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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:

Take a spin through this issue of *CPER* — it sure looks as though we're in for some rousing political battles in the days ahead. Indeed, many of them seem to bear directly on the public sector jurisdictions throughout the state.

Consider the governor's proposal to supplant teachers' current salary-setting system with a merit-based plan. U.C. Berkeley Professor Stuart Tannock casts a critical eye on the topic, posing some fascinating questions about its underlying tenets. His thoughtful discussion of the broader concept of merit pay — speaking not just in terms of teachers — hopefully will enlighten the debate to include a discussion of the social impact of the merit pay proposal.

Pensions. Pensions. Pensions. The governor also has come out fighting on this facet of public sector employment. We're beginning to hear some discussion of this complex issue, as it relates to teachers as well as state and local employees. More and more, lawmakers in Sacramento are focusing on the issue, but it remains to be seen whether it will end up before the voters come November.

And, speaking of Sacramento, the California Nurses Association won a round with Schwarzenegger over nurse-to-patient ratios. Nurses, teachers, and firefighters have taken a highly visible stance in opposition to the governor, and I suspect this conflict will heat up as the political process ensues.

On the federal level, the No Child Left Behind Act has created what Alan Hersh describes as a problem of catastrophic proportions for our schools. California and other states are attempting to add some flexibility to the federal law, but as Hersh sees it, the options that are available to our public school districts may pose horrendous additional difficulties.

Political commentary is at the root of a dispute between attorneys Martin Fassler and Bruce Barsook. They are opposing counsel in a case that concerns the use of email in the community college setting. In two interesting articles, the two have articulately shared their divergent views with *CPER* readers.

With that overview, I won't keep you from the pages of this thought-provoking issue!

Sincerely,



Carol Vendrillo,
Editor

Yes, Let's Talk About Merit

Stuart Tannock

We must financially reward good teachers and expel those who are not. The more we reward excellent teachers, the more our teachers will be excellent. The more we tolerate ineffective teachers, the more our teachers will be ineffective. So, ... I propose that a teacher's pay be tied to merit, not tenure.... My colleagues, this is going to be a big political fight.... This is a battle of the special interests versus the children's interests. Which will you choose?¹

—Governor Arnold Schwarzenegger, State of the State Address
Sacramento, California, January 5, 2005

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'Red Herring' or 'Trojan Horse'?

When Governor Schwarzenegger proposed, in his January 2005 State of the State Address, to transform teacher pay in California from the current uniform salary scales that are based largely on teacher experience and education to variable salary structures that would be based on teacher merit and student achievement, he drew on an idea that is the darling of business-minded education reform think tanks across the country. Indeed, in the days following Schwarzenegger's speech, op-ed pieces appeared in the state's newspapers applauding the governor's initiative. Louis Gerstner, former chairman of IBM and founder of the Teaching Commission, assured readers of the *Los Angeles Times* that "Money Plus Merit Equals Better Teachers."² The Pacific Research Institute's Lance Izumi told the *Sacramento Bee* that, "It's Right to Link Teacher's Pay to Merit."³ Schwarzenegger's own Secretary of Education, Richard Riordan, is a close friend of billionaire philanthropist Eli Broad, founder of a third think tank, the Broad Foundation, which helped launch what is currently the most prominent model of teacher merit

pay in the country, located in Denver. What all of these reformers claim is that radical transformation of teacher compensation holds the key to raising student achievement levels and introducing high standards of excellence and accountability into our public schools.

Schwarzenegger's proposal drew an immediate and impassioned reaction from many teachers, parents, school administrators, education researchers, and teacher unions. While strongly questioning the core claims that merit pay has a positive effect on teacher and student performance, this group's dominant message is that merit pay is a smoke screen, a diversion, a red herring, and a blatant form of teacher bashing designed to distract attention from the state's continuing and devastating underfunding of California's public schools.⁴

These critics' concerns may be warranted. At the same time Schwarzenegger was introducing the idea of teacher merit pay, he was reneging on a prior commitment to provide California schools with billions of dollars in public funding they are owed under state law.⁵ State Senator George Runner, who is sponsoring legislation in support of the governor's merit pay proposal, was quoted in the *San Francisco Chronicle* as saying that the goal is "to find poor teachers who are hidden in the system, but are rewarded at the same level as the outstanding ones."⁶ This makes the new proposal sound less like a plan to reward good teachers with extra pay and recognition, and more like a cost-cutting measure designed to keep overall levels of teachers' compensation down in a workforce that, when costs of living are taken into account, already is one of the lower paid in the country.⁷

It is tempting, then, to argue that the most appropriate response to the governor's merit pay proposal might be to ignore it altogether and instead, focus attention on the "real problems" that afflict our schools. I suggest, however, that rather than trying to shut down conversation on the subject, we open it up for three reasons.

First, teacher merit pay is an idea that never seems to go away; it crops up over and over again. Moreover, merit pay in

general is a reform measure impacting the lives not just of teachers but of public sector workers throughout the United States and the world.⁸ Second, merit pay is not an isolated or random proposal. It forms part of an encompassing and currently dominant mindset that schools and the public sector would best be improved if re-formed in the image of business, the market, and the private sector. Third, the invocation of merit functions less as a red herring than as a Trojan Horse. "Merit" is a deeply compelling concept — who could argue *against* wanting to have a meritorious teaching

workforce? It speaks to our most heartfelt worries about current educational inequities and all too easily can be used to get in through the schoolhouse door a whole host of business and market model reforms that many of us, on second glance, might otherwise view as most unwelcome.

So, let's talk about merit pay for teachers. Let's talk about the model of the private sector and what lessons it can and cannot teach us about how to work better for the broader public good. Let's talk about the many other issues that get raised in merit pay discussions —

the differences between "hard-to-serve" and "easy-to-serve" schools, the differences in pay levels between different occupations, the assertions of what it means to be "professional," and the notion that the "best and brightest" deserve more financial reward than everybody else. And yes, let's talk about merit: what it means; who should get to define it; and how, when, and where we should use it to determine both local and society-wide distributions of resources and opportunities.

The core principle in the following discussion is that to make schools more equitable and effective, we cannot look solely to individual reform ideas as if they were "magic bullets," but must consider the education system in its entirety. And, we cannot look at the education system in isolation but must think carefully and critically about what is going on in the social, political, and economic structure within which schools are situated — which includes, of course, looking at our massive private sector.

Some feel that merit pay is a smoke screen, a diversion, a 'red herring,' and a blatant form of teacher bashing.

Merit Pay for Teachers: A Long History of Short-Lived Reform

Promoters of teacher merit pay love to emphasize its cutting edge newness. The Teaching Commission's Lou Gerstner, for example, describes Schwarzenegger's merit pay proposal as a "call to usher California's schools into the modern era"⁹ A 2002 report funded by the Broad Foundation proposes, "it is time to move beyond a pay method [i.e., the "single salary schedule"] designed early in the last century and...begin building an innovative system that addresses the realities of public schools in the 21st century."¹⁰

These claims are, however, at best misleading. Merit pay for teachers is an old concept that dates back to the beginning of the 18th century. It was widely used in Canada and England during the second half of the 19th century. And in the United States, it periodically has emerged and re-emerged as a fashionable and "novel" reform, on a 20- to 30-year cycle. Merit pay was used widely or considered for use by the nation's school districts in the 1920s, the 1950s, the 1980s, and again, today, at the turn of the 21st century. Over the course of this long history, the single-most salient characteristic about teacher merit pay is that it is a school reform plan which is almost invariably short-lived, disappearing from widespread use until its next burst of public popularity a few years later.¹¹

Today, most teachers in California and elsewhere in the United States are paid on "single" or "uniform" salary scales that set out predetermined rates of pay based on years of teaching experience and level of education (typically measured by formal degrees and advanced course work). While pay scales can vary dramatically between school districts, within each district, scales typically are uniform for all teachers regardless of the school or subject area in which they work. Uniform salary scales, it generally is agreed, have the advantage of being stable and predictable; teachers know what they can expect to earn over the course of their careers. And, this system eliminates or reduces the possibility of un-

fair and discriminatory variations in rates of pay that can arise when individual administrators have discretionary power over teacher compensation. Indeed, teacher salary scales were adopted in the first place to combat endemic gender discrimination in the pay of men and women working within the teaching profession.¹²

The key disadvantage of uniform salary scales, many would argue, is that there is neither financial reward for good and hard-working teachers nor penalty for bad or lazy ones. This lack of accountability, it is argued, all too easily helps

grease the skid of school performance into a lowered pit of mediocrity, and is, therefore, at least partly to blame for many of the central problems faced in schools today. Merit pay, which can come in an infinite number of technical permutations, essentially seeks to combat this danger by linking individual teacher pay raises to some measure of performance and to the resulting impact performance has on students' classroom achievement. The theory at the heart of all merit pay plans is that "if teachers are paid competitively on the basis of performance, they will work harder. The system will reward effective teachers and encourage them to remain in their

classrooms while nudging ineffective, unrewarded teachers to leave. As a result...the schools will improve."¹³

The concept of merit pay is intuitively appealing to many parents, students, and teachers. So why does merit pay tend, in practice, to fail more often than succeed? Researchers point to a series of negative effects:

- Merit pay tends to pit teacher against teacher in a zero-sum competition for financial reward; it can foster jealousy, resentment, and divisiveness, and undermine the spirit of workplace collaboration.
- Merit pay can lower teacher morale, since judgments of merit often are viewed as subjective, arbitrary, unfair, and prone to favoritism and discrimination; there is little common agreement on how to define and measure merit with respect to teaching work.

