Schifando timely filed a FEHA charge.<sup>10</sup> On appeal, the city added a new argument that Schifando also failed to exhaust his administrative remedies under the city charter, which allows discharged employees to make a demand for reinstatement with the Board of Civil Service Commissioners.<sup>11</sup> The Court of Appeal affirmed the judgment on the new theory, holding that Schifando was required to exhaust *both* the internal and external administrative processes.

On review, the Supreme Court recognized the continuing vitality of the administrative exhaustion doctrine in California, including the component that requires the exhaustion of an employer's internal remedies.<sup>12</sup> However, where the legislature mandates an *external* administrative process such as with the FEHA, the court said the purposes behind the exhaustion doctrine are better served by a rule that allows aggrieved public employees to choose the administrative forum — internal or external — most appropriate to their case. The court compared the two available administrative remedies and determined, not surprisingly, that the DFEH's procedures were more employee-friendly than those of the city. Among other things, the DFEH process insists on a third-party investigator and decisionmaker, provides a longer statute of limitations, and gives a non-binding effect to DFEH decisions adverse to the employee. This last reason appears to have influenced the court's decision to exempt FEHA claims from internal exhaustion requirements.

Under the FEHA, when an employee receives an adverse administrative decision, it is not binding in a subsequent judicial action.<sup>13</sup> By contrast, when an employee receives an adverse decision under an employer's internal appeal process, the decision is binding in all subsequent actions unless a court sets the decision aside in an administrative mandamus proceeding.<sup>14</sup> Further, in such an administrative mandamus proceeding, the agency's decision receives substantial deference from the reviewing court.<sup>15</sup> Thus, the risks associated with an adverse decision for an employee are far greater under an employer's internal process than they are under the FEHA's external process.

To require public employees to exhaust the internal process for FEHA claims, and face the potential collateral estoppel effect of an adverse administrative decision, certainly would not place public employees on equal footing with private sector employees in the battle against employment discrimination. Therefore, the court concluded that an employee with a FEHA claim may elect the forum that is most advantageous to his or her needs.

*Not surprisingly, the DFEH's procedures were more employee-friendly than those of the city.*

The *Schifando* decision begs two questions, both of which the court declined to answer: (1) Is an employee required to exhaust internal remedies concerning other types of statutory claims that do not mandate their own administrative process like the FEHA; and, (2) Is an employee required to exhaust internal remedies on non-FEHA claims that are based on the same facts as a FEHA claim? The former question will be answered by the court in the near future when it issues its decision in *Campbell v. Regents of the University of California*.<sup>16</sup> In that case, an alleged whistleblower argues that she was not required to exhaust the university's internal appeal process before bringing her suit under the False Claims Act and Labor Code Sec. 1102.5 (barring retaliation against employees who disclose information to law enforcement agencies). The latter question recently was tackled by the Court of Appeal for the Second District. (For more on *Campbell*, see p. 15 of this issue of *CPER*.)

### **Williams Decision**

In *Williams v. Housing Authority of the City of Los Angeles*,<sup>17</sup> the California Court of Appeal for the Second District extended *Schifando's* reach and held that where an employee alleges both FEHA claims and "FEHA-related non-statutory claims," the employee is not required to exhaust an employer's internal remedies on the "FEHA-related non-statutory claims." The court determined such a rule was necessary to protect FEHA claims from collateral estoppel effect by administrative findings on related non-statutory claims.

The suit arose when Michael Williams, a print shop supervisor for the Housing Authority of the City of Los Angeles, received a civil subpoena and was advised by HACL's attorney not to respond. Williams ignored the instruction, provided testimony, and received a demotion for insubordination. He appealed his demotion under HACL's internal process. In the meantime, Williams refused to report to his new assignment — cleaning houses — and was

terminated for job abandonment. Williams did not file another internal appeal, nor did he complete his first appeal. Instead, Williams obtained a right-to-sue letter from the DFEH, and sued for retaliation under the FEHA and for wrongful demotion and termination in violation of public policy. The trial court sustained HACLA's demurrer for failure to exhaust the employer's internal administrative remedies. The Court of Appeal reversed — in part.

Under *Schifando*, Williams' FEHA retaliation claim clearly was not subject to internal exhaustion, and the trial court was reversed on that issue. The court then considered whether Williams' common law public policy claims were subject to the internal exhaustion requirement. The court found it would vitiate *Schifando's* choice of remedy rule to require employees to exhaust internal remedies on non-statutory claims when the administrative findings on those claims could have a "preclusive effect" on a FEHA claim. Once again, the underlying concern — and reason that the exhaustion requirement was further diminished — was the binding effect that an adverse administrative decision could have on an employee's FEHA claim.

The *Williams* court provided only general guidance as to those claims it would consider "FEHA-related non-statutory claims" and exempt from the internal exhaustion requirement. First, the court said the exhaustion exception on non-statutory claims applies only when a FEHA claim is pleaded. If no FEHA claim is made in the lawsuit, there is no reason to excuse the employee from the internal exhaustion requirement under *Schifando*. Second, a non-statutory claim will not be exempt from internal exhaustion simply because it is joined in an action with a FEHA claim. The court expressly rejected the argument that once a FEHA claim is pleaded, all other claims ride to the courthouse on its coat-tails. Third, the test for the exemption is whether an administrative finding on the non-statutory claim would have a "preclusive effect" on the FEHA claim, not merely whether the claims involve the same set of facts. Finally, the court

stated that a public policy claim based on the FEHA statute is clearly a "FEHA-related non-statutory claim."

Williams' public policy claims were based on his decision to obey the subpoena and provide testimony in court. The court held that these claims did not qualify as "FEHA-related non-statutory claims" because they did not have a preclusive relationship with his FEHA retaliation claim and, therefore, were *not* exempt from the exhaustion requirement.

*Williams* is a curious decision for several reasons. First,

it focuses exclusively on non-statutory claims that an employee might bring against his or her public employer. However, Government Code Sec. 815 provides public entities with an immunity defense to non-statutory claims. Except as otherwise provided by statute, a public entity is not liable for an injury whether such injury arises out of an act or omission of the public entity, one of its employees, or some other person.<sup>18</sup> For example, a public policy wrongful discharge claim, otherwise known as a *Tameny* claim, is a common law, judicially created tort.<sup>19</sup> Under Sec. 815(a), public entities are not liable based on such a theory.<sup>20</sup> Therefore, *Williams'* focus on exhaustion requirements related to

non-statutory claims will not be particularly helpful in most public sector cases.

The *Williams* decision also is unusual because it determines, without analysis, that Williams' public policy claims for wrongful demotion and discharge would not have a preclusive effect on his FEHA retaliation claim. The court did not describe or apply any standards for determining when an administrative decision would have a preclusive effect on a FEHA claim, beyond merely referencing the doctrine of judicial exhaustion. This lack of guidance leaves employees in an untenable predicament over whether they choose to internally exhaust non-FEHA claims and risk a binding, adverse decision, or choose not to exhaust and risk dismissal for failing to do so. Additional judicial guidance on the exhaustion of non-FEHA claims is imperative.

*In Williams, the  
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ministrative decision  
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claim.*

### ***The Other Exhaustion Doctrine: Exhaustion of Judicial Remedies***

Although the legal issue resolved in both *Schifando* and *Williams* was whether the exhaustion of administrative remedies doctrine applied, there was another exhaustion doctrine underpinning the courts' decisions: the exhaustion of judicial remedies. Exhaustion of judicial remedies is a species of res judicata and collateral estoppel. It requires that a party who is dissatisfied with an administrative finding must attack that finding by filing an administrative mandamus proceeding.<sup>21</sup> Unless an administrative decision is challenged in a mandamus proceeding, it binds the parties in subsequent litigation on those same issues. On the other hand, if the employee is satisfied with the administrative finding, he or she need not exhaust judicial remedies. Exhaustion of judicial remedies simply means that if the employee attacks the administrative determination, he or she must launch that assault in an administrative mandamus proceeding and not in a lawsuit for damages.

The judicial exhaustion doctrine serves important policy considerations. First, it respects an agency's autonomy and its quasi-judicial decisionmaking procedures by reviewing them under the deferential standards applicable to mandamus proceedings.<sup>22</sup> Second, it provides a uniform practice of judicial, rather than jury, review of quasi-judicial decisions. Third, it affords some assurance of an end to litigation. Conferring finality on an agency's decisions, unless they are set aside in a mandate action, ensures that litigants who choose to use internal procedures are not given a second bite at the procedural apple.<sup>23</sup>

Unlike the administrative exhaustion doctrine, FEHA claims are not excepted from the judicial exhaustion doctrine. The judicial exhaustion rule will preclude a public employee's FEHA claims when, after an adjudicatory hearing, the employee fails to have an adverse administrative decision set aside in a mandamus proceeding.<sup>24</sup> For example, in *Johnson v. City of Loma Linda*,<sup>25</sup> an assistant city manager's

FEHA retaliation suit was dismissed because he failed to bring a timely administrative mandamus action to set aside the personnel board's decision that he was discharged for economic reasons and not because of retaliation. Refusing to give binding effect to the findings of an administrative agency in these circumstances, the California Supreme Court reasoned, would undermine the efficacy of such proceedings, rendering them little more than dress rehearsals for litigation.<sup>26</sup>

### ***Where Schifando gives employees a choice of administrative remedies, Page holds them to their choice once made.***

*Schifando* leaves the judicial exhaustion doctrine intact. *Schifando* gives employees with a FEHA claim a choice between available administrative remedies. Once an employee makes the choice to proceed with an employer's internal remedy, however, he or she will be held to that choice and made to exhaust judicial remedies. This issue recently was addressed in *Page v. Los Angeles County Probation Dept.*,<sup>27</sup> a post-*Schifando* decision of the Second District Court of Appeal. In *Page*, an employee participated in three days of hearing and received the hearing

officer's recommended decision on her disability discrimination claims, which was adverse to her. Instead of completing the internal appeal process to a final decision, the employee obtained a right-to-sue letter and sued the employer in court.

The Court of Appeal held that where an employee elects to pursue claims through an employer's internal administrative remedy to the point of hearing and a proposed decision, the employee must complete the administrative process and then exhaust judicial remedies before pursuing a FEHA or other claim. In other words, where *Schifando* gives employees a choice of administrative remedies, *Page* holds them to their choice once made.

The judicial exhaustion requirement is not without limitation. It applies only where the administrative agency proceeded in a quasi-judicial capacity and the parties had an adequate opportunity to litigate.<sup>28</sup> Further, according to at least one Court of Appeal decision, the doctrine will not operate to preclude a claim unless the identical issue was

decided in the prior administrative proceeding. In *Castillo v. City of Los Angeles*,<sup>29</sup> the Court of Appeal applied collateral estoppel elements to determine that an employee's FEHA claims were precluded by a prior administrative decision. Traditionally, collateral estoppel has been found to bar relitigation of an issue decided in a prior proceeding if: (1) the issue is identical to an issue decided in the former proceeding; (2) the issue actually was litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the decision of the prior proceeding was final and on the merits; and (5) preclusion is sought against a person who was a party, or was in privity with a party, to the former proceeding.<sup>30</sup>

Castillo was a 29-year public works employee for the City of Los Angeles who was discharged for unauthorized absences and tardiness. He claimed he was treated disparately and that his termination was discriminatory, though he did not identify on what protected bases. The Civil Service Commission upheld the discharge, and Castillo's administrative mandamus proceeding to overturn the commission's decision was unsuccessful. While the mandate petition was pending, Castillo obtained a right-to-sue notice from the DFEH and filed a separate suit for age, race, and national origin discrimination and public policy violations based on his termination. That suit was dismissed, as well.

In upholding summary judgment for the city, the Court of Appeal applied traditional collateral estoppel elements and found that the lawsuit and the administrative hearing involved the identical issue, which the court labeled "the wrongfulness of the discharge." Specifically, the administrative hearing officer found that Castillo engaged in an uncorrected pattern of unauthorized absences and tardiness, and that discharge was an appropriate disciplinary action. From this finding, the court determined that the hearing officer apparently and/or implicitly rejected Castillo's arguments that he was subject to disparate treatment.

*Castillo* is slightly troubling because it broadly labeled the identical issue in both proceedings to be "the wrongfulness of the discharge." This general characterization suggests that when an agency renders a decision that a discharge or other disciplinary action is for "just cause," it precludes a claim that the decision was motivated by other, unlawful rea-

sons. Such a rule obviously would sweep too broadly. It is conceivable that an act of misconduct may warrant discipline, but the discipline nonetheless can be motivated by discrimination. More to the point in *Castillo*, however, was the fact that the employee actually raised the subject of disparate treatment in the administrative proceeding. Although he may not have articulated his discrimination theories and arguments as clearly as he was able to in the subsequent litigation, raising them was sufficient to establish an "identical issue" for purposes of applying collateral estoppel. *Castillo* reinforces the lesson herein: no informed employee with FEHA claims will exhaust the employer's internal administrative processes.

### **Conclusion**

In the last year, the exhaustion of administrative remedies doctrine has taken a beating in the employment context. As a result of *Schifando* and *Williams*, public employees have the green light to bypass the employer's internal administrative processes with regard to FEHA claims and, apparently, related non-FEHA claims. While an employee still has the option of using an employer's administrative process with regard to such matters, the judicial exhaustion doctrine and the preclusive effect that an adverse administrative decision could have in a subsequent lawsuit render rejection of this option a no-brainer.

An unfortunate effect of these recent developments is that public employers will have fewer opportunities to self-correct employment decisions, resolve disputes at the lowest level possible, and mitigate damages. While some may argue that the FEHA's administrative process provides the same opportunities for conciliation and informal dispute resolution as an internal process, this is not so. Merely upon filing an administrative complaint, an employee can request an immediate right-to-sue letter and bypass FEHA's administrative process altogether. As Justice Marvin Baxter recognized in his dissent, the *Schifando* decision means "the road to possible conciliation, amicable settlement, or mitigation of damages will first have to pass through the courthouse." \*

1 The seminal case is *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280.

2 *Id.* at 292.

3 *Id.* at 293; see also *Rojo v. Kliger* (1990) 52 Cal.3d 65, 85, 88 CPER 49, and *Lopez v. Civil Service Commission* (1991) 232 Cal.App.3d 307, 311, 90 CPER 32.

4 Compare *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212 (holding that the exhaustion requirement is not jurisdictional, but merely a procedural prerequisite that can be waived).

5 *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465, 476; *Rojo v. Kliger*, *supra* at 85-86.

6 See e.g., *Palmer v. Regents of University of California* (2003) 107 Cal.App.4th 899, 904-05, 160 CPER 54 (university employee was required to exhaust internal administrative remedies offered by employer before resorting to court on whistleblower wrongful discharge claim); *Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515 (discharged architect was required to exhaust internal grievance procedure before pursuing judicial action for breach of contract, emotional distress, negligent hiring, and fraud).

7 See *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 282, 160 CPER 19.

8 *Ogo Assoc. v. City of Torrance* (1974) 37 Cal.App.3d 830, 834; *Edgren v. Regents of University of California*, *supra* at 520.

9 (2003) 31 Cal.4th 1074, 164 CPER 44.

10 On remand from the Supreme Court, the Court of Appeal reversed this decision in an unpublished opinion. See *Schifando v. City of Los Angeles* (April 27, 2004) 2004 Westlaw 797716.

11 Because the failure to exhaust administrative remedies is considered a jurisdictional defect under California law, it may be raised at any time. *People v. Coit Ranch* (1962) 204 Cal.App. 2d 280, 293.

12 *Schifando*, *supra* at 1091.

13 See *State Personnel Board v. Fair Employment and Housing Commission* (1985) 39 Cal.3d 422, 433, 67 CPER 20 (where case is tried before FEHC, and decision is rendered adverse to the employee, the superior court will independently review the evidence rather than defer to the agency's decision).

14 *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 76, 144 CPER 33.

15 See *Fakuda v. City of Angels* (1999) 20 Cal.4th 805, 816-17 (if fundamental rights are not implicated, substantial evidence standard of review applies to agency decision; in a fundamental rights case, the trial court nonetheless affords the agency's findings a strong presumption of correctness).

16 Cal. S.Ct. Case No. S113275.

17 (2004) 121 Cal.App.4th 708.

18 Gov. Code Sec. 815(a).

19 See *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.

20 *Palmer*, *supra* at 909-10.

21 *Westlake Community Hosp. v. Superior Court*, *supra* at 483-85.

22 *Id.* at 484.

23 *Schifando*, *supra* at 1090-91.

24 *Schifando*, *supra* at 1090; see also *Risam v. City of Los Angeles* (2002) 99 Cal.App.4th 412, 419, 155 CPER 55 (employee's FEHA claim was precluded where employee failed to seek mandamus relief after civil service commission decided that while demotion was not for cause, nor was it due to discrimination or retaliation); *Logan v. Southern California Rapid Transit Dist.* (1982) 136 Cal.App.3d 116 (employee's tort and contract claims were precluded where employee failed to seek mandamus relief from administrative decision upholding his discharge); compare *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 77 CPER 29 (where civil service commission determined that employee should be demoted instead of discharged, and employee failed to seek mandamus review of the demotion decision, he was precluded from bringing judicial claims based on the demotion but not the termination).

25 *Supra*.

26 *Id.* at 72.

27 (2004) 123 Cal.App.4th 1135, 169 CPER 23.

28 *McDaniel v. Board of Education of Mountain View School Dist.* (1996) 44 Cal.App.4th 1618 (employee was not required to exhaust judicial mandamus remedies where adverse decision on her application for early retirement was not rendered after a quasi-judicial hearing); see also Cal. Civ. Proc. Code Sec. 1094.5 (administrative mandamus applies to a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and the administrative tribunal is vested with the power to make adjudicatory decisions).

29 (2001) 92 Cal.App.4th 477, 150 CPER 64.

30 *Id.* at 481.

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# The Uphill Battle of Whistleblowers in California's Local Public Entities

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The California legislature and political leaders proclaim the importance of protecting the public from governmental wrongdoing, corruption, and waste. There is recognition that the best information comes from public employees with inside knowledge. Several California statutes, as well as case law on the free speech rights of public employees, purport to encourage public employees to be whistleblowers and to protect them from retaliation.<sup>1</sup> But, the reality is different.

The honest public employee who has knowledge or suspicions of wrongdoing faces formidable hurdles in “doing the right thing.” The likelihood is that an employee who is an internal whistleblower within a public agency will be labeled a troublemaker, not a team player, a liar, and an incompetent — no matter how good his or her job performance record is. The employee’s message of suspected wrongdoing likely will be given short shrift and will not be investigated impartially. The employee is likely to face retaliation in the form of poor work performance evaluations, unfavorable assignments or transfers, isolation and shunning by coworkers, defamation, and possibly termination.

If the employee has the audacity to become an external whistleblower by reporting the wrongdoing to an outside entity (such as the news media, the district attorney, the Federal Bureau of Investigation, or CalOSHA), retaliation is likely to take the form of swift termination.

Persuading a regulatory or law enforcement agency to undertake a thorough investigation can be a slow, uphill battle. To increase the likelihood that allegations will be taken seriously, the employee may need to obtain the assistance of counsel. Significant legal fees may be incurred, with little chance of recovery. Even with assistance, it is unlikely that a criminal prosecution will be initiated or that significant sanctions will be imposed on the public employer or public officials.

The loss of a job, the stigma of being “fired,” and the hostility displayed by potential employers leery of hiring a whistleblower are just the start of the whistleblower’s problems.

Obtaining justice through a legal claim for retaliatory termination against a local public entity is very challenging. The attorney representing a whistleblower must carefully anticipate and prepare for the minefield of potentially fatal employer defenses. He or she also must be prepared to work at least twice as hard as the defense counsel in order to obtain a settlement or judgment. The challenges often exceed those of handling a whistleblower case in the private sector.

Legal hurdles that arise in a public sector whistleblower case include: (1) the doctrine of exhaustion of internal agency remedies; (2) the doctrine of exhaustion of external administrative remedies and their interplay with the internal agency remedies; (3) compliance with the California Tort Claims Act; (4) governmental tort immunities and the unsettled case law interpreting them; (5) the overlay of constitutional law principles as they relate to public employees (both at-will and those with a protected property interest); and (6) factors that hinder reimbursement for the plaintiff’s attorneys’ fees and costs.

A public employee who opts to be a whistleblower is likely to be disappointed in a quest for “justice.” The downsides greatly exceed the upsides. Whistleblowing is a situation where doing the right thing must be its own reward. It will demand tremendous personal sacrifice of the whistleblower. Whistleblowers may forfeit their public employment career and their public pension, impair their mental health, damage their reputation, adversely impact their family life, and incur liability for substantial attorneys’ fees and costs to prosecute their claims. Even if a whistleblower obtains a settlement or judgment, he or she is likely to view it as inadequate, given the level of personal sacrifice involved.

If the public hopes to ensure that public employees with knowledge of wrongdoing come forward, substantial reforms

are necessary. This article focuses on two issues: (a) the doctrine of exhaustion of internal agency remedies, and (b) attorneys’ fees and costs.

### ***The Doctrine of Exhaustion of Internal Remedies***

Efficacy of whistleblower lawsuits demands changes to the doctrine of exhaustion of internal remedies. In his dissenting argument in *Palmer v. Regents of the University of California*,<sup>2</sup> Associate Justice Earl Johnson of the Court of Appeal, Second Appellate District, is persuasive:

An employee alleging a common law cause of action for tortious wrongful termination in violation of public policy (hereafter “Tameny” claim) should not be required to first resort to his or her employer’s internal grievance procedure, unless he or she is contractually or statutorily obligated to do so, or the trial court determines in the exercise of its discretion that resort to the employer’s administrative remedy would be consistent with the principles underlying the doctrine of primary jurisdiction.

*The loss of a job, the stigma of being ‘fired,’ and the hostility displayed by potential employers...are just the start of the whistleblower’s woes.*

**Current law.** The doctrine of exhaustion of internal agency remedies is

the prime “killer” of plaintiffs’ legal claims of termination in retaliation for whistleblowing. This court-made doctrine is an affirmative defense for public agencies, and it holds that an employee alleging retaliation, including suspension, layoff, or termination, must timely exhaust any internal agency remedies or forever lose the right to pursue his or her legal claim against the agency.

The origin of the doctrine is *Westlake Community Hospital v. Superior Court*,<sup>3</sup> a case that involved a doctor who was denied privileges at a hospital. Over the years, the courts have expanded the doctrine to apply to all public employees (both those at-will and those with property interests in their positions).<sup>4</sup>

The majority opinion in *Palmer* considered exhaustion of internal remedies in the context of the University of California, a constitutionally created public agency. Without first

exhausting U.C.'s internal agency remedies, the plaintiff whistleblower filed a lawsuit for wrongful termination in violation of the public policy set out in Labor Code Sec. 1102.5(b), which prohibits retaliation for reporting unlawful activity. Relying on *Westlake*, the court held that Gov. Code Sec. 8547.10(c) (a whistleblower protection statute applicable to U.C. employees) demands that a U.C. employee who alleges retaliation for having made a protected whistleblowing disclosure first exhaust internal agency remedies or be barred from pursuing a lawsuit. The court further held that the plaintiff's sole remedy was a statutory claim for damages under Gov. Code Sec. 8547.10, not a *Tameny* cause of action, citing the governmental immunity of Gov. Code Sec. 815(a).<sup>5</sup> The court affirmed summary judgment for the defendant.

**Prospective California Supreme Court Decision in Campbell.** A case that may affect the doctrine of exhaustion of internal agency remedies is pending before the California Supreme Court. In *Campbell v. Regents of the University of California*,<sup>6</sup> the issue is whether a U.C. employee must exhaust the university's internal administrative remedy before filing statutory causes of action under the False Claims Act<sup>7</sup> and under Labor Code Sec. 1102.5. Neither statute contains an express exhaustion requirement.

The plaintiff in *Campbell* internally reported her complaint that U.C. was violating the state's competitive bidding laws. She subsequently reported her concerns to the FBI, which began an investigation. Before filing her lawsuit, she did not file a complaint pursuant to U.C.'s procedure for reporting improper governmental activities. The lower court<sup>8</sup> sustained U.C.'s demurrer and dismissed the case on the ground that the plaintiff had failed to exhaust her administrative remedies.

*Campbell* provides the California Supreme Court with the opportunity to clarify how a public employee-whistleblower can invoke protection from retaliatory termination and how Labor Code Secs. 1102.5 and 1105 should be construed to operate, given the doctrine of exhaustion of

internal remedies. The court's decision may turn on Labor Code Sec. 1102.5(e), a 2003 amendment which provides that a public employee who makes a "report" (not defined by statute) to his or her own employer is protected from retaliation. Previously, the employee had protection only if he or she made disclosure to an outside law enforcement or other regulatory agency.<sup>9</sup>

*Campbell* also is a chance for the California Supreme Court to clarify whether a plaintiff who claims protection under Labor Code Sec. 1102.5 must exhaust his or her administrative remedy with the California Labor Commissioner under Labor Code Sec. 98.7 prior to filing a lawsuit for a direct statutory violation. Neither of the parties raised this issue.

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#### **Possible Responses to Exhaustion Defense**

**The public agency has no regulations to exhaust.** In order to claim the affirmative defense that the plaintiff failed to exhaust an agency's internal remedies, public agencies must make specific administrative remedies

available to a plaintiff.<sup>10</sup> Hence, most public agencies have adopted regulations or ordinances that establish a grievance procedure for employment claims and/or a special procedure dealing only with whistleblower claims.

Some public agencies, especially small ones, appear to have no grievance procedure available to a terminated employee. However, this may be a trap for the unwary; a public agency's grievance procedure may be so poorly drafted it does not clearly specify it even applies to terminations. Nevertheless, the public agency is likely to argue that the burden is on the plaintiff to ask about the procedure's applicability; and if the plaintiff failed to make such inquiry, that failure may bar a subsequent lawsuit.<sup>11</sup>

**Waiver due to the public agency's failure to provide notice of its grievance procedure.** Where a public agency terminates an employee and fails to inform him or her of the applicability of a grievance procedure, the plaintiff can argue that the agency waived its affirmative defense of the fail-

ure to exhaust internal remedies. *Westlake*<sup>12</sup> supports this view.

One trap for the unwary plaintiff is that the public agency may be responsible only for informing the plaintiff of the *existence* of the internal grievance procedure. In the now unpublished *Campbell v. U.C. Regents*,<sup>13</sup> the court asserted that the *Westlake* notice requirement does not include notice of the legal consequences of failing to utilize the internal remedy.

Another potential trap is that the seemingly permissive language contained in a grievance procedure or statute, i.e., “may file” or “has the right to file,” does not mean that the plaintiff can escape the affirmative defense of failure to exhaust internal remedies.<sup>14</sup>

***Equitable estoppel.*** One exception to the bar of failure to exhaust internal remedies is equitable estoppel. Where the public agency gives the inquiring employee misleading or erroneous information about exhaustion of internal remedies, the court may bar the defendant from asserting its affirmative defense.<sup>15</sup>

***Unconscionable time limit for filing a grievance.*** A plaintiff who fails to file a grievance prior to a deadline specified in the grievance procedure can argue that the time limit is unconscionable on both procedural and substantive grounds. Support for this contention can be found in cases discussing unconscionably short time limits for employees invoking binding arbitration provisions in an employer’s policy.<sup>16</sup> But be forewarned that a court has upheld a filing period as short as 10 workdays following the termination.<sup>17</sup> Such a short period is unfair to a terminated employee who may be upset and unrepresented. Some public agencies provide for a longer filing period, such as 90 days.<sup>18</sup>

***Exceptions to doctrine of exhaustion of internal remedies.*** A plaintiff may argue that exceptions to the doctrine apply because of inadequacies of the grievance procedure. A sketchy grievance procedure may fail to ensure fundamental fairness.<sup>19</sup> For example, a procedure might be silent with regard to (1) whether a full evidentiary hearing or something

less is to be provided; (2) whether there is any provision for an impartial decisionmaker; (3) whether the complainant has a pre-hearing right to receive copies of documents used against him or her; (4) whether the complainant has the right to subpoena witnesses; (5) who has the burden of proof and the burden of producing evidence; (6) whether the complainant has a right to present witnesses under oath and documentary evidence; (7) whether there is a right to cross examination; and (8) whether there is a requirement for a reasoned written decision.

Whether the exhaustion doctrine is excused because of the alleged inadequacy of the administrative remedy must be determined on a case-by-case basis with the focus on whether the need for agency expertise outweighs other factors.<sup>20</sup>

A second exception applies if the subject of the controversy is beyond the agency’s jurisdiction. This encompasses situations where the public agency lacks the authority — statutory or otherwise — to resolve the underlying dispute between the parties.<sup>21</sup>

For example, in *Embury v. King*,<sup>22</sup> the court held that the University of California’s tenure committee had no specialized knowledge regarding the state’s public policies and, therefore, no expertise in determining whether the professor’s discharge was a wrongful termination under *Tameny*. Under these facts, the university could not assert as an affirmative defense the plaintiff’s failure to exhaust his internal remedies.

A plaintiff also can argue that pursuit of an internal remedy would be futile. The lack of impartiality of the public agency’s final decisionmaker may provide a basis for futility. For example, the decisionmaker may have made public statements defaming the plaintiff or may have been the target of the whistleblower’s charge. Or the decisionmaker may have issued a prior report concluding that the whistleblower’s complaints were without merit. In such situations, the plaintiff can argue that the decisionmaker’s bias makes it inevitable that the decision will be against the complainant and that exhausting the internal remedy would be futile.<sup>23</sup>

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**Exhaustion requirement and preclusive effect on other claims.** Where a whistleblower has multiple potential causes of action, he or she faces the potential nightmare of having to exhaust administrative remedies in multiple forums before ever getting to court. This can include the grievance procedure established by the employer, the administrative remedies afforded by the California Department of Fair Employment and Housing, and remedies available through the Labor Commissioner under Labor Code Secs. 98.7 and 1102.5.

The expense and potential conflicts fostered by litigating in multiple forums is significant. The option of simply filing a lawsuit in superior court and avoiding the administrative forums means there is only one decisionmaker, who is impartial. And a court proceeding ensures the full panoply of litigation rights including discovery and the right of cross-examination. Moreover, it is not necessary to file a writ of mandate to challenge an adverse ruling by the administrative forum.