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- Depending on the criteria used to judge good teaching, merit pay can introduce perverse and socially undesirable incentives, leading to a narrowing of the curriculum, teaching to the test, rote instruction, and neglect of subject areas and educational goals not considered by merit pay plans. It can reorient teaching toward targeted outcomes selected because of their ease of measurability. It also can induce teachers to shun low-achieving students and “hard-to-serve” schools, where gains in student test scores or other measures of learning often are more difficult to produce.
- Merit pay can be costly in terms of the time and training required for administrators to determine “appropriate” merit raises for all district teachers, as well as in terms of increases in overall payroll costs. As a consequence, merit pay plans often are capped, suspended, and even eliminated during budgetary shortfalls; this, in turn, can lead to lowered teacher morale and increased charges of unfairness and arbitrariness.¹⁴

As for their impact on student achievement, the historical record of teacher merit pay plans is decidedly ambiguous. Some studies show a positive impact, others a negative result. But questions linger about the validity and social desirability of how student “achievement” is defined and measured in these studies in the first place.¹⁵

Learning From the Private Sector?

Opponents of teacher merit pay tend to emphasize the “special” or “distinctive” nature of teaching work to explain why pay strategies that work in the private sector are inappropriate when it comes to compensating public school teachers. Teaching, these observers insist, is not like building a car. Teaching is “imprecise” and “uncertain,” and complicated by the presence of multiple and often conflicting goals as to what education is meant to accomplish. Teachers’ success is dependent on the variable nature of “inputs”

over which they have no control (e.g., different levels of student “preparedness”); and, since the nature of learning is cumulative, collaborative, and not always linear, it is hard to isolate the impact of an individual teacher on a student’s achievement within any discrete period of time.¹⁶

This stance on the distinctive nature of teaching is both factually dubious and politically unwise; it does little to relieve public concern about what teachers are or are not doing with the education of their children. Further, it fans the flames of market reform rhetoric that sees an appalling lack of accountability in public school teaching. And, it raises the question of why teachers think what they do is so special that they should not be subject to the same conditions and work standards as everyone else. The descriptions of teaching offered above are not wrong, but the same can be said about all types of work, especially intellectual work and “service” work that involves dealing with customers, clients, patrons, or patients.

Rather than exaggerate differences between teachers and the rest of the workforce, it would be more accurate and expedient to focus on similarities and solidarities.

Take the work of grocery store cashiers. In the name of “high performance” quality control, many supermarkets use computer-based technology to measure and rank the performance of cashiers based on the speed and accuracy of their check-outs. Some publicly post these rankings so cashiers can see how they compare with their peers and be pressured (or shamed) into working more quickly. In research I conducted with grocery workers, many cashiers were highly resentful of this system, which they believed to be unfair and counterproductive.

Why? Cashiers’ check-out times sometimes were slowed by senior-citizen customers, who can take a long time to pay for purchases. Cashiers who provide friendly service to seniors and who attract them to their checkout lines in large numbers inevitably post slower work rates and end up penalized for poor work performance. The supermarket’s speed rating system essentially provides an incentive to cashiers to harass the elderly or avoid them altogether.

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To measure the quality of cashiers' customer service, most supermarkets now hire "mystery shoppers" — company spies who pose as customers and report back to corporate headquarters on the service they receive. To many cashiers, this performance measurement system frequently is inappropriate, invalid, and unfair. Since cashiers never know which customer interactions are being observed, they have no way to challenge the validity of their work evaluations.

As cashiers know, the customer service they provide is highly dependent on factors beyond their control. Poor service just as often occurs because a store is shorthanded — because a manager deliberately understaffs the store to keep labor costs low, or because workers call in sick — as it is a measure of any cashier's inherent merit.¹⁷

Grocery checking and teaching are not typically thought of as being comparable forms of work, yet we find many similar characteristics: conflicting goals, variable inputs, and the inappropriateness of standardized and individualized assessment in work that inherently is collaborative, interactive, and context dependent. Is the argument that merit pay is inappropriate and unworkable for public school teachers therefore wrong? Not at all. But the argument should be made that merit pay can be just as problematic and undesirable in other lines of work as it is in teaching.

For lessons that the private sector can teach us about the benefits and liabilities of merit pay, we should look at the example of Wal-Mart — now America's biggest private sector employer. Wal-Mart is facing the nation's largest civil rights lawsuit, which covers over 1.5 million current and former employees. The suit charges the company with systematic sex discrimination, including awarding of disparate "merit" pay raises between the men and women.¹⁸ *Business Week* reported in June 2004 that Wal-Mart was curtailing its merit pay plan in an effort to limit future liability.¹⁹ Wal-Mart is not an isolated case. In recent years, workers at dozens of U.S. companies, including Home Depot, Texaco, and Boeing,²⁰ have filed class action lawsuits alleging sex and race discrimination in how "merit" pay raises are divvied up.

Perhaps, too, we could look at Sears, which eliminated performance-based pay at its California car repair shops after investigators found that employees were "selling unneeded services to unsuspecting customers" in an effort to boost their take-home pay. Highland Superstores, a chain of electronics retail outlets, eliminated a performance-based pay plan that caused its sales staff to adopt overly aggressive tactics that alienated customers. At Lantech, a Kentucky-

based machinery manufacturer, "individual incentives caused such intense rivalry that the chairman of the company, Pat Lancaster, said, 'I was spending 95 percent of my time on conflict resolution instead of on how to serve our customers.'"²¹

Merit pay, it turns out, is rejected by many human resource professionals and researchers as a deeply flawed compensation model, not just for teachers and public sector workers, but for workers in the private sector as well — and for many of the same reasons. Stanford Business School Professor Jeffrey

Pfeffer, for example, labels the belief that "individual incentive pay improves performance" as one of the "dangerous myths about pay." He blames business schools and management consulting companies for its propagation. "The problems with individual merit pay," writes Pfeffer, "are numerous and well documented. It has been shown to undermine teamwork, encourage employees to focus on the short term, and lead people to link compensation to political skills and ingratiating personalities rather than to performance." According to one recent survey cited by Pfeffer, 47 percent of companies using individual merit pay systems report that these systems are thought by their employees to be "neither fair nor sensible"; 51 percent of these companies say that their pay systems provide "little value to [their] company."²²

Why, then, is a compensation method of greatly disputed value within the private sector being foisted on public schools as the core reform measure needed to solve our most intractable educational failures and inequities? This question deserves to be asked repeatedly of teacher merit pay proponents.

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Part of the answer has to do with the larger ideological message that invocations of “merit” and “merit pay” seek to send. Another part of the answer is encompassed by the “red herring” argument. Consider Pfeffer’s judgment of private sector employers who are in the thrall of merit pay reform:

Any organization believing it can solve its attraction, retention and motivation problems solely by its compensation system probably is not spending as much time and effort as it should on the work environment....It is a question of time and attention, of scarce managerial resources. The time and attention spent managing the reward system are not available to devote to other aspects of the work environment that in the end may be much more critical to success.²³

On Being Professional

When proponents of teacher merit pay are not trumpeting private sector business practices, they are calling for teachers to smarten up and follow the lead of other professionals. “Pop quiz,” writes Louis Gerstner in his *Los Angeles Times* op-ed piece: “Name the one American profession in which workers get almost no rewards for a job well done....The profession is teaching.” Gerstner claims that those who want to introduce merit pay into our public schools want no more than to “professionalize teacher compensation.”²⁴ Conflating merit pay with professionalism and then calling on teachers to “be professional” plays on teachers’ long-standing anxiety about the uncertain (or semi) professional status of their work. By adopting merit pay, the message goes, teachers can be viewed as “true professionals.”²⁵

However, there are many lessons that can be learned by looking at the work experiences of other professionals. Here is another pop quiz: Name the group of California professionals who, in May 2002, threatened to strike and were successful in eliminating the merit pay system under which they had worked for more than 20 years. That would be the

8,000 nurses who work at U.C. medical and student health centers, and who are represented by the California Nurses Association.

These nurses had found merit pay to be subjective, arbitrary, divisive, prone to favoritism, cronyism, and discrimination, and in the end, “little more than a popularity contest.” They felt the system did not evaluate them on their core professional responsibility of patient care, but instead focused on “extra-curricular” tasks such as committee work. Rather than increase workplace accountability, they felt the merit pay system worked to “absolve managers of the responsibility for doing real managerial work.” Instead of working with lower-performing nurses to bring them up to their full professional potential, managers tended to “manage” by assigning differential percentage pay increases to their staff. For nurses and union representatives involved in this struggle, *getting rid of merit pay* helped make their work more “professional.”²⁶

The language of professionalism gets thrown around a lot these days. It is a powerful and often persuasive discourse, since achieving professional

recognition is a highly attractive proposition to most workers. It is associated with increased power, freedom, status, skill, and, of course, financial reward. Workers often use the discourse of professionalism to legitimize their demands on management for increased control and compensation. Managers and administrators, for their part, who want workers to adopt new behaviors, practices, attitudes, outlooks, rules, or procedures, also are going to tell workers that following management wishes is the way to become “more professional.”²⁷

‘Combat Pay’

In addition to pay-for-performance schemes, two other market-based reforms commonly are promoted under the merit-pay umbrella. One is what Governor Schwarzenegger refers to as providing extra “combat pay” to teachers who

Conflating merit pay with professionalism and then calling on teachers to ‘be professional,’ plays on their long-standing anxiety about the uncertain status of their work.

work in the state's "hardest-to-serve" schools.²⁸ This military metaphor is an offensive and racist way of framing the relationship between teachers and the students, parents, and other members of the public who live in the communities where "hard-to-serve" schools are located — communities that overwhelmingly tend to be populated by the poor, the working class, and people of color.