In addition to the practical considerations, some plaintiffs have argued that having to go to multiple administrative forums violates legislative intent and is fundamentally unfair. In other words, the plaintiff asserts that exhaustion of administrative remedies with a specialized agency trumps any requirement to exhaust internal remedies afforded by the public employer.

The starting point for this argument is *Schifando v. City of Los Angeles*.<sup>24</sup> In that case, a municipal employee who had not exhausted his internal agency remedies claimed discrimination in violation of the California Fair Employment and Housing Act. But he exhausted his remedies under the FEHA and obtained a right-to-sue letter. He then filed a lawsuit under the FEHA but did not allege any other causes of action. The court held that Schifando did not have to exhaust his internal remedies with the city. Since the primary intent of the FEHA is to vindicate civil rights, a plaintiff can choose between his civil service remedies and those provided by the FEHA. Requiring a plaintiff to pursue remedies under both would frustrate the legislature's intent.

In *Williams v. Housing Authority of the City of Los Angeles*,<sup>25</sup> the question was whether a public employee who asserts both FEHA claims and unrelated, non-FEHA tort causes of action is barred from suing if he fails to exhaust the internal remedies of his employer. The Court of Appeal held that imposing an internal exhaustion requirement on the FEHA claim is precluded by *Schifando*,<sup>26</sup> but whether an internal exhaustion requirement can be imposed on non-statutory claims depends on whether the resolution of those claims will have a preclusive effect on the FEHA claim. If it would, the internal exhaustion requirement is excused.

There are no reported California appellate cases addressing the internal exhaustion requirement where a whistleblower has filed an administrative complaint with the Labor Commission under Labor Code Sec. 98.7.<sup>27</sup> Given the rationale of *Williams*, a plaintiff could argue that an exemption to the exhaust rule likewise should apply.

### **Attorneys' Fees and Costs for Whistleblowers**

A second reform is necessary to remove a major deterrent to whistleblowers: A plaintiff-whistleblower who prevails on a *Tameny* claim for tortious wrongful termination in violation of public policy should have the right to recover attorneys' fees and costs from the defendant.

Currently, it is extremely difficult for a California public employee-whistleblower who files a *Tameny* claim to recover reasonable attorneys' fees and costs from a public employer that terminated the employee in retaliation. This is particularly inequitable where the whistleblower has reported the corruption, mismanagement, or other legal violations to an outside law enforcement agency that commenced an investigation. The plaintiff's action may have benefited the public by bringing to light governmental corruption or by putting pressure on the public entity to enact reforms.<sup>28</sup>

The unavailability of attorneys' fees and costs has several practical effects that combine to serve as a powerful deterrent to potential whistleblowers. First, given the com-

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plexity of public sector whistleblower cases and the significant litigation costs, many attorneys in the plaintiff's bar are extremely reluctant to take on such cases on a contingency fee basis. Many public employees cannot afford to pay for representation on an hourly basis. Thus, many potential whistleblowers are unable to obtain legal representation and thus expose their knowledge of governmental wrongdoing. The public is ill served by this disincentive.

Second, without the "stick" threatened by the potential liability for attorneys' fees and costs, public employers are unlikely to take seriously reports of governmental corruption, waste, mismanagement, and illegal conduct. As a result, they are unlikely to conduct thorough investigations to uncover the truth.

Third, under *Satrap v. PG&E*,<sup>29</sup> plaintiffs are very unlikely to recover attorneys' fees and costs under Code of Civil Procedure Sec. 1021.5, the private attorney general statute. That section confers discretion on a trial court to award legal fees to a prevailing party if the plaintiff can show that the litigation (1) enforced an important public right; (2) conferred a significant benefit on the general public or a large class of persons; and (3) imposed a financial burden on the plaintiff that was out of proportion to his individual stake in the matter. In assessing the plaintiff's personal economic interest, the court will look at the estimated value of the case at the time the vital litigation decisions were being made.

That final element is the *coup de grace* to a plaintiff-whistleblower who seeks to recover attorneys' fees and costs. In *Satrap*, the court found that the jury verdict of \$523,750 barred recovery of any award of attorneys' fees and costs, which were tallied at \$1.2 million. The denial of attorneys' fees in that case was especially unjust given the tremendous benefit triggered by the plaintiff's whistleblowing.<sup>30</sup>

The reality is that most public employers will not thoroughly investigate themselves when government corruption is charged. Since plaintiff whistleblowers usually will find that internal reporting leads to retaliation and cover-up, external reporting to a law enforcement agency is necessary

to ensure a thorough and impartial investigation. In order to avoid getting bogged down in exhausting internal agency remedies that frequently do not provide plaintiffs with adequate discovery or due process rights, plaintiffs will be compelled to file lawsuits alleging *Tameny* causes of action. Thus, as long as the internal exhaustion requirement remains law, provision should be made to award prevailing whistleblowers their reasonable attorneys' fees and costs on *Tameny* causes of action. \*

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1 Gov. Code Secs. 53296 et seq. provide whistleblower protection to employees of local public agencies; Secs. 8547 et seq. provide whistleblower protection to employees of the State of California; Gov. Code Secs. 9149.20-9149.23 provide whistleblower protection to individuals making disclosures to the investigating committees of the state legislature.

California Labor Code Secs. 6310-6312 provide whistleblower protection for employees (public or private) who make internal or external complaints about workplace health and/or safety issues; Sec. 1102.5 provides whistleblower protection to a public employee who makes a "report" to his or her employer. Public employees (as well as private sector employees) also are protected when they make disclosures to another governmental or law enforcement agency.

Gov. Code Secs. 12653 et seq. comprise the False Claims Act, which provides a financial incentive for whistleblowers to help uncover and prosecute fraudulent claims made against state and local governmental entities.

The California Constitution, Art. I, Secs. 2 and 3, provide the right of free speech and the right to petition the government for redress of grievances. Employer retaliation for exercising such rights can support a cause of action for tortious wrongful termination in violation of public policy. *Green v. Ralee Engineering* (1988) 19 Cal.4th 66, 85-87; *Kirchmann v. Lake Elsinore USD* (1997) 57 Cal.App.4th 595, 126 CPER 29; *Ceballos v. Garcetti* (9th Cir. 2003) 361 F.3d 1168, 1174.

2 (2003) 107 Cal.App.4th 899, at 917-918, 160 CPER 54.

3 (1976) 17 Cal.3d 465.

4 For a discussion of the context to which *Westlake* applies, see *Rojo v. Kliger* (1990) 52 Cal.3d 65, 86, 88 CPER 49; also see the history of the doctrine and a critique of it in the dissent in *Palmer v. Regents of U.C.* (2003) *supra* at 910, 915, rev. den. 2003 Cal. Lexis 4559.

5 *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1425, 93 CPER 43, held that the governmental immunity of Gov. Code Sec. 821.6 barred the plaintiff state employee's *Tameny* action based on the public policy of Gov. Code Sec. 19683, but held that the immunity did not bar the plaintiff's direct statutory cause of action under Sec. 19683; *Bragg v. East Bay Regional Park Dist.*, 2003 U.S. Dist. Lexis 23423 (Gov. Code Sec. 815[a] immunity bars plaintiff's tort claims and *Tameny* claim for wrongful termination against the public employer, citing *Palmer*); *Burden v. County of Santa Clara* (2000) 81 Cal.App.4th 244 (public entity is immune from liability under Gov. Code Sec. 818.8 to public employee for fraud and for statutory cause of action under Labor Code Sec. 970 for misrepresentations inducing employment).

But Gov. Code Sec. 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity. There can be liability if the enactment is designed to protect against the risk of a particular kind of injury. Whistleblower statutes and anti-retaliation statutes fall under this category. Also, while Gov. Code Sec. 815.2 provides that a public entity is not liable for injury resulting from the act or omission of an employee where the employee is immune from liability, the section contains an important exception: "except as otherwise provided by statute." Some whistleblower statutes specifically define an "employer" as including public entities and "employee" as including public employees. An example is Labor Code Secs. 1102.5, 1106.

Contrary to *Palmer*, other cases hold that a *Tameny* cause of action can be brought against a public entity, despite various governmental immunities. *Gardenshire v. Housing Authority of Los Angeles* (2000) 85 Cal.App.4th 236, rev. den. 2001 Cal. Lexis 1623, 146 CPER 60 (no discussion of governmental immunities); *Colores v. California State University* (2003) 105 Cal.App.4th 1293, 159 CPER 37 (no discussion of government immunity); *Southern California Rapid Transit Dist. v. Superior Court* (1994) 30 Cal. App.4th 713, 725-726; *Fenton v. Groveland Community Services Dist* (1982) 135 Cal. App.3d 797, 808, disapproved on other grounds in *Katzberg v. Regents of U.C.* (2002) 29 Cal.4th 300, 328, fn. 30, 158 CPER 64.

It is important to note that California governmental immunity statutes are not applicable to claims brought under federal civil rights statutes, including 42 USC Sec. 1983.

6 2003 Cal. Lexis 1578.

7 Gov. Code Sec. 12653.

8 2002 Cal.App. Unpub. Lexis 11973.

9 Subsection (e) codifies the holding in *Gardenshire v. Housing Authority*, *supra* at 242-243.

10 *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1105.

11 *Bockover v. Perko* (1994) 28 Cal.App.4th 479, 490. In *Bogan v. Ironhouse Sanitary Dist.* (Case No. C-400249 in Contra Costa Superior Court, 2004) the agency argued that the plaintiff, my client, had this burden of inquiry, even though the agency failed to inform my client upon his termination of his right to file a grievance. When he was terminated, I argued that the agency waived its affirmative defense. I also argued that the plaintiff had no duty to inquire as to the applicability of the grievance procedure because no reasonable person reading it could believe that it was applicable to him. The case settled for \$330,000 on or about November 4, 2004, after two days of mediation.

12 *Supra* at 477-478.

13 *Supra*.

14 *Gutierrez v. RWD Technologies Inc.* (E.D.Cal. 2003) 279 F.Supp.2d 1223, 1228 (despite the permissive language of "may file a complaint" with an administrative agency, California courts consistently have held that administrative remedies must be exhausted before a civil claim may be filed).

15 *Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476, 486-487. For the tough burden of proving equitable estoppel, see *Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 990; *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1449-1450.

16 See *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267; *Stirlen v. Supercuts* (1997) 51 Cal.App.4th 1519, 1542, 122 CPER 99.

17 *Williams v. Housing Authority of City of Los Angeles* (2004) 121 Cal.App.4th 708, 716, 168 CPER 32.

18 *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1083, 164 CPER 44 (city charter provides for a time period of 90 days following the date of the alleged illegal action).

19 *Murden v. County of Sacramento* (1984) 160 Cal.App.3d 302, 311.

20 *Rojo v. Kliger*, *supra* at 87-88.

21 *County of Los Angeles v. Department of Social Welfare* (1953) 41 Cal.2d 455, 457; *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926.

22 (2001 N.D.Cal.) 191 F.Supp.2d 1071, 1085.

23 *Townsel v. San Diego Metropolitan Transit Development Bd.* (1998) 65 Cal.App.4th 940, 953, rev. den. 1998 Cal. Lexis 6799,

132 CPER 71 (a civil service employee is entitled to a neutral decisionmaker in a post-termination hearing); *Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 681-682 (an at-will city employee is entitled to a neutral final decisionmaker regarding his termination, but futility is a narrow exception to the general rule).

In *Bogan v. Ironhouse Sanitary Dist.*, *supra*, cited in footnote 2, the subject of Bogan's whistleblowing was the conflict of interest of certain board members under Gov. Code Sec. 1090. Prior to termination, two board members made defamatory statements about Bogan in the local newspaper. Under the agency's grievance procedure, the board was the final decisionmaker. Prior to Bogan's termination, the district issued a public report asserting that none of Bogan's complaints had merit. Given these facts, I argued it would be futile for Bogan to exhaust his internal remedies.

24 *Supra* at 1092.

25 *Supra*.

26 *Supra*.

27 Labor Code Sec. 98.7 provides an administrative remedy for "discrimination" claims, which include retaliation claims for whistleblowers under Labor Code Sec. 1102.5. 8 CCR 13501-13508; DLSE Enforcement Policies and Interpretations Manual, June 2002, Sec. 17. The time limit for filing a complaint with the Labor Commissioner is within six months of the occurrence of the alleged discriminatory or retaliatory action. The Labor Commissioner is to investigate the claim, prepare an investigative report, and may hold a hearing to fully establish the facts. The Labor Commissioner's office can make a determination that a violation has occurred, issue a cease and desist order, and bring a court action against the employer. The Labor Commissioner may dismiss a complaint on a finding that no violation has occurred. The administrative remedies are limited to reinstatement, reimbursement of lost wages and interest, and reasonable attorneys' fees for any administrative

hearing, but no other damages. Subsequently, a complainant can file a court action.

A plaintiff can elect not to file an administrative claim under Labor Code Sec. 98.7. Instead, he or she may file a lawsuit alleging a *Tameny* cause of action, i.e., tortious wrongful termination in violation of Labor Code Sec. 1102.5. *Liebert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1704-1705, 111 CPER 56 (the administrative remedy of Labor Code Sec. 98.7 is not exclusive; exhaustion of administrative remedies is not required for a *Tameny* cause of action). But *cf. Guttierrez v. RWD Technologies Inc.*, *supra* at 1227. In such a situation, the plaintiff faces the defendant's affirmative defense of failure to exhaust the employer's internal remedies and must argue why it should not apply.

28 In *Bogan v. Ironhouse Sanitary Dist.*, *supra*, Bogan revealed information to the local district attorney about conflicts of interest of certain board members and other potential legal violations. With my assistance, Bogan prepared a written summary and gathered exhibits for the D.A., who commenced a criminal investigation and subpoenaed ISD officials and employees to testify before a grand jury. The D.A. concluded that conflicts of interest in violation of Gov. Code Sec. 1090 (a felony statute) had occurred, but declined to prosecute. However, he pressured ISD to enact significant reforms and, at the deposition, he testified that, but for Bogan's complaints and the subsequent investigation, ISD would not have made the significant reforms it did.

29 (1996) 42 Cal.App.4th 72, 80, review den. 1996 Cal. Lexis 2595.

30 The Public Utilities Commission denied PG&E's application for recovery from ratepayers of \$90 million.

# Education: A Civil Right

*Gregory J. Dannis*

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One of the presidential candidates declared proudly during the debates that “Reading is a civil right.” I suspect that neither his opponent nor members of the viewing public ever thought to disagree with this seemingly self-evident truth. This statement, however, has resonated in my mind and bothered me ever since.

Education has been a fundamental right in California since the passage of our original Constitution. Many believe that entitlement to education is even more deep-seated, that it is a human right, a natural right, and a civil right. If this is true, education is necessary for freedom, and the maintenance of a reasonable quality of life. If this is true, the expectations placed on our public education system are immense and more complex than one might suspect, if one examines and truly understands the nature of human, natural, and civil rights.

A civil right is an enforceable right or privilege that, if interfered with by another, gives rise to an action for injury. These rights are inherent in a civilized society, and flow to every individual. They are absolute, not variable or situational, and are never to be tempered or tampered with.

What kind of rights are we talking about? The right to vote. The right to speak freely, especially about disagreeable subjects. The right to be free from discrimination based on status, such as race, gender, age, disability, and in some venues, sexual orientation. The right to not be deprived of your property without due process of law. The right to equal treatment and protection under the law.

These “natural laws” are codified in statutes, constitutions, constitutional amendments, and court decisions. These declarations do not *create* the rights; rather, they merely capture them on paper for all to see and follow. They appear in documents such as the Declaration of Independence, the Bill of Rights and, more recently, the Universal Declaration of Human Rights.

In our country, expressions of these rights are stated in the positive and the negative. The federal Constitution states what Congress “can do,” and the Bill of Rights secures individual rights, thereby setting forth what the federal government “cannot do.” Thomas Jefferson said, “A Bill of Rights is what the people are entitled to against every government on earth.” The Fourteenth Amendment ensures that no *state* “shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States...or deprive any person of life, liberty, or property without due process of law, or deny to any person...equal protection of the laws.”

When a right or privilege is labeled a “civil right,” it takes on great power. The state is obligated to protect it at all costs, and every individual expects to receive these privileges. It becomes a right that is deserved, and not a privilege that needs to be earned. Recently, however, we have seen a careless use of the concept of civil rights. Union buttons assert that fully paid health care is a civil right. Protesters decry the lack of adequate public housing as denial of a civil right. And, of course, there is that statement that got me started: “Reading is a civil right.”

Adequate health care and housing and the ability to read are unquestionably important to maintaining freedom and a reasonable quality of life. But if we begin to label *every* societal aspiration as a civil right, we dilute the true meaning of the term, and we instill in our citizens an unwarranted sense of absolute entitlement. The line between what truly comprises such a right and that which does not becomes blurred if not indistinguishable, and the sense of absolute entitlement challenges our education system from the outside and within.

Our legislature continues to act as if it believes that furthering and protecting the civil and constitutional right to an education demands hundreds of new laws every year. This year, the legislature passed bills that:

- Prohibit bus drivers from using cell phones.
- Urge the accurate and comprehensive portrayal of

human rights violations and other historical atrocities in social science textbooks.

- Would have established the “California Racial Mascots Act.” (An opponent called the bill “political correctness run amok.” The bill’s author called it a civil rights issue. The governor vetoed it.)
- Require employers to provide sexual harassment training to all supervisors.
- Amends the Education Code to more closely mirror the bases for discrimination set forth in the Fair Employment and Housing Act. These expanded categories will apply to personnel policies and practices, including failure or refusal to interview or hire an applicant, and to any question posed to an applicant.
  - Urge passage of the federal Employee Free Choice Act. (This law declares that “freedom to join a union is recognized as a fundamental human right,” and that “a worker’s fundamental right to choose a union is a public issue that requires public policy solutions, including legislative change.”)
- Would have allowed teachers to voluntarily solicit feedback from their pupils concerning a course taught or the teacher’s performance. (The governor said current law already permits this, and he vetoed the bill.)

Which among these bills reinforce the concept that education is a civil right, and which merely muddy the issue? A stark example of this distinction can be found in a vetoed bill that contained various declarations regarding the purpose of public education in California and set forth the principles which should guide the operation and future development of public schools.

Governor Schwarzenegger is in agreement with making California’s education system the best in the world, but he has cautioned that “great care should be taken that the goals and principles are achievable both fiscally and programmatically. This measure creates expectations that the state will deliver an educational system without providing specific programmatic changes needed to achieve the gen-

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eral goals and principles in the bill.” He continued, “While I agree with much of the intent expressed, I firmly believe government should deliver what it promises. While well meaning in its intent, I am concerned this bill could create grounds for litigation against the state in the future for failing to meet its ambitious goals.”

There, in simple words, is a message to not complicate the meaning of a civil right — in this case education — by increasing the already absolute level of expectation placed on the system.

Some may misconstrue this as a defeatist approach, as in “don’t make promises you can’t keep,” an obviously flawed slogan during an election campaign. But this is not the case. The point is that “extraneous legislating” detracts from the real work that needs to be done to protect our civil right of education, and it often overshadows legislative accomplishments.

For example, this year, due to the tireless efforts of Senator Dede Alpert, we finally have meaningful reform in the categorical funding system of our schools. Beginning in 2005–06, nearly 30 categorical programs representing over \$2 billion will be consolidated into six block grants organized according to broad goals instead of narrow programs. Districts will have more flexibility to transfer funds among programs and into programs that have encroached on general fund revenues.

This is real reform. And, it may enhance a district’s ability to protect, preserve, and deliver the civil right of education to its students.

There also is potential for reform in the recently released California Performance Review. In the area of K-12 education, the major recommendations include:

- Restructuring the role of the Secretary of Education.
- Regionalizing the educational infrastructure by consolidating County Offices of Education.

*Districts will have more flexibility to transfer funds among programs and into programs that have encroached on general fund revenues.*

- Eliminating unnecessary reports required by the Education Code.
- Establishing qualifications for chief school business officers.
- Establishing performance-based contracts between the state and school districts.
- Improving special education hearing and mediation processes.
- Balancing career technical education and college preparation in high schools.

According to the Legislative Analyst’s office, many of these recommendations are inferior to those made in previous studies, like the Master Plan for Education and the 1996 Report of the California Constitutional Revision Commission. Indeed, several of the recommendations are controversial, like the elimination of County Offices of Education. And some fly in the face of recent developments. For example, although one recommendation calls for more vocational educational opportunities, such courses have been in decline for decades, with the emphasis shifting to classroom academics.

This trend has intensified with the No Child Left Behind Act, which holds schools accountable for student performance on high-stakes, standardized tests and requires “highly qualified teachers” only in core academic areas.

The reality is that 38 percent of the country’s high school seniors who do not enroll in two- or four-year colleges would benefit from vocational education.

These kinds of new laws and studies represent the potential for *real* change and improvement of our education system. They display a true trusteeship of the civil right that is education.

By contrast, one might question how the civil right of education has been furthered by the legislature’s creation of:

- The Week of the Teacher.
- Children’s Memorial Day.

- Student Volunteer Day.
- Family Empowerment Month.
- Equal Pay Day.

All of these commemorations no doubt arise from good intentions, but with an education system under siege and attack, and a state on the brink of bankruptcy, does the drafting, amending, debating, and voting on these measures represent time well-spent? Do such measures acknowledge the immensity of the system and the obligations placed on it? California's 9,000 schools enroll 6.5 million students; they are overseen by thousands of elected school board members in addition to 58 county offices with their own elected boards. The K-14 budget accounts for 46.8 percent of California's \$79 billion general fund. Those precious dollars must be expended to provide not only a fundamental civil right, but to preserve a democratic society.

To address that challenge, our laws must be substantive, not merely symbolic, and written with an intentional lack of clarity, or driven by a legislator's primary goal of having his or her name on an education bill.

### ***Williams and the Promise of Educational Opportunities***

This year, there is no better illustration of education's status as a civil right than the *ACLU/Williams* litigation and settlement. One education advocate called the *Williams* case "the most important civil rights issue of our time," adding that "the cycle of low expectations for kids of color has to be broken."

The *Williams* suit was filed on May 17, 2000, the 46th anniversary of *Brown v. Board of Education*, on behalf of one million public school students throughout the state. At the heart of the case was the ACLU's claim that California was failing to meet its promise of equal educational opportunities embedded in American law and public policy.

In response to the lawsuit, former Governor Davis, who proclaimed himself to be the "education governor," countersued the local school districts, asserting that any wrongdoing was their fault and not the state's. The governor spent \$20 million in legal fees pursuing what lawyers call a "scorched earth" litigation strategy, part of which involved reducing students to tears during depositions and deposing the ACLU's top expert for 17 days.

Everything changed with the recall election. The new governor said the ACLU was right — all children in California were not receiving an equal education. The new governor ordered that the case be settled, and it was. The governor signed five pieces of legislation that will set aside \$1 billion to repair deteriorating facilities in 2,400 low-performing schools; another \$139 million will be spent this year for textbooks, along with \$50 million to assess facility needs. Initially, most of this money comes from shifting funds, not additional revenue to the schools.

The new laws also set up a uniform complaint procedure for students, parents, and teachers to identify inadequate instructional materials, teacher vacancies and misassignments, and emergency or urgent facility problems.

County Offices of Education will bear primary responsibility for monitoring compliance with the new requirements, including conducting announced and unannounced inspections of schools. Fiscal Crisis and Management Assistance Teams also may play a role in reviewing teacher hiring practices, teacher retention rates, and the extent of teacher misassignments. Current principal training requirements have been augmented to include personnel management, including hiring, recruitment, and retention practices, and insure the sufficiency of instructional materials.

Regardless of one's opinion concerning the *Williams* settlement, one cannot deny that it returned the focus to education as a civil right — something every child deserves, not is required to earn. Rather than passing thousands of new laws to embrace *this* new reform or to create *that* new program, or to add yet another mandate onto the overburdened

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system, the *Williams* case compelled us to return to the core issue: Are we providing the *minimum* level of educational services to all children, regardless of color or income? Can we say we are providing them with their civil right to an education? To date, the answer apparently has been no.

### ***Laws and Lawsuits as Catalysts for Change***

Our state superintendent claims, "Since the filing of the lawsuit, we have made some real, positive steps forward in our schools." This may or may not be the case. The real question, however, is why did it require a lawsuit to enforce a universally recognized civil right?

We are accustomed to lawsuits and litigation being catalysts for educational reform. *Brown v. Board of Education*. *Serrano v. Priest*. Whenever a civil right is involved, the public to which that right flows always will ensure that the entitlement will be received in full. This year is no different. Our state Supreme Court has decided when student poetry is a criminal threat. It has held that an employer is liable for all acts of sexual harassment by supervisors. Our United States Supreme Court ruled that parental custody laws shielded the pledge of allegiance from extinction, and proved what we already knew — that Mom is more powerful than God.

Our Courts of Appeal have held that an employer must protect its employees from sexual harassment by non-employees. In coming months, the state Supreme Court will decide whether a school district is accountable when a charter school collects money from the state and does not provide the level of instruction and educational materials for which the funds were earmarked.

More lawsuits on the horizon will clarify, expand, or constrict the contours of this civil right we call education. One district is suing the state over an Education Code provision and accompanying anti-discrimination regulation defining "gender." A federal court soon will decide whether a high school student may wear a t-shirt to school with a message condemning homosexuality. Once again, the conflict between constitutionally protected speech and a district's

latitude to regulate arguably disruptive student speech will be resolved.

Laws intended to preserve and protect educational civil rights will continue to be the primary source for more challenges. Unhappy voices over No Child Left Behind grow louder every day. The promised level of funding has never materialized. Will the emphasis on testing really result in better-educated kids? Or, as teachers teach more and more to the test, will we discover that, in the long run, spoon-

feeding teaches us nothing but the shape of the spoon? Even if we produce a vast population able to read, will it be able to distinguish what is worth reading?

Equally troubling is the chronically underfunded Individuals With Disabilities Education Act. Statewide, the number of special education pupils remains at the prior year level of 10.10 percent of the total K-12 pupil enrollment. But population is shifting to include those whose disabilities are more costly to accommodate. Statistically, the number of students with a specific learning disability, which is relatively low-cost, is decreasing, while the number of students with autism, requiring higher-cost placements and programs, continues to rise by nearly 20 percent.

All the while, the originally promised 40 percent funding level is stuck at 20 percent of the average per pupil expenditure. An Assembly Joint Resolution passed this year "petitions" Congress and the President to live up to their 40 percent promise; to do so would mean over \$1 billion more in annual revenue for California education.

This brings us full circle to the origin of civil rights in this country. Our founding fathers cried for an end to taxation without representation and petitioned the King for independence. Now our state legislature is petitioning the equally distant elected kings in Washington for the same relief.

This brings us full circle to the origin of civil rights in this country. Our founding fathers cried for an end to taxation without representation and petitioned the King for independence. Now our state legislature is petitioning the equally distant elected kings in Washington for the same relief.

### ***An Educational Bill of Rights***

When we fully understand education as a civil right, we appreciate not only its challenges, but also its beauty. It seems our critics always far outnumber our supporters. It is easy to

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criticize, and too many take pleasure in the exercise. But that robs us of the pleasure of appreciating some of education's finest achievements. If not for education, there could be no informed debate over whether medical benefits, housing, union affiliation, or indeed, reading, are civil rights. Only if we can fulfill our obligation to make this civil right a reality will other fundamental rights be achieved and preserved.

How can this happen? Well, it *is* happening, despite the many obstacles placed in our way. Thousands of school board members, superintendents, principals, teachers, and staff already know this to be true. Perhaps we should heed the advice of Thomas Jefferson and create our own "Educational Bill of Rights" to guard against the government of which we are a part. What might some of those rights be?

First, board members, superintendents, principals, teachers, and staff must be enabled through adequate support, resources, and time to perform their jobs to their full potential.

Second, with all due respect to the well-meaning but largely uninformed reformers, lawmakers, and critics outside and within the system, take the time to understand what public education really is, what it really needs, and what it does not need. Alternatively, please get out of the way and let the rest of us do our jobs and fulfill our commitment.

Third, every law, rule, regulation, and initiative substantively (not symbolically) must embrace the primacy of

our educational mission to serve all children. If education truly is a civil right, the circumstances that gave rise to the *Williams* lawsuit simply cannot be tolerated.

Fourth, if education is to remain a civil right, there must be as much emphasis placed on the "civil" as there is on the "right." This means a tangible recognition of the critical position public education holds in our civilized society.

Finally, if education is indeed a universal, civil right, there cannot be a system of funding that perpetuates a chasm between the haves and the have-nots. Civil rights are absolute, not variable depending on the historical happenstance of funding schemes.

We know better than to claim our system of public education is as good as it can be. We know it can improve. After all, only mediocrity can be trusted to always be at its best. We also know that education always will be at the center of controversy because there is nothing simple about the profession we practice and the service we provide.

There is no pure right or wrong, or black or white. The greatest controversies usually are not amenable to a "one size fits all" approach, even when confronted by the most well-intentioned who share the same goals.

But we can be certain of one thing: if we allow educators the tools, the time, and the freedom to use their talents without obstructions, education forever will be the most prized civil right in our nation. \*

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**Co-Moderators:**

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❖ **Panel Discussion: “The California Economy”**

Jean Ross, Executive Director, California Budget Project  
Angie Wei, Legislative Director, California Labor Federation, AFL-CIO  
Danny Curtin, Regional Director, Carpenter’s Union

❖ **Panel Discussion: “Interest Arbitration and Collaborative Relationships: Is the Mix Right?”**

Neil Bodine, Attorney, Beeson, Tayer, and Bodine  
Ron Hoh, Arbitrator

❖ **Panel Discussion: “Neutral Update: Mediation, PERB, and ALRB”**

Micki Callahan, Supervisor, State Mediation and Conciliation Service  
John Duncan, Chairman, California Public Employment Relations Board  
Genevieve Shiroma, Chairwoman, California Agricultural Labor Relations Board

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Tom Sher, Vice President, Driver Alliant Insurance Services, Inc.

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# Pension Reform — Who Will It Help?

*Katherine Thomson, CPER Associate Editor,  
Carol Vendrillo, CPER Editor*

***Is Governor Schwarzenegger accurate when he calls the public pension system, 'outdated' and a liability to taxpayers? Or is CalPERS on the money when it disputes the 'myth' that defined contribution plans cost less? When the battle is over, who will come out ahead?***

The governor has put his muscle behind legislation that would dramatically change the pension rights of newly hired public employees in California. The proposal by Assembly Member Keith Richman (R-Northridge) would place all employees hired on or after July 1, 2007, into a defined contribution plan rather than the defined benefit pension plan in which current and former public employees are enrolled. The governor asserts that the current pension system is “outdated” and a liability to taxpayers. Leaving out a long history of fluctuating pension costs, he related in his State of the State address that the state’s pension contribution costs for its employees “have risen from \$160 million in 2000 to \$2.6 billion this year.” Other public entities have experienced similar pension obligation increases in recent years, after paying little or nothing in contributions when the stock market was booming.

One outspoken critic of the governor’s proposal is Alberto Torrico (D-Newark), who chairs the Assembly Public Employees, Retirement, and Social Security Committee. He voices the view that, at least in the short run, the state would not save much money shifting to the 401(k)-type system. Torrico and others concede that the current system is not perfect, but he cautions against a “meat cleaver” approach to the problem.

Recent newspaper articles blame powerful public employee unions for running up pension costs by demanding enhanced benefit formulas from the legislature and from Governor Gray Davis. As expected, public employee unions have committed their considerable strength to beat back the assault on a major component of public employee compensation. Many of their claims are backed up by the California Public Employees Retirement System, which asserts that employee benefit increases are only a fraction of the state’s problem. The CalPERS website

includes numerous articles and links to information relevant to the pension plan debate.

### ***Governor Calls Extraordinary Session***

Assembly Member Richman first introduced defined contribution pension legislation in December. Assembly Constitutional Amendment 5 would add Section 8 to Article XX of the state Constitution. It would mandate that employees hired by a public entity on or after July 1, 2007, be enrolled in a defined contribution plan, not a defined benefit plan. The bill would place limits on the contributions that a public employer could make to the pension plan and would allow current plan members to transfer their retirement funds to the defined contribution plan. ACA 5 provides that local agencies could pay higher contributions on the approval of two-thirds of the electorate. Section 8 could be amended without returning to the electorate if three-quarters of each house of the legislature voted for an amendment in two consecutive sessions.

Not content with last year's alterations in the pension system for new employees (see story in *CPER* No. 167, pp. 56-57), the governor joined Richman's cause. A month after Richman introduced ACA 5, the governor called an extraordinary session to consider several bills, including pension legislation similar to ACA 5. ACAX1 1, also sponsored by Richman, omits the provisions fixing the contribution limits for public agencies and the clause allowing the legislature to amend the proposed section without returning to the electorate.

The extraordinary session bill contains language that would make it the prevailing law if it receives more votes than a pension initiative, such as one introduced in January by the Howard Jarvis Taxpayers Association, which also may be on the ballot at the same time ACAX1 1 goes to the voters for approval. The HJTA initiative is similar to ACA 5. It would establish a maximum 6 percent employer contribution for most employees and a maximum 9 percent contri-

bution for peace officers and firefighters. Additional employer contributions could be made if employees do not participate in Social Security.

Pointing to evidence that defined benefit plans are decimating the budgets of public entities, Richman emphasizes that the money going to fund employee pensions at both the state and local levels could be used to pay for education and health care programs. He argues that state employees should be in the same kind of pension plan as most private sector employees. Defined benefit plans administered by CalPERS

provide to retirees a fixed payment that is determined by a formula based on the employee's age, years of service, and salary at the time of retirement. Employees contribute a fixed percentage of their salaries into the retirement fund. Employers' contributions vary, based on actuarial analyses of whether the assets of the retirement fund are sufficient to pay the expected benefits to current and future retirees. Factors such as poor investment return and unanticipated salary jumps can significantly affect employer contribution rates.

Richman contends that public employees should be entitled only to defined contribution plans similar to the 401(k) accounts that many private sector employees have. In such plans the employer makes a fixed contribution to an employee's individual account. As in a defined retirement plan, the contributions are invested, but the individual's benefit in retirement depends on the size of the contributions and how well the investments performed. The employee bears the risk of a downturn in the stock market and the risk that he or she may outlive the benefits. On the other hand, as Richman points out, defined contribution plans have shorter vesting periods, and the funds are portable if an employee leaves public service. They also can be passed on to heirs upon death.

*Richman argues that state employees should be in the same kind of pension plan as most private sector employees.*

## ***Pension Costs Surging***

**State contributions.** The Legislative Analyst's Office projects that pension obligations from the state's general fund will increase an average of nearly 10 percent annually from 2005-06 through 2009-10. Currently the state contributes an amount equal to 17 percent of payroll for most employees, but contributes 34 percent of payroll for California Highway Patrol officers. Because of the ongoing fiscal crisis, the 2004-05 budget included a plan to finance a portion of the state's contributions using a \$929 million pension obligation bond. (See stories in *CPER* No. 169, pp. 44-45.) But the Pacific Legal Foundation has filed a lawsuit to block the sale of the bonds. It contends the bonds would violate state constitutional prohibitions on carrying over more than \$300,000 in debt from one year to the next without approval of the electorate. Although legal counsel for the Department of Finance is confident that the bonds are not unconstitutional, even a delay in bond sales could jeopardize the state's finances.

**At the local level.** Skyrocketing pension costs among local government jurisdictions are legion. Part of the explanation dates back to 1999, when S.B. 400 was passed, authorizing CalPERS to provide state and school retirees with an ad hoc retirement benefit increase of 1 to 6 percent, depending on the date of retirement. That legislation also gave PERS the ability to provide a new 3 percent at age 50 retirement formula for California Highway Patrol members and a new formula of 3 percent at age 55 for state peace officer and firefighter members.

S.B. 400 also made both the 3 percent at 50 and the 3 percent at 55 formula available to PERS local contracting agencies as a negotiable option. Then, in 2000, Governor Davis expanded the availability of these optional benefit increases by signing A.B. 1937. That bill gave local contracting agencies of PERS the ability to provide their retired members an ad hoc benefit increase of 1 to 6 percent. It allowed the same ad hoc increase to the 20 counties operat-

ing retirement systems under the County Employees Retirement Law of 1937, and gave them the option of adopting for their safety members either the 3 percent at age 50 formula or the 3 percent at age 55 formula.

Interest in the enhanced retirement benefits among public safety groups runs high. The Peace Officers Research Association of California has kept a running tally of agencies that contracted with PERS to provide the 3 percent at age 50 benefit. To date, over 250 local entities have done so.

In 2001, the governor signed legislation that extended the enhanced retirement benefit options to local miscellaneous members. A.B. 616 gave local agencies the choice of agreeing to a 3 percent at age 60 formula, a 2.5 percent at age 55 formula, or a 2.7 percent at age 55 formula. Retirement benefits for public safety officers were further enhanced in 2001. Legislation raised the maximum annual retirement income from 85 to 90 percent of annual salary.

The precise impact of these legislative changes on local governments is unclear. However, data compiled by Assembly Member Richman from

PERS and the Legislative Analyst's Office depict a gloomy and worrisome financial future for many of the state's cities and counties. The data accompanying Richman's analysis state that the retirement plans of 38 cities are funded below 90 percent and the safety plans of 190 cities are funded below the 90 percent mark.

As of June 2002, the City of San Diego topped the list, with an unfunded liability of 77 percent, carrying a price tag of \$720 million. According to more recent data supplied by the City of San Diego Pension Reform Committee, the city's unfunded liability exceeded \$1 billion as of January 1, 2004, and was funded at only 68.7 percent. The committee cited benefit improvements as the explanation for 41 percent of the city's retirement problems. The City of Oakland registered the next highest tab of unfunded liability at \$414 million.

Data for California counties was equally troublesome. Among PERS counties, Riverside had the highest unfunded

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liability at \$215 million, or 92 percent. Among independent counties, Los Angeles and San Diego recorded unfunded liabilities at nearly \$4 billion and \$1.5 billion, respectively.

Contra Costa County is one of the independent counties having the greatest unfunded liability. In 2003-04, its retirement expenses to the general fund were \$80.6 million, or 9.32 percent of the general fund. In fiscal year 2004-05, costs jumped to \$103.9 million, or 12.26 percent of the general fund. According to the county's grand jury report to the board of supervisors, the county's pension costs have leaped up by 12 percent. In fiscal year 1994-95, retirement expenses were 5.78 percent of the general fund. In 2004-05, those costs have increased to 12.26 percent, or \$103 million.

Other examples in the information presented by Richman place the blame for local governments' financial woes at the heels of enhanced retirement benefits. But, according to a CalPERS factsheet, only 20 percent of the pension cost increases can be laid to higher benefits.

CalPERS explains that employer contribution rates are cyclical. Retirement costs are no higher now than they were in the late 1970s and 1980s. CalPERS experienced higher than expected investment returns in the late 1990s, which led to employer contribution rates that were close to zero, while state employees remained obligated to make contributions amounting to 5 percent of payroll. Rates are high now because of the downturn in the markets from 2000 to 2002. In fact, 70 percent of the increased costs to public employers since 2000 is due to market downturn. But the retirement fund's return on investments of 17 percent in 2004 may lead to lower contribution requirements again, in a few years.

### ***Unions' Opposition to Defined Contribution Plan***

Public employee unions have formed a pension protection coalition to fight off proposals that threaten the security of CalPERS pensions. According to the coalition, the 400,000

California pensioners draw an average annual retirement benefit of \$19,128 from CalPERS, not the \$46,000 pensions that several newspapers have trumpeted. The American Savings Education Council states that retirees need income that amounts to at least 60 to 80 percent of their pre-retirement salaries, and Social Security provides only a portion of that for most retirees. The average rank-and-file state worker earns around \$40,000 a year, says Jim Hard, president of Service Employees International Union Local 1000, California State Employees Association.

Hard pointed out in response to a *Sacramento Bee* article that good pensions compensate for state employees' pay, which generally is lower than private-sector workers with similar levels of education and experience. In fact, Richman's press release support materials show that, of 27 classifications surveyed by the Department of Personnel Administration in December 2003, only eight in state civil service earn average salaries as high or

higher than the private sector. In four of those classifications, the employees earn less than \$3,000 a month.

CSEA also disputes the governor's characterization of the defined benefit plan as an "outdated" system. It asserts that 80 percent of Fortune 100 companies, as well as many other states, provide defined benefit plans for employees. A CalPERS research brief backs up this claim. Most of the employers who have switched to defined contribution plans have fewer than 1,000 employees, CalPERS says. Sixty-eight percent of large private sector employers and 45 percent of all private sector employers still provide defined benefit plans, despite burdensome federal laws that do not apply to public sector plans. One of the states that converted to a defined contribution plan 25 years ago, Nebraska, is now returning to a defined benefit plan. It believes it may be wasting taxpayer money by contributing to retirement accounts that are poorly invested. A paper by the National Association of State Retirement Administrators notes that in the 17 years ending in 1999, Nebraska state employees had managed an average annual return of about 7 percent, while the state's defined benefit fund managers garnered 11 percent average annual returns.

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### ***CalPERS Predicts Higher Costs From Reform***

CalPERS disputes the “myth” that defined contribution plans cost less. The average cost of administering the CalPERS defined benefit plan is .18 percent of assets, while the average administrative costs of defined contribution plans are 2 percent of assets, it claims. Start-up costs for a defined contribution plan would be required in the short term, during a budget crisis. A CalPERS analysis of the best-case scenario indicates that the state would save only about \$34 million during the first decade after adoption of a defined contribution plan.

Moreover, CalPERS warns, the current plan and its unfunded liabilities would still exist because there are legal obstacles to changing the retirement rights of current employees. Normally, the contributions made by, or on behalf of, new plan members help to fund the costs of the liabilities for future benefits. If contributions to the plan decrease, as they would when all new employees are mandated to enter defined contribution plans, the assets of the retirement fund drop, which necessitates higher rates of contribution on behalf of those left in the defined benefit fund. The state also loses much of its ability to pay benefits using returns on investments because there is less money to invest.

CalPERS also dispels the impression that public employers are paying a disproportionate share of the costs of the system. “Over the last decade, member contributions have exceeded employer contributions by \$1.1 million,” the research brief discloses. Over that same period of time, 75 percent of the retirement fund’s income has come from investments and only 12 percent from employer contributions.

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CalPERS points out that there are wide implications from a change to a defined contribution plan. CalPERS no longer would have the assets it currently uses to invest in inner-city communities, housing, and infrastructure. Defined contribution plans are not accompanied by disability benefits for employees who no longer can work. If employees use their defined contribution accounts for expenses prior to retirement or their investments fail to perform well enough

in the stock market to provide them with money for rising living expenses to the end of their lives, the state could end up paying more in public assistance to retirees. Switching to a defined contribution plan also could have unintended effects on the state workforce. A pension, not the state’s comparatively low salaries, draws interested workers into state employment and keeps them working for the state, CalPERS asserts. Public entities would have greater problems recruiting and retaining a capable workforce. For those who do stay in public employment, stock market performance, not age, likely will have the greatest effect on when an employee retires. When markets are booming, the

employer could lose disproportionate numbers of experienced workers. When markets are down, highly paid long-term workers would stay in their jobs and prevent the state from hiring less-expensive new workers.

Which retirement system will prevail, or whether the governor will settle for changes to the current defined benefit system, is difficult to predict. Democratic legislators are not likely to approve the switch to a defined contribution plan, but the governor has threatened once again to take his agenda directly to the voters if the Democratic-controlled legislature does not cooperate. \*

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## Recent Developments

# Public Schools

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### Governor Launches Attacks on Educators; Educators Fight Back

Governor Arnold Schwarzenegger has proposed a number of changes in recent weeks, several of which will, if enacted, severely impact teacher salaries and benefits. He proposed withholding \$2.2 billion due the public schools and altering Proposition 98, approved

*Schwarzenegger says schools will not get the promised funds.*

by the voters in 1988 to ensure that K-12 schools and community colleges receive at least 40 percent of state spending in each year. He suggested tying teachers' pay to job performance, called for reforms making it easier to fire teachers, and demanded that teachers contribute more to their pension funds. Teachers and other educators, outraged by Schwarzenegger's actions, have vowed to fight back.

#### School Funding

The educators' ire is fueled by what they perceive as Schwarzenegger's re-

neging on an explicit promise not to cut education funding in this year's budget. Last year, the governor got education officials to agree to suspend Proposition 98 and take a \$2 billion dollar cut in education. In exchange, he promised to protect schools against further cuts and pledged to restore the \$2 billion in the coming year's budget. In addition, the schools were to receive \$2.2 billion over the next two years because state revenues exceeded expectations. At the time, education groups were criticized by Democratic lawmakers for acceding to the deal offered by the governor.

Now, Schwarzenegger says the state's public schools will not get the promised funds. "We made the governor our best friend, our partner, and stood shoulder-to-shoulder with him," said Scott Plotkin, executive director of the California School Boards Association. "Without warning, he handed us a divorce." Barbara Kerr, president of the California Teachers Association, said, "I feel that teachers and children have been betrayed. I am very disappointed. We had an agreement. I worked very hard to have a bipartisan organization. Right now, I don't feel very bipartisan."

Administration officials said that, though schools will not get the funds promised under last year's deal, the governor's proposed budget includes a \$2.9 billion increase for schools — a 7.1 percent rise in general fund education spending from this year and nearly twice the 4.2 percent rate of increase in overall state spending. The governor's office claims that, because more revenue than projected had been coming in, schools would be getting a 14 percent increase if Proposition 98's formula were followed. "It is just not responsible with an overall budget gap of

*'[The governor] handed us a divorce.... Teachers and children have been betrayed.'*

this size for any one item — even an item as important as this one — to go up that much," said Finance Director Tom Campbell.

Educators also are outraged over Schwarzenegger's support of a constitutional amendment that would weaken Proposition 98 by removing its guaranteed funding levels. Under the governor's proposal, if lawmakers do not reach an agreement on the budget by July 1, the governor would call a special session. If there still was no agree-

ment, the controller would make an automatic adjustment across all state programs, including education. The cut also could take place in the middle of the year. "Imagine the chaos created in public schools if you make drastic cuts midyear. You'd have class sizes increasing overnight. That is not the way to fund vital programs," said Senator Wes Chesbro (D-Arcata), chair of the Senate Budget Committee. Administration officials responded that the governor's proposals would put an end to political leadership diverting education funds to balance the budget, as they did last year, because it would prohibit the state from borrowing from one program to fund another.

### Teachers' Pay

The governor unleashed a storm of criticism from teachers and their union representatives when, in his State of the State speech, he said that California should stop paying teachers for their length of service and educational level, and instead pay them based on how their students perform. "We must financially reward good teachers and expel those who are not," he said. "The more we tolerate ineffective teachers, the more our teachers will be ineffective." He proposed that "teacher employment be tied to performance, not just showing up." Schwarzenegger talked about high drop-out rates and poor student performance as proof that the public schools are failing. The governor acknowledges that his proposal will trigger "a big political fight." Cali-

fornia Education Secretary Richard Riordan came to Schwarzenegger's defense and reassured educators that there would be a lot of local control in assessing teachers' performance. Individual districts would determine what constitutes merit, such as test scores. Whether the teacher works with a challenging population could be factored into evaluations.

The day after Schwarzenegger's speech, Senator George Runner (R-Northridge) introduced a bill, sponsored by the governor, that would

*The governor  
acknowledges that  
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trigger a fight.*

amend the California Constitution to tie teacher and school administrator pay to performance evaluations and student improvement on state standardized tests. It also extends the probationary period for new employees from 2 years to 10. State law currently prohibits schools from using standardized test results in teacher evaluations.

Many California education analysts believe that Schwarzenegger's proposal is a tactic to distract people from the real problem plaguing public schools — chronic underfunding. "Rather than saying, 'Our schools are

**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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hurting because we have a terrible deficit and can't fully finance the schools,' he appears to be blaming teachers for the state of public funding," said Bruce Fuller, a U.C. Berkeley professor of education and public policy and co-director of Policy Analysis for California Education.

Teachers' unions called the proposal for merit pay unworkable. "Merit pay is an unfair way to reward teachers," said David Sanchez, vice president

*Teachers' unions called the proposal for merit pay unworkable.*

of the California Teachers Association. "With merit pay, right away you presume that we don't do our jobs."

Most analysts agree that the governor will have an uphill battle. The National Education Association in Washington, D.C., does not support performance-based pay because it found that teachers do not function well in an unsupportive environment. Jack O'Connell, state superintendent of public instruction, said of the governor's plan, "His approach would pit teacher against teacher when we know that collaboration is the key to improving student achievement."

**Teachers' Pensions**

Another of the governor's proposals, this one involving teachers' pensions, substantially would reduce the \$2.9 billion in increased funding for schools for the next year. Schwarzenegger's budget proposes that the state stop contributing to active teachers' retirement, cutting the state's annual obligation to CalSTRS by \$469 million. Currently, the state pays 2 percent on the dollar of payroll into the plan; school districts pay 8.25 percent, and teachers pay 8 percent. The remainder comes from investment income. Schwarzenegger's proposal contemplates that schools either pick up the tab or pass it along to the teachers. Those who find the retirement plan a hardship could opt out in exchange for a 2 percent boost in pay and no retirement plan.

"Our teachers are not eligible for Social Security. Their senior lifeline is our retirement system," said O'Connell. "We simply can't allow the governor to pull the rug out from under teachers."

Educators predict that, if this proposal passes, districts will have to renegotiate contracts with teachers, triggering contentious battles with unions. "We're going to have strikes up and down the state as school districts pick up on this time bomb," said CSBA's Plotkin. They fear that the additional financial burden also would exacerbate economic conditions at cash-strapped districts and drive away new teachers.

**The Fight Is On**

Schwarzenegger, in his State of the State address, urged lawmakers to pass his proposals, including the constitutional amendments, quickly. He threatened that if lawmakers failed to act, he would go directly to the voters with initiatives, bypassing the legislature.

Educators and public employee unions are uniting to take on the governor. They are planning demonstrations, a letter-writing effort, billboards, and

*The NEA does not support performance-based pay.*

door-to-door campaigning. "He picked the wrong target this time," said Mary Bergan, president of the California Federation of Teachers. "Taking millions of dollars from folks that most people consider special interests, I think, makes him very vulnerable, and we are certainly going to focus on those vulnerabilities. We educate, we agitate, we organize," Bergan said. "Do I think he can be beat? Yeah. He's put himself into a lot of traps."

Democratic lawmakers also are planning to mobilize against the governor's budget proposals by reaching out to their constituents. "We are actually the ones that come from 80 different parts of the state and live there

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

By Dale Brodsky

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

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

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

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half the week,” said Assembly Budget Committee Chairperson John Laird (D-Santa Cruz.) “We will be taking these issues to the people.”

Education leaders also are considering suing the state to demand more money. The California School Boards Association, the Association of California School Administrators, and business groups have come together to consider the feasibility of an “adequacy” lawsuit. This type of suit gained popularity in 1989, when Kentucky school districts won a judgment against the state for failing to fulfill its constitutional obligation to provide an adequate public edu-

cation. Since 1989, more than 30 states have faced similar suits, and courts have ordered the states to spend more on education in 80 percent of them. The last five cases all have gone in the districts’ favor. “The only place to go for a long-run fix of California financing is the courts. It would reframe the debate,” said Michael W. Kirst, a Stanford education professor. “We came one step closer to the lawsuit as a result of the governor’s proposal,” said State Superintendent O’Connell. “That appears to be the next frontier for education funding.” \*

she was notified by the district that she would not be reelected. Schnee was terminated at the end of the 2002-03 school year.

Schnee went to court, claiming that the district should not have classified her as a probationary employee. It was her stance that, under the Education Code, she was a permanent employee and the district violated her rights by terminating her. The trial court concluded that she was a probationary employee and that the district had the right to terminate her at the end of the school year so long as it gave her notice of its intention by March 15 of that year. Schnee appealed.

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## Reading Specialist Later Certificated Is Second-Year Probationary Employee

In *Schnee v. Alameda Unified School Dist.*, the First District Court of Appeal was faced once again with the complex question of teacher classification under the Education Code in the context of termination. As part of its determination, the court was obliged to address and clarify its statements in a prior decision, *Zalac v. Governing Board of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 155 CPER 38. The court summarized the issue as follows: “When a certificated teacher has been employed for several years in a categorically funded position under Education Code section 44909, and is subsequently employed by the school district in a probationary position, does the

teacher obtain permanent status upon commencement of the probationary position or only if and when the teacher is retained for the succeeding school year?”

### Factual Background

From August 1994 through the 2001-02 school year, Kathleen Schnee was employed by the Alameda Unified School District as a reading specialist, a position that was categorically funded under Education Code Sec. 44909. In August 2002, the district hired her as a full-time, third-grade teacher, a position supported by general funds, and classified her as a second-year probationary employee. On March 12, 2003,

### Court of Appeal Decision

Schnee argued that she was a permanent employee pursuant to the provisions of Sec. 44929.21(b), which reads:

Every employee of a school district of any type or class having an average daily attendance of 250 or more who, after having been employed by the district for two complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district.

The court agreed that, as both the reading specialist position and the third-grade teaching position required

certification qualifications, a literal reading of this code section would support Schnee's position. However, stated the court, "literal application of this section is precluded by the need to reconcile its provisions with other sections of the Education Code."

Section 44909 is one of those sections that limits the applicability of Sec. 44929.21(b), held the court, quoting from its opinion in *Zalac*:

Although section 44909 does not use the term "temporary" ... it does define a circumstance of employment under which a certificated employee's service does not count towards the attainment of permanent status. ... The section provides that the terms and conditions under which [certificated persons employed in categorically funded projects which are not required by federal or state statutes] are employed shall be as mutually agreed in writing, and that "service pursuant to this section shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee" unless two conditions are met. The first condition is that the person have served for at least 75 percent of the regular school days of the district, and the second is that the "person is subsequently employed as a probationary employee in a position requiring certification qualifications."

The precise question before the court was whether the second condition is satisfied immediately upon the individual being appointed to a probationary position, i.e., whether he or she

becomes a permanent employee simultaneously with being retained as a probationary employee, or whether such a person must serve as a probationary employee for a school year before obtaining permanent status.

The court held that Schnee did not become a permanent employee upon being retained as a probationary employee, agreeing with the trial court that the district had the right to terminate her because it had given her notice prior to March 15. But in order to come to

*Schnee did not become  
a permanent employee  
upon being retained  
as a probationary  
employee.*

this conclusion, the Court of Appeal had to address language that appeared in its decision in *Zalac*. *Zalac* had been employed as a certificated teacher under a class-size reduction program governed by Sec. 44909. Though the district dropped out of the program in the third year of her employment, it continued to classify *Zalac* as a temporary employee. The court held this was improper, and that *Zalac* should have been classified as a probationary employee during her third year. The court also stated, in a footnote:

Since *Zalac* had served for at least 75 percent of the school year during her first two years and should have been treated as a probationary employee during the third year, the two conditions for including her service towards obtaining permanent status that are specified in section 44909 were satisfied. *Under section 44929.21, subdivision (b), Zalac obtained permanent status upon commencement of the third year.*

The court acknowledged that this language, if applied to Schnee, would mean that Schnee had obtained permanent status at the start of the 2002-03 school year. The court, however, determined that it was not required to come to that conclusion because the language in *Zalac* was dictum. In other words, because the *Zalac* court already had decided that the district erred by classifying her as a temporary employee for the third year, it did not need to reach the question of whether *Zalac* had acquired permanent status at the commencement of her probationary employment. Therefore, any language purporting to decide that issue was merely "dicta," or an advisory opinion not binding on other courts in subsequent cases.

The court disputed Schnee's argument that the language of Sec. 44929.21 compels the conclusion that she was a permanent employee at the "commencement" of the probationary appointment. It found that the language of Sec. 44909 is not as explicit and does not state that permanent status is ob-

tained as soon as the individual is retained in the probationary position.

Schnee's reading of the code section makes no sense, determined the court:

If Schnee's interpretation of the statute were accepted, on the date on which a teacher who formerly served in a categorically funded program for at least two years first renders paid service in a probationary position..., the individual would immediately acquire permanent status. In effect, the individual would never serve as a probationary employee, much less do so for a school year....

Schnee's interpretation also would be at odds with the purpose of Sec. 44909, said the court, the intent of which is "to prevent a person from acquiring probationary status solely through teaching in a categorically funded program." To adopt Schnee's interpretation "would deprive the school district of the opportunity to evaluate the performance of the individual as a general curriculum teacher, and would require the district to decide whether to grant tenured status based solely on the individual's performance in the categorically funded program." The court was not persuaded by Schnee's argument that the district has an adequate opportunity to evaluate the individual while he or she is performing in the categorically funded position.

In further support of its conclusion regarding the legislature's intent, the court looked to those provisions of the

Education Code that deal with temporary employees. The court found that, under Secs. 44919 and 44920, "regardless of the number of years that the employee may have served in a temporary status in a position with certification qualifications, the employee must serve one year as a probationary employee before acquiring permanent sta-

tus. We can perceive no reason for treating persons whose employment is temporary by virtue of section 44909 differently in this respect than temporary employees under section 44919." (*Schnee v. Alameda Unified School Dist.* [12-29-04; certified for publication 12-30-04] No. A105993 [1st Dist.] \_\_\_ Cal.App. 4th \_\_\_, 2005 DJDAR 69.) \*

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## Substitute Community College Employees Entitled to Classified Status

In a case that brings to mind high school grammar lessons, the Fourth District Court of Appeal has ruled that, under Education Code Sec. 88003, substitute employees of community colleges qualify for classified status if they work more than 75 percent of the academic year while temporarily replacing absent classified employees.

### Factual Background

The South Orange County Community College District employed approximately 1,100 teachers and 525 full-time classified employees who provided non-teaching services.

The district hired Samuel Hamblen as a substitute warehouse worker during the 1997-98 school year. Hamblen worked 222 days during the academic year. In August 1998, he was hired by the district as a probationary classified worker. The district did not consider him a classified employee prior to that date.

The district hired Alfredo Osuna as a substitute custodian. During the 1998-99 school year, he worked 229 days filling in for various employees. He was hired by the district as a probationary employee in August 1999. Like Hamblen, the district did not consider him a classified employee prior to that time.

Gerald Schwab worked as a maintenance worker for the district from 1996 to July 1999. He worked over 195 days in each of those years, though he did not specify whether it was as a substitute or a short-term employee. Schwab claimed he was discharged in May 1999 and, because the district did not consider him a classified employee, he was not given a written notice of cause or provided a hearing to contest his discharge.

In 1999, the California School Employees Association, Hamblen, Osuna, and Schwab filed a formal grievance, contending that, according to Sec.

88003 and provisions of the collective bargaining agreement, the three had earned classified status by working over 195 hours as substitutes during the academic year. Section 88003 reads, in relevant part:

The governing board of any community college district shall employ persons for positions that are not academic positions. The governing board...shall classify all those employees and positions. The employees and positions shall be known as the classified service. Substitute and short-term employees, employed and paid for less than 75 percent of a college year, shall not be a part of the classified service.

The grievance proceeded to an administrative hearing, where an arbitrator determined that the bargaining agreement was too ambiguous to support their claim. The arbitrator declined to interpret Sec. 88003 because he believed his role was limited to conventional contract interpretation.

CSEA and the three men filed a lawsuit asking the court to compel the district to award the three classified status and lost wages and benefits, and to reinstate Schwab. The trial court refused to do so, concluding that the phrase “employed and paid for less than 75 percent of a college year” in Sec. 88003 does not modify the term “substitute” but rather modifies the term “short-term employee.” The trial court also found that the plaintiffs had not complied with the technical notice requirements of the Government Claims

Act. CSEA and the three employees appealed.

### Court of Appeal Decision

In interpreting Sec. 88003, the court first cited Sec. 88004 to demonstrate that the legislature’s statutory scheme “defines a classified position by describing what it is not. Thus, every position not defined by the regulations of the board of governors as an academic position and not specifically ex-

*Treating the word  
‘substitute’ as a noun  
made ‘no  
grammatical sense.’*

empted from the classified service according to the provisions of Section 88003 or 88076 shall be classified as required by those sections and shall be a part of the classified service.”

The parties agreed that, under Sec. 88003, short-term employees working less than 75 percent of the college year are specifically excluded from classified status, and short-term employees working more than 75 percent of the time are specifically included. With these two factual circumstances moved aside, the court framed the question before it as follows: “whether substitute employees are subject to the same

requirement that they must work more than 75 percent of the college year to gain classified status, or whether they are excluded altogether.”