Nonetheless, the principle of paying teachers more to take jobs in "low-performing" schools — jobs that are recognized as being harder to do than teaching jobs elsewhere — is one that attracts support from across the political spectrum. Both national teacher unions, the National Education Association and the American Federation of Teachers, for example, which otherwise tend to oppose or be deeply suspicious of incentive-based reforms of teacher compensation, have embraced the concept.²⁹

Despite its broad appeal, the idea of offering incentives to teachers who work in "hard-to-serve" public schools should be approached cautiously. Certainly, there are important arguments for raising teacher pay across the board, and for ensuring that teachers in poorer, urban school districts are not paid *less* than their peers in wealthier, suburban ones. It also is understandable that individual teachers might want to be paid more for working in lower-performing, hard-to-serve schools; and that administrators, students, and parents at these schools might want to offer extra financial incentives to attract and retain good, experienced teachers. As a matter of policy, however, the practice of paying teachers more to work in hard-to-serve schools risks being absurd and unjust. That the absurdity and injustice rarely are even commented on is a sign of just how low our expectations have fallen concerning the state's responsibility and ability to work towards real economic and educational equality.

Consider an analogy: A community suffers from extreme health problems; its residents live in a polluted environment; the health facilities are run-down; basic medical supplies are lacking; and nurses and doctors who are frustrated with their

inability to successfully resolve these health problems are leaving the community in droves. One response is to address the root causes of the problems by cleaning up pollution, rebuilding health facilities, and ensuring the availability of medical supplies. Another response is to label the community "hard-to-serve" and adopt a "market solution": raise doctors' and nurses' wages so they will be "incentivized" to stay. In this latter scenario, a few health care miracles might

emerge, but there will be no overall resolution of the community's health problems, regardless of how "excellent" the doctors and nurses might be.

Some argue that "if all teachers in a [school] district are compensated at the same level without regard to differences in amenities or the difficulty of the task, they naturally will gravitate to jobs with less stress, fewer demands, and more desirable working conditions."³⁰ But this is an argument that risks treating as natural and inevitable those environmental differences that make some schools "easy-to-serve" and others "hard-to-serve" in the first place.

As many education reformers and researchers argue, teaching conditions (which also are student learning conditions) must be transformed radically in low-performing schools to achieve any real and lasting change in teacher recruitment and retention. "Few teachers will be swayed by financial incentives," Cynthia Prince, of the American Association of School Administrators, warns, "if they suspect that they are purely compensatory measures to make up for bad working conditions, lack of resources, and poor leadership, rather than part of a larger plan to make teaching in hard-to-staff schools personally and professionally rewarding."³¹

However, much more than school-site working conditions need to be addressed to eliminate differences between hard- and easy-to-serve schools. It is no great secret that what sets these schools apart is that the former are more likely to serve children of the poor and working class, while the latter most often cater to children of the middle class and the wealthy. Any serious effort to reduce educational inequi-

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ties and turn low-performing schools into high-performing ones must tackle poverty and wealth inequality in our society head on. For starters, this requires a commitment to raise incomes at the bottom of the occupational hierarchy, eliminate poverty wages, increase job security, and make health care and affordable housing universally available. All of these factors have been linked to how well students from different family backgrounds perform in school.³²

Some assert that providing financial incentives to teachers could be part and parcel of a broader, comprehensive, and genuine anti-poverty agenda. This is true. However, the kinds of efforts, as mentioned above, that would tackle poverty and wealth inequality head on all involve, not mimicking the private sector and embracing the market — as merit pay proposals, including “combat pay,” do — but rather regulating them, imposing real financial costs on them, and alleviating their negative social impact.

Governor Schwarzenegger, in making his teacher merit pay proposal, is not thinking or talking small. He is speaking of waging “big political fights” against powerful “special interests”; of bringing in reform measures that would affect millions of students and hundreds of thousands of teachers across the state; and even of changing the very text of the state Constitution (which he is required to do to make teacher merit pay legal in California). We, too, should think and act big. But we also should be clear about the models of change we embrace, and the vision of a just and good society towards which we want to be headed.

Competing for the ‘Best and the Brightest’

The third widely discussed market-based reform to teacher salary scales proposes extra pay not just to teachers who work in hard-to-serve schools but also to those who work in “high-need” subject areas, most notably math and science. Shortages of experts in these specializations, it is claimed, are generated by marketplace competition with

other occupations. “Prospective teachers with a background in certain fields like math and science,” suggests a Broad Foundation-funded report on teacher compensation, “arguably have more lucrative alternatives to K-12 teaching than do candidates in other fields. A talented young chemist, for example, might have opportunities in private industry...that would pay more than a typical K-12 teaching position.”³³

This call to alleviate shortages of math and science teachers by raising their pay is, in essence, a repetition in miniature of a more general call to alleviate shortages of highly capable and qualified individuals coming into the teaching workforce as a whole by raising and incentivizing their compensation packages through merit-pay reform. We must “bring a sense of national urgency to luring and keeping the best and brightest in the teaching profession,” proclaims the Teaching Commission.³⁴ Likewise, the Broad Foundation-funded report echoes that “without pay that is commensurate with other career opportunities, we will never attract enough of the best and brightest into teaching.”³⁵

There are empirical questions to be answered about what factors figure into individuals’ decisions to enter and remain in one occupation over another, whether we are talking about teaching in general, or math and science teaching, in particular. But it also is worth engaging this idea of needing to compete for the “best and brightest” to raise teaching quality and school performance on a more abstract and conceptual level. The rhetoric of the “best and brightest” is pervasive and deeply seductive. Yet, who exactly are these people so glibly dubbed the “best and brightest”? How many of them are there? Where do you find them? What is the social consequence if some individuals come to think of themselves as being the “best and brightest,” racing in to save the rest of us? And, do we really want to orient our schools, or any other social institution, to finding, keeping, and paying only the “best and brightest”?

Many of us might want to answer “yes” to this last question. We should remember, however, that most of us are not

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the best and brightest in whatever line of work we are engaged in. Most of us are pretty good at what we do. A few of us might be the best and brightest. And a few of us might need to start looking for other kinds of work to do in the near future. The fervent embrace of the idea of a social order committed only to the interests, recruitment, and retention of the “best and brightest,” though appealing in theory, in actuality can be profoundly destabilizing and have an undermining impact on the rest of the vast majority of the population.

Even if we could agree on who the “best and brightest” are, where are these individuals working, if they are not currently teaching in our public schools? If they are in occupations just as important to serving the public good as working in K-12 education, then it makes no sense to start a compensation bidding war to attract away their talent. If our “best and brightest” are working towards goals that do not serve the public good, then we should ask how we might attract them to the teaching profession. But it still might not make sense to do so by incrementally raising teachers’ wages.

Former Governor Gray Davis once told reporters, in an infamous speech he delivered in Sacramento in January 2000, that “there’s no way we can offer the kind of compensation [in California public schools] that, say, a 23-year old can command from Silicon Valley.” “I’m trying,” Davis went on to say, “to tap into idealism...[to] make teaching a selfless act of patriotism, something young people will do for at least a limited period.”³⁶ Davis was condemned quite rightly for suggesting that public school teaching should be done as a temporary, stopgap occupation.

But in the first half of his statement, Davis has a real point. In a society like ours, public sector compensation cannot compare to wages in the private sector. If we are serious about influencing where people choose to work, then we cannot focus just on changes to the public sector; we need to regulate and reform the private sector as well. In other words, we need to alter and eliminate market incentives (and cultural norms) that reward our math whizzes when they take up the predatory practices of short-term currency speculation, or our science talent when it takes to developing and refining, not the minds of our children, but weapons of mass destruction.

Why are mathematicians and scientists are in such high demand in America in the first place? Is it really in the pub-

lic interest to pour ever-greater resources into these fields, while neglecting other areas? Isn’t educating children in foreign languages, music and art, the humanities, and the social sciences in the broader interests of the public good? These all are areas of study that in many schools in our state are not even being offered due to budget cuts.

Rather than responding blindly to the financial forces of the market, and thereby letting them dictate our public education priorities, we must embrace our responsibility to shape and constrain the impact of the market, and of the private sector. We need to set a course around those social and educational priorities we have chosen together.

Schooling and Merit

Anyone who has met a single teacher not doing his or her job may well feel empathy when the governor raises the specter of a lack of merit and accountability in our public schools, and boldly proposes to take action. This we may feel even if we know that most teachers already work hard and perform amazingly well, sometimes under difficult conditions.

In the face of these feelings, two points must be acknowledged. First, merit pay and other such market-based reforms may not be the models to adopt to address our real and legitimate concerns about the state of our schools. Despite its name, merit pay may not foster and promote meritorious teaching but may undermine and penalize it. The model on which merit pay proposals are based — of unleashing the forces of market competition — may, in fact, be the very thing to question and challenge to address our schools’ most pressing inequities and injustices.

Second, other people’s definitions of merit (and accountability), including the governor’s, may be different from our own. Too often we speak of “merit” as if our meaning were inherently obvious and universally shared. Yet as William Bowen and Derek Bok, former presidents of Princeton and Harvard University respectively, write regarding the debate on affirmative action, to insist on “considerations of merit...is to pose questions, not to answer them.”³⁷

Economist Amartya Sen describes merit as a “derivative” concept that always is “qualified and contingent.” We judge individuals and actions to be meritorious when they produce outcomes that we value, but what we value depends

on what visions we embrace of the “good society”; and figuring that out is a matter not of technical assessment but rather of moral choice and political ideology. Your version of “merit” and mine depend on the degree our values and goals are shared, and could be far apart.³⁸

Some have suggested that the issue of teacher merit pay is being raised now because it falls within a broader reform project to further entrench standardized testing and scripted curriculum as the core essence of public school teaching and learning.³⁹ In 1999, for example, a report issued by Public Agenda, a national education summit of governors, business leaders, and educators, warned that many teachers across the country, including many of the most experienced teachers, were resisting and undercutting the standards movement because they believed it is “destructive and unfair.” “Bringing the nation’s teacher corps firmly inside the movement to raise standards,” Public Agenda suggested, “could be the most pivotal challenge of all.”⁴⁰

To meet this challenge, the 1999 summit focused on “devising ways in which teacher preparation and pay can be tied directly to the standardized curriculum and tests developed by states.”⁴¹ In this light, merit pay is not simply a procedural intervention designed to improve school performance, but an overt political act aimed at imposing a particular education model on our schools, teachers, and students.

There is a temptation to treat questions of merit pay as narrow, technical matters of interest primarily to human resource professionals and union negotiators. But we need to do more. We need to connect discussion of matters such as teacher merit pay to our broader vision of schooling and society.

To talk about merit in teachers, we have to think too about how we construe merit in students. If individualized and competitive assessment systems that concentrate resources on the “best and brightest,” while passing over the rest are undesirable for teachers, then might not the same be said for our students? To talk about merit in the lives of teachers and students, we also need to think about how our schools fit in with the rest of our society and economy. This is the way — by opening up our conversations about merit, rather than narrowing them — we truly can begin to move towards supporting all teachers and students in their critical work of teaching and learning together. *

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Email Communications — A Union Perspective

Martin Fassler

We know that the government of China aggressively blocks its citizens' access to certain websites, and that the government of Saudi Arabia does the same to prevent its people from gaining full access to the Internet.¹ Of more immediate interest to some of us who work in California public sector labor relations, is this question, which a union client asked us to consider last fall: Can a community college district legally prevent its faculty employees from sending or receiving email messages endorsing a political candidate?

Consider the facts. Shortly before the November 2004 election, the president of a union that represents the employees of a California community college district sent an email to the union's members, addressed to the employees' workplace email addresses. The email described the endorsements of the local central labor council, including the Democratic Party's candidates for president and vice president, and of a series of candidates running for federal, state, and local offices. A district administrator quickly warned the union president that the distribution of the email was in violation of the district's page-long email policy, which includes the following statements, among others:

The Email system shall be used for District business and only incidentally for personal use which does not violate District policies or restrictions....

[The policy does not define "incidentally"].

Use of District Email shall not be for communications that:

Constitute political campaigning for or against any candidate for public office or any ballot proposition, or constitute lobbying any federal, state or local official (elective or non-elective) with respect to any matter not involving official District business.

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A district administrator told the union that the district believes it is required to adopt this prohibition on email political campaign messages by Education Code Sec. 7054, which provides, in relevant part:

No school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate....

Our firm does not agree with the district administration. We believe Sec. 7054 does not require adoption of the prohibitive district policy quoted above.

Instead, we believe that Sec. 7054 was intended by the legislature to restrict only the conduct of the small number of people who control the district's facilities and funds — the governing board and the district's administrators. We believe that the simultaneous enactment of Sec. 7058 as part of the same bill supports our conclusion because Ed. Code Sec. 7058 and (pre-existing) Sec. 82537 protect the rights of the public, including school and community college district employees, to use the email system for the distribution of political campaign messages.

Aside from statutory considerations, California constitutional law regarding free speech and the use of public facilities militates against an interpretation of Sec. 7054 that would prevent the use of the email system to circulate election endorsement messages. Finally, we believe that federal constitutional law would bar an interpretation of the law to prevent use of the email system to circulate endorsement messages.

Sections 7054 and 7058

Sections 7054 through 7058 were part of a bill adopted by the legislature in 1995, introduced by Sen. Quentin Kopp of San Mateo, and amended several times before its passage. Section 7058 provides:

Nothing in this article shall prohibit the use of a forum under the control of the governing board of a school district or community college district if the forum is made available to all sides on an equitable basis.

“Forum” is not defined in the code section or elsewhere in the bill. What is a “forum?” These definitions appear in widely used dictionaries: (1) “an assembly for the discussion of public matters or current questions;” (2) “a public meeting place for open discussion;” (3) a “medium of open discussion or voicing of ideas, such as a newspaper or radio or television program;” (4) “a public meeting or presentation involving a discussion, usually among experts and often including audience participation.”

Is a community college district's email system a “forum”? It sure is.

Several of the definitions above would apply to an email system operated by a community college district, (and to email systems operated by many organizations, public and private). Certainly,

the primary use of the system is to communicate information or instructions, or to discuss district policy or implementation of those policies. But certainly, the same system also is used regularly for distribution of information that is of interest to a significant number of district employees, although unrelated to official district business. As examples (taken from a review of email messages that were circulated on the district's email system last fall), we know the system was used to provide information about fundraising events, the availability of tickets for cultural and recreational events, public service announcements unrelated to the district, and celebrations of employees' “life-cycle” events, such as weddings and births.

We know that college faculties include instructors in government, economics, politics, psychology, and sociology. We know that these faculty members send and receive email about their areas of interest from students, colleagues, and members of the public — some of them course-related, some of them not. Even more, we know that email systems generally serve as a forum for the exchange of information and opinion among the users — about job-related subjects

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and about non-job related questions — everything from current movies and music to the comparative merits of politicians, or the prospects of the local sports teams. And all of us who have worked for large organizations know that this use of email systems is widespread, perhaps universal. Email systems are a combination of public address system, official and unofficial bulletin board, employee lounge and water-cooler humor-exchange center, and free speech area. An email system is a veritable street-corner, a high-tech Hyde Park — a public forum.

In addition to Sec. 7058, pre-existing provisions of the Education Code require school districts to allow their facilities to be used for civic gatherings of all kinds. Education Code Sec. 82537 (enacted prior to 1976) requires community college districts to make their facilities available to community groups “formed for recreational, educational, *political*, economic, artistic or moral activities...,” and where they may “meet and discuss...as they may desire, any subjects and questions which in their judgment appertain to the educational, *political*, economic, artistic and cultural interests of the citizens of the communities in which they reside.” [Emphasis added.] This law remained unchanged when Secs. 7054 and 7058 were enacted in 1995. K-12 school districts are covered by an identical law: Ed. Code Secs. 38130-38131.

Because of these “civic center” laws, it is commonplace for auditoriums at community colleges and at elementary and high schools to be used by community groups for a wide range of purposes, including political meetings. But, if read literally, Sec. 7054 would prohibit the use of an auditorium on a college campus as a setting for a public political meeting because the language of Sec. 7054 would prohibit the use of the supplies and equipment within the auditorium — like the auditorium’s stage, seats, and public address system. That literal reading of Sec. 7054 would be incorrect because it is inconsistent with both Sec. 7058 and with Education Code Sec. 82537, which recognizes and protects the public’s right to use of school district facilities for public discussion, including political discussion. Similarly, Sec. 7054 cannot

be read in a way that would prevent members of the public, including employees, from using a district’s email system. After all, an email system is another “forum” — a place for discussion and debate — that is made available to all sides on an equitable basis.

Court Decisions: California Law

California courts interpreting the free speech provisions of the California Constitution (Art. I, Sec. 2) view the “public forum” concept as a continuum, with public streets and parks at one end of the continuum, and other government institutions, like prisons and hospitals, where limitations on access are essential, at the other end. As one Court of Appeal decision held:

The basic thrust of these cases is to limit regulation to that which proscribes expression that is “basically incompatible with the normal activity of a particular place at a particular time.”²

Another court used the same “continuum” approach and wrote:

The touchstone for evaluating these distinctions [regarding various uses of public facilities] is whether they are reasonable in light of the purpose which the forum at issue served.³

Where would a school district or community college district’s email system fit into the continuum? The email system is a fabulously open forum. District employees are able to send and receive messages from all over the world, about virtually any subject under the sun.

Applying this analysis of California constitutional protections, we believe that a prohibition on the distribution of political campaign messages through a district’s email system would violate the California Constitution. Distribution of such messages is “reasonable in light of the purpose which the forum at issue served” because the messages are “basically compatible with the normal activity of a particular place

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at a particular time.” For an email system that frequently is used for personal messages from one employee to another, including comments about political issues, California courts would not allow Sec. 7054 to justify a local public agency’s adoption or enforcement of a rule that would prevent distribution of a political endorsement message.

Federal Freedom of Speech Protections

In defense of the prohibition of circulation of political endorsement messages, lawyers for public agencies probably would rely on federal court decisions that refer to traditional public forums (e.g. streets and parks) and areas of public agencies that are “designated forums” (physical areas that public agencies designate for public discussions). They would argue that while the email system occasionally may be used for political messages, the district has not designated its system for completely unfettered political discussions because its policy excludes political endorsements.

Indeed, some federal court decisions do refer to these formal categories in analyzing certain free speech issues (although there is room for debate on these categories and where to draw the dividing lines). However, federal cases hold that even in the matter of a non-public forum, under the constitutional analysis, a public agency’s regulation on the use of the forum must be “content neutral” and reasonable in light of the purpose served by the forum.⁴

Email is a substitute for in-person or telephone communication, intended to allow a free exchange of ideas. A district’s email system allows use for writings produced for college courses. Community colleges offer courses on rhetoric, persuasive writing, politics, government, history, and ethics. Presumably, this would allow distribution (student to teacher, teacher to student, student to student) of political essays related to classes. This would include essays supporting or opposing limits on abortion, essays supporting or opposing immigration policy, a commentary about the film *Fahrenheit 9/11*, or about the influence of evangelical Chris-

tians in the presidential election in Ohio, or the strength of the Social Security system.