The court refused to adopt the trial court’s analysis, instead focusing on the legislature’s intent in enacting Sec. 88003. To do so, the court looked to the statutory language, “being careful to give the statute’s words their plain, commonsense meaning. If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources is...unnecessary.” The court found the statutory language very clear. It explained that, “following routine grammatical construction, ‘substitute’ is an adjective modifying the word ‘employees.’ Consequently the statute can be read as follows: ‘Substitute...employees, employed and paid for less than 75 percent of a college year, shall not be part of the classified service.’”

It determined that treating the word “substitute” as a noun as the trial court had done made “no grammatical sense.” To do so would mean the pertinent part of the statute would read “substitute...shall not be part of the classified service.”

It also rejected the district’s argument that “the last antecedent rule” of statutory construction mandates the conclusion that the phrase “short-term employees” is the only term modified by the clause “employed and paid for less than 75 percent of a college year.” The last antecedent rule provides that

“qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.”

The court concluded that the wording of Sec. 88003 fell within two exceptions to the last antecedent rule. One is based on punctuation. “Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.” The other exception stemmed from the legislature’s use of the word “or” in a statute. This, said the court, “indicates an intention to use it disjunctively so as to designate alternative or separate categories.” In the case of Sec. 88003, the qualifying phrase “employed and paid for less than 75 percent of a college year” is separated from its antecedents by a comma, and the words “substitute” and “short-term” are joined by the word “and.” The court found support for its conclusion in other decisions, citing *California School Employess Assn v. Oroville Union High School Dist.* (1990) 220 Cal.App.3d 289, and *California School Employees Assn. v. Trona Joint Unified School Dist.* (1977) 70 Cal.App.3d 592.

The district contended that, when Sec. 88003 “is viewed as a whole, it is apparent that the Legislature intended to exclude from classified service all substitute employees, including those who worked more than 75 percent of

the college year.” The court found this argument was not supported by the legislative history.

The court also was not persuaded by the district’s claim that construing Sec. 88003 to allow substitute employees to become part of the classified service would lead to “absurd consequences.” The district reasoned that by awarding classified service to substitute employees working more than 195 days during the college year, the district

*‘This outcome is not a  
patently absurd  
consequence.’*

could be required to employ two classified employees for the same position. That is an absurd result, the district charged, because classified status “would create an illusion of permanency since the District, upon the incumbent’s return, would immediately terminate the former substitute and now newly classified probationary employee.” “This outcome is not a patently absurd consequence,” said the court. The result is the same even if substitutes are denied classified status since the substitute would be discharged once the classified employee returned. The only difference would be that the substitute would be entitled to various benefits, the court noted.

The district argued it would be forced to stagger the employment of different substitute employees to avoid any one from reaching the 195-day level and, if the union’s position were adopted, the competitive hiring process would be circumvented. The legislature has provided various fiscal protections for community college districts, the court responded, and the legislature reasonably could conclude that only qualified substitutes would be retained to work more than 195 days.

The court ordered the district to reclassify the three plaintiffs pursuant to Sec. 88003, but withheld any monetary relief because they had failed to give proper notice of their claims to the district prior to filing a lawsuit, as required by the Government Claims Act. (*California School Employees Assn. v. Governing Board of the South Orange County Community College Dist.* [11-30-04] No. G032195 [4th Dist.] \_\_\_ Cal. App.4th \_\_\_, 2004 DJDAR 14264.) \*

# Local Government

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## Charter Compels Arbitration of Impasse Over Promotion Rule

When the San Francisco firefighters union and the city reached a bargaining impasse over a promotional rule change, the union argued that the matter should be submitted to binding arbitration under provisions of the city charter. The civil service commission refused, taking the position that because the rule was necessary to ensure compliance with anti-discrimination laws, it fell within an exception to the arbitration mandate.

In a carefully drafted and thorough opinion, the First District Court of Appeal sided with the union. Finding no exception to the charter-prescribed arbitration procedure, the court concluded that the city could not unilaterally change the terms and conditions of employment once it reached a bargaining impasse. At that point, the city was required to submit the matter to binding arbitration.

In an unpublished portion of the decision, the court concluded the city had not established that its preferred promotion rule was necessary to ensure compliance with anti-discrimination laws and thereby excused from complying with the impasse procedures.

**City's interest arbitration law.** Section A8.590 of the charter of the City and County of San Francisco es-

tablishes the collective bargaining procedures for firefighters and other public safety employees who are denied the right to strike. Under these provisions, the civil service commission cannot unilaterally change any terms or conditions of employment for these employees until it meets and confers with

*The SFFD has a long, ignoble history concerning the hiring of racial minorities and women.*

union representatives. And, if the parties bargain to impasse without reaching an agreement, the charter directs that the matter must be submitted to binding interest arbitration before a three-member arbitration board.

At the center of the dispute was charter Sec. A8.590-5(g)(3), which exempts from binding arbitration "any rule, policy, procedure, order or practice...which is necessary to ensure compliance with federal, state or local

anti-discrimination laws, ordinances or regulations."

**History of litigation.** The San Francisco Fire Department has a long, ignoble history concerning the hiring of racial minorities and women, and has been the target of a series of lawsuits.

The fire department hired no African-American firefighters before 1955, and, in 1970, only 4 of 1,800 uniformed fire personnel were African-American. The department allowed no women to apply before 1976 and hired no women until August 1987. Because of this record, between 1970 and 1973, a federal district court ruled that three successive versions of the firefighter entry-level exam had an adverse impact on minority applicants and that the tests the department used had not been professionally validated as an accurate measure of the knowledge, skills, and ability needed for the job. In an affirmative action order, the court directed the city to hire one minority applicant for each non-minority hired from the entry-level eligibility list until all minority applicants on the list had been hired. More than 55 percent of the minorities who had been hired by the department as of November 1987 were hired under this court order.

A consent decree agreed to by the parties in one lawsuit set a goal of 40 percent representation of minorities on the list of eligibles for entry-level positions, but it did not require strict ratio or quota hiring. That consent decree expired in 1982.

Thereafter, promotional exams became the focus of subsequent lawsuits. The California Fair Employment and Housing Commission found that a 1978 promotional exam had an adverse impact on minorities and was insufficiently job-related to be valid. In 1986, in another case, a federal court found that entry-level and promotional exams used between 1982 and 1984 also had adverse impacts on minorities and

### *Promotional exams became the focus of lawsuits.*

women. That court ordered the department to develop new exams that satisfied federal civil rights anti-discrimination laws. The court also established an interim hiring procedure under which the department was allowed to hire from existing eligibility lists, but had to assure that those offered positions reflected the minority and female populations of the applicant pool.

In 1988, the parties approved a consent decree that set long-term hiring goals of 40 percent minority and 10 percent female representation in the department. The goal for promotions was to reflect the minority representation in the applicant pool.

In 1991, the court approved the use of "banding" to help the city meet these hiring and promotional goals. Candidates with scores within the designated

band, or group of scores, were considered equally qualified with respect to skills and abilities measured by an exam. Promotions then were made from among the candidates with scores in the band on the basis of other criteria, including race.

When the consent decree was terminated in 1997, the court affirmed the hiring and promotional goals, and required the city to use its best efforts within the law to attain a workforce that reflected the percentages of minorities in the city's population.

When this stipulated order expired in 1998, the parties entered into a one-year memorandum of understanding that affirmed the goal of attaining a workforce that reflected the city's diversity.

**Firefighter promotional rules.** In San Francisco, applicants for city employment take a civil service exam and are ranked in order of their scores on an eligibility list for new hires or promotions. Names from the list of eligibles are certified as candidates for open positions. The appointing officer must choose from among these certified candidates to fill positions.

In April 2000, three certification rules governed hiring and promotions in the fire department. First, under the rule of three scores, all employees with the three highest scores on the lists are certified as candidates when one position is available. Because of tied scores, this group may include more than three individuals. For every additional available position, employees with the next higher scores are added to the list of

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

*Mae West*

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certified candidates. A second rule, the rule of three or more scores, operates the same as the rule of three scores, except that the initial number of scores can be higher than three. Finally, the rule of the list provides that all employees on the eligibility list are certified as candidates. All three of these rules were applied to hiring for entry-level positions, but only the rule of three scores could be used for promotions.

Appointing officers are responsible for establishing selection criteria for choosing among the certified candidates. Selection must be based on “merit and fitness without regard to relationship, race, religion, sex, national origin, or other non-merit factors and with due consideration of Equal Employment Opportunity goals.”

**Negotiations.** In December 2000, the civil service commission notified San Francisco Fire Fighters’ Local 798 that it intended to revise these rules, and offered to meet and confer with the union on the proposed changes. The parties reached agreement on some matters but were unable to agree on Rule 313. Negotiations focused on the banding method used to certify promotional candidates. The union wanted a method that resulted in a narrow band, which would have given limited discretion to appointing officers. The commission favored wider bands with greater discretion.

On December 2002, after two years at the table, the commission declared impasse and, consistent with its last offer to the union, amended Rule 313.

Under these procedures, the commission would continue to authorize the use of the rule of three scores, the rule of three or more scores, and the rule of the list for entry-level selections. But it added a fourth option, called a statistically valid grouping, or sliding band.

The rule incorporated a statistical method for determining the width of the band and provided that eligible candidates within the grouping “are considered to be of comparable knowledge, skills and abilities with respect to the

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certify promotional  
candidates.*

areas tested on the examination.” If the highest score in the grouping is exhausted, the grouping then slides so that its upper limit rests on the highest score remaining on the list. Any of the four rules then can be used to fill entry-level positions, but only the sliding band can be used for promotional purposes. The revised rule carried forward the requirement that the appointing officers establish non-discriminatory selection procedures, but now required that the criteria be announced and approved by the commission in advance of any job announcement.

When the commission declared impasse, the union invoked binding arbitration under provisions of the city charter. However, the commission refused to use that process, claiming that the promotional rule was exempt under Sec. A8.590-5(g)(3).

**Court of Appeal decision.** The following question was at the center of the court’s legal analysis: Was the commission’s determination that the adoption of revised Rule 313 was necessary to ensure compliance with anti-discrimination law a matter of discretion for the commission or was it a matter subject to the court’s independent review?

Relying on precedent dating back to 1914, the court rejected a deferential standard of review. It concluded that the declaration of whether an emergency existed that would allow the commission to sidestep the arbitration process was a matter the court was entitled to decide. Only actions of municipal agencies within the ordinary scope of their authority are reviewed for abuse of discretion, the court said.

In reaching that conclusion, the court rejected several cases cited by the city where the courts had deferred to the decisions of civil service commissions on employment-related matters. “None of the cases involved situations where a city charter restricted the commission’s right to unilaterally change terms and conditions of employment and the commission invoked an exception to that restriction on its powers.”

The commission's authority to make rules regarding employment testing and promotion is limited by the city charter, said the court. "Section A8.590-4 restricts the Commission from unilaterally changing the terms and conditions of firefighters' employment without first bargaining with the firefighters' union, and it requires the Commission to submit unresolved is-

*The court considered whether it was necessary to adopt revised Rule 313 to ensure compliance with anti-discrimination laws.*

sues of bargaining to binding arbitration unless one of the exceptions in section A8.509-5(g) applies." The court underscored that "the collective bargaining context is critical to this case."

The court also was unpersuaded by cases cited by the city where a reviewing court had deferred to a public entity's enactment of an emergency ordinance. In the context of an emergency ordinance, the court explained, a declaration of emergency exempts the municipal body from procedural requirements; it does not expand the municipal authority's substantive powers.

For example, in *Sonoma County Organization of Public/Private Employees, Local 707 v. County of Sonoma* (1991) Cal.App.4th 267, 92 CPER 18, the declaration of emergency permitted a county to immediately implement, without first meeting and conferring with the union, an ordinance that placed employees on administrative leave if they participated in job actions. In that case, the county had the power to unilaterally enact the ordinance after fulfilling its bargaining duty. The declaration of emergency allowed it to implement the ordinance immediately, rather than after a 30-day period of bargaining. The emergency declaration in that case, the Court of Appeal contrasted, did not directly expand the county's substantive powers. "The emergency ordinance rule is not applicable to the City's determination of necessity," said the court, "which was made not to permit immediate passage or implementation of an ordinance, but to expand the scope of the City's powers under the Charter."

The court concluded:

The City's determination of necessity permits it to act *outside* the scope of its ordinary powers under the Charter. It is not an exercise of legislative discretion *within* the ordinary scope of the City's powers. Thus, the determination is subject to independent judicial review, rather than review for abuse of discretion.

**Meaning of 'necessary.'** The court next considered whether the city had demonstrated it was necessary to adopt revised Rule 313 to ensure com-

pliance with anti-discrimination laws. To bolster its case, the commission adopted a number of legislative findings. It cited the lengthy history of legal challenges to the fire department's examination and selection procedures, the mandates of Title VII of the Civil Rights Act, and constitutional constraints against affirmative action. What is missing from this list, said the court, is a finding that the revised rule would have the least adverse impact on protected groups compared with other available promotional methods, while still serving the city's legitimate employment needs. Notably, the court observed, the commission's findings said nothing about the union's proposed promotional rules, which included several banding methods and other proposals for secondary selection criteria to be used in conjunction with banding. In addition to banding, the union also suggested more clearly delineated promotional lines and service requirements, implementation of an officer candidate program, and the use of a combined oral interview and performance evaluation method as a means of appraising candidates' qualifications.

The city failed to explain why these proposals would not ensure compliance with Title VII as effectively as the statistically valid grouping proposal implemented by the commission, said the court. Without a finding that the revised rule had the least adverse impact of available alternatives, the court observed, the city had no grounds to conclude that adoption of the rule was

necessary to ensure compliance with state and federal anti-discrimination law.

The court summed up:

Because the City has not demonstrated that adoption of Revised Rule 313 was necessary to ensure compliance with antidiscrimination laws, it exceeded its powers under the Charter by unilaterally implementing the rule. After reaching impasse in its negotiations with the Union over a new firefighter promotional rule, the City was required to submit the matter to binding arbitration.

Attorney Diane Sidd-Champion, of McCarthy, Johnson & Miller in San Francisco, represented the firefighters union in this case and has been involved in the dispute since before negotiations began in 2000. Sidd-Champion told *CPER* that the union presented numerous alternatives to the city's shifting band proposal, but the city was adamant about the use of the sliding band and was not open to alternative approaches. In terms of the court's ruling that the city could not opt out of the arbitration process, Sidd-Champion called the decision "a real vindication for collective bargaining."

It is too soon to know whether the city will successfully challenge the Court of Appeal decision. But, as it stands, the decision bears contemplation by other local public agencies with charter provisions that compel the use of binding interest arbitration as an impasse-breaking mechanism. The court independently determined that unilateral enactment of the revised rule was not necessary to comply with anti-

discrimination laws. Stressing the collective bargaining context in which the case arose, the court found no reason to defer to the commission's assessment. Under the court's reasoning, similar decisions undertaken by municipal officials — particularly those made in the

collective bargaining context — may face equally rigorous scrutiny. (*San Francisco Fire Fighters, Loc. 798 v. City and County of San Francisco* [1-20-50] A104822 [1st Dist.] \_\_\_ Cal.App.4th \_\_\_, 2005 DJDAR 797.) \*

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## Officer's Porno Video *Not* a Matter of Public Concern

Remember the case of the San Diego police officer who was fired for selling a video of himself masturbating in uniform? The Ninth Circuit viewed his conduct as a matter of public concern and ruled that it was protected by the First Amendment. The court reasoned that the officer's expression was not an internal workplace grievance, took place while he was off-duty and away from his employer's premises, and was unrelated to his employment. (See *CPER*No. 165, pp. 56-59, for a full summary of the appellate court's opinion.)

The U.S. Supreme Court agreed to review the case and, not surprisingly, came to the opposite conclusion.

The police officer made and sold "custom" videos on the adults-only section of eBay, under the user name "Code3stud." Following an internal investigation, the officer was discharged for conduct unbecoming an officer. The district court ruled the officer had not demonstrated that producing and selling sexually explicit videos for profit qualified as an expression relating to a matter of public concern, and upheld

the discharge. The Ninth Circuit reversed.

The Supreme Court agreed to review the case and began by citing the well-established principle that a government employee does not relinquish all First Amendment rights by reason of his or her employment. On the other hand, said the court, a government employer may impose certain restraints on the speech of its employees that would be unconstitutional if applied to the general public. Citing *Connick v. Myers* (1983) 461 U.S. 138, 22 *CPER* SRS 71, and *Pickering v. Board of Education* (1968) 391 U.S. 563, the court again recognized the right of public employees to speak on matters concerning governmental policies that are of interest to the public at large. Outside of that category, however, the court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification far stronger than mere speculation in regulating it. "We have little

difficulty in concluding that the City was not barred from terminating [the officer] under either line of cases,” said the high court.

The Ninth Circuit’s conclusion that the officer’s activities were a matter of public concern relied on *United States v. National Treasury Employees Union* (1995) 513 U.S. 454. In that case, the court established that the federal employer could not restrict the outside earnings an employee made from speech that was unrelated to his em-

*The conduct brought the professionalism of the officers into serious disrepute.*

ployment and that had no effect on the mission or purpose of the employer. “The Court of Appeals’ reliance on *NTEU* was seriously misplaced,” said the Supreme Court. Although the officer’s activities took place outside the workplace and purported to concern subjects unrelated to his employment, the San Diego police department demonstrated “legitimate and substantial interests of its own that were compromised by his speech.” The use of the uniform and the reference to police work in the pornographic videos were cited by the court as conduct that brought the mission of the employer and the professionalism of its officers into serious disrepute.

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

*Lily Tomlin*

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by Dieter Demeier

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

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It is true, conceded the court, that the officer’s speech was not a comment on the workings or functioning of the police department. However, it is quite a different question whether the speech was detrimental to the police department. “On that score the City’s consistent position has been that the speech is contrary to its regulations and harmful to the proper functioning of the police force. The present case falls outside the protection afforded in *NTEU*.”

*The speech was detrimental to the mission and function of the police department.*

The Supreme Court next turned to the balancing test adopted in *Pickering* to reconcile the employee’s right to engage in speech and the government employer’s right to protect its own legitimate interests in performing its mission. But *Pickering* did not hold that all statements by a public employee are subject to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices, said the court. Therefore, as a threshold matter, a public employee’s speech must touch on a matter of public concern.

Relying on *Connick* for guidance in defining the boundaries of the public concern test, the court said, “public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.”

Applying that test and other First Amendment principles to the present case, the high court found “no difficulty in concluding that [the officer’s] expression does not qualify as a matter of public concern under any view of the public concern test.” It found that the officer’s activities did nothing to inform the public about any aspect of the department’s functioning or operation. Nor were his activities a comment on an item of political news. “His expression was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer’s image.” The speech was detrimental to the mission and function of the police department. In a final rebuke to the Ninth Circuit, the Supreme Court said there was “no basis for finding that it was of concern to the community as the Court’s cases have understood that term in the context of restrictions by governmental entities on the speech of their employees.” (*City of San Diego v. Roe* [12-6-04] Supreme Ct. No. 03-1669, 543 S.Ct. 521, 2004 DJDAR 14395.) \*

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## Discovery of All Non-Confidential Documents Available Under Bill of Rights Act

Procedural rights conveyed by the Public Safety Officers Procedural Bill of Rights Act encompass the right to discovery of any non-confidential reports or documents created by the public agency in the course of an investigation into allegations of misconduct. In *Hinrichs v. County of Orange*, the Fourth District Court of Appeal concluded that the discovery right encompassed in Sec. 3303(d) extends to peace officers who have been served with a written reprimand. The court also was critical of the sheriff’s department for its reliance on a sergeant’s assertion that Hinrichs had an odor of alcohol on her breath to support the charge that she had violated the department’s use-of-alcohol prohibition.

**Factual background.** Beverly Hinrichs, a special officer in the Orange County Sheriff’s Department, reported to work at the county jail in Santa Ana on November 5, 1999. Her supervisor, Sergeant Brian Schmutz, held the door for her as she entered the building. About one hour later, she was directed to see Schmutz in the watch commander’s office. There, she met with Schmutz and Sergeant S. Taylor. Schmutz informed Hinrichs that he had smelled alcohol on her breath when she entered the jail that morning. When asked if she had been drinking, she said she had consumed two beers with lunch, about 10 hours earlier. She also

explained that she had been sick for two nights and had been taking Nyquil. At Schmutz’ invitation, Hinrichs agreed to take a breathalyzer test, but none was administered. Instead, Hinrichs was moved from her assignment at the visitors’ desk to a less-public location in the jail. Hinrichs was required to work unarmed that day, but the department conceded that she was not impaired, in the sense of being under the influence of alcohol.

*The department  
would release  
documents only if  
discipline was more  
than a written  
reprimand.*

Three months later, the department provided Hinrichs with a written notice that she was the subject of an investigation based on her “use of alcohol” on November 5. The investigation included a more formal interrogation of Hinrichs. At the conclusion of the interrogation, her counsel served the department with a written demand for copies of any non-confidential complaints or reports made by investiga-

tors or other persons about the case. In response, the department said it would release those documents only if Hinrichs were given discipline more severe than a written reprimand.

The department issued a formal written letter of reprimand on April 14, 2000. It charged that Hinrichs reported to work with the odor of alcohol on her breath and thereby alienated coworkers and opened up the department to liability because of her assignment to the visitors' desk in the jail. The department cited two sections of the department's manual. One, entitled "Standard of Conduct," mandates that members conduct their private and professional lives in a manner that avoids bringing discredit on themselves or the department. The other regulation, entitled "Use of Alcohol," instructs that members are not to report to duty while under the influence of alcohol or be unable to carry out their duties because of its use. The regulation also provides: "The odor of an alcoholic beverage on the breath will be considered presumptive evidence of a violation of this section."

When Hinrichs appealed the reprimand, she asserted that she had been denied the requested documents and that regulations cited in the disciplinary action were vague. Captain Harry Gage responded to Hinrichs' appeal, explaining that the department had issued the reprimand for "odor of an alcoholic beverage." He assured Hinrichs that the department was not accusing her of being intoxicated or impaired.

Hinrichs proceeded with the next step of the administrative appeal process by requesting relief from the human resources department. While that request was pending, she filed a petition with the court asserting that, in violation of the Bill of Rights Act, she had been denied her right to be informed of the nature of her initial interrogation and her right to obtain copies of all non-confidential reports and witness

### *The initial question posed to Hinrichs was self-explanatory.*

statements pertaining to her case. She also charged that the use-of-alcohol regulation did not give her adequate notice that the mere odor of alcohol was proscribed conduct.

The trial court rejected Hinrichs' petition, finding that any claim based on alleged violations of Hinrichs' substantive rights were not ripe because her administrative appeal had not yet been fully resolved. It also denied her any relief based on the alleged procedural violations.

***Appellate court reasoning.*** The Court of Appeal first analyzed Hinrichs' contention that Sec. 3303 of the Bill of Rights Act was violated by the department's failure to inform her of the nature of its investigation before her initial interrogation by Schmutz and Taylor. At the outset, the court clarified that Sec. 3303 imposes no proce-

dural requirements in the case of "any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer." The statutory prescriptions apply only in cases where the interrogation "could lead to punitive action," defined to include any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

Hinrichs argued that her initial questioning by Schmutz and Taylor constituted an interrogation because it did not occur in the normal course of duty, but was a specific response to a one-time concern about her condition when she reported to work. And, she contended, it was not "unplanned" because it took place an hour after Schmutz' concern arose and when she was called into the watch commander's office for the specific purpose of answering questions from her two supervisors. Hinrichs asserted that the interrogation triggered the basic protections specified in Sec. 3303 applicable to any interrogation that could lead to punitive action, including the right to be informed of the nature of the investigation prior to an interrogation. The court disagreed.

"Procedural due process violations, even if proved, are subject to a harmless error analysis," the court countered. Hinrichs did not contend that either Schmutz or Taylor were unknown to her at the time of the initial

questioning or that she was confused about the nature of the investigation during that questioning. In fact, the court pointed out, the initial question posed to Hinrichs was self-explanatory; it was prefaced by Schmutz' statement that he had smelled alcohol on her breath when he opened the door for her; he then began asking her about whether she had consumed any alcohol. "In our view," said the court, "that prefatory statement and initial question should have adequately put Hinrichs on notice that she was being investigated for use of alcohol. The failure to otherwise expressly say so was harmless as a matter of law."

Hinrichs also claimed that the department had impermissibly denied her copies of any reports or complaints made against her by investigators or other persons as required by Sec. 3303(g). On this point, the court agreed. First, the court explained, this finding does not require any determination as to whether Hinrichs' initial questioning constituted an interrogation because Hinrichs and her counsel subsequently met with investigators from the Internal Affairs Department at a second, more formal interrogation and, at that time, made a written formal demand for documents premised on Sec. 3303(g). That request was denied on the basis that such documents would be provided only if the recommended discipline were greater than a written reprimand. The court rejected this reason as a valid basis for the department's attempts to justify its refusal to provide

Hinrichs with the requested written documents.

The court brushed aside the argument that the department had no duty to provide the reports because the due process protections specified in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 27 CPER 37, do not apply to written reprimands. That argument is irrelevant, said the court, because the department's obligation to produce the documents is not based on *Skelly*, but on the requirements of Sec. 3303, which

*The department's  
refusal to produce  
reports could not be  
presumed harmless.*

are expressly made applicable in the case of a written reprimand.

The department also asserted that under Sec. 3303(g), Hinrichs was not entitled to "pre-interrogation" documents, which it defined as any documents created prior to her formal internal affairs interrogation. The department relied on *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 87 CPER 31. But in that case, the Court of Appeal explained, the issue was the timing of the mandatory disclosure required by Sec. 3303(g), not the scope of that discovery. In *Pasadena*, the Supreme Court concluded that disclosure of all investigative notes and

reports to the officer under investigation prior to his or her interrogation would undermine the efficacy of the process and hamper the agency's ability to elicit truthful statements from persons being questioned. But, said the Court of Appeal, "nothing in *Pasadena* suggests the court was drawing a distinction between documents *created* before an interrogation and those *created* after."

Finally, the court disregarded the department's contention that any failure to produce documents was harmless because the information obtained in advance of Hinrichs' internal affairs interrogation was included and summarized in the written reprimand from Captain Gage. The court pointed to Hinrichs' allegation that the department had obtained a written statement from another officer stating that Hinrichs' breath smelled only of medicine on the day in question. In this case, where the sole allegation against Hinrichs concerned the odor of her breath, the issue of whether such a report was made "would seem significant," said the court, and "the Department's refusal to produce whatever reports were in its possession cannot be presumed harmless."

Hinrichs also challenged the department's use-of-alcohol regulation, which includes the provision that "the odor of an alcoholic beverage on the breath will be considered presumptive evidence of a violation." Hinrichs argued that this portion of the regulation was unconstitutional because it carries a presumption that the odor of

alcohol on the breath evidences an impairment and thus shifts to her the burden of proving that she was not under the influence of alcohol at the time in question. The court rejected that contention, finding that the regulation's imposition of an evidentiary presumption does not shift the burden of proof, but merely shifts the burden of producing evidence.

*The court criticized the department's unsupported assertion.*

In other words, the court explained, once evidence of an odor is offered, Hinrichs has the opportunity to rebut it or offer evidence that, based on where she stood or sat in relation to others, the odor of alcohol on her breath would not be detectable or would be recognizable as medicinal. After that, the evidence must be weighed in light of the department's burden of proving that the odor of alcohol not only existed but in fact interfered with her ability to perform her duties. "The odor of alcohol is not proscribed by this regulation," the court cautioned. It merely is evidence creating a rebuttable presumption of alcohol use that caused the officer to be unable to perform his or her duties. "Nothing in the provision alters the ultimate burden of proving the violation," said the court. "That burden remains with the Department."

The court voiced disapproval concerning the department's letter of reprimand and its decision on appeal, calling these actions, "at best confusing and at worst, completely inconsistent." The letter of reprimand does not refer to Hinrichs' inability to carry out her duties because of alcoholic beverage use, but only asserts that she could not perform her assigned job because of the odor of alcohol. Also criticized by the court was the department's unsupported assertion that Hinrichs had alienated her coworkers or that any members of the public were close enough to smell Hinrichs' breath. Nor does the record reflect that Hinrichs was given any opportunity to come forward to rebut the presumption that the odor of alcohol meant she was under the influence of an alcoholic beverage or unable to carry out her duties for that reason.

Referring to Captain Gage's decision on appeal, the court concluded that the department's decision was based on "odor of alcohol" only and not on a conclusion that she was unable to carry out her duties. Documentation for the written reprimand "will need clarification if the Department chooses to try again," the court observed.

The court also rejected the department's contention that the written reprimand was appropriately grounded on the regulation that requires officers to conduct their private and professional lives in a manner that avoids bringing discredit to themselves or the department. Hinrichs never was notified that she had been charged with

any violation of the general standard-of-conduct regulation, said the court. She was given only one written notice of the charges against her, and that notice specified that the allegation was for her "Use of Alcohol." "It is difficult, if not impossible, to interpret the notice as merely reciting a general description of her alleged misconduct, or as giving her fair warning that she was accused of violating any other regulation."

*It was difficult to interpret the notice as giving fair warning.*

Section 3303 provides only that Hinrichs is entitled to be informed of the nature of the investigation before any interrogation. Under that standard, said the court, it would be hard for Hinrichs to argue that she was entitled to a detailed specification of the exact charges leveled. But, the court cautioned, if the department does choose to specify a particular regulation that the officer is alleged to have violated, and provides no other description of the alleged wrongful conduct, the department cannot thereafter impose discipline based on a different regulation. (*Hinrichs v. County of Orange* [12-20-04; request for publication granted 1-12-05] No. G028834 [4th Dist.] \_\_\_ Cal.App. 4th \_\_\_, 2005 DJDAR 476.) \*

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# State Employment

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## Lawsuits Against CDC Impinging on Union Turf

Two organizations representing employees at the California Department of Corrections have been drawn into litigation filed by the Prison Law Office against the CDC. In a case that began in 1990 with allegations of excessive force against inmates at Pelican Bay State Prison, the California Correctional Peace Officers Association has been granted the right to intervene in a lawsuit allowing it to take part in an investigation into whether the labor contract between the state and CCPOA violates the district court's use-of-force remedial plans. In a separate matter, the Union of American Physicians and Dentists is objecting to an agreement between the Prison Law Office and the CDC that would mandate all physicians working in the prison system be evaluated by an outside entity and would impose other requirements on the CDC medical system that conflict with the contract between UAPD and the state. The court, however, would not allow UAPD to intervene to protect its collective bargaining rights.