Thus, numerous messages with political content (political analysis, commentary, and advocacy) are allowed. Only when an individual — or union — distributes an email indicating candidate endorsement (even reporting an endorsement by another group), would a district seek to suppress the speech. This suppression would be designed to quash the point of view of the speaker on an otherwise permissible subject (e.g. politics, government, ethics). We believe that such a restriction would be unconstitutional under federal law.

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A PERB Decision That Might Support the Opposing View

But, you might ask, hasn’t the Public Employment Relations Board already decided that Sec. 7054 prohibits use of school district facilities for distribution of political endorsements? In *San Diego Community College Dist.*,⁵ PERB held that Sec. 7054 allows a district to prohibit a union from distributing political endorsement flyers in individual boxes in the campus mailroom.

We believe that case is factually distinguishable from the situation described here, and the decision in *San Diego* should not dictate the result in a case involving an email system. Certainly, while an email system fits easily within the meaning of “forum,” as in Sec. 7058, a mailroom, with an inherently and obviously limited purpose, and with access restricted to a limited number of district employees, is not at all easily described as a forum. And, *San Diego* gave no consideration to the significance of Sec. 7058. Adding that section to the analysis would compel a different conclusion.

Perhaps most importantly, PERB, as an administrative agency created by statute, has no authority to consider the constitutionality of legislation. Thus, the *San Diego* decision did not contemplate a reading of Secs. 7054 and 7058 that would protect free speech, rather than restrain it.

The primary decision relied on in *San Diego* is *Stanson v. Mott*.⁶ That decision held that a state agency could not use

\$5,000 of public funds to promote the passage of a bond issue. That decision, while constitutionally correct, cannot properly be extended to allow a district to prohibit speakers, other than government agency managers or employees taking direction from them, from distributing information about a political endorsement in a way that does not require the expenditure of government funds to finance the communicative process. *

Conclusion

In light of this analysis, it is our belief the district may not constitutionally bar email messages that include endorsement of political candidates or ballot propositions.

1 See *Empirical Analysis of Internet Filtering in China*, by Jonathan Zittrain and Benjamin Edelman: cyber.law.harvard.edu/filtering/china/ and cyber.law.harvard.edu/filtering/saudi Arabia/.

2 *Prisoners Union v. California Department of Corrections* (1982) 135 Cal.App.3d 930 at 935, 185 Cal. Rptr. 634, quoting from *United States v. Douglass* (9th Cir. 1978) 579 F.2d 545 and *Grayned v. City of Rockford* (1972) 408 U.S. 104, at 116, 92 S.Ct. 2294.

3 *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157, 201 Cal.Rptr. 837.

4 *Lamb's Chapel v. Center Moriches Union Free School Dist.* (1993) 508 U.S. 384 at 392-394.

5 (2001) PERB Dec. No. 1467, 152 CPER 86.

6 (1976) 17 Cal.3d 206, 130 Cal.Rptr. 697.

Email Communications — Management's View

Bruce A. Barsook

ELECTRONIC COMMUNICATION is ubiquitous in our society and has had a profound effect in the workplace. Public employers view email as a valuable tool to communicate work-related issues and increase productivity; labor unions use it to communicate, organize, and educate its members and staff. However, unions' desire to use public employers' email systems raises a number of concerns among employers. These include adverse affects on:

- Productivity, i.e., interruption of work time because employees are reviewing/responding to non-work-related emails;
- Staff resources;
- Computer systems, e.g., the need to protect computer bandwidth, avoid a burden on servers and other equipment, and guard against harmful viruses; and,
- Compliance with legal requirements regarding the use of public resources.

The tension between unions' desire to use employers' email systems and employers' need to insure that their systems are used properly has resulted in disputes and litigation over the past several years.¹ This article answers the following questions: What rights of access do unions have to an employer's email system? Is email a negotiable subject? Under what circumstances can the right to use email be lost? And finally, what legal restrictions exist regarding the use of an employer's email system?

Union Access Rights

Under California's public sector laws, labor organizations generally have the right of access at reasonable times to areas in which employees work. They also have the right to use institutional bulletin boards, mailboxes, and other means of

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communication, subject to reasonable regulation.² Unquestionably, email qualifies as a means of communication. However, the Public Employment Relations Board and at least one court have ruled that an employer need not make all means of communication available to employee organizations.³ Based on the statutory right to reasonable regulation, an employer may reserve some sources of communication for business use.⁴ The key is whether these alternative means provide an adequate opportunity for communication. Access is determinative, not speed.

Neither PERB nor the courts has required a public employer to open its electronic mail system to labor organizations if the employer reserves its computer system for business purposes only. That is, if an employer wants to exclude an employee organization — or any other group or individual — from using its email system, it may do so by reserving the system for business purposes only. The rule in the private sector is the same.⁵

In contrast, if a public employer permits its system to be used for non-business reasons (e.g., social, recreational uses), a labor organization has an equal right to such use. An employer's failure to grant a union the right to use its system when it grants access for other non-business purposes would constitute unlawful discrimination and a denial of rights guaranteed to employees and employee organizations under the law.⁶ For example, in *State of California (Department of Personnel Administration et al.)*,⁷ PERB held that it was a violation of the Dills Act for the state to allow minimal personal communication by email but prohibited such communication by the labor organization.

While an employer may not discriminate against employee organizations in the use of email, nothing in the law demands that simply because some email use is provided for non-business reasons, a union is entitled to unfettered use of the system. Thus, even if an employer permits non-business use, it retains the ability to adopt reasonable time, place, and manner restrictions. For example, an employer may restrict

access to non-work time or incidental use, or may prohibit the transmittal of voluminous email or burdensome attachments.

In the Dills Act case noted above, although PERB condemned the state's refusal to allow the California State Employees Association access to its email system (when it allowed access for other minimal personal communication), the state's action prohibiting the union from sending voluminous messages was lawful because

there was no evidence that the state had ever permitted others to conduct, for personal reasons, frequent and heavy levels of email communication.

Unions' Right to Negotiate Email Policies

Each of the laws that PERB administers provides for a duty to negotiate regarding subjects within the scope of representation. In general, the scope of representation includes such matters as wages, hours, and other terms and conditions of employment. It excludes consideration of the merits, necessity, or organization of any service or activity

provided by law or executive order.⁸

Union access rights generally are considered to be within the scope of representation.⁹ Furthermore, PERB has ruled that email and computer use policies are subject to the duty to negotiate.¹⁰ Such policies are negotiable, according to PERB, because they affect employee organization access rights and constitute a new ground for discipline for employees who violate their provisions. As a result, a proposed change to a past practice regarding employees' use of agency-provided computers is subject to the obligation to negotiate. An employer that contemplates such a change therefore must either provide notice and a reasonable opportunity to negotiate prior to taking the action or otherwise have a valid defense to a unilateral action (e.g., clear and unmistakable waiver).

Nothing in the law demands that because some email use is provided for non-business reasons, a union is entitled to unfettered use of the system.

Loss of the Right to Use Public Agency's Email

Even in situations where a labor organization has a right to use the public agency's email system, such a right may be lost under certain circumstances. PERB has ruled:

Speech which is related to employer-employee relations may nonetheless lose its statutory protection where it is found to be so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice," [citations] as to cause "substantial disruption of or material interference with material interference with [the employer's] activities."¹¹

For example, in *San Diego Community College Dist.*,¹² PERB upheld the dismissal of an unfair practice charge where the facts demonstrated that the district refused to distribute a document in which the union accused district officials of engaging in felonious conduct. The refusal to distribute the document was warranted, PERB ruled, because the defamatory speech had lost its protected status and the district had acted consistent with its retained authority under the parties' collective bargaining agreement

Logically, the same process should apply to situations involving the transmittal of email. Thus, union email communications that are so insulting, opprobrious, defamatory, insubordinate, or malicious as to create a reasonable likelihood of substantial disruption of or material interference with governmental services can be prohibited. The prohibition against sending such communication also can be incorporated into the parties' collective bargaining agreement. If such communications are sent by employees without the prior knowledge and consent of the public agency, the agency would be able to discipline employees for improper conduct.

Logic and reason also dictate that email communication that discloses confidential business information will lose its protected status. Thus, if a union officer divulges confi-

dential terms of a potential agreement involving the dismissal of a public agency manager, the communication should be considered unprotected, thereby permitting the public agency to take disciplinary action. Indeed, a few years ago, the general counsel to the National Labor Relations Board provided advice on a case where an employee obtained an internal management memorandum that revealed the terms and costs of a special retirement program proposed by the employer. The general counsel opined that it was lawful for the employer to discipline the employee who posted the memorandum on the union's website because the employee's activity was not protected by Section 7 of the National Labor Relations Act.¹³

Laws throughout the country recognize that although employees are not prohibited from being politically active, certain activities are restricted....

Legal Restrictions on the Use of Email

Education Code Sec. 7054 provides that no school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candi-

date including, but not limited to, any candidate for election to the governing board of the district. Government Code Sec. 8314 provides that it is unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes that are not authorized by law.

These and similar laws throughout the country¹⁴ recognize that although government officials and employees are not prohibited from being politically active, certain activities are restricted to protect the integrity of the government and the electoral process. Namely, these are laws created to safeguard public resources, ensure that government remains nonpartisan and neutral in election matters, and protect government employees from pressure to support or oppose candidates or ballot measures. Among these forbidden activities is the use of employer means of communication to dis-

seminate information supporting or opposing political candidates or ballot measures.¹⁵ Since email is a means of communication, then logically its use by unions (or governing body members, managers, or employees) to support or oppose political candidates or ballot measures should be prohibited.

There are no cases directly holding that the use of email to support or oppose political candidates or ballot measures is prohibited. Thus, some uncertainty exists about the conclusion to be reached and some union advocates argue that this prohibition should not apply to email. An examination of the origin and purposes of the law, however, as well as a review of the statutory and constitutional issues raised by certain union advocates, leads to the conclusion that email should be treated no differently than any other form of (forbidden) communication.¹⁶

The claims of union advocates have centered on Ed. Code Sec. 7054. The evident purpose of that section is found in the seminal case of *Stanson v. Mott*.¹⁷ In *Stanson*, the director of the State Department of Parks and Recreation was accused of improperly expending public funds to promote passage of a park bond issue. In holding the expenditure of funds for that purpose to be unlawful, the Supreme Court cited potentially serious constitutional questions:

A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing factions...the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.¹⁸

Ed. Code Sec. 7054 was enacted a year after the *Stanson* case was decided and undoubtedly was designed to incorporate the holding of the court. Union attorney Martin Fassler has claimed that amendments to the section in 1995 reveal

an intent to limit the section's provisions to elected officials and administrators (managers). Case authority, logic, and reason, as well as a careful review of the legislative history, show that no such restriction was intended. (For Fassler's opinion, see pp. 17-20.)

First, the clear focus of the statute — and the Supreme Court's concern in *Stanson* — is on the use of public funds and resources to support or oppose candidates or ballot measures, not on the identity of the speaker. The use of taxpayer

money is proscribed, not the rights of individuals to engage in political activity. In addition, in PERB's *San Diego* ruling, the board held that Ed. Code Sec. 7054's prohibitions were not limited to board members or administrators but included employees and the union as well. In that case, PERB concluded that a union's efforts to use the district's intersite mail system and photocopying services on a reimbursement basis were prohibited by the Education Code and thus, the district's refusal to allow the union to use its resources was not only permitted but mandated.¹⁹

If employees or others were entitled to use district funds or resources to support or oppose candidates or ballot measures, the purposes of the law

would be undermined. Taxpayer money would be used to subsidize political speech. Government would be able to perpetuate itself by allowing third parties to act in its stead. For example, a governing board could allow district employees or the exclusive representative to urge coworkers to support the incumbents or their allies, or send mass email communications to the public urging support.

Second, the legislative history concerning Sec. 7054 makes clear that the focus was on the expenditure of public resources, not on the identity of the speakers (i.e., board members or administrators). A State Senate Committee staff analysis states that the bill "would prohibit district employees from using working hours or district facilities to solicit or receive funds to support or defeat ballot measures that affect their compensation or working conditions."²⁰ This same

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analysis and one prepared for the Senate Rules Committee stated that the bill “would conform the rule on the use of public funds by school or community college districts with the rule on the use of public funds by a city, county, or state.”²¹ Furthermore, a staff analysis when the bill was ready for final action noted:

A principal purpose of this bill is to prevent the use of taxpayers’ money to support or oppose school bond measures. This bill recognizes the difficulty in prohibiting speech by school employees or officials while working regarding a bond....²²

The legislative intent, as set forth in Section 1 of the statute, continues the focus on the expenditures of public funds, while recognizing that its actions will have a limiting effect on the political activities of board members and employees. The language provides in pertinent part as follows:

“(a) The Legislature hereby finds and declares that, in a democratic society, the use of public funds in election campaigns is unjustified and inappropriate. No public entity should presume to use money derived from the whole of taxpayers to support or oppose ballot measures or candidates.” (b) However, it is not the intent of the Legislature, in enacting this act, to restrict the political activities of officers or employees of a school district or community college district except as provided in Article 2 (commencing with Section 7050) of Chapter 1 of Part 5 of the Education Code or as may be necessary to meet specified requirements of federal law.²³

Another argument made by those favoring unions’ use of district email systems is that the same legislation that adopted changes to Ed. Code Sec. 7054 added Sec. 7058. That section provides that “nothing in this article shall prohibit the use of a forum under the control of the governing board of a school district or community college district if the forum is made available to all sides on an equitable

basis.” Union advocates argue that email is a forum and that, therefore, the Education Code sanctions the use of a district’s email system so long as all points of view may be expressed. That argument lacks merit.

First, the statutory language indicates that the decision to open up a forum is discretionary. Nothing in the language requires a district to offer a forum on political campaigns. Districts that do not want to avail their email systems to political commentary and advocacy thus are free to decide against that action. In addition, the concept of a forum almost certainly means something other than an email system, otherwise the exception would swallow up the rule. If an email system is considered a forum — indeed if any of the other forms of communication, such as mail systems and telephone systems are considered fora for purposes of Ed. Code Sec. 7058 — then a district could circumvent the prohibition simply by opening up these communication avenues to other groups and individuals. Surely, this cannot be the purpose of the legislation.

Instead, a more reasonable and likely interpretation of Ed. Code Sec. 7058 is that it authorizes a district to

open up its premises to all sides of a political issue, so long as it does so on an equitable basis. Staff analysis of the 1995 legislation said the bill would “provide that public facilities may be used if the facilities are made available to all sides on an equitable basis.”²⁴ Nothing in the language of the statute or its legislative history indicates that use of the term “forum” could be used to eviscerate the intention of the law to forbid the use of public funds or resources to support or oppose political candidates or ballot measures.

Potential constitutional claims by union advocates center on the argument that Ed. Code Sec. 7054’s restrictions on the use of a district’s email system constitute a violation of employees’ freedom of speech. In support of such a claim, Fassler has argued that a district email system is a forum under California law. As such, argues Fassler, it must be judged by the standard as to whether the email communications are

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compatible with the normal activity of a particular place at a particular time, and whether they are reasonable in light of the purpose served by the forum. Fassler also has claimed that even if an email system is a nonpublic forum under constitutional analysis, a public agency's regulation on its use must be "content neutral" and reasonable in light of the purpose served by the forum. In either case, according to Fassler, a court likely would conclude that restrictions on the use of email for political purposes were unconstitutional. A careful review of the law reveals, however, that no constitutional violation of the law would occur.

With respect to whether a forum exists, ample case law indicates that a public employer's email system is not a public forum.²⁵ The Supreme Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. Traditional public fora are those places that "by long tradition or by government fiat have been devoted to assembly and debate." Public streets and parks fall into this category. A public forum may be created also by government designation of a place or channel of communication. The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse.²⁶ If either a traditional forum or a designated forum exists, government must show a compelling state interest in order to limit free speech.

Public property that is not by tradition or designation a forum for public communication is considered a nonpublic forum. The government can restrict access to a nonpublic forum as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view.

Here, a district's email system clearly is a nonpublic forum. Email systems are not traditional public forums and have not been designated for public use.²⁷ The fact that unions and others may have access to the email system under limited circumstances does not convert it to a public forum.

Thus, restrictions on a district's email system are appropriate so long as the district demonstrates that the restrictions contained in Ed. Code Sec. 7054 are reasonable in light of the purpose served by the forum and are viewpoint neutral.

Political restrictions on speech imposed by Ed. Code Sec. 7054 and implemented through a district's email system are reasonable and viewpoint neutral. The restriction against expending public funds or resources to support or oppose political candidates or ballot measures is reasonable

because it is consistent with the district's purpose of preserving its property for the use to which it is dedicated, i.e., communications regarding district-related business. In addition, avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum.²⁸ Furthermore, the reasonableness of the limitations on political campaigning via a district's email system also is supported by the substantial alternative channels of communication that remain open for union communication. Such channels include direct mail, a union Internet website, and in-person solicitation.²⁹

Second, it has long been recognized that a government agency has far broader powers in regulating the speech of its employees than in regulating the speech of the general citizenry.³⁰

Finally, even if it were necessary to focus on whether the restrictions on political speech were "content neutral," as Fassler claims are necessary, the restrictions imposed by Ed. Code Sec. 7054 are content neutral. Section 7054 restricts all speech for or against a political candidate or ballot measure. It makes no distinction based on perceived support or lack thereof regarding a particular position. The fact that it is a union that wants to make a speech does not suggest that the government is seeking to limit a particular viewpoint.³¹

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Conclusion

The use of email in the workplace is a valuable tool but a potentially contentious issue for labor and management. A public agency may restrict access to its email system by dedicating its use solely for business purposes. If a public agency opens up its system for non-business use then it must provide a labor organization with equal access. Certain speech by a union may be considered unprotected, which may result in the loss of the right to use the email system. California law prohibits the use of public funds and resources to urge the support or defeat of political candidates or ballot measures. Since email is a public resource (as a service or as equipment), its use in political campaigns by unions should be prohibited. *

1 Indeed, the genesis of this article stems from a recent disagreement between the author's clients and the clients of Martin Fassler, author of the accompanying article endorsing a labor union's use of a district's email system to support particular political candidates.

2 See Gov. Code Secs. 3507 (MMBA), 3543.1(b) (EERA), 3568 (HEERA), 71636(a)(7) (TCEPGA), 71823(a)(8) (TCIELRA) and Public Utilities Code Sec. 99563.2 (TEERA). The Dills Act, Gov. Code Secs. 3512 et seq., which regulates the collective bargaining rights for most State of California employees, does not contain a specific provision giving employee organizations the right to use the state's internal methods of communication. (See *State of California [Department of Personnel Administration et al.]* [1998] PERB Dec. No. 1279-S, 22 PERC par. 29148.)

3 *Regents of the University of California v. Public Employment Relations Board* (1986) 177 Cal.App.3d 648, 654, 223 Cal.Rptr. 127, 130; *Regents of the University of California* (1995) PERB Dec. No. 504-H, 9 PERC par. 16123.

4 *Regents, supra*, 177 Cal.App.3d at 655, 223 Cal.Rptr. at 131.

5 See *In re Adtranz*, (2000) 331 NLRB No. 40, 2000 WL 739735, partially vacated on other grounds, (D.C. Cir. 2001) 253 F.3d 19.