### Investigation Into CCPOA MOU

In 1995, the federal district court for the Northern District of California found that the CDC's deliberate indif-

ference to use of excessive force on inmates violated the constitutional prohibition against cruel and unusual punishment. A special master was appointed to develop a remedial plan to curb excessive force and to monitor compliance.

In the wake of a criminal prosecution against two guards at the Pelican Bay institution, the CDC began, and

*A special master was appointed to develop a remedial plan to curb excessive force.*

then suddenly abandoned, an investigation into whether three more officers committed perjury or other misconduct in connection with the criminal case. The special master's subsequent investigation into why the CDC dropped charges against the three officers has led to recent headlines about a code of silence among correctional officers that hides and perpetuates abuse against inmates. It also has raised questions whether CCPOA interfered in investigations of abuse. Several steps

were taken in response: the governor asked the California Performance Review for suggestions to improve the department; new leaders of CDC and the Youth and Adult Correctional Agency were appointed; and the legislature passed laws governing disciplinary matters and investigations into allegations of reprisal against employees who report wrongdoing. (See stories in *CPER* No. 167, pp. 57-60, and No. 169, pp. 42-44.)

In June, the special master recommended to the district court that he continue working with the CDC to remedy problems with investigations of misconduct, discipline, and the code of silence among correctional officers. He also recommended that the district court order the CDC to exclude CCPOA representatives from its Executive Review Committee meetings during which the committee often reviews guards' use of force against inmates. Most galling to CCPOA was the special master's proposal that he investigate whether provisions of the memorandum of understanding between the state and CCPOA violate "by their terms or practice," the use-of-force remedial plans the court adopted in the mid-1990s. CCPOA moved to intervene in the lawsuit so that it could respond to any effort to change the terms and conditions of employment of its unit members.

In late November, the district court adopted the recommendations of the special master that he continue to work with the new corrections hierarchy to

remedy “systemic deficiencies” in the CDC’s investigation and discipline of correctional staff. The court emphasized, “the ability to effectively investigate and discipline officers charged with abusing force (or interfering with abuse of force investigations) is essential to correcting the underlying constitutional violations found in this case.” The court applauded the CDC’s recent efforts to counter the code of silence, implementation of a new disci-

*CCPOA will have the right to object to any proposed contract modifications.*

plinary matrix, and changes in the handling and monitoring of investigations and disciplinary actions. Because of the recent moves to reform the disciplinary system, the court decided not to institute civil contempt proceedings to secure the CDC’s compliance with the court-ordered remedial plan.

CCPOA’s motion to intervene was granted. The court found that the association should be able to take part in the investigation of whether certain provisions of the MOU violate court-ordered remedial plans. The special master will look into the operation of contract provisions which allow CCPOA participation on various committees that give association stewards immunity from having to disclose in-

formation they receive from employees they represent, and that enable a CCPOA steward to assist witnesses in an investigation as well as assisting the subject of the investigation. The special master expressed particular interest in contract provisions which require the CDC to turn over to officers inmate complaints against them that could result in disciplinary action. He also will examine the operation of the grievance procedure and officers’ procedural protections in discipline cases, including clauses that allow an officer’s disciplinary and citizen complaint files to be purged after several years. Other side-letter agreements and addenda regarding transfers of officers and post-and-bid rights of supervisors also are subject to review. CCPOA will have the right to object to any proposed modifications of the labor contract and to appeal decisions to change the contract over its objections.

The court also ordered the CDC to amend its plans to exclude CCPOA participation, either direct or indirect, in Executive Review Committee evaluations of use of force at the Pelican Bay prison. As the court noted, participation on the committee is not covered by the MOU and is not necessary to protect the due process rights of guards because separate procedures are designed to provide procedural protections.

**Physician Testing for Competence**

UAPD also asked to intervene in a lawsuit when the CDC surreptitiously

agreed to a court order that subjects all CDC physicians to competency testing by the University of California at San Diego. The case involved allegations that the CDC violated the prohibition against cruel and unusual punishment by not serving prisoners’ serious medical needs. The CDC and the Prison Law Office reached an agreement in 2002 that subjected the CDC to ongoing audits of inmate medical care. After a report that the system still was providing

*UAPD’s motion to modify the order was denied.*

substandard care, the parties stipulated to a plan designed to address allegations of physician incompetency. Contending that the CDC had no right to agree to an order beyond its authority under state law and that it was required to bargain certain provisions with the union, UAPD asked the court to modify the stipulated order to recognize UAPD’s collective bargaining rights and require the CDC to bargain over the proposals in the stipulated order.

UAPD’s motions to intervene and to modify the order were denied. The union contended that the stipulated order must provide for a hearing before a physician’s clinical privileges are terminated or restricted due to competency testing because physicians have

property rights to practice in the state's clinical facilities. Under the stipulated order, if physicians were found incompetent, those clinical privileges could be denied.

UAPD also contended that the order for medical and psychological examinations of physicians is unnecessary, particularly since medical exams already are required under UAPD's agreement with the state. The examinations violate privacy rights, and also may violate rights under the Americans With Disabilities Act and the California Fair Employment and Housing Act. The union asked that testing be based on suspicion that an individual is mentally or physically impaired, rather than be implemented for all physicians in the CDC.

Physician classifications, peer review, and other working conditions also are implicated by the order to which the CDC stipulated without first notifying the union. But, the court ruled the stipulated agreement did not irreconcilably conflict with UAPD's bargaining rights.

UAPD also has filed an unfair practice charge, claiming that the CDC negotiated with the Prison Law Office concerning mandatory subjects of collective bargaining and that it agreed to provisions that conflict with the labor contract. PERB declined to apply for an injunction to prevent the CDC from implementing the evaluation program, but it is still investigating the charge.\*

47.) CAPT filed an unfair practice charge, asserting that DPA was engaged in regressive bargaining. CAPT eventually agreed to a proposal to end the practice of counting sick leave hours for purposes of determining when an employee becomes eligible for overtime pay. But DPA was unable to prevail on health benefits takeaways. The unfair practice charge has been withdrawn.

## *CAPT fended off a proposal to base health plan premium contributions on length of service.*

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### **CAPT Sends State's Final Proposal to Members**

Without much enthusiasm, the California Association of Psychiatric Technicians is conducting a ratification vote on a tentative agreement with the state that CAPT is referring to as the state's "final proposal." The 7,100 psychiatric technicians, who work as nursing professionals in mental health centers, developmental centers, and prisons, have been working without a contract since January 2, 2004. If approved by members and the legislature, the new contract would remain in effect until June 30, 2006.

CAPT was unable to reach agreement with the Davis administration prior to the recall election, and then tried unsuccessfully for nine months to revive negotiations with the Schwarzenegger administration. In November, after five months of bargaining, CAPT thought the parties were nearing a tentative agreement. Instead, the negotiator for the Department of Personnel Administration, which represents the state in collective bargaining, insisted on two take-aways. (See story in *CPER* No. 169, pp. 45-

### **Compensation Increases and a Takeaway**

Psychiatric technicians would receive a 2.5 percent salary increase retroactive to August 1, 2004, and another 2.5 percent raise effective January 1, 2005. In a press release, DPA explained that the salary increases, which would cost the state about \$14 million, are necessary due to a shortage of personnel in the health care field. The state's registered nurses in bargaining unit 17 convinced the governor of the need to increase salaries last summer and received a 5 percent raise in August as part of the 2004-05 Budget Act.

CAPT fended off a proposal to base health plan premium contributions on

length of service, but did not garner the 80 percent premium contribution formulas that the Davis administration agreed to provide for 14 other bargaining units just before the recall. (See story in *CPER* No. 162, pp. 42-45.) Effective February 1, the state would increase its contributions to medical, dental, and vision premiums to cover increases that took effect January 1. For employees in rural areas without access to a health maintenance organization, the state would continue to pay a rural health care subsidy. The current \$1,500 annual payment would change in July to a \$100 monthly payment, with the ability to obtain \$1,500 in reimbursements for copayments and deductibles from the current subsidy pool until the funds are exhausted. At that point the state would increase monthly payments to \$125.

In an attempt to decrease future premiums for single parents, the parties would urge a new rate for single parents with dependent children. Because average health care costs for two adults are greater than costs for one adult and a child, the two-party and family plans that single parents now have are more expensive than necessary.

One concession that CAPT made was an agreement not to include sick leave in counting the hours toward eligibility for overtime pay. Types of leave other than sick leave would continue to be used in determining when overtime pay begins.

**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.

Useful for labor relations and personnel officers, union officers and shop stewards, managers and supervisors, negotiators, and consultants.

### **Pocket Guide to the Ralph C. Dills Act**

*See back cover for price and order information.*

In addition, the tentative agreement contains language to include new miscellaneous (non-safety) employees in the alternate retirement program enacted last fall. The program saves the state from making retirement contributions for the first two years of employment for any employee hired after August 11, 2004. (See story in *CPER* No. 167, pp. 56-57.)

### **Work Hours Improvements**

The pact would give employees more protection from mandatory overtime and slightly more control over their work hours. An employee scheduled to work morning shifts could not be required to work an afternoon shift without his or her consent. When required to work 15 continuous hours, the employee would have the option of delaying his or her next scheduled shift for 10 hours or taking two hours unpaid leave at the beginning of the next shift to achieve a 10-hour break. If staffing permits, the employee may choose to use vacation leave, compensatory time off, or holiday credit instead of working the next scheduled shift.

The employee's right not to be called into work on a regular day off would be expanded to encompass any scheduled leave, such as vacation or compensatory time off. Employees also could not be required to work more than four hours of overtime on the last day of their scheduled workweek to minimize interference with personal plans for scheduled time off.

### Disciplinary Protections

The proposed contract would require that an employee summoned to an interview that may lead to adverse action be notified of the subject matter and whether disciplinary or criminal action may result from the interview. An employee would be entitled to advance written notice, including the reason and date, of any administrative leave or reassignment during an investigation. New provisions would require

*Performance would be deemed satisfactory if management does not conduct an annual performance appraisal.*

that the investigation be concluded within 75 days after the notice.

An appeal of AWOL separation from employment would be made to the State Personnel Board, not through the grievance and arbitration process.

An employee would be entitled, in advance, to receive a copy of any materials placed into the employee's personnel file. An employee's performance would be deemed satisfactory if management does not conduct an annual performance appraisal, as long as there are no negative documents. Similarly, if management fails to issue a quarterly report for a probationary

employee, the employee's performance would be deemed satisfactory.

### Future Negotiations

The ratification vote concluded at the end of January, after *CPER* went to press. But, even if the tentative agreement is ratified, bargaining likely will begin again in May. The reopener clause permits negotiations on several economic items. In addition to salaries and benefits, DPA will be able to force negotiations on retirement, overtime, leave, and holidays. Each of those items was targeted in the governor's January budget as a way to achieve savings through "employee compensation re-

form." CAPT will renew its demand to include retention and recruitment bonuses as base salary for purposes of calculating retirement benefits and overtime eligibility.

Although no one foresees any evaporation of the projected \$9 billion deficit for 2005-06, DPA Director Michael Navarro characterized the reopener clause as built-in flexibility that is both fair to employees and fiscally responsible. "Either party — the employer or the union — has the right to revisit key provisions if the State's fiscal circumstances change." \*

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### Interim Report Identifies Best Practices in State Employment of Individuals With Disabilities

As part of the U.S. government's New Freedom Initiative project, four states volunteered to be scrutinized by the Equal Employment Opportunity Commission, which is reviewing the employment practices for people with disabilities. In November, the EEOC released an interim report detailing some of the methods that Florida, Maryland, Vermont, and Washington use that promote the hiring, retention, and advancement of individuals with disabilities in state government employment.

#### New Freedom Initiative

In February 2001, President Bush announced the New Freedom Initiative

to expand employment and educational opportunities for people with disabilities, and to increase access to assistive technologies, public accommodations, accessible transportation, and housing. One impetus for the initiative was the 70 percent unemployment rate of individuals with disabilities, despite enactment of the Americans With Disabilities Act in 1990.

The EEOC began a States' Best Practices Project to promote the employment of people with disabilities in government jobs. The agency decided to focus on state governments because they employ more than five million workers nationwide and have "unique

opportunities to serve as model employers.”

In addition to looking for practices that expand employment opportunities, the agency is offering free technical assistance to states that participate in the project. The EEOC chose the first four states to review based on their geographical diversity and differences in workforce size.

### *Washington offers a central pool of assistive technology equipment.*

#### **Practices Described**

The report contains descriptions of practices that may help employers currently having trouble finding qualified applicants with disabilities. Three of the states have outreach and recruiting plans that target individuals with disabilities through communications with disability advocacy organizations, the American Association of Retired Persons, the Veterans Administration, and other groups that serve that population. In Vermont, an applicant with a qualifying disability, as defined by the ADA, is entitled to a mandatory interview if the applicant meets minimum qualifications for the job and the applicant's name is referred to the hiring official. Washington and Vermont

have programs that train those with disabilities for state jobs. Each of the states provides training or written advice for managers and hiring officials in interviewing disabled applicants and addressing reasonable accommodation requests.

Three states have written procedures for handling requests for reasonable accommodation. Some procedures allow an appeal of accommodation denials. Maryland tracks the results of requests for reasonable accommodation. Among the innovative accommodation solutions that Washington offers are a central pool of assistive technology equipment that a department can borrow and a program that employs prison inmates to transcribe materials into Braille.

Several other states have volunteered to be involved in the next phase of the review. The EEOC is planning to issue a final report in October 2005. \*

# Higher Education

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## Unfair Practice Charges Traded as CAASE/UAW Claims Right to Information From CSU

Bargaining for a first contract is seldom easy, and negotiations between the California State University and the California Alliance of Academic Student Employees are proving the rule. CSU recognized the union in September, sunshined proposals in October, and was hit by a strike on December 9. The university has filed a charge with the Public Employment Relations Board, claiming that the move was an illegal economic strike. But CAASE/UAW says that its job action was an unfair practice strike because CSU is not providing information the union needs for negotiations.

### Bargaining for First Contract

PERB ruled last March that a majority of CSU's 6,000 teaching associates, graduate assistants, tutors, and graders had voted to unionize, but it took until mid-August for the parties to agree on the composition of the unit. The CSU board of trustees approved the agreement in September. (See stories in *CPER* No. 166, pp. 42-44, and No. 168, pp. 57-60.) Although proposals were sunshined in October, bargaining did not begin until November 2. In line with a long-standing board policy, CSU demanded that the parties' pro-

posals be sunshined for 30 days before negotiations could begin.

Despite the delay, CAASE/UAW set a December 3 deadline for concluding negotiations. CAASE/UAW bargaining team member Giuseppe Getto told *CPER* that the union wanted to have the contract ratified before students left

*The union wants a clause requiring each student to waive the privacy right as a condition of employment.*

for winter break so that new wages and benefits could be implemented January 1. Instead, on December 2, CAASE/UAW filed 20 unfair practice charges against the university for alleged unilateral changes to working conditions and CSU's refusal to include certain academic student employees in the unit. The union also charged that its activists have been denied access to

The union's biggest complaint, however, is the university's denial of information requested for bargaining. For each academic student employee, CAASE/UAW has sought the name, job title, pay, department in which the employee works, and benefits received, along with what contributions the ASE is making by payroll deductions. The union proposes to place a provision in the contract establishing its right to this information. Because the university is claiming that it cannot provide this confidential student information under the Family Educational Rights and Privacy Act, the union wants a clause requiring each ASE to waive the FERPA right as a condition of employment. Getto points out that the contract between the University of California and the UAW local union representing academic student employees at U.C. contains such a waiver provision.

Assistant Vice Chancellor for Human Resources Sam Strafacci told *CPER* that CSU has provided both aggregate and individualized salary and benefits data to CAASE/UAW, but has not linked names to the data. Strafacci asserts that the union does not need home addresses or individual students' classifications and rates of pay to engage in negotiations. "It is not a legal bargaining proposal, and we don't care if other institutions have agreed to the language," Strafacci insists.

The December 3 deadline was not met, and CAASE/UAW extended it by one week. But the union called a one-day strike for December 9, citing nu-

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

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

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

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

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merous unfair practices. The university claimed the union was attempting to pressure CSU to make bargaining concessions. It asserted the strike was illegal and filed its own PERB unfair practice charge against the union.

### CSU Proposals 'Sub-Par'

The parties have reached tentative agreement on 13 articles, but are far apart on compensation and several non-economic items. Getto claims that CSU's proposals in the areas of job security, discipline, workload, and compensation are far below the standard provisions in academic student employee contracts across the country.

CAASE/UAW is demanding a 12 percent increase in salaries over the next 18 months, increases in minimum hourly rates of pay, and enhanced benefits. The university maintains that the union's benefit proposals would increase costs by \$26 to \$46 million annually. It has countered with a 3.3 percent increase scheduled for July 2005, and another 3 percent increase in July 2006. But the university conditions both increases on fulfillment of the governor's higher education compact with CSU, which calls for 3 percent increases to the base budget for 2005-06 and 2006-07 to fund increased costs, including health benefit and salary increases.

Getto points out that the average monthly salary for an ASE at CSU is \$520, whereas U.C. ASEs are paid \$1,200 a month. Of the 6,000 ASEs at CSU, only about 200 — teaching associates who have worked at least half-

time for at least six months — receive health benefit coverage through a program administered by the Public Employees Retirement System. In contrast, U.C. pays for health benefits and provides a 100 percent fee remission to any graduate student employee who works at least 25 percent of a full-time load. CSU's fee waiver policy does not apply to its academic student employees. Meanwhile, fees have increased 59 percent over the last four years and are scheduled to increase another 8 to 10 percent next academic year.

Another point of contention is job

### *CSU's fee waiver policy does not apply to its academic student employees.*

security. CAASE/UAW wants an ASE's standard appointment to be an annual half-time contract. CSU contends that academic, budgetary, and operating circumstances mandate that departments have the discretion to issue appointments for only one semester or for less than 20 hours a week. Getto believes, however, that the university's concerns are addressed by the union's proposed contract language. It requires the annual half-time appointment only "when sufficient funding is available." The language also recognizes that differ-

ences in course offerings between terms and the need to distribute available work among ASEs "are among the legitimate reasons for offering less than a full academic year of support."

Other issues that separate the parties are a proposal requiring just cause for discipline, a no-strike clause that includes sympathy strikes, and workload maximums for teaching associates who are professional employees exempt from wage and hour laws. U.C.'s contract with UAW Local 2865, which represents ASEs, requires just cause for discipline and contains workload maximums that are not arbitrable but can be grieved to a dispute resolution committee. Local 2865 has agreed not to engage in sympathy strikes.

Strafaci says the university's positions on sympathy strikes and confidential student information will not change. But, depending on the governor's budget, the parties should be able to find agreement on the remaining contentious issues. \*

## Fighting for Scraps at U.C.

When state funding is cut 15 percent at the same time student enrollment rises 19 percent, someone has to suffer. Students are paying ever-higher fees, but little of that money is going to the employees who teach, advise, or feed them. Employee groups from professors to groundskeepers at the University of California are clamoring for pay increases, which have been rare and tiny since the state's revenues began to fall in 2001. The lack of raises has exacerbated the economic difficulties of the university's lowest-paid employees, especially those in high-cost areas of the state.

Instead of raises, the university has provided one-time benefits as tokens of appreciation. This year's offer of two bonus leave days to staff members unrepresented by employee organizations touched off a battle by U.C. employee unions for equivalent leave time in addition to raises. Although service workers and research and technical workers reached deals that included the bonus days, the university's 15,500 clerical workers were unable to convince U.C. to agree to the extra leave. But if the governor keeps his word, and the legislature goes along with his higher education compact, university employees are holding out hope that their salaries will increase next year.

### Costs Rise, Funds Fall

The university has suffered actual cuts in state funding, unlike some sectors of the public. State funds for current operations of \$3.3 billion in 2001-02 dwindled to \$2.72 billion in 2004-05. In two years, state funding has fallen from 25 percent to about 19 percent of U.C.'s operating budget, exclusive of operations for three national laboratories for the Department of Energy.

## *Employees' salaries did not keep pace with inflation.*

Meanwhile, costs for employees' benefits, utilities, and other ongoing expenses have continued to rise. In 2003, benefit costs grew \$150 million, an increase of 13 percent, and in 2004 they increased by \$133 million, another 10.3 percent. Utility costs increased 5.1 percent in 2003, and another 13.3 percent to \$305 million in 2004. In the same two years, supplies and materials costs grew \$240 million.

### Employees on the Brink

Costs rose for employees too. According to the Bureau of Labor Statistics, the national consumer price index shows the cost of living rose 2.4 per-

cent in 2002, 1.9 percent in 2003, and 3.3 percent in 2004. Prices in the Los Angeles-Riverside-Orange County area increased even more — 2.8 percent in 2002, and 2.6 percent in 2003.

Employees' salaries did not keep pace with inflation, however. Unrepresented employees received no general raises in 2002-03, 2003-04, or 2004-05, after receiving only a .5 percent increase in 2001-02.

Clerical employees represented by the Coalition of University Employees got a 1 percent raise and a 1 percent bonus in 2001-02 and another 1 percent increase plus half-step merit increases in 2002-03. They are still in negotiations for both 2003-04 compensation and a new contract to replace the one that expired September 30, 2004. Service workers represented by Local 3299 of the American Federation of State, County and Municipal Employees have been bargaining for a successor to the contract that expired June 30, 2004, after receiving 2 percent raises in 2001-02 and 2002-03, but no wage increases in 2003-04. Technical and research employees represented by University Professional and Technical Employees, Local 9119, CWA, negotiated increases of 2 percent in 2001-02, and a 1.5 percent boost for open-range employees and a .5 percent plus half-step merit increase for employees on step-based salary structures in 2002-03. The union also obtained a conversion to a complete step-based salary structure that resulted in salary increases for some employees for

2003-04. Technical employees' and researchers' contracts expired at the end of September, and negotiations for a new contract are continuing. U.C. has so far refused to fund step increases for eligible employees.

The lack of even small wage increases has the lowest-paid workers living on the edge of poverty. In "Berkeley's Betrayal: Wages and Working Conditions at Cal," five doctoral

*Hundreds of workers  
make less than the  
Berkeley living wage.*

students in U.C. Berkeley's Department of Sociology reported on the effects of wage stagnation on food service workers, clerical workers, and custodians. The September 2004 report indicates that hundreds of workers make less than the living wage of \$10.76 an hour established by the City of Berkeley in October 2003. As the university is not offering any raises in 2004-05, their economic situations will worsen as prices continue to rise.

In recognition of the lack of raises, the university provided extra deferred compensation of 3 percent and 5 percent of wages to employees eligible for the U.C. retirement plan for 2002 and 2003. It has also covered most of the increased costs in health and welfare benefits.

**Fight For Bonus Days**

In May 2004, the university proposed to grant two bonus leave days to unrepresented staff employees who had not received general salary increases in 2004-05. The primary intention of the leave days was for employees' use during the winter curtailment period, the last week of December, when many buildings close for the winter break to limit expenses and employees must take unpaid leave, compensatory time, or vacation leave on days that are not holidays. Employees have not responded favorably to the increased use in recent years of a curtailment period.

Several unions demanded the bonus leave days for the employees they represent. But U.C. balked, insisting that the extra leave time was available only to those employees who were not receiving a raise in 2004-05. After 14 months, including mediation and factfinding, AFSCME gave up its demand for a wage increase for 2003-04 and accepted the two days of paid leave in addition to three days for training and career development. Bargaining for a new contract, including 2004-05 raises, is now at impasse.

U.C. initially refused to agree to bonus days for research and technical employees represented by UPTE unless the union agreed to no raises this year, less than a 1 percent raise in 2005-06, and a 3 percent pay boost in the following year, contingent on state funding for salaries. In the end, the university agreed to the two bonus days for employees who did not receive a gen-

eral increase in the 2004-05 year. In exchange, UPTE agreed to extend the effective date of several articles of the contract through January 31, 2005. The extension gave the university the ability to make unilateral changes in benefits, parking rates, leave, assignments, and other areas that the prior contract allowed. UPTE is continuing its demands for step increases for this year and general salary increases the next two years.

*Employees have not  
responded favorably to  
the increased use of a  
curtailment period.*

CUE, however, was unable to garner the bonus leave days for the clerical workers it represents. According to U.C., the union refused to give up its demand for retroactive raises for 2003-04, and insisted on wage increases for 2004-05. The university decided it would be inequitable to give clerical workers the bonus leave time without their agreement to forego raises. The parties are in factfinding after reaching impasse on 2003-04 wages, and are also negotiating a new contract. U.C. claims it is offering 1.5 percent salary increases for 2005-06 and the following year, but the raises are contingent on state funding increases.

## governor strikes at labor research again

Last year, Governor Arnold Schwarzenegger announced a budget that contained no funding for the Institute for Labor and Employment, a multi-campus labor research program of the University of California. (See story in *CPER* No. 164, pp. 62-64.) After months of lobbying the legislature, \$3.8 million was put back into U.C.'s general support budget, rather than being earmarked as an augmentation for the ILE as it had been in prior budgets.

The ILE was disbanded, but the U.C. Office of the President decided to continue to use the funding for labor and employment research. UCOP has created a Labor Education and Research Fund run by a faculty steering committee that will distribute \$1.26 million for faculty grants and graduate fellowships. The remaining funds are being distributed by the Institutes of Industrial Relations at the Berkeley

and Los Angeles campuses to continue some of the work of the now-defunct ILE, such as the annual State of California Labor report and the union leadership school.

But now, the ILE funding again is being singled out for elimination. The governor's budget describes the elimination of these funds as a "policy adjustment." No other area of research is targeted for reduction. Michael Reich, director of the IIR at the Berkeley campus, says the move raises issues of academic freedom. "Can the governor cut money out of the general support budget of the university just because he doesn't like the research it's funding?" The Office of the President has assured the university community that it will work for restoration of the labor research money.

### Governor Increases Budget

Last spring the governor announced he had hammered out a compact with the heads of U.C. and the California State University. One of the major components of the deal was that, in exchange for cuts in funding for 2004-05, the state would increase the university's base budget by 3 percent in both 2005-06 and 2006-07, and by 4 percent in 2007-08. The compact specifically earmarks this money for cost increases, including faculty and staff salary and benefit cost increases.

When asked for their input in crafting U.C.'s 2005-06 budget, the Academic Council was adamant that raises were required for all faculty and staff. In his letter to President Robert Dynes,

the chair of the Academic Council, George Blumenthal, wrote,

[T]he Academic Council unanimously agreed that, as a combined and single priority, faculty and staff salaries (including both merits and COLAs) and graduate student support, should be given highest consideration in the allocation of the planned 3% increase in 05-06 state funding as well as the additional funds retained from increased student fees. In conjoining these three items into a single priority, the Academic council acknowledges the comparable importance of faculty, staff and graduate students as resources essential to maintaining the quality of the university, and recognizes them as elements that are interlinked.

It remains to be seen whether the Academic Council's view will prevail. AFSCME's chief negotiator, Paul Worthman, told *CPER* that U.C.'s latest wage offer to AFSCME, prior to mediation, calls for no increases for 2004-05, a 2 percent raise for 2005-06, 3 percent for 2006-07, and 3 percent for 2007-08. But, all of the raises are contingent on state funding. UPTE President Jelger Kalmijn reports that U.C.'s August wage proposal has not changed. The university is balking at funding step increases and is offering no across-the-board raises until 2006-07. U.C. has proposed a 3 percent increase that year, but has made the offer dependent on state funding and health benefits costs. \*

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## New Student Rights Bill Launched in 'War for Academic Freedom'

Democratic professors outnumber Republican professors at the University of California's Berkeley campus nearly 10 to 1, according to a new study coauthored by Daniel Klein at Santa Clara University. The study likely will become fodder in what State Senator Bill Morrow (R-Oceanside) calls a "war for academic freedom." Morrow has introduced a "Students' Bill of Rights," S.B. 5, to "protect students and promote learning in California's public universities and colleges." Although narrower, S.B. 5 contains some of the same provisions that appeared in Morrow's "Academic Bill of Rights," S.B. 1335, which was defeated during the last legislative session.

The Students' Bill of Rights requires the California State University and the California Community Colleges to develop guidelines and implement five principles. It also requests that U.C. voluntarily comply with the legislation. One principle requires that students be graded on the basis of reasoned answers and appropriate knowledge, not on the basis of political or religious beliefs. Another principle requires "an environment conducive to the civil exchange of ideas," in which "obstruction of invited campus speakers, the destruction of campus literature, or any other effort to obstruct this exchange" would not be tolerated.

These standards do not appear to be objectionable. However, several other provisions mirror those that the American Association of University Professors has criticized in the past. After reviewing conservative commentator David Horowitz' draft Academic

### *Provisions mirror those that the American Association of University Professors has criticized.*

Bill of Rights, on which Morrow's bills and federal legislation have been modeled, the AAUP contended that implementation of the bill "infringes academic freedom in the very act of purporting to protect it."

One provision requires that curricula and reading lists in the humanities and social sciences provide students with dissenting sources and viewpoints because of the "uncertainty and unsettled character of all human knowledge in these areas." It places on faculty the responsibility to expose students to the "spectrum of significant scholarly viewpoints" in their disci-

plines. The AAUP asserts that the language of the bill implies all opinions are equally valid and would negate the function of university education to make judgments of quality in order to advance knowledge.

While the AAUP agrees with the principle that "[f]aculty shall not use their courses or their positions for the purpose of political, ideological, religious, or anti-religious indoctrination," the organization believes that placing such a precept into law invites university administrators or the courts to become the ultimate judges of academic quality, rather than the faculty who are experts in their subjects.

S.B. 5 does not contain the language of former S.B. 1335 that would have addressed faculty employment decisions. It also omits a clause that would have directed academic institutions to "maintain a posture of organizational neutrality with respect to the substantive disagreements that divide researchers on questions within...their fields of inquiry."

Senator Morrow asserts, "Our children are systematically being denied a full education on too many campuses. They are not exposed to the diversity of social, economic, historical, and political perspectives that characterize the world they will enter upon graduation." Referring to demonstrations against visiting speakers and destruction of student newspapers, he says, "We protect [our students] from sexual harassment, but not from intellectual harassment." \*

# Discrimination

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## Requiring Female Employee to Wear Makeup Not Sex Discrimination

In a decision that is a throwback to the 1950s and a setback to women's rights, the Ninth Circuit Court of Appeals has ruled that firing a female employee for refusing to wear makeup as required by her employer does not violate the sex discrimination prohibitions of Title VII of the Civil Rights Act of 1964. Judge Sidney R. Thomas wrote a strongly worded dissent.

### Factual Background

Darlene Jespersen was a bartender at Harrah's Casino in Reno for almost 20 years. According to her supervisors, Jespersen was "highly effective," had a "very positive" attitude, and made a "positive impression" on the guests. Customers repeatedly praised her.

Although, for many years, Harrah's encouraged its female beverage servers to wear makeup, it was not a mandatory requirement until February 2000, when Harrah's introduced new appearance standards under what it called the "Personal Best" program. All beverage servers were required to be "well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform." Female beverage servers were required to wear stockings and colored nail polish, and have their hair "teased, curled,

or styled." Male beverage servers were prohibited from wearing makeup or colored nail polish, and were required to maintain short haircuts and neatly

*Employers may not  
adopt standards that  
impose a greater  
burden on one sex  
than the other.*

trimmed fingernails. Jespersen agreed to adhere to these standards in March 2000.

Shortly thereafter, the standards were amended to require all female beverage servers to wear makeup including at-least mascara, blush, lipstick, and foundation. As before, male beverage servers were prohibited from wearing makeup. Jespersen refused to comply with the new requirement. Harrah's gave her 30 days to apply for a position that did not require makeup, but she was unwilling to do so and was terminated.

After exhausting her administrative remedies with the Equal Employment Opportunity Commission, Jespersen went to court. The trial court dismissed her case, finding that the "Personal Best" policy did not violate

Title VII because "(1) it did not discriminate against Jespersen on the basis of 'immutable characteristics' associated with her sex, and (2) it imposed equal burdens on both sexes." Jespersen appealed.

### Court of Appeals Decision

Writing for the majority, Judge A. Wallace Tashima recognized that "in order to prevail on a Title VII disparate treatment sex discrimination claim, an employee need establish only that, but for his or her sex, he or she would have been treated differently." Regarding the requirements of the "Personal Best" program, the court defined its task as determining "whether these standards are discriminatory; whether they are 'based on a policy which on its face applies less favorably to one gender.'"

Judge Tashima recapped prior Ninth Circuit decisions involving appearance standards. "We have previously held that grooming and appearance standards that apply differently to women and men do not constitute discrimination of the basis of sex...because Congress intended that Title VII only prohibit discrimination based on 'immutable characteristics' associated with a worker's sex." This position, asserted in *Baker v. California Land Title Co.* (9th Cir. 1974) 507 F.2d 895, and *Fountain v. Safeway Stores, Inc.* (9th Cir. 1977) 555 F.2d 753, was changed in later cases, when the court recognized "that an employer's imposition of more stringent appearance standards on one sex than the other constitutes sex discrimi-

nation even where the appearance standards regulate only 'mutable' characteristics such as weight." For example, in *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, where the employer held female employees to a stricter weight standard than that imposed on male employees, the court cautioned that "although employers are free to adopt *different* appearance standards for each sex, they may not adopt standards that impose a greater burden on one sex than the other."

In the prior cases, Judge Tashima asserted, "our task was simple because it was apparent from the face of the policies at issue that female flight attendants were subject to a more onerous standard than were males." Here, however, the majority refused to see its task as simply measuring the makeup requirement for women against the no-makeup requirement for men. Instead, the court adopted Harrah's argument that "the burden of the makeup requirement must be evaluated with reference to all of the requirements of the policy, including those that burden men only, such as the requirement that men maintain short haircuts and neatly trimmed nails." The court reasoned:

Because employers are permitted to apply different appearance standards to each sex so long as those standards are equal, our task in applying the "unequal burdens" test to grooming and dress requirements must sometimes involve weighing the relative burdens that particular requirements impose on workers of one sex against the distinct requirements imposed on workers of the other sex.

The court declined to frame the exact parameters of the "unequal burdens" test. But, the majority noted, any "burden" to be measured under the "unequal burdens" test is only that burden which is imposed "beyond the requirements of generally accepted good grooming standards," perhaps suggesting that Harrah's female-only makeup requirement falls within "generally accepted good grooming standards."

The court found no support for Jespersen's contention that "the makeup requirement imposes innumerable tangible burdens on women that men do not share because cosmetics can cost hundreds of dollars per year and putting on makeup requires a significant investment in time." It rejected evidence contained in academic literature discussing the cost and time burdens of makeup generally, finding it did not address specifically the cost or time burdens that must be borne by female bartenders to comply with the makeup requirement. The court also cited Jespersen's failure to introduce evidence concerning the burdens of the "Personal Best" requirements on male bartenders.

Jespersen had argued that the unequal burdens test should be invalidated because of the Supreme Court's decision in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 81 CPER 72. In that case, a female associate at an accounting firm was told that her chances of becoming a partner would be improved if she learned to behave more femininely, wore makeup, had her hair

## 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.

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styled, and wore jewelry. The Supreme Court held that the employer's discrimination against the associate because of her failure to conform to a traditional, feminine stereotype was sex discrimination in violation of Title VII.

The majority attempted to distinguish Harrah's policy from the employment practice in *Price Waterhouse*:

Although *Price Waterhouse* held that Title VII bans discrimination against an employee on the basis of that employee's failure to dress and behave according to the stereotype corresponding with her gender, it did not address the specific question of whether an employer can impose sex-differentiated appearance and grooming standards on its male and female employees. Nor have our subsequent cases invalidated the "unequal burdens" test as a means of assessing whether sex-differentiated appearance standards discriminate on the basis of sex.... In short, although we have applied the reasoning of *Price Waterhouse* to sexual harassment cases, we have not done so in the context of appearance and grooming standards cases, and we decline to do so here.

The majority further bolstered its opinion by noting that because *Price Waterhouse* predates *Frank*, it does not qualify as an intervening decision on which to overrule *Frank*:

We hold that under the "unequal burdens" test, which is this Circuit's test for evaluating whether an employer's sex-differentiated appearance standards constitute sex discrimination in violation of Title VII, Jespersen failed to introduce evidence raising a triable issue of fact as

to whether Harrah's "Personal Best" policy imposes unequal burdens on male and female employees.

### The Dissent

Justice Thomas rejected the majority's conclusions:

A reasonable factfinder could determine that Harrah's acted because of Jespersen's sex under not just one theory, but two. First, Harrah's fired Jespersen because of her failure to conform to sex stereotypes, which is discrimination based on sex and is therefore impermissible under Title VII. Second, Jespersen created a triable issue of fact as to whether the policy imposed unequal burdens on men and women, because the policy imposes a requirement on women that is not only time consuming and expensive, but burdensome for its requirement that women conform to outdated and impermissible sex stereotypes.

Thomas admonished the majority for refusing to apply the holding of *Price Waterhouse* to the facts before it:

The majority attempts to distinguish this case from *Price Waterhouse*...because this is not a sexual harassment case. But neither was *Price Waterhouse*, in which the adverse employment action taken against the plaintiff was that she was denied partnership. Even if it were, that would not matter.... There is no grounding whatsoever in Title VII for the notion that harassing an employee because he or she fails to conform to a sex stereotype is illegitimate, while firing them for the same reason is acceptable.

Thomas challenged the majority's suggestion that *Price Waterhouse* did not address sex-differentiated appearance and grooming standards. The plaintiff in that case "was denied partnership at a prestigious accounting firm where she had excelled because she didn't act femininely enough and was specifically faulted for not wearing makeup." "Jespersen was fired from a job she also excelled at, for exactly the same reason." Thomas concluded that the majority's

*Workers in service industries are left without the protection that white-collar professionals receive.*

opinion left workers "in service industries, who are more likely to be subject to policies like the Harrah's 'Personal Best' policy, without the protection that white-collar professionals receive."

Thomas also concluded that, even if *Price Waterhouse* did not apply to appearance and grooming standards, Jespersen had demonstrated that the makeup standard imposed an unequal burden on women and was, therefore, unlawful. He rejected the notion that the burdens imposed by all of Harrah's appearance requirements must be compared to each other, finding that by doing so the majority would "permit all

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

*William James*

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sorts of sex discrimination as long as it 'balances out' for both genders." Thomas would compare each standard imposed on women to the counterpart imposed on men: "If the makeup requirement for women is compared to the clean face requirement for men, there can be no dispute that Jespersen created an issue of material fact as to whether the burdens are unequal."

Thomas also emphasized that, in weighing the relative burdens, the court should have considered more than just time and money. "The sex-stereotyping inherent in certain appearance standards is a burden that falls more heavily on one sex than the other. Thus, we have recognized that the unequal burdens test does not permit sex-differentiated appearance standards that denigrate one gender based on sex stereotypes," he stated, referring to language contained

in *Gerdom v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602:

Jespersen testified very compellingly to the burdens she personally felt in complying with the makeup policy, explaining that it required her to conform with a feminine stereotype that she felt had nothing to do with making drinks. Given her stellar customer and supervisor evaluations, Jespersen is obviously not alone in this analysis. Sex-differentiated appearance standards stemming from stereotypes that women are unfit for work, fulfill a different role in the workplace, or are incapable of exercising professional judgment systematically impose a burden on women, converting such stereotypes into stubborn reality.

*(Jespersen v. Harrah's Operating Company, Inc.* [9th Cir. 12-28-04] No. 03-15045 \_\_\_F.3d\_\_\_, 2004 DJDAR 15328.) \*

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## **Supreme Court to Decide Whether Title IX Prohibits Retaliation**

On November 30, the United States Supreme Court heard argument in a case involving a girls' basketball coach who was fired for complaining that the boys' team was treated better. Roderick Jackson is asking the Supreme Court to reverse the Eleventh Circuit Court of Appeals ruling that Title IX of the Education Amendments of 1972 does not allow individuals to sue for retaliation.

Jackson lost his coaching job in 2001 after repeatedly asking school officials to provide his team with a regu-

lation-sized gym with basketball rims that were not bent — just like the boys' team had. Title IX bans discrimination "on the basis of sex" in any school receiving federal funding. The prohibition covers admissions, recruitment, course offerings, counseling, financial aid, student health and housing, and athletics.

Jackson argued that the statutory language, the history of interpreting similar language in other anti-discrimination laws, the historical context in which the

## 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.

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act was passed, and its implementing regulations all indicate that the statute allows lawsuits by individuals, regardless of their sex, who claim they were punished for pointing out gender bias. Lawyers for the Birmingham Board of Education argued that the word "retaliation" does not appear anywhere in Title IX and that to side with Jackson would open a floodgate of litigation.

The court appears to be split along ideological lines. Justices Ruth Bader Ginsburg, David Souter, John Paul Stevens, and Stephen Breyer pressed the Birmingham lawyers on whether bias complaints would be fully aired if coaches and teachers could be fired without recourse. "If we say to a school, you can't retaliate, that's a powerful tool to prevent retaliation and to force them to do something about discrimination,"

said Justice Ginsburg. Justice Antonin Scalia argued that expanding Title IX protections when the statute is silent on the issue would be unfair. Justice Anthony M. Kennedy indicated that he agreed with Justice Scalia. "You have to show there was a congressional intent" to allow private lawsuits, he told Jackson's attorneys. Justice Sandra Day O'Connor asked several questions during the argument but did not indicate how she plans to vote. Chief Justice William H. Rehnquist was not present but may participate in deciding the case after listening to oral argument audiotapes and reviewing briefs. A decision is expected in the first half of 2005. (*Jackson v. Birmingham Board of Education*, U.S. Supreme Ct. No. 02-1672.) \*

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## California Supreme Court Agrees to Review Third-Party Harassment

By unanimous vote, the California Supreme Court granted petitions for review in two conflicting cases involving the question of whether employers can be held liable for failing to protect employees from sexual harassment by third parties.

In one case, a veterans home nurse alleged that her employer knew or should have known that she was being sexually harassed by a patient and did nothing to correct the situation. Though the jury found in favor of the

nurse, in *Carter v. California Department of Veterans Affairs* (2003) 109 Cal.App.4th 469, 161 CPER 71, the Fourth District Court of Appeal decided in favor of the employer, ruling that the Fair Employment and Housing Act does not extend to employees the right to sue their employers for the misconduct of third parties who are not workers.

The Supreme Court initially granted a petition for review, but then sent the case back to the Court of

Appeal after the legislature amended Government Code Sec. 12940(j)(1) to impose a duty on employers to protect workers against harassment by third parties.

On remand, the Fourth District found in *Carter v. California Department of Veterans Affairs* (2004) 121 Cal.App.4th 840, 168 CPER 63, that, although the legislature intended the amendment to be applied retroactively, it was unconstitutional to do so.

In the second case, *Adams v. Los Angeles Unified School Dist.*, a teacher sued the district for failing to take action when students circulated an underground campus publication depicting her as a porn star. The Second District Court of Appeal, on the same day that the Fourth District issued its decision in *Carter*; ruled, in an unpublished decision, that the amendment “may constitutionally apply retroactively to the present case.” \*

examined by another doctor who found she was fit to go back to work with no restrictions. Lonicki’s union representative negotiated an agreement that extended her leave to August 23. Lonicki did not return to work until August 27, at which time she was fired.

Lonicki brought a lawsuit contending that her termination violated the state family rights act, but the trial court found she was not entitled to CalFRA leave because, at the same time that she was demanding medical leave from Sutter, she was performing the same functions at her position at Kaiser. Lonicki appealed.

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## Health Condition Justifying CalFRA Medical Leave Not Job-Specific

In *Lonicki v. Sutter Health Central*, the Court of Appeal for the Third District was asked to decide whether the Moore-Brown-Roberti Family Rights Act, known as CalFRA, entitles an employee to a medical leave of absence if she is unable to perform the essential duties of her position with one employer but is able to perform the same duties in an identical position for another employer. The court held, by a vote of two to one, that an employee’s rights under CalFRA are not employer-specific. This means an employee is entitled to medical leave only if she can show that her health condition precluded her from performing the essential job functions generally, not just for a specific employer. The majority was sympathetic to employers who are faced with what it termed a “capable but unwilling employee” who is claiming “a selective disability.”

### Factual Background

Antonina Lonicki began working at Sutter Health in 1989. In 1993, she became a technician in the sterile processing department. At the time of the dispute, she worked 32 hours a week for Sutter. Lonicki held a similar position and performed the same duties in the sterile processing department at Kaiser.

On July 26, 1999, when Lonicki’s shift at Sutter was changed, she told her supervisor she was too upset about the change to work. Lonicki was directed to submit a doctor’s note excusing her absence. Instead, she submitted a note from a nurse practitioner indicating that she was absent “due to medical reasons” and that she should plan to return to work on August 27. She also supplied Sutter with an application for medical leave of absence. Lonicki was

*The court held that an employee’s rights under CalFRA are not employer-specific.*

### Court of Appeal Decision

Government Code Sec. 12945.2(a) makes it an unlawful employment practice for an employer to refuse to grant the request of a qualified employee for “family care and medical leave” for up to 12 weeks in a 12-month period. Section 12945.2(c)(3)(C) defines “family care and medical leave” to include “leave because of an employee’s serious health condition that makes the employee unable to perform the functions of the position of that employee....”

Lonicki argued this language should be interpreted to mean that the legal standard must be employer-specific. In other words, the fact that she was performing the functions of her job at Kaiser should not preclude her entitlement to medical leave from Sutter. In contrast, Sutter asserted that, because Lonicki could perform the same job functions for another employer, she did not have a “serious health condition” entitling her to leave under the act.

The court considered two cases in support of Lonicki’s position. The first, *Stekloff v. St. John’s Mercy Health Systems* (8th Cir. 2000) 218 F.3d 858, concerned the federal Family and Medical Leave Act of 1993. The FMLA provides that an eligible employee may take medical leave for “a serious health condition that makes the employee unable to perform the functions of the position of such employee.” The *Stekloff* court found that a psychiatric nurse was entitled to FMLA leave, holding “the inquiry into whether an employee is able to perform the essential functions of her job should focus on her ability to perform those functions in her current environment, even if she was continuously able to work as a psychiatric nurse for some other employer.” Although the court in the present case acknowledged that CalFRA “closely parallels” the FMLA, and thus regulatory and decisional interpretations of the FMLA may be persuasive in interpreting CalFRA, it did not find *Stekloff* to be persuasive. The court charged that “the decision pro-

vided no reasoning” but rather “simply represented the court’s opinion of what the law should be.” Therefore, “in the absence of persuasive reasoning, we cannot defer to that opinion in interpreting and applying CalFRA.”

The court also refused to follow the holding of the Oregon Court of Appeals applying the Oregon Family Leave Act. In *Centennial School Dist. No. 28J v. Oregon Bureau of Labor and Industries* (2000) 169 Or.App. 489, a school janitor who worked four hours a day at one school and four hours a day

*CalFRA is concerned  
with promoting  
'stable workplace  
relationships.'*

at another school claimed he was entitled to leave at one school because he was unable to do his job there due to stress and depression; he continued to work at the other school. The Oregon court relied on federal decisions interpreting the Americans With Disabilities Act, holding that the ability to work at a specific job site is an essential job function. The court applied this reasoning to the Oregon act and ruled that the employee was entitled to leave. The court in the present case was not convinced by the cases cited by the Oregon court, and called the Oregon court’s argument “sophistical and wholly unpersuasive in interpreting CalFRA.”

Having summarily dismissed Lonicki’s legal authority, the majority was convinced that the trial court had been correct to dismiss her case “in light of the language and purpose of CalFRA.” The court pointed to the Department of Fair Employment and Housing regulation interpreting the language of Sec.12945.2(c)(3)(C). It specifies that the employee must be “unable to work at all or unable to perform any one or more of the essential functions of the position of that employee.” The court reasoned that, by adopting the “essential functions” formulation also applicable to discrimination cases, the standard for the right to medical leave “can only have been adopted to prevent employees from abusing the right to medical leave by asserting some broad, amorphous, and perhaps subjective need or desire for leave.”

The court expounded upon its interpretation of the legislative intent underlying the act:

CalFRA, like the FMLA, is concerned with promoting “stable workplace relationships.” Its purpose is like that of the FMLA, “to balance the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling family reasons.”

A stable workplace relationship is a two-way street, and balance requires consideration of the needs of each party....everyone would like to hold a job as stress free as possible. But stress inheres in most jobs, and personality conflicts with coworkers, particularly supervisors, can arise. If

an employee is entitled to make legal demands on an employer merely because his or her boss creates stress, then at times entire offices might go unstaffed. And supervisors would no longer be able to manage effectively, without fear of constant demands for transfer by their increasingly hypersensitive employees.

The majority emphasized its disdain for employees who claim they are unable to work because of psychological or emotional reasons:

There is an obvious distinction between an employee who has become medically unable to perform the essential functions of the job and one who has become unwilling to do so for the employer. It is not uncommon for an unwilling employee to seek the benefits of a statutory scheme by claiming stress, anxiety, or depression arising from things such as conflict with coworkers or supervisors, or from the workplace in general. In such cases, the alleged disability is often of a "very flexible" or selective sort.

In conclusion, the majority held that "an employee who is able to perform the essential functions of his or her position is not entitled to medical leave regardless of the assertion of a selective disability." "If an employer is required to make concessions to an unwilling employee who makes a claim of selective disability, the employer's ability to effectively manage will be severely compromised."

### **The Dissent**

Judge George Nicholson disagreed with the majority's analysis. He interpreted the phrase "position of that

employee" to mean "the specific job position, for the specific employer, held by the employee, not the generic job description or type of work he or she performs." He found that this interpretation does not violate the purposes of CalFRA "or common sense." (*Lonicki v. Sutter Health Central*[12-10-04] No. C039617 [3d Dist.] \_\_\_ Cal.App.4th \_\_\_, 2004 DJDAR 14701.) \*

## General

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### Formal Notice of Discipline Not Required Within One-Year PSOPBRA Time Limit

Formal notice requirements spelled out in the state's civil service laws were not incorporated into the prescriptions of the Public Safety Officers Procedural Bill of Rights Act. Therefore, there is no mandate that state agencies provide formal notice of proposed disciplinary actions within the one-year statute of limitations period outlined by the act.

The interesting interpretive riddle was presented in a case brought by Paul Sulier, an employee of the California Department of Corrections, who was demoted from correctional sergeant to correctional officer based on allegations that he gave confidential information about one inmate to another. The initial investigation into Sulier's conduct began on July 10, 2000. On July 2, 2001, the department sent Sulier a letter notifying him of the investigation's completion and the proposed disciplinary action, a one-step demotion. Sulier was personally served with formal notice of adverse action on August 2, 2001, more than one year after the investigation was initiated.

Sulier appealed his demotion to the State Personnel Board. At a hearing before an administrative law judge, he asked that the disciplinary action be dismissed because he had not been served with the formal notice of adverse

action within the one-year statute of limitations period set out in the Bill of Rights Act. The ALJ denied Sulier's motion, but the SPB rejected that conclusion and found that the discipline was improper because the department had failed to serve a formal notice of

### *The informal notice satisfied the requirements.*

adverse action within one year of the start of the investigation. The SPB revoked the demotion and awarded Sulier backpay with interest and the restoration of benefits he would have earned as a correctional sergeant.

The Department of Corrections challenged the SPB's ruling and convinced the trial court that the informal notice of the proposed discipline satisfied the requirements of Sec. 3304(d).

Section 3304(d) of the Bill of Rights Act provides that, in the event a public agency determines that disciplinary action may be taken, "it must complete its investigation and notify the public safety officer of its proposed disciplin-

ary action within that year." Further, Sec. 3304(f) provides that, if, after an investigation, the public agency decides to impose discipline, the public agency must notify the public safety officer "in writing" of its decision to impose discipline within 30 days.

At the heart of Sulier's contention on appeal is the assertion that, in order for the state employer to comply with Sec. 3304(d), it must adhere to strict notice requirements set out in Government Code Sec. 19574. That section, along with Sec. 19635, sets out a three-year statute of limitations for any cause for discipline of a state civil service employee and states that the adverse action is valid only if the employee formally is advised in writing before the effective date of the adverse action. That section also spells out that the notice must include a statement of the nature of the adverse action, the effective date of the action, a statement of the reasons for the action "in ordinary language," a statement advising the employee of the right to answer the notice orally or in writing, and a statement advising the employee of the time within which an appeal may be filed.

Sulier's argument was that the department must serve a formal notice of the adverse action under Sec. 19574 within one year.

The Court of Appeal disagreed, finding in Sec. 3304(d) no suggestion of any invocation of the formal civil service process set out in Sec. 19574. Nor did the court find in Sec. 3304(d) any reference to the items specified in

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Sec. 19574, except for the nature of the proposed discipline. All that Sec. 3304(d) requires is that the agency “notify the public safety officer of its proposed disciplinary action within that year.” This language, said the court, does not invoke the requirements of Sec. 19574.

The Court of Appeal also took notice of the context of Sec. 3304(d), both in terms of who it applies to and where it is located in the Government Code. Section 3304(d) applies to both

*The preliminary notification did not trigger the full panoply of Sulier’s Skelly rights.*

state and local agency employees, not solely to state civil service employees. Therefore, reasoned the court, it makes sense that Sec. 3304(d) does not necessarily incorporate Sec. 19574. The court also observed that Sec. 3304(d) is contained in a completely separate part of the Government Code from the state civil service portion of the law. Accordingly, the court found, “there is no logical reason to infer that section 3304(d) incorporates the notice of adverse action requirements of section 19574.”

The court also contrasted the notice that is demanded by Sec. 3304(d), which requires the employer to give original informal notice of a *proposed* disciplinary action, with that contemplated by Sec. 3304(f), which is formal notice required when the agency decides to impose discipline. In the context of this statutory scheme, said the court, it would be illogical to require the employer to provide formal notice sufficient to satisfy Sec. 19574 with regard to both proposed and final disciplinary actions. In fact, said the court, the public agency would be unable to specify the effective date of the adverse action or the time the officer has to file an appeal based on discipline the agency has not yet decided to impose.

The court rejected Sulier’s assertion that the informal notice provided by the department deprived him of his *Skelly* rights. “Here,” said the court, “the CDC’s notification to Sulier of the proposed discipline was simply that: a *proposal* of discipline that the agency might impose.... This preliminary notification did not trigger the full panoply of Sulier’s *Skelly* rights. It was the first step whereby the CDC initiated the process through which the matter would be adjudicated.” And, noted the court, the CDC afforded Sulier his *Skelly* rights when they provided service of the formal notice of adverse action. At that point, they gave him notice of the charges, access to the material on which the charges were based, and an opportunity to respond orally or in writing to

the authority initially imposing discipline. (*Sulier v. State Personnel Board; Department of Corrections, RPI* [12-20-04] No. C046695 [3d Dist.] \_\_\_ Cal. App.4th \_\_\_, 2004 DJDAR 15096.) \*

# Public Sector Arbitration

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## Teacher's Response to Student Grading Dispute Justified Letter of Reprimand

The competition for admission into the best colleges and universities may have prompted the parents of a high school student to challenge the grade their daughter received from her drama teacher. The musical theater class had presented a production of *Les Misérables* and continued to meet after the performances. The teacher gave a two-day final examination at the end of the semester.

The student, who was earning an "A" grade before the final, was given a B+ for the course because she was absent on the second day of the exam. When the school principal discussed the challenged grade with the teacher, he explained that a substitute had marked the student absent on the second day of the final and she had not arranged to take the second part of the exam at a different time. Although the student turned in that second portion of the exam later, her teacher did not count it in her grade.

The parents appealed the matter to the deputy superintendent, and an investigation ensued. The grievant submitted his grade book and a grading rubric for the two essay questions. His grade book showed that students received either full credit for the essay

portion or zero credit. All of the students who did not take the test received zeroes. The student reported to the deputy superintendent that she had completed one of the questions and turned in the second question later.

When the principal and the deputy superintendent met with the grievant to further investigate the complaint, the grievant supplied a copy of just one essay question, along with a more detailed grading rubric.

*The district violated the parties' contract by charging 'deliberate falsification.'*

There was considerable confusion over the correct number of essay questions on the final. The student and her parents believed two questions were given, while the grievant insisted that there had been only one question. Both administrators testified that during their meeting, the grievant accused the student of lying regarding the number of essay questions on the exam.

The principal then questioned several other students who had taken the final; all confirmed that there had been two questions. Shortly thereafter, the grievant notified the principal that he had been mistaken, and he forwarded a copy of the second question. He testified he had been truthful with the principal and the deputy superintendent when he said there was only one essay question and it was not his intention to deceive anyone during the investigation.

The grievant received a written reprimand for providing false information and documents in the course of an investigation and for deliberately falsifying district documents. The deputy superintendent testified that the grievant had misrepresented the grading process by providing a rubric that was not used, as students received either full credit or no credit, instead of the range of grades one would normally expect. The grievant submitted a rebuttal to the district, in which he explained that he believed he had submitted the entire exam when it contained only one essay question.

Arbitrator Walter Kaufman sustained the grievance, finding that the district violated the parties' contract by charging the grievant with "deliberate falsification of district documents." Arbitrator Kaufman agreed that the grievant's actions manifested at least a reckless disregard for the truth with respect to his continual insistence that only a single question was given. The grading rubric clearly was at odds with the grades that the grievant actually

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assigned to the students. This was problematic because it was not the criteria he used to assign grades.

Arbitrator Kaufman disagreed with the association's contention that the grievant should not have been disciplined at all. The gravamen of the written reprimand was the grievant's unqualified and insistent misrepresentation concerning the number of essay questions. However, the district produced no evidence to prove the grievant engaged in any type of falsification of district documents. The reprimand itself was reasonable because of the grievant's failure to cooperate with the

investigation in a straightforward manner. However, because the language used in the reprimand did not describe the actual offense, the district was ordered to amend the reprimand by deleting the language referring to the falsification of documents. (*Capistrano Unified School Dist. and Capistrano Unified Education Assn.* [9-28-04] 18 pp. *Representatives:* David C. Larsen, Esq. [Rutan & Tucker, LLP], for the district; Joseph R. Colton, Esq., Department of Legal Services, California Teachers Association, for the association. *Arbitrator:* Walter N. Kaufman [AAA Dec. No. 72 390 00334 04].) ❁

Step 2 provides that, if the grievance is not resolved, the employee can submit the matter to the CEO/general manager, again, with or without the union's involvement. The CEO/general manager must schedule a meeting within 15 days, discuss the grievance

*Jones had a  
constitutionally  
protected property  
interest in continued  
employment.*

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## Union's Exclusive Right to Invoke Arbitration Is Not Due Process Violation

A grievance procedure contained in a memorandum of understanding that gives the union the exclusive authority to request arbitration does not violate an individual employee's due process rights. The Fourth District Court of Appeal ruled that the grievance and arbitration procedure outlined in the MOU conveyed ample due process protections, and that the union's decision not to invoke arbitration was subject to challenge based on typical duty of fair representation standards.

The case was brought by Jeffrey Jones, a coach operator for Omnitrans, a local public transit agency. Jones was dismissed by the transit agency for misconduct following a verbal altercation with a security guard. Jones requested

that the matter be arbitrated, but his union, the Amalgamated Transit Union, Local 1704, declined to take the matter to arbitration. Jones then requested that Omnitrans proceed with arbitration despite the union's refusal, but the agency declined, arguing that it would violate the terms of the MOU if it did so.

The MOU establishes a three-step formal grievance procedure. In Step 1, the employee can present his grievance in writing, with or without the union's representation, to the director of operations. The director must schedule a meeting within 15 working days, discuss the grievance with the employee, and respond in writing within seven working days after the meeting.

with the employee, and issue a written response within seven working days. Step 3 provides that if the grievance is not resolved in Step 2 and concerns a disciplinary action that resulted in termination, the employee, "with the union representative," may request that the grievance be referred to a grievance committee. The union then must call for a membership vote to confirm whether or not it wishes to proceed with the third step of the grievance procedure.