6 *State of California (Department of Personnel Administration et al.)*, *supra*. The rule in the private sector is the same. See

E.I. du Pont de Nemours & Co. (1993) 311 NLRB 893, 897-98. In addition, in Wisconsin, an examiner has ruled that the University of Wisconsin Hospitals and Clinics Authority engaged in unlawful discrimination by blocking the union's ability to communicate with members through the office email system when it allowed use of such system for personal reasons. (*University of Wisconsin Hospitals and Clinics Authority*, Dec. No. 30202-B [Nielsen 7/02].)

7 *Ibid.*

8 See Gov. Code Secs. 3504 (MMBA), 3516 (SEERA), 3543.2 (EERA), 3562 (HEERA), 71634 (TCEPGA), 71816 (TCIELRA) and Public Utilities Code Sec. 99563.5 (TEERA).

9 See *Jefferson School Dist.* (1980) PERB Dec. No. 133, 4 PERC par. 11117; *Davis Joint Unified School Dist.* (1984) PERB Dec. No. 474, 9 PERC par. 16045.

10 *Trustees of the California State University* (2003) PERB Dec. No. 1507-H, 27 PERC par. 26; See also *State of California (Water Resources Control Board)* (1999) PERB Dec. No. 1337-S, 23 PERC par. 30136.

11 *Rancho Santiago Community College Dist.* (1986) PERB Dec. No. 602, 11 PERC par. 18021.

12 (2001) PERB Dec. No. 1455, 25 PERC par. 32099.

13 See NLRB General Counsel Feinstein's Report on Advice, Appeal, and Section 10j Cases Released Nov. 12, 1999, 212 DailyLab.Rep. E-1 (BNA) (Nov. 3, 1999) cited in 40 American Business Law Journal 827, Nancy J. King, "Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces" (Summer 2003)

14 See e.g., New York Constitution, Article VII, Section 8(1), *Schultz v. State of New York* (1995), 86 N.Y.2d 225, 630 N.Y.S.2d 978, Louisiana Constitution, Art. XI, Sec. 4, *Godwin v. East Baton Rouge Parish School Board et al.* (1979) 372 So.2d 1060, writ denied 373 So.2d 527.

15 *San Diego Community College Dist.* (2001) PERB Dec. No. 1467, 26 PERC 33014, rehearing denied, (2003) PERB Dec. No. 1467a, 27 PERC par. 55. See also Gov. Code Sec. 8314, which defines "public resources" to mean "any property or asset owned by the state or any local agency, including, but not limited to, land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel and state-compensated time." Unlike Ed. Code Sec. 7054, Gov. Code Sec. 8314 excludes from the definition of campaign activity "incidental and minimal use of public resources."

16 A written opinion prepared by the General Counsel to the Chancellor's Office of the California Community Colleges (September 16, 2004), and distributed to all of California's community colleges, indicates that use of a district's email system to

support or oppose political candidates and/or ballot measures is prohibited by Ed. Code Sec. 7054. As a result, the opinion urges community colleges not to distribute, nor allow others to distribute, political material advocating the support or defeat of a ballot measure or candidate via its email system. See also "The Public Trust," Newsletter of the Los Angeles City Ethics Commission, volume 8, issue 1 (Summer 2004); *Los Angeles Times*, "Election Emails Were Illegal, Councilman Says," November 3, 2004, California Metro section.

17 *Stanson v. Mott* (1976) 17 Cal.3d 206, 551 P.2d 1, 130 Cal.Rptr. 697

18 *Id.* at 217.

19 *San Diego Community College Dist.* (2001) PERB Dec. No. 1467, 26 PERC par. 33014, rehearing denied, (2003) PERB Dec. No. 1467a, 27 PERC par. 55.

20 Senate Committee on Criminal Procedure, S.B. 82 Bill Analysis, as amended April 24, 1995, April 25, 1995 hearing date.

21 *Id.* See also Senate Rules Committee, Office of Senate Floor Analyses, S.B. 82 Bill Analysis (May 30, 1995). Gov. Code Sec. 8314 explicitly refers to employees engaging in "campaign activity" through the use of public resources.

22 Senate Bill Analysis, Third Reading, S.B. 82, as amended August 29, 1995. Earlier bill analyses, when the legislation was pending in the State Assembly, continue to emphasize that the purpose of the bill was to "declare the use of public funds in election campaigns is unjustified and inappropriate." As support for the need to modify then-current statutory language, one bill analysis noted that in one school district, school funds were used to hire political consultants, set up telephone banks to contact potential supporters, pay bonuses to principals who achieved a certain level of electoral support, and distribute mailings urging the passage of the measure. Significantly, that same bill analysis noted that nothing in the proposed amendment to the statute was designed to affect the right of free speech of any member of a governing board or any employee thereof. (See Assembly Committee on Elections, Reapportion-

ment and Constitutional Amendments, S.B. 82 Bill Analysis, hearing date June 26, 1995; Assembly Committee on Public Safety, S.B. 82 Bill Analysis, as amended July 1, 1995.

23 Stats. 1995, c 879 (S.B. 82), Sec. 1

24 Senate Rules Committee, Office of Senate Floor Analyses, S.B. 82 Bill Analysis, "Unfinished Business" (September 8, 1995).

25 *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* (1985) 473 U.S. 788, 87 L.Ed.2d 567.

26 *Id.*

27 See *United States et al. v. American Library Assn., Inc.*, (2003) 539 U.S. 194 (Internet access in public libraries was neither a traditional nor a designated forum); *Perry Education Assn. v. Perry Local Educators Assn. et al.* (1983) 460 U.S. 37 (a school mail system is a nonpublic forum; as such the district could grant use to exclusive representative while denying such use to other labor organizations).

28 *Cornelius, supra.* See also *Education Minnesota Lakeville v Independent School Dist. No. 194* (2004) 341 F.Supp.2d 1070 (unions are not entitled to an injunction enjoining the school district from enforcing policy prohibiting the placement of political brochures in teacher mailboxes).

29 See *Education Minnesota Lakeville, supra.*

30 See *e.g., Waters v. Churchill* (1994) 511 U.S. 661.

31 See *Lamb's Chapel v. Center Moriches Union Free School Dist. et al.* (1993) 508 U.S. 384. Cited as authority by Fassler, the decision concludes that the district violated the petitioner's constitutional rights by refusing the church's request to use school facilities for a religious-oriented film series on family values and child rearing solely because the film dealt with the subject from a religious standpoint (while the district had permitted other non-religious views on the subject to be presented). In this matter, however, there is no evidence that a district would prevent a union (or anyone else) from speaking based on the viewpoint of their message. Here, all political speech in support or opposition to political candidates or ballot measures is prohibited.

‘No Child Left Behind’: The Test No District Can Pass

Alan S. Hersh

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The No Child Left Behind Act of 2001 amended the Elementary and Secondary Education Act.¹ No law since the original enactment of ESEA in 1965 has been so revolutionary in placing demands on public school districts throughout the United States. Schools that fail to meet the rigid yearly scoring targets of NCLB or fail to have a sufficient student population taking the test become Program Improvement schools. The law ultimately forces districts that have schools which fail to meet the NCLB targets to “restructure” by implementing an “Alternative Governance Plan.”

The Alternative Governance Plan is a radical, last-step solution imposed by the school district on its failing schools. Districts have only five options for an Alternative Governance Plan, each fraught with severe labor and educational consequences. Thousands of California public schools are in the program, marching towards the mandated Alternative Governance Plans.

There is an even more dire threat to school districts under NCLB, which has been little talked about or even recognized in the educational or labor community. The law provides that an entire school *district* that fails to meet the yearly targets of NCLB will be “restructured.” When an entire district faces Program Improvement, there are more drastic consequences imposed by the state.

NCLB currently applies to elementary and middle schools, and only a few high schools receiving Title I funds. President Bush now wishes to expand NCLB to all high schools.²

This article focuses on the options available to school districts that are forced to choose an Alternative Governance Plan for failing schools and the draconian sanctions that can be imposed on an entire school district by the state for failing to meet the federal standards.

Federal Law

Adequate Yearly Progress. NCLB requires schools that receive Title I money to test all students, as well as numerous subgroups of students, and meet strict yearly scoring targets.³ Schools must meet the federal target score by passing the test as a whole, as well as for each subgroup. This federal standard is known as the Adequate Yearly Progress test score. The target AYP score rises higher each year, whether or not a school passed or failed the year before.⁴

There are two ways a school can fail to reach the target AYP in a given year: the school as a whole (or any one subgroup) fails to pass the target score, or fewer than 95 percent of the school's student population (or any subgroup population) fails to take the test.⁵

Program Improvement School. If a school fails to pass the target score two years in a row, or fails to have 95 percent of its students take the test, the school becomes a Program Improvement School. The school then enters into the PI stages, each one year long, requiring the school to take progressively more drastic measures to pass the test. There are five stages, and schools are classified as being in YR 1 (Year 1), YR 2, etc. Schools that fail to hit the yearly mark move to the next stage.⁶

Alternative Governance Plan. If the school continues to fail after four years of PI, the school district is required to implement an Alternative Governance Plan. The plan must be approved by the school board in YR 4 of Program Improvement and implemented in YR 5 should the school fail to meet the YR 4 AYP target score. The AYP test is given in the spring, and the results are known in August of each year.⁷

The AGP permits school districts only five options, each of which is radical:

- (1) Reopen the school as a public charter school;
- (2) Replace all or most of the school staff (which may include the principal) who are relevant to the failure to make adequate yearly progress;

- (3) Enter into a contract with an entity, such as a private management company, with a demonstrated record of effectiveness, to operate the public school;
- (4) Turn the school's operation over to the state educational agency, if permitted under state law and agreed to by the state;
- (5) Undertake any other major restructuring of the school's governance arrangement that makes fundamental reforms.⁸

The school district plan for YR 5 "undertakes fundamental reforms, such as significant changes in the school's staffing and governance."⁹ The plan cannot contravene state

law or existing labor contracts.¹⁰ If a school district does not impose an Alternative Governance Plan at a failing school site, the district risks losing all of its federal Title I funding, something no school district can afford. The federal Department of Education has implied that ultimately, all federal funding would be in jeopardy.