**Due process right.** The court first concluded that Jones could be discharged only for cause by Omnitrans and therefore that he had a constitutionally protected property interest in continued employment by the public transit agency.

A public employee who is subject to dismissal only for cause may not be dismissed without being afforded procedural safeguards that are sufficient to satisfy the employee's right to due process. At a minimum, explained the court, this means the employee must be given notice of the reasons for termination, an opportunity to respond to the charges, either orally or in writing, and an evidentiary hearing at which the employer bears the burden of proving the facts supporting the decision to terminate employment.

The right to due process is a personal one, noted the court, and a collective bargaining agreement cannot waive an employee's right to due process. However, said the court, citing *Armstrong v. Meyers* (9th Cir. 1992) 964 F.2d 948, 94 CPER 43, due process is satisfied by a collective bargaining agreement that affords the employee notice, an opportunity to be heard, and the opportunity for arbitration of his dismissal, even though the employee's union has the sole authority to request the hearing, as long as the union acts in accordance with its duty of fair representation. While not bound by the *Armstrong* ruling, the court was in agreement with its reasoning.

An employee's interest in keeping his job is substantial, the court said. However, there is a strong public policy in favor of providing a reasonable method of resolving disputes between local agencies and their employees concerning the terms and conditions of employment. "To that end," said the court, "the Meyers-Milias-Brown Act

authorizes the formation of employee organizations to represent employees in negotiating terms and conditions of employment with public agencies and the creation of an MOU establishing rules governing the employer-employee relationship."

**Union discretion.** A central feature of most collective bargaining agreements is a process for the resolution of disputes between employers and employees, and, the court explained, "a strong public and private interest in maintaining an *effective* grievance pro-

*Union discretion  
is essential to the  
functioning of the  
collective bargaining  
system.*

cess to settle such disputes." In that regard, union discretion in determining which grievances to arbitrate is essential to the functioning of the collective bargaining system. Citing the seminal decision in *Vaca v. Sipes* (1967) 386 U.S. 171, the court instructed that, while a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, an individual employee does not enjoy an absolute right to have his grievance taken to arbitration regardless of the provisions of the collective bargaining agreement. In providing for a grievance arbitration

procedure that gives the union discretion to supervise the grievance machinery and invoke arbitration, the union and the employer contemplate that each will endeavor to settle grievances short of arbitration. Through this process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedure. If the individual employee could compel arbitration, regardless of the merits of his grievance, the settlement machinery provided by contract would be substantially undermined.

The court acknowledged that *Vaca v. Sipes* does not address the due process issue raised in the present case. Nor could it cite to any California case addressing that point. However, the court recognized the importance of allowing unions the discretion to decide which grievances have sufficient merit to be taken to arbitration. Citing *Lane v. IUOE Stationary Engineers* (1989) 212 Cal.App.3d 164, 82 CPER 22, the court said:

It is essential that labor organizations have some freedom and discretion in handling employee disputes with employers. In order to prevent the settlement mechanism from being clogged by meritless complaints, the union must be permitted to sort out the substantial grievances from the unjustified ones. If the union did not have the power to settle or discard groundless complaints, the employer would have little motivation to participate in a dispute resolution mechanism.

Moreover, the court observed, the risk of an erroneous determination on the part of the union is not large and the value of additional procedures is not great. This is true because, while the union may decide not to take a grievance to arbitration, it does so under a duty of fair representation and may be sued for a breach of that duty if its conduct toward a member is arbitrary, discriminatory, or in bad faith. "The availability of recourse for a breach of the duty of fair representation allays any concern that might otherwise arise

### *The MOU afforded sufficient procedural due process.*

from limiting the employee's individual right to seek a hearing."

The court cautioned that, while the duty of fair representation is implicit in the National Labor Relations Act and is made explicit in some California labor laws, the MMBA does not explicitly provide that employee organizations created under its aegis have a duty of fair representation to their members. Nevertheless, said the court, any labor organization that acts as the exclusive representative of its members has such a duty and, in turn, the members have recourse for breach of that duty either through the courts or through the Public Employment Relations Board.

In this case, the MOU between Omnitrans and ATU made the union Jones' exclusive representative with respect to Step 3 of the grievance procedure. Jones therefore had recourse against the union if its decision not to pursue arbitration on his behalf was arbitrary, discriminatory, or in bad faith.

The court also stressed that the grievance procedure spelled out in the MOU afforded Jones sufficient procedural due process. Jones received written notice of the reasons for his dismissal, and he had the right to have a meeting with two levels of management to discuss his grievance. At each step, he was entitled to a written response. Because the MOU made the union the employee's exclusive representative with respect to the determination to pursue the grievance to arbitration, the union had a duty of fair representation and could not make that decision arbitrarily, discriminatorily, or in bad faith. This procedure afforded Jones adequate due process, and Omnitrans had no duty to arbitrate Jones' grievance in the absence of a request from the union.

The court dismissed Jones' reliance on *Phillips v. State Personnel Board*

(1986) 184 Cal.App.3d 651, 70X CPER 4, which held that a union may not waive the individual due process rights of its members in a collective bargaining agreement. "We agree that a collective bargaining agreement may not waive employees' constitutional due process rights," said the court. "However, the issue here is whether the MOU *did* unconstitutionally waive Jones's due process right to a hearing, and *Phillips* sheds no light on that issue."

Jones cited other cases which state the general proposition that procedures established by an MOU are subject to scrutiny to determine whether they violate due process. But, like *Phillips*, those cases did not address whether a provision vesting the union with the exclusive authority to decide whether to pursue an evidentiary hearing constitutes a waiver of due process rights.

Finding that the MOU provided Jones with adequate procedural due process rights, the court found that Omnitrans had no duty to afford Jones a hearing. (*Jones v. Omnitrans* [12-23-04] E035295 [4th Dist] \_\_\_ Cal.App. 4th \_\_\_, 2004 DJDAR 15262.) \*

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## **Faculty Association's Petition to Compel Arbitration Granted**

The Sixth District Court of Appeal determined that an "issue of significance in higher education labor relations" was presented in *Hartnell Com-*

*munity College Dist. v. Superior Court*, where a community college district refused to arbitrate two faculty grievances, claiming that it could not be compelled

to do so. The Court of Appeal disagreed, finding that the parties' arbitration agreement did not give the district the unilateral power to determine arbitrability.

### **Factual Background**

Two faculty members at Hartnell Community College asked that their grievances be arbitrated pursuant to the grievance/arbitration section of the collective bargaining agreement. One claimed that the district had docked two days' pay in violation of the agreement. The other claimed that her workload as a math lab instructional specialist was excessive and should not exceed that of a similar full-time math faculty position. Both grievances were denied and both members requested arbitration.

The district refused to arbitrate the grievances, claiming that Article 15(B)(1)(b) of the collective bargaining agreement expressly permitted it to exclude particular grievances from arbitration. That provision reads:

#### **B. Definition**

1. A grievance is defined as a formal written allegation by a grievant that the grievant has been adversely affected by violation of a specific article, section, or provision of this Agreement....

b. Not included in this definition of grievance is a complaint which may, or should as interpreted by the District, be appealed or redressed through some other complaint, appellat [sic] or redress process.

Hartnell College Faculty Association, the union, took the matter to court. It argued that Article 15(B)(1)(b) did not apply because the district had arbitrated faculty grievances in the past. A declaration revealed that, from 1982 to 2000, the district had not refused to arbitrate a single faculty grievance or asserted that it had absolute discretion to determine whether a grievance should proceed to arbitration. The union argued that the parties' mutual agreement to arbitrate all faculty grievances could be inferred from this past conduct.

*From 1982 to 2000,  
the district had not  
refused to arbitrate a  
single faculty  
grievance.*

The union also contended that the district should be barred from refusing to arbitrate because the union had relied on its past practice of arbitrating all faculty grievances and because the district's new position that it, alone, had the power to determine whether a grievance could be arbitrated left faculty members with no remedy for violations of the collective bargaining agreement. The union further asserted that the grievance procedure was binding on both the district and the union.

The district believed that it could not be compelled to arbitrate because the provision in question was the product of "arms-length collective bargaining." Further, as the terms of the agreement were clear and unambiguous, extrinsic evidence of pattern and practice could not be introduced to change those terms. In addition, it argued, an employer has the right to unilaterally change a past practice where the new practice is permitted by the collective bargaining agreement. It took the position that its exercise of its right under the collective bargaining agreement to process a grievance did not constitute a waiver of its contractual right to refuse arbitration.

The trial court agreed with the union and ordered the parties to arbitration. The district appealed.

### **Court of Appeal Decision**

The court began by reviewing the principles applicable to determining whether a written arbitration agreement exists and whether the parties should be ordered to arbitrate their controversy. Code of Civil Procedure Sec. 1281.2 provides that it is the court that makes this determination, not the arbitrator. "In order to make its determination, the court is required to examine and construe the underlying agreement." Further, there is a legal presumption in favor of arbitration. "Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. The court

should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute.” This presumption applies to governmental entities.

With these general principles in mind, the court reviewed the arbitration agreement before it, focusing on Article 15, section B, subdivision (1)(b):

[H]aving independently reviewed the arbitration agreement, we deem it to be ambiguous, particularly with regard to the Article 15(b)(1)(b) language indicating that District may determine whether a faculty complaint can “be appealed or redressed through some other complaint, appellant [sic], or redress process.” It cannot be determined from this awkward and nearly unintelligible language what other process could have been contemplated as an alternative to arbitration for redress of unresolved faculty grievances other than the grievance review and arbitration process set forth in Article 15.

The court also disagreed with the district’s argument that the collective bargaining process is a “redress process” which is an adequate alternative to arbitration. Referring to definitions set forth in *Merriam-Webster’s Collegiate Dictionary*, the court found:

“Redress” means “to set right” or the “means or possibility of seeking a remedy,” while “collective bargaining” is defined as a “negotiation between an employer and a labor union.” Thus, a redress process must involve the remedy-

ing of an individual employee’s complaint, while collective bargaining concerns the collective relationship of employer and employees with regard to wages, hours, and other conditions of employment....

Thus, as generally understood, the collective bargaining process does not include the remedying of an individual employee’s particular grievance. Moreover, District has not explained how individual complaints, such as the faculty grievances at issue in the present case, would be resolved through collective bargaining.

Because the court determined that the arbitration agreement was inherently ambiguous, it was free “to consider extrinsic evidence to aid its interpretation.” Such evidence is necessary to determine the parties’ intent “in light of earlier negotiations, later conduct, related agreements, and industry-wide custom.”

Most important in deriving the intention of the parties, the court found, was “the undisputed extrinsic evidence” that, prior to the two grievances involved in the present case, the district had never refused to arbitrate a faculty grievance because the grievance could be redressed by another process such as collective bargaining. This was true even though the same language found in Article 15(B)(1)(b) was present in all of the bargaining agreements. Said the court:

For over 20 years, it could be inferred from District’s conduct that it, like Faculty Association, intended Article 15 to provide for the arbitration of faculty grievances after three levels of employer grievance review were exhausted. Therefore, we find that the arbitration agreement contained in Article 15 of the parties’ collective bargaining agreement was intended by the parties to provide for arbitration upon the written request of the grievant after exhaustion of District’s grievance review process, and does not provide District with the unilateral power to decide the arbitrability of faculty grievances.

The union had made a written request to arbitrate in this case, and the trial court was correct in granting its petition to compel arbitration. Therefore, the appellate court determined that it did not need to address the balance of the union’s contention that the district waived its purported right to determine the arbitrability of faculty grievances. (*Hartnell Community College Dist. v. Superior Court* [12-15-04] H025540 [6th Dist.] \_\_\_Cal.App.4th \_\_\_, 2004 DJDAR 14907.) \*

# Arbitration Log

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• **Discharge — Just Cause**

**County of San Joaquin and Service Employees International Union, Loc. 790** (5-13-04; 17 pp.)  
*Representatives:* Anne Yen, Esq. (Weinberg, Roger & Rosenfeld), for the union; Gilbert Gutierrez, deputy county counsel, for the county. *Arbitrator:* Bonnie G. Bogue.

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

*County's position:* (1) The grievant has been employed as a housekeeping service worker at San Joaquin General Hospital for nine years. On three separate occasions in March 2003, she was observed to be unsteady on her feet and was slurring her words. She tested positive for benzodiazepine, an anxiety medication for which she held a current prescription.

(2) The grievant did not deny that she took the drug while on duty. These three incidents, plus the grievant's recent history of drug use problems, were sufficient to terminate her employment. The county's drug use policy prohibits working under the influence of medication that impairs one's ability to perform her job duties.

(3) After two similar incidents in June 2002, the county placed a 15-day suspension in abeyance provided the grievant completed a residential drug treatment program. She completed the inpatient portion of the program, but

not the outpatient phase, which required 12 visits to a group counseling meeting over a three-month period. The grievant was informed of both requirements and signed several documents that described the program as including the outpatient phase. The county considered her failure to complete the program and her disciplinary record as a whole in deciding to terminate her.

(4) The grievant's use of medication while on duty prevented her from effectively performing her job and caused her to endanger herself and others. She lost her keys on one occasion, causing a serious security breach. She cannot be trusted to maintain safety, and the supervisory staff has lost confidence in her ability to do her job.

(5) The grievant's actions have demonstrated that she does not deserve another chance. She already has been issued written reprimands and given corrective interviews and suspensions of various lengths. She repeatedly has been given notice of the county drug

policy. No permanent, lasting improvement resulted from application of progressive discipline.

*Union's position:* (1) The grievant is a good worker whose 2002 performance evaluation gave her the highest rating possible. It also noted that she was overcoming personal problems that affected her attendance. Her supervisor testified that she is a good worker when not impaired.

(2) The grievant acknowledged taking too many doses of her prescribed medication in reaction to domestic stress. Her prescription was disclosed to the county when she submitted to drug testing in 2002 and 2003.

(3) Consistent with the county's policy, the grievant sought help for her drug problem and completed the 28-day residential program in October 2002, in exchange for the county's decision to place her 15-day suspension in abeyance. The county was aware that she did not complete the outpatient phase of the program, but it did not discuss the issue with the grievant until after the three subsequent impairment incidents occurred.

(4) The grievant then offered to take a leave of absence and undergo another rehabilitation program. She

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advised the county that her overuse of the prescribed drug was triggered by domestic abuse, and that both she and her husband were going to receive counseling. The county did not respond to her request. It would have been consistent with the county's policy to allow her to do so.

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

*Arbitrator's reasoning:* (1) The parties' sole dispute is whether the grievant should be given another chance at rehabilitation. The county believed it had exhausted all reasonable efforts to allow the grievant to rehabilitate and that no reason existed to give her another chance, given the hazards of her misconduct and her extensive disciplinary record. However, given the information she made available to her supervisors prior to her termination concerning the domestic violence she was experiencing, the county's conclusion that it had "no option" but to terminate her was not reasonable under the circumstances.

(2) Although the county claimed the grievant's failure to complete the rehabilitation program was evidence that she could not be trusted to complete a second program, the grievant credibly testified that she believed the rehabilitation program primarily was residential based on her conversations with the county. She believed that she did not need to attend all of the follow-up counseling sessions; she received such limited attention from the counselor that the sessions were worthless to her.

(3) Even though her understanding of the program's demands may have been unreasonable, the county was aware that she was not attending the counseling sessions and did not notify her that she was violating the terms of her agreement.

(4) Giving the grievant a second chance to complete rehabilitation is fully within the letter and spirit of the county drug policy. Since her termination, she successfully completed a treatment program and no longer relies on her anxiety medication. The county's safety concerns are valid, but they existed before the first treatment program and should not stand in the way of a second chance. The appropriate remedy is to approximate the terms of employment that would have existed had the grievant been suspended to complete a second rehabilitation program.

*(Binding Grievance Arbitration)*

#### • Discipline — Just Cause

**Benicia Police Officers Assn. and the City of Benicia** (7-15-04; 20 pp.) *Representatives:* Adam J. Krolkowski, Esq. (Mastagni, Holstedt & Amick), for the grievant; Glenn W. Peterson, Esq. (McDonough, Holland & Allen), for the city. *Arbitrator:* Christopher D. Burdick (CSMCS Case No. ARB-03-0098).

*Issue:* Was the grievant properly suspended without pay for two workdays for arresting the wrong person?

*City's position:* (1) The grievant, an officer with the Benicia Police Department, encountered the arrestee during a routine traffic stop and looked at the

arrestee's driver's license. When the grievant radioed the license information to the dispatcher, he was informed of a warrant in the system for the arrest of a man with the same birthdate and Social Security number. Based on this information, the grievant believed he had probable cause to make an arrest.

(2) The arrestee told the grievant he was not the subject of the warrant and had never lived in Sacramento, where the warrant had issued.

(3) At the police station, the grievant reviewed the actual warrant and discovered certain discrepancies. However, he concluded he had sufficient information to book the arrestee. When the arrestee was transferred to the county jail, he was fingerprinted and his prints were sent to the state for identity confirmation. The county did not receive any notification that the wrong person had been jailed.

(4) The arrestee was not released until another officer received a call from the arrestee's employer, who insisted that the wrong person was in custody. The officer retrieved the warrant, compared it with the grievant's arrest and detention report, and immediately detected discrepancies. The officer then checked the fingerprints and photographs on file, verified the mistaken arrest, and released the arrestee, who had spent four days in jail.

(5) The grievant should have noted the discrepancies on the arrest and detention form. His failure to do so and to follow up on the discrepancies was negligent and caused an innocent man to spend four days in jail.

(6) If the arbitrator does not find that the preponderance of the evidence supports the two-day suspension, the matter must be remanded to the city for reconsideration.

*Union's position:* (1) The grievant acknowledged he should have recorded all known aliases on the arrest and detention form, and should have informed his sergeant of the discrepancies. This practice was not known to the grievant at the time of the incident.

(2) The grievant's conduct was reasonable and met or exceeded the police department's standards. Accordingly, the imposed penalty was disproportionate to his errors and was inconsistent with the doctrine of progressive discipline.

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

*Arbitrator's reasoning:* (1) The fact that the grievant had been disciplined in the past was not raised by the department before the arbitration hearing, and thus could not be a basis for the suspension.

(2) The consequences for the arrestee were not disputed. However, police officers often make errors in the normal performance of their duties.

The grievant made the arrest pursuant to a valid warrant. Such an act cannot be punished under the California Civil Code if the arrest is made without malice and the officer has a reasonable belief that the person arrested is the one referred to in the warrant. The grievant acted in this manner, and although he was not as diligent as he could have been, he did not fail to meet the department's standard of care as he understood it.

(3) Neither the gravity of the grievant's misconduct nor his inability to grasp the magnitude of his errors justified skipping the lesser step of a reprimand and going directly to the suspension. A written reprimand was more appropriate in light of the need to adhere to principles of progressive discipline.

(4) The parties' memorandum of understanding provides that a properly elected arbitration decision is final and binding. The grievant chose arbitration for the final appeal of his suspension pursuant to the process agreed to in the MOU. There is no basis for returning the matter to the city for reconsideration. The decision issued is binding on the parties.

*(Binding Grievance Arbitration)*

• **Contract Interpretation**

**County of Los Angeles and Los Angeles County Police Officers Assn.** (8-2-04; 16 pp. *Representatives:* Dieter Dammeier, Esq. (Lackie & Dammeier), for the association; John Garrisi (Chief Administrative Office), for the county. *Arbitrator:* Robert D. Steinberg.

*Issue:* Did the county fail to withhold fair share fees in violation of the parties' memorandum of understanding?

*Association's position:* (1) The MOU requires the county to deduct fair share fees for employees after 30 days of employment. The association did not receive fees from the county for up to 117 employees between April 2001 and February 2003. The county failed to provide new personnel data despite several requests for that information.

(2) Proper *Hudson* notices were provided to the county for distribution prior to April 2001. However, even if the notices were not provided, any basis for denying payment of fees exists between affected employees and the union. The county is obligated to deduct fees 30 days after an employee is hired, even when the authorization form is not returned.

(3) The indemnification clause is not a valid defense to the county's conduct, and it is not allowed to withhold fees absent employee authorization; several employees testified that they had deductions made in the absence of authorization.

(4) The association is not obligated to send annual financial statements to

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the county or to employees. State law requires only that such records be made available upon request. A satisfactory *Hudson* notice does not include a financial statement.

*County's position:* (1) The association is required to issue an annual financial statement in addition to its *Hudson* notice. The one provided in February 2001 became outdated in March 2001. Though the association was obligated to provide an updated statement sooner, it did not do so until January 2003, when the county resumed withholding dues and fees.

(2) An employee authorization form must be submitted because the practice of withholding agency fees is not self-initiating. The county needs to know what the employee's choice is with respect to dues and fees.

(3) The county was not at fault for failing to provide the association with timely information on new hires. The established practice was to provide an updated list upon request.

(4) The county is merely a collection agent for the association. Even if it erred in the performance of its dues/fees obligation, the MOU indemnification clause protects it from liability to the association.

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

*Arbitrator's reasoning:* (1) New employees are advised within the first 30 days of employment that they must join the association and pay dues, or pay fair share or agency fees, or claim a religious exemption. Employees are instructed to complete authorization

forms, but regardless of whether the forms are completed, the county is obligated to deduct dues or the equivalent, pending receipt of a valid *Hudson* notice. An employee challenge to the deduction is a matter between the employee and the association; the county is merely the facilitator of the distribution process.

(2) The county offered no persuasive evidence that it had the right to unilaterally discontinue fair share fee deductions because the association's financial statements became outdated. California law requires only that financial documentation be made available upon request. If the county wanted a new financial statement from the association in March 2001, it knew the existing statement would be outdated at the end of February when the *Hudson* notice was distributed, and that it was obligated to request a new one.

(3) The association never was advised that it was solely responsible for informing the county of new employees whose dues would not be deducted absent receipt of a valid authorization form. Had it understood this to be the practice, as the county claimed, the association would not have sought monthly payroll data from the county in order to learn who the new employees were. The language of the MOU defeats this argument.

(4) The indemnification clause of the MOU does not protect the county from liability to the association for its failure to withhold fees. The clause merely protects the county from employees' claims that their fees have been withheld improperly.

(5) The county is obligated to make the association whole by paying the withheld fees. The association is entitled to repayment for the period of time it actively pursued its rights to personnel data.

*(Binding Grievance Arbitration)*

• **Contract Interpretation — Benefits**

**Fresno Teachers Assn. and Fresno Unified School Dist.** (9-1-04; 8 pp.) *Representatives:* Marc T. Cryer, associate director, for the association; Gregory J. Dannis, Esq. (Miller, Brown & Dannis), for the district. *Arbitrator:* C. Allen Pool (CSMCS Case No. ARB-03. 1832).

*Issue:* Did the district violate the parties' contract when it denied health care coverage to teachers who were laid off?

*Relevant contract provision:* "Article 18.5(B): Should a bargaining unit member's employment terminate following the last day of the school year and before the commencement of the subsequent school year, such unit member shall be entitled to continued District-paid coverage under all District-paid programs through September 30 of the subsequent school year."

*Association's position:* (1) The 700 teachers employed at the close of the 2002-03 school year were entitled to health care benefits through the summer until September 30.

(2) The contract language was negotiated in 1978, when the school year for all teachers in the district commenced in September and ended in early June. It provides guaranteed health care benefits for all teachers for

12 months, commencing on October 1 and extending through September 30. The subsequent creation of year-round schools changed the calendar for some district schools; eventually the traditional school calendar was modified such that school began before September. Nonetheless, the contract provision, while discussed several times, remained clear: unit members are entitled to paid health care benefits through September 30.

*District's position:* (1) While the contract language is clear, a 20-year past practice requires a different interpretation. Changes to the school calendar require use of a different time frame, even though the original intent of the language and resulting 12 months of paid health care coverage did not change.

(2) The association's interpretation of the contract would result in some unit members receiving 13 months of guaranteed benefits and others receiving 12 months.

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

*Arbitrator's reasoning:* (1) In the past, when the school year began in September, teachers' health care benefits commenced on the first day of the following month, October, and coverage continued for the next 12 months. The next year, returning-teachers' benefits would renew on October 1, and laid-off teachers' benefits appropriately would terminate on September 30.

(2) When the traditional school calendar changed, such that service and classes began in August, benefits for the

new year now began on the first day of the following month, September. The 12 months of coverage then continued through August 31. Teachers on the year-round school calendar receive the same coverage.

(3) If the association's position were accepted, teachers who were laid off in June actually would receive 13 months of paid health care, whereas returning teachers would receive 12 months. Such a practice would lead to inequity between the two groups, which clearly was not the intention of the parties.

*(Binding Grievance Arbitration)*

#### • Discipline — Just Cause

**University of California, Berkeley, and Alameda County Building and Construction Trades Council** (9-30-04; 11 pp.) *Representatives:* Scott M. De Nardo, Esq. (Neyhart, Anderson, Freitas et al.), for the council; Kenneth T. Phillippi, labor relations specialist, for the university. *Arbitrator:* Philip Tamoush.

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

*University's position:* (1) The grievant had been employed as a stationary engineer in the university's physical plant section for 18 years. He had been in a lead position for one year.

(2) In 2001, following disclosures by a whistleblower, the university hired an outside investigator to delve into allegations of on-duty drug use by employees in the physical plant section. The investigator's observations led him to conclude that the grievant consumed alcohol and illegal drugs while on duty,

falsified time records, and took university tools home without authorization. When he was confronted with this information by management and an undercover agent, he admitted to drug use, which he attributed to personal problems. The grievant's actions, in light of his role as a lead employee, justified immediate termination.

(3) Before this confrontation, the grievant had told his supervisor about his drug use and was referred to the university employee assistance program. He received counseling and other treatment but did not complete the program because his employee benefits were terminated after his dismissal.

(4) The grievant cannot excuse drug use at work by reason of his personal problems. The code of conduct is clear and unambiguous, and the grievant was on notice of its requirements. As a stationary engineer, his drug use posed a safety risk to those using the buildings under his supervision.

(5) The grievant's statement to the undercover investigator was not coerced, and he was free to leave the interview when he wanted to do so.

*Union's position:* (1) The grievant's written statement regarding his drug use that was used to justify termination was dictated to him by the undercover agent pursuant to a set format. He was not given the opportunity to make a statement in his own words.

(2) The university failed to support the allegation that the grievant improperly took home tools belonging to the university. The grievant's former super-

visor testified that employees regularly borrowed tools with permission. As for the alleged falsification of time records, the grievant often began work at a remote location before reporting to his primary office, and left work from another remote location, all without being observed by anyone, including the undercover agent. Moreover, the whistleblower who prompted the investigation never was produced so that his motivations or relationship to the grievant could be examined.

(3) The grievant admitted his ongoing use of drugs and already had taken advantage of the university's employee assistance program. He should have been given the opportunity to continue that course of treatment.

(4) The university violated its own disciplinary rules by dismissing the grievant. He told the truth during the investigation and was punished for cooperating. That conduct should be considered as a mitigating factor.

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

*Arbitrator's reasoning:* (1) Discharge of the grievant is not supported by just cause. The grievant was a long-term employee who sought treatment for his drug use after discussing his problems with his supervisor. His work record was exemplary and he recently had been promoted to a supervisory position. The university ignored these factors in contravention of its own policy that dictates consideration of individual circumstances.

(2) On-duty drug use must be taken seriously, and the grievant's admitted

use should be dealt with directly. University policy allows demotion to a lower classification and assurance that the employee has been rehabilitated. This is an appropriate remedy for the grievant while he continues treatment. If he fails to meet his obligation, the university will be justified in taking further disciplinary action.

(3) Insufficient direct evidence justified discipline with respect to the theft of university tools and the falsification of time records. No direct evidence was available regarding permission to remove the tools, and the grievant's explanation of his work schedule was reasonable.

*(Binding Grievance Arbitration)*

# Resources

## Update on Workplace Rights

CPER's informative *Pocket Guide to Workplace Rights of Public Employees* has a new, second edition. In concise and understandable language, this compact book explains the many rights afforded public employees in California — state, local government, and school employees — and in the federal workforce. It provides an overview of the rights that have been granted to individual employees by the United States and California Constitutions, and by a variety of statutes, including the Americans With Disabilities Act and the Family and Medical Leave Act of 1993, and anti-discrimination laws, such as Title VII of the federal civil rights act and the state Fair Employment and Housing Act.

Part I covers personal rights that public employees enjoy, such as free speech, equal protection, due process, privacy, and protections against wrongful termination. Part II explains the rights of individual employees who work where there is a union, such as the right to participate (or not to participate) in a union and the union's duty to fairly represent all employees, regardless of union membership or political activity.

Pocket Guide author Bonnie Bogue is a labor lawyer, arbitrator, and former director of the CPER Program. Labor lawyer Liz Joffe participated in the preparation of this booklet as a research project sponsored by CPER and Boalt Hall School of Law, University of California at Berkeley.

***Pocket Guide to Workplace Rights of Public Employees*** (2nd edition), by Bonnie G. Bogue and Liz Joffe (2005) 164 pp. California Public Employee Relations, U.C. Berkeley, <http://cper.berkeley.edu>. Softcover, \$12.

## Revitalizing Labor in the U.S.

In *Rebuilding Labor*, U.C. professors Ruth Milkman and Kim Voss bring together established researchers and a new generation of labor scholars to assess the current state of labor organizing and its relationship to union revitalization. The focus of this interdisciplinary collection of articles is on the formidable challenges unions face today and on how they may be overcome. The book begins with a comprehensive overview of recent union organizing in the

United States and goes on to present a series of detailed case studies of such topics as union leadership, organizer recruitment and retention, union democracy, and the dynamics of anti-unionism among rank-and-file workers. The book concludes with a quantitative chapter on the relationship between union victories and establishment survival.

“In order to recruit new members on a scale that would be required to significantly rebuild union power, unions must fundamentally alter their internal organizational practices,” state the authors. “This means creating more organizer positions on the staff; developing programs to teach current members how to handle the tasks involved in resolving shop-floor grievances; and building programs that train members to participate fully in the work of external organizing. Such a reorientation entails redefining the very meaning of union membership from a relatively passive stance toward one of continuous active engagement.”

***Rebuilding Labor: Organizing and Organizers in the New Union Movement***, Ruth Milkman and Kim Voss, editors (2004) 320 pp. Cornell University Press, <http://www.cornellpress.cornell.edu/>. Hardcover, \$49.95; softcover \$19.95.

## So, Sue Me!

Community colleges exist in a highly litigious society, and their officials are confronted with numerous legal issues as they carry out assigned duties. This 125th issue of the quarterly higher-education journal, *New Directions for Community Colleges*, informs academic leaders about current legal issues that threaten institutional stability and effectiveness.

Some of those issues are not new to postsecondary education: governing board relations, academic freedom and tenure, collective bargaining, and employment issues. New topics of importance include student rights, codes of conduct, accommodation of disabled students, campus safety, distance education, intellectual property rights, and risk management.

Officials are confronted with a multitude of federal statutes and court rulings. Special-interest groups, like

teachers unions and taxpayers associations, are increasingly involved in governing board elections, creating volatile situations for presidents. Community college leaders must find ways to resolve or mitigate these and other issues if their colleges are to continue providing exemplary services to students.

**“Legal Issues in the Community College,”** *New Directions for Community Colleges*, Robert C. Cloud, editor (April 2004) 120 pp. Jossey Bass, <http://www.josseybass.com/WileyCDA/>. Softcover, \$29.

### **Bringing About Big Changes in Higher Ed.**

The companion publication to the community college treatise also is celebrating its 125th anniversary. *New Directions for Higher Education* focuses on the theme of revamping general education curriculum in big ways — through significant reforms and, more frequently, through incremental changes. The articles present ways to better accomplish purposes; connect with students more thoroughly; and provide a more engaging, and intellectually and emotionally compelling common collegiate experience. This issue of the journal includes the results of a recent national survey on changes in general education; case studies highlighting institutions that have undertaken change; and articles that touch on achieving curricular coherence, the nature of change, and how to bring it about.

**“Changing General Education,”** *New Directions for Higher Education*, James L. Ratcliff, D. Kent Johnson, Jerry G. Gaff (March 2004) 136 pp. John Wiley & Sons, <http://www.josseybass.com/WileyCDA/>. Softcover, \$29.

### **Recourse for Non-Union Workers**

This widely publicized book provides an analysis of organizational justice systems by exploring non-union systems of workplace justice and comparing them with the union system, American courts, and systems in 11 other countries.

Justice in the U.S. non-union workplace operates within the tenets of employment-at-will. Based on the late-

19th century “Wood’s rule,” this concept led courts to recognize the right of an employer to fire a worker at any time, for any reason. For non-union workers, a workplace justice system has evolved that provides some recourse when they are let go without just cause. This is a complex and not widely understood system, but the authors attempt to clarify its workings and compare its effectiveness and fairness to a variety of other workplace justice systems.

The U.S. non-union workplace justice system includes protective federal legislation, labor arbitration, and a host of management-initiated procedures including the use of open-door policies, ombudsmen, mediation, peer review panels, and the most recent and controversial method, employment arbitration. The latter method — arbitration of workplace disputes in a non-union setting — receives special attention from the authors, who include a discussion of the law concerning employment arbitration along with an intensive survey that investigates its practice.

The authors’ empirical analysis focuses on the overall win/loss rates by employees in termination cases in labor arbitration, employment arbitration, and the federal courts. Specifically, they attempt to determine the degree to which the same result would be reached using the different processes by posing scenarios to labor arbitrators, employment arbitrators, managers, members of peer review panels, jurors in employment discrimination cases, and labor court judges from other countries. An analysis of the responses allows a comparison of the relative harshness or leniency of the systems toward employees for different disciplinary offenses, and the criteria used to reach decisions. The result is a body of data and analysis that permit the authors to discern the differences among these systems in both outcome and procedure, and to compare them on the basis of their merits.

***Workplace Justice Without Unions***, by Hoyt N. Wheeler, Brian S. Klaas, and Douglas M. Mahony (2004) 231 pp. W.E. Upjohn Institute for Employment Research, <http://www.upjohninst.org/>. Hardcover, \$40; softcover, \$18.

### Championing Women and Families

Not that long ago, women only dared to dream that they could stop sexual harassment, keep their jobs if they became pregnant, get the quality health care they needed, and care for their families without putting their jobs on the line. Change has come about thanks in part to the National Partnership for Women and Families.

Founded in 1971 as the Women's Legal Defense Fund, the National Partnership is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. From outlawing sexual harassment to prohibiting pregnancy discrimination to giving 50 million Americans family and medical leave, the National Partnership has fought for every major policy advancement that has helped women and families in the last three decades. One new area of interest is an initiative to improve the quality and safety of health care. Writes, President Debra L. Ness, "We believe that people have a right to information about the quality of their health care, and they should have that information when they need to choose a doctor, a hospital, or a health plan."

**National Partnership for Women and Families,**  
<http://www.nationalpartnership.org/>.

### Children Left Behind

The No Child Left Behind Act was a fiercely debated educational issue during this past election year, and it will be at the center of the national conversation about schools for the foreseeable future. NCLB, signed into law in 2002, purports to improve public schools — especially the way they serve poor children — by enforcing a system of standards and accountability through high-stakes testing and sanctions. It is radically affecting the life of schools around the country.

*Many Children Left Behind* is a devastating brief against NCLB. Far from improving public schools and increasing the ability of the system to serve poor and minority children, the authors argue, the law is doing exactly the opposite. In

this book, some of the most prominent, respected voices in education — including Deborah Meier, Alfie Kohn, and Theodore R.Sizer — show, point by point, how NCLB undermines the things it claims to improve: how NCLB punishes rather than helps poor and minority kids and their schools; how NCLB helps further an agenda of privatization and an attack on public schools; how the focus on testing and test preparation "dumbs down" classrooms; and how we need alternatives to construing the idea of accountability in terms of test scores and sanctions.

The editors and contributors are founding members of the Forum for Education and Democracy, a nonprofit think tank.

***Many Children Left Behind: How the No Child Left Behind Act Is Damaging Our Children and Our Schools,*** by Deborah Meier, George Wood (2004) 144 pp. Beacon Press, <http://http://www.beacon.org/index.html> Softcover, \$13.

# 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***

#### **Report prepared by non-attorney and containing no legal advice is not privileged: DVA.**

*(Stationary Engineers Union, Loc. 39 v. State of California [Department of Veterans Affairs], No. 1686-S, 9-9-04; 8 pp. + 21 pp. ALJ dec. By Chairperson Duncan, with Members Neima and Whitehead.)*

**Holding:** Information sought by the union concerns workplace safety and is not protected by the attorney-client privilege.

**Case summary:** Stationary Engineers Union, Local 39, filed an unfair practice charge alleging that the Department of Veterans Affairs refused to provide information it requested that is necessary and relevant for it to represent its members. The information in dispute is a special investigator's report concerning allegations of a hostile work environment at the Yountville Veterans Home Plant Shop.

Union business representative Stephanie Allan received complaints from painters and window washers in the plant shop about one of the supervisors, Nathan Stout. Employees' concerns referred to racism, offensive language toward women, and claims of firearm use against African-Americans.

Allan demanded that management undertake an investigation of Stout's behavior and enact a plan of corrective action. Peter Hogan was assigned to the case as a special

investigator. Allan believed Hogan was an outside investigator, not employed by the department, to whom the employees could speak freely and without fear of retaliation. Hogan interviewed employees and prepared a report of his findings.

The charge arose when the department would not release a copy of the report to Local 39. The department claimed it fell within the attorney-client privilege because it was prepared in anticipation of litigation at the request of department counsel.

Employers have a duty under the Dills Act to provide the exclusive representative with necessary and relevant information on request. A refusal to release such information is considered a bad faith action unless the employer can justify its decision. In *Stockton Unified School Dist.* (1980) PERB Dec. No. 143, 48 CPER 61, the board held that information pertaining to mandatory subjects of bargaining is so intrinsic to the employer-employee relationship that it is deemed presumptively relevant. In this case, the business representative was informed by a majority of unit members that they were afraid of their supervisor. The information obtained in the workplace investigation is necessary and relevant to workplace safety.

#### Reprint Service

Copies of the full text of PERB decisions and orders abstracted in this section are available from *CPER* at \$.30 a page. When ordering, identify the decision by the case title and decision number given at the beginning of each abstract.

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

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

Hogan's report was neither a personnel record nor an internal investigation by the Yountville Veterans Home, determined the administrative law judge. Stout has no expectation of privacy in the report. Moreover, the report was not prepared by an attorney and contains no legal advice. Legal advice must be present in the communication for the attorney-client privilege to attach. Otherwise, as the California Supreme Court stated in *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, "[k]nowledge which is otherwise not privileged does not become so because that subject matter has been communicated to [an] attorney."

The information requested by Local 39 was the report itself, not the department's analysis thereof, which would be privileged, noted the ALJ. The report is necessary for the exclusive representative to determine if workplace safety concerns exist. The parties' agreement also requires the department to produce the report. No defense based in the California Public Records Act exists.

The board ordered the department to provide Local 39 with information necessary and relevant to its duties as exclusive representative, including a copy of the Hogan report.

**Wrongful termination charge dismissed for failure to state a prima facie case: DFFP.**

(*Reddington v. State of California [Department of Forestry and Fire Protection]*, No. 1690-S, 9-17-04; 3 pp. + 7 pp. R.A. dec. By Chairperson Duncan, with Members Neima and Whitehead.)

**Holding:** The charging party failed to allege specific facts to support his claim of termination without cause.

**Case summary:** Kevin Reddington filed an unfair practice charge alleging that the Department of Forestry and Fire Protection terminated him without cause, created a hostile work environment, and took other adverse actions against him. While he claimed a violation of Dills Act Sec. 3519(a), he failed to allege evidence of protected conduct that preceded any of the adverse actions. Reddington also did not allege evidence of employer knowledge of his conduct, or any connection between his protected conduct and the adverse action.

The amended charge simply labeled two incidents as "protected conduct." The regional attorney did not find either to constitute protected conduct under PERB precedent. Case law did not support Reddington's contention that his request for a transfer was protected conduct. The charge described an incident in which two managers yelled at him, leading him to call the California Highway Patrol, but the R.A. found this event was not described in sufficient detail to support his claim of protected activity. Even if it were described more fully, the charge still would fail to establish that his subsequent termination was motivated by the incident.

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

**Dispute deferred to arbitration: DOT.**

(*IUOE, Loc. 12 v. State of California [Department of Transportation]*, No. 1691-S, 9-17-04; 2 pp. + 9 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

**Holding:** The charge was dismissed and deferred to arbitration because the dispute was covered by the parties' memorandum of understanding and subject to arbitration.

**Case summary:** International Union of Operating Engineers, Local 12, filed an unfair practice charge alleging that the Department of Transportation unilaterally changed the workweek schedule at one of its shops without providing IUOE prior notice or the opportunity to bargain.

According to the charge, the shift occurred when the department notified IUOE on February 7, 2003, of its intention to change the shop work schedule from a 9/80 workweek to a 5/40 workweek. The department felt the change was necessary because there were insufficient staff members to accomplish the work on alternate Fridays when roughly half of the employees were off work. The employees received notification on February 11 that the change would take effect on March 11. However, the parties' memorandum of understanding required a minimum of 30 days advance notification. The department withdrew its notice and agreed to bargain with IUOE.

On February 20, IUOE representatives met with the department and presented several proposals that would alleviate the department's concerns while retaining the 9/80 schedule. On February 28, IUOE learned that the department had reissued its original notice eliminating the 9/80 work schedule effective April 1.

The parties' MOU has an "entire agreement" clause which specifies that if the parties are in dispute as to whether a proposed change to the MOU is subject to the clause's notification and bargaining requirements, the dispute may be submitted to binding arbitration for resolution. Based on the MOU, Dills Act Sec. 3514.5(a), and PERB Reg. 32620(b)(5), the regional attorney found that the charge must be deferred to arbitration.

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

## EERA Cases

### *Unfair Practice Rulings*

#### **District unilaterally transferred work between classifications: Desert Sands USD.**

(*California School Employees Assn. v. Desert Sands Unified School Dist.*, No. 1682, 8-25-04; 12 pp. + 17 pp. ALJ dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

**Holding:** The district unilaterally transferred work between two bargaining unit classifications without negotiating with the charging party.

**Case summary:** The California School Employees Association filed an unfair practice charge alleging that the Desert Sands Unified School District unilaterally transferred certain job duties from one unit classification to another without giving CSEA prior notice or the opportunity to bargain. Specifically, the district assigned the job of installing covert security cameras from electronic repair technicians to security agents. The ALJ found that while a change in policy occurred without proper notice to CSEA, the transfer of work did not have a generalized effect or continuing impact.

The ALJ rejected CSEA's post-hearing motion to amend its charge to allege that the transfer of work was retaliatory. Applying the three-part test articulated in *Tahoe-Truckee USD* (1988) PERB Dec. No. 668, 78 CPER 74, the ALJ found the retaliation claim had not been fully litigated at the hearing.

On appeal, the board disagreed with the ALJ's conclusion regarding the transfer of work. First, the board found that the transfer of the covert camera installation was negotiable under board precedent. Second, CSEA did not waive its right to negotiate the transfer of work under the parties' agreement. The district rights clause of the agreement did not clearly convey the right to permanently transfer work outside of the ERT classification, and the higher classification provision did not constitute a waiver of CSEA's right to negotiate the transfer of work. Thus, the change in policy was within the scope of representation. The district's failure to provide the association with notice and an opportunity to negotiate violated EERA Secs. 3543.5 (a), (b), and (c).

The board ordered the status quo restored and directed the parties to negotiate the transfer of unit work.

#### **Denial of membership on internal union negotiating committee permissible: CSEA.**

(*Peterson v. California School Employees Assn.*, Chap. 36, No. 1683, 8-27-04; 2 pp. + 10 pp. R.A. dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

**Holding:** Employee organizations have latitude to manage their internal affairs as long as such choices are made lawfully.

**Case summary:** Lee Peterson filed an unfair practice charge alleging that the California School Employees Association breached its duty of fair representation by discriminating and retaliating against him for serving as president of the Classified Senate and barring him from simultaneously serving as a member of the union's negotiating committee and as chief job steward on CSEA's executive board. Peterson was a classified employee at Santa Monica College who served as both an elected member of CSEA's negotiating

committee and as the elected chief job steward on CSEA's executive board for the year 2002. In October 2002, he accepted a position as president of the Santa Monica College District's Classified Senate, an advisory committee to the district board of trustees. The senate assists in developing school policies but is explicitly barred from deciding issues within the scope of representation.

Immediately following Peterson's decision to become president of the senate, the CSEA president called a special membership meeting at which Peterson's elected positions were filled by other union members. Peterson's name later was removed from the ballot for reelection to the negotiating committee. He filed an application for a new election. At the hearing, two former chapter officers testified that they each had served simultaneously as CSEA elected officers and senate officers. The application and subsequent appeal were denied.

The regional attorney found that the Classified Senate did not fall within the definition of an employee organization as defined by EERA Sec. 3540.1(d), and as such, the holding of a Classified Senate office was not activity protected by EERA. The R.A. further found that CSEA had not violated EERA by preventing Peterson from participating on the negotiating committee because employee organizations have latitude to make decisions about their internal management, as long as the action is not unlawfully motivated. CSEA prevented Peterson only from membership on the negotiating committee; his membership within the organization as a whole remained unchanged. Finally, Peterson did not provide sufficient information to support the discrimination and interference allegations, which the R.A. dismissed for failure to state a prima facie case.

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

**Request for reconsideration denied for failure to present new evidence: Oakland USD.**

(*Ferguson v. Oakland Unified School Dist.*, No. 1645a, 8-30-04; 2 pp. dec. By Chairperson Duncan, with Members Neima and Whitehead.)

**Holding:** The board denied the request for reconsideration because the charging party failed to present new evidence regarding his charge.

**Case summary:** James Eric Ferguson filed an unfair practice charge alleging that the Oakland Unified School District violated EERA by causing him to transfer schools, which the board dismissed. He filed a request for reconsideration based on his belief that the decision ignored material facts and was based on prejudicial errors of fact, but he failed to provide the board with any new evidence to support his request. Merely rearguing facts that were already presented is not a valid ground for reconsideration. Thus, the request was denied.

**Appeal withdrawn pursuant to parties' settlement: Yosemite CCD.**

(*Yosemite Faculty Assn. v. Yosemite Community College Dist.*, No. 1684, 9-7-04; 2 pp. dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

**Holding:** The request to withdraw the charging party's appeal was granted following the parties' settlement.

**Case summary:** The Yosemite Faculty Association appealed a board agent's dismissal of its unfair practice charge alleging that the Yosemite Community College District discriminated against a faculty member. The association and the district later reached a mutual settlement that required the association to withdraw its appeal. As the settlement and withdrawal appeared to be in the best interests of the parties, the board granted the request.

**Appeal to excuse late filing granted: Allan Hancock Joint CCD.**

(*Allan Hancock College Part-Time Faculty Assn. v. Allan Hancock Joint Community College Dist.*, No. Ad-340, 9-7-04; 2 pp. dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

**Holding:** The administrative appeal to excuse the district's late-filed opposition was granted because the filing would have been timely had it been sent to the correct office.

**Case summary:** The Allan Hancock Joint Community College District filed an administrative appeal contesting an appeals assistant's determination that its opposition to the appeal of the dismissal of the unfair practice charge was untimely. The district served its opposition before the deadline to the regional office, however it actually was due at PERB headquarters. The filing reached its correct destination four days late. The board found good cause to excuse the late filing and accepted the opposition.

**Administrative appeal denied because charging party had notice of filing requirements: San Ysidro EA.**

(*Armas v. San Ysidro Education Assn.*, No. Ad-341, 9-8-04; 3 pp. dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

**Holding:** The administrative appeal to excuse an untimely filing was denied because the charging party had notice of the pertinent requirements.

**Case summary:** Bernard Armas, Jr., appealed an administrative determination that his appeal of the board agent's dismissal of his unfair practice charge was untimely filed. The appeal was received two days past the deadline and was deemed untimely. Armas claimed he believed the filing deadline was calculated using business days, not calendar days. However, when the B.A. dismissed his charge, the letter plainly included notice that the time period was measured by calendar days. As Armas had notice of the filing requirements for his appeal, the board did not find good cause to excuse the late filing and affirmed the administrative determination.

**Changing the proportion of work performed by bargaining unit employees not violative of EERA: Allan Hancock Joint CCD.**

(*Allan Hancock College Part-Time Faculty Assn. v. Allan Hancock Joint Community College Dist.*, No. 1685, 9-8-04; 3 pp. + 7 pp. R.A. dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

**Holding:** The district did not commit a violation by transferring bargaining unit work to non-unit employees who sporadically had performed that work in the past.

**Case summary:** The Allan Hancock Part-Time Faculty Association filed an unfair practice charge alleging that the Allan Hancock Joint Community College District illegally transferred bargaining unit work to administrators. The charge stemmed from the district's decision to assign administrators to teach certain classes as a cost-saving measure. Over the association's objections, the district claimed it had the discretion to make these assignments because administrators had performed teaching duties before these particular assignments were made.

The association claimed that teaching was work exclusive to the bargaining unit and that the district's decision violated EERA in several ways. First, administrators would teach at least part of the class without pay, thus undermining the negotiated working conditions of the part-time bargaining unit. Second, administrators must now either teach classes or donate money to the district, pursuant to the district's announcement. Third, there was no established past practice of requiring administrators to teach, and previously all administrators who taught were paid in full for those hours. Fourth, the plan to pay administrators at the part-time rate minus the donated time constituted a reduction in wages for part-time teaching. Finally, the association alleged that it was not given the opportunity to bargain over the unilateral change.

The regional attorney found the charge did not state a prima facie violation of EERA. Generally, the transfer of work from bargaining unit employees to those in a different bargaining unit is a subject within the scope of representation. In *Eureka City Schools* (1985) PERB Dec. No. 481, 65 CPER 70, the board held that a change in the distribution of duties between unit and non-unit employees, where an established practice of overlapping duties exists, does not always give rise to a duty to bargain. The board stated that the charging party must establish that unit employees ceased to perform work they previously had performed or that non-unit employees began to perform duties previously performed exclusively by unit employees. No violation has occurred where the employer decreases the amount of work

done by unit employees and increases the amount done by non-unit employees.

Teaching classes is not work exclusive to the part-time faculty bargaining unit. The administrators shared this work prior to the district's announcement. Consequently, the decision to shift the proportion of work was not violative of EERA. Moreover, the charge did not demonstrate that the district's decision regarding the administrators' wages, hours, and working conditions changed any of the part-time faculty's conditions of employment. Such decisions regarding administrators are not negotiable because they are not part of the bargaining unit.

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

**No constructive discharge without evidence of motivation: Visalia USD.**

(*Townsend v. Visalia Unified School Dist.*, No. 1687, 9-9-04; 2 pp. + 32 pp. ALJ dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

**Holding:** The district did not constructively discharge the charging party.

**Case summary:** Bruce Townsend filed an unfair practice charge alleging that the Visalia Unified School District constructively discharged him in retaliation for his protected activities. Townsend was a sixth-grade teacher and active within the Visalia Unified Teachers Association.

Townsend's charge identified several incidents he believed were part of a management plan to drive him out. One problem concerned the timing and scheduling of an instructional aide. Another problem was that his application to transfer to a different school was rejected. And, after he was notified of the decision, the hiring principal indicated that Townsend gave the impression of not being a team player. Townsend also had difficulty obtaining payment for a supplemental reading program in his classroom called *Weekly Reader*. Although payment usually was handled promptly through the district, Townsend's bill was sent to a collection agency before it was paid.

Townsend also charged that he feared the school principal would give him a negative evaluation because of the

tense relations between the two regarding Townsend's behavior and union activities, including an accusation that the principal negatively impacted his attempt to transfer. The principal agreed to postpone the upcoming evaluation, even though Townsend's classroom performance had never been criticized.

Townsend was upset with the principal when a local newspaper reported that the sixth-grade students were working below their grade level. Townsend felt the sixth-grade teachers had been singled out and asked the principal to request the paper to print a correction. The principal refused to do so.

Townsend claimed that the school tried to deprive him of necessary resource materials, including a reading assessment testing kit and student files containing test results. He also complained that he did not receive the necessary materials for in-service training.

Townsend clashed with the principal at a staff development meeting where Townsend questioned the use of a new teaching program. The principal responded angrily, though it was unclear whether it was directed at Townsend alone or at all the teachers who were present. After the meeting, Townsend requested that someone other than the principal perform his evaluation. He could not articulate any reason why the principal might give him a negative evaluation, and the request was denied.

The administrative law judge examined the credibility of Townsend and the principal. While he believed Townsend's assertions regarding the principal's "not a team player" comment and general evidence of anti-union animus, he did not find that the principal's personal differences with Townsend carried over into his opinion of Townsend as a teacher.

Constructive discharge occurs when working conditions become so intolerable that the employee is forced to resign. Townsend alleged this occurred here because of the district's retaliation against him for his protected activities.

The matter that figured most prominently in Townsend's decision to resign was his request concerning the evaluation. However, a belief that one is going to receive a negative evaluation usually is insufficient on its own to

justify a charge of retaliatory constructive discharge. The record did not reflect that Townsend would receive a negative rating for his teaching or even that the principal had been critical of his abilities. The principal had observed him in the classroom a few months prior to when the evaluation was scheduled and only had praise for him. The principal had praised him in his previous evaluation, even as Townsend was actively opposing the district's proposed agreement with the association. Townsend never expressed any fear of imminent termination, and he admitted he sought a different evaluator in order to keep his employment record flawless.

The ALJ found insufficient evidence to support additional onerous working conditions. Townsend claimed that he was denied resource materials and aide time, but his access was merely delayed. The *Weekly Reader* incident was an overreaction on Townsend's part. The newspaper article never referred to Townsend by name and was factually accurate, and the principal testified that his intent in speaking to the reporter was not to single out the sixth-grade teachers. Finally, the verbal attack at the staff development meeting seemed to be directed more at Townsend alone, but the ALJ found that Townsend was being disruptive at the meeting and had provoked the principal several times over the past few months. Overall, the ALJ held the alleged district acts of harassment failed to demonstrate that Townsend's working conditions were intolerable.

The board agreed with the ALJ and dismissed the charge.

### ***Representation Rulings***

#### **Unit modification petition approved: AFSCME.**

(*Elk Grove Unified School Dist. and Elk Grove Administrative Support Assn.; Elk Grove Unified School Dist. and AFSCME, Loc. 258, No. 1688, 9-17-04; 3 pp. + 30 pp. ALJ dec. By Member Whitehead, with Chairperson Duncan and Member Neima.*)

**Holding:** The disputed positions share a sufficient community of interest with the existing bargaining unit represented by AFSCME. Creation of a new unit is not justified.

**Case summary:** The Elk Grove Administrative Support Association requested recognition of a proposed unit composed of approximately 100 employees in 33 classifications. These administrative support staff positions previously had been classified as confidential employees. AFSCME Local 258, the exclusive representative of a unit of classified employees, filed a contemporaneous unit modification petition seeking to add 31 of those 33 classifications to its existing unit.

As required by EERA, EGASA demonstrated proof of at least majority support in its requested unit. Witnesses in the proposed unit testified their preference for representation by EGASA over inclusion in the existing AFSCME-represented bargaining unit.

EGASA contended that the positions they sought to represent shared a greater community of interest among themselves than with positions in the AFSCME unit. Factors against representation in the AFSCME unit include differing vacation accrual, life insurance, and longevity; a different salary schedule; a longer probationary period; higher levels of training and education requirements; and higher levels of job responsibility and accountability. EGASA argued that the inclusion of the positions within the existing unit would present a potential conflict of interest as many of the unit positions provide direct support to the administration.

AFSCME argued that the disputed classifications shared a strong community of interest with the existing unit. This was demonstrated by similar job duties and functions; regular interaction; shared lines of supervision; identical hiring procedures; similar training, education, and skills requirements; and similar employment benefits. Any differences should be discounted because they were developed while the disputed positions were mistakenly classified as confidential and because the benefits were not established through collective bargaining. Exemption from overtime is insufficient to warrant establishment of a separate unit; if it were enough, the board would require exempt positions to be a unit unto themselves.

EERA Sec. 3545(a) and *Sweetwater Union High School Dist.* (1976) PERB Dec. No. 4, 32 CPER 46, govern unit

determination cases. While employees should share a sufficient community of interest and should be able to choose the organization that will most effectively represent them, the board must avoid excessive fragmentation of negotiating units. In accordance with *Los Angeles Unified School Dist.* (1998) PERB Dec. No. 1267, 131 CPER 74, the board should find the largest reasonable unit to be appropriate for purposes of collective bargaining.

The administrative law judge found the petitioned-for classifications do share some characteristics that differ from those represented by AFSCME in the area of wages and fringe benefits; however, such differences are not controlling for purposes of unit modification. The employees in the existing unit also share a number of common traits. Moreover, numerous differences exist within the group of classifications as a whole. Evidence also showed that a number of employees in the petitioned-for classifications obtained those positions after working in one or more AFSCME-represented classifications. This supports finding a shared community of interest.

The ALJ also rejected EGASA's argument that the affected employees should be able to choose their representative organization. The issue is whether the petitioned-for unit is an appropriate bargaining unit, noted the ALJ. EERA guarantees employees the right to change or remove an exclusive representative but not to make the initial determination as to the appropriateness of the unit.

The board issued a unit modification order that added 31 of the 33 disputed classifications to the existing AFSCME unit.

## MMBA Cases

### *Unfair Practice Rulings*

**Association must follow local unit modification procedures to challenge confidential designation: Beverly Hills.**

(*Municipal Employees Association of Beverly Hills v. City of Beverly Hills*, No. 1681-M, 8-20-04; 3 pp. + 6 pp. R.A. dec. By

Member Neima, with Chairperson Duncan and Member Whitehead.)

**Holding:** The unfair practice charge challenging the confidential status of administrative secretaries is untimely.

**Case summary:** The Municipal Employees Association of Beverly Hills filed an unfair practice charge alleging that the City of Beverly Hills improperly designated all administrative secretary positions as confidential. The association represents employees in classifications assigned to the technical services unit. The 14 administrative secretaries employed by the city have been designated confidential for over 20 years and are part of the confidential employee bargaining unit. The association claimed that administrative secretaries have never been properly classified because neither the duties nor the job description of the position meets the city's definition of confidential employee.

The association alleged that the use of the city's unit modification procedure is inappropriate or unnecessary because the administrative secretaries who approached the union seeking representation are concerned about retaliation and would be unwilling to sign a unit modification petition. The association also believed pursuit of unit modification would be futile because the city has decisionmaking discretion over proposed unit modifications.

The regional attorney found the charge untimely because of the length of time the association has been aware of the improper classification. Even if the charge were timely, the R.A. found it did not state a prima facie case because the association has not attempted to use the unit modification procedure, making claims of futility premature. She also observed that the city's unit modification procedure does not require proof of majority support.

Accordingly, the board dismissed the case.

**Contemptuous request for reconsideration merits attorneys' fee award: Marin County Law Library.**

(*Geismar v. Marin County Law Library*, No. 1655a-M, 8-30-04; 4 pp. dec. By Chairperson Duncan, with Members Neima and Whitehead.)

**Holding:** The request was sufficiently frivolous and contemptuous to merit an award of attorneys' fees to the employer.

**Case summary:** Elizabeth Geismar filed a request for reconsideration of the board's dismissal of her unfair practice charge. Her representative, James Baker, presented that request to the board in a manner likened to a "temper tantrum on paper." He addressed individual board members by demeaning and offensive names. The request did not meet the statutory grounds for reconsideration. Exercising its authority under EERA, the board found Baker in contempt and ordered him to pay the legal fees incurred by the Marin County Law Library in its preparation and filing of its response to the reconsideration request. He also was ordered to refund to his client any funds collected from her related to the reconsideration request.

**Request for reconsideration denied for failure to state a valid ground: Marin County Law Library.**

(*Geismar v. Marin County Law Library*, No. Ad-338a-M, 8-30-04; 2 pp. dec. By Chairperson Duncan, with Members Neima and Whitehead.)

**Holding:** The request was denied because the charging party did not set forth any of the statutory grounds for reconsideration.

**Case summary:** Elizabeth Geismar filed a request for reconsideration of the board's decision regarding an untimely amendment to her unfair practice charge. She failed to set forth any of the valid grounds for reconsideration as required by PERB Reg. 32410, causing the board to deny her request.