California's Serious Situation

In this 2004-05 school year, 1,610 schools in California are in some stage of Program Improvement. Additionally, 1,525 schools will enter PI after

this spring's testing because they will fail to make the 95 percent special education participation rate.¹¹ Hundreds of additional schools already in YR 3 PI will enter YR 4 in the new school year, having failed the test or to reach the student participation percentage.

In 2004-05, 266 California schools are in YR 4, requiring school districts to plan to implement an Alternative Governance Plan in YR 5, the 2005-06 school year.¹² Large urban school districts that primarily serve poor children of color are the most impacted.¹³ San Diego City School District has 10 YR 4 schools, Oakland Unified School District has 13, West Contra Costa Unified School District (including the City of Richmond) has 10, and Fresno Unified School District has 16.¹⁴ The Oakland Unified School District has

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cational consequences.*

indicated that YR 4 schools make up 15 percent of its total schools.¹⁵

Los Angeles Unified School District has 62 YR 4 PI schools. In fact, that district already has nine schools in YR 5, and has implemented one of the five Alternative Governance Plan options.¹⁶

Of the five options offered in the YR 4 and YR 5 Alternative Governance Plan, districts have chosen different paths.

Option One: Reopen the School as a Public Charter School

NCLB allows the school district to hand over operation of the YR 5 public school to a private charter school. Several districts already have published Requests of Proposals for their YR 4 schools that invite charter schools, as well as “contract schools” and private organizations of every type, to bid for operation. Both San Diego City School District and Oakland Unified School District have done this.¹⁷

Under the terms of both the SDCSD and OUSD RFPs, a charter school applicant’s employees need not be covered by the union collective bargaining agreements with the district. Neither school district requires that the charter hire current employees to fill the positions at its school.¹⁸ If approved, the charter school can hire an entirely new, outside staff.¹⁹

School district employees not chosen would have to be placed at other district sites until they can be formally released. Classified employees could be released with 45 days notice. Certificated employees would have a job through the end of a school year unless noticed by March 15 of that year. This could create grave financial problems for a school district, depending on the timing of charter approval and notification of the number of certificated employees who will not be hired by the charter.

The OUSD RFP specifically addresses this situation. The district cites a preference for the charter school to “lease”

school employees already at the site. However, the charter is not required to do so, in which case the district and the charter will sign an MOU indicating that teachers not chosen would be laid off according to the seniority provisions of the collective bargaining agreement.²⁰ There is no mention of certificated or classified union involvement in negotiating these MOUs with regard to the impact on employees not hired by the charters.

One concern about issuing RFPs and selecting charters in the YR 4 stage is that this move might be premature. While NCLB requires a school district to vote on a plan to implement in YR 5, it does not require implementation until after a school district knows its school has failed the AYP test,

thereby becoming a YR 5 school. The results of the 2005 AYP exam will not be known until August 2005, and school districts need not implement alternative governance plans until then. Some YR 4 schools will meet the AYP standard and avoid moving into YR 5. Actually awarding YR 4 schools to charters at this time is not required by law.

Teacher-dependent charters. An alternative to the typical private charter school is the teacher-dependent charter (not to be confused with the charter concept where 51 percent of the teachers on a site vote for a charter).²¹

Charter school law allows a school district to work with a teachers union to create a “dependent” charter. Typically, teachers unions are interested in having more control over a school’s academic programs and teaching methods, but they do not want the burden of school financing, staffing, discipline, evaluation, or facility repair. In a dependent charter, the union exercises autonomy in selecting and implementing academic programs and innovative teaching methods, but the district retains control of fiscal, facility, staffing, and personnel matters, and retains ultimate control over the charter school.

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Request for Proposals
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for the charter
school to ‘lease’
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already at the site.*

Option Two: Replace School Staff

NCLB option two suggests the massive transfer in and out of teaching staff at YR 5 Program Improvement schools, a process sometimes referred to as “reconstitution.” As a consequence, in bargaining across the state, teachers unions are proposing language that declares teachers irrelevant to the school’s failure to make AYP. This protective measure forecloses a school district’s option of shuffling its teaching staff.

The NCLB requirement that no option can contravene the existing collective bargaining agreement makes reconstitution more difficult in some districts. The labor agreement may prohibit transfers of teachers or classified employees except based on seniority.

The San Francisco Unified School District has instituted what it refers to as “Dream Schools.” Teachers must reapply each year, and the district exercises its discretion to hire. Those hired must sign a contract committing to the achievement of the students. Teachers not rehired at the school will be given jobs at other school sites. Currently, there are three Dream Schools, with seven more slated for the 2005-06 school year. Only 71 of 200 teachers now working in these schools have reapplied, but the district has received 400 applications for the jobs. The teachers union has filed an unfair practice charge against the district for implementing this plan.

Other states have used this option. Nearly complete changes in teaching staff are occurring in Denver, Colorado; Houston, Texas; New York, New York; Portland, Oregon; and Prince Georges County, Maryland.²² More than half of Michigan schools in restructuring will replace principals and staff.²³

The jury is still out as to whether massive transfers of the teaching staff help or hurt the academic performance of the school, when balanced against the damage to morale.²⁴

Option Three: Turn Over Management to a Private Company

Both the SDCSD and the OUSD RFPs provide for private “contract schools” to apply for takeovers. Both districts require that contract schools taking over YR 5 PI schools will continue to be covered by the collective bargaining agreement unless the staff votes to waive the union contract.²⁵ “Waivers” will be hard to obtain since they are governed by the collective bargaining agreements. In Oakland, for example, the RFP indicates it will require a two-thirds vote of

the entire staff at the school site to waive the contract. Also, the waiver must be approved by the union’s building representative and school principal.²⁶

Charter school applicants have an advantage over “contract school” applicants since they do not need to obtain waivers.

Many school districts across the U.S. are looking at partnering with a university or other institution of higher education to run a failing school.²⁷ In Palo Alto, Stanford University became the charter school for East Palo Alto

High School. The district is able to partner with experts in educational thinking and share the name recognition of an outstanding university. The university can use the public school as a “teaching hospital,” where student teachers can observe best practices while getting real world experience.²⁸

Temple University, in Philadelphia, supports six public schools. In Baltimore, Johns Hopkins University has formed a partnership and has taken over a local public high school. The university uses Baltimore city public school teachers but selects the people it wants. The university has developed its own curriculum for the high school, and does not depend on the school district’s professional development program to train and educate its teachers.²⁹

*In ‘Dream Schools,’
teachers must reapply
each year, and the
district exercises its
discretion to hire.*

Option Four: State Takeover

No one is talking about this plan, least of all the state. In the only major state guidance to date on Alternative Governance options, the California Department of Education omits any mention of this option.³⁰

Option Five: Any Other Major Restructuring

NCLB's fifth option offers school districts the most creativity. It has the advantage of allowing districts to retain control of their schools (and teaching staff) during YR 5, rather than offering them to charter or private institutions.

Major restructuring means the school district "undertakes fundamental reforms, such as significant changes in the school's staffing and governance."³¹ According to the California Department of Education, this may include:

- Redefining leadership roles of all stakeholders, so that leadership and decisionmaking extend beyond the traditional position of the principal to include teachers, parents, and the community;
- Building a system of instructional leadership at the school that includes not only principals but teachers as instructional leaders, mentors, and/or coaches to other teachers. Instructional leaders would receive professional development in classroom observation, provide instructional feedback, use data to drive instruction, and encourage teacher collaboration;
- Dividing the school into multiple, small, autonomous schools at the same site or another site, generally with the same student population but separate administrations and staff.³²

To date, the proposals have centered on redefining the role of the administrators at the sites, or the responsibilities of the superintendent and upper-level management for the direction and control of all decisions at YR 5 schools. Teach-

ers unions have proposed that they be allowed to take control of the school sites and let teachers at each site decide whether the school should be run by a principal or a teacher.

The Stockton Unified School District has significantly changed the position descriptions of the principal and vice principal in its failing schools. The principal is responsible solely for the academic achievement of the students. The vice principal is responsible for the day-to-day operation of the school.

West Contra Costa Unified School District has decided to grant the superintendent and assistant superintendents direct control of all major decisionmaking functions at YR 5 schools. Principals will offer input. For YR 5 schools, the district also will consider RFPs and other alternatives for YR 6, should the schools not improve. School site councils will work with the superintendent in making recommendations.

The California Teachers Association has presented school districts with several variations of a proposal that provides for union or teacher control of YR 5 schools.³³ One such proposal allows teachers at failing schools the option of creating a union-led governance model.

In this model, teachers vote whether to retain the principal or substitute that role with a teacher "site leader" who directs the work. An "action team," with greater union representation at sites with "site leaders," replaces the school site council. The action team elects a representative to a leadership council that would supervise all YR 5 schools. The teachers union president selects a "coordinator" who, along with the union president, shares power with the school board in overall governance of these schools.

While this model might have certain advantages, having teacher site leaders replace principals raises issues about the selection, evaluation, transfer, assignment of work, and discipline of school site staff and students. The suggestion that the school board delegate its authority to teacher non-administrators at the sites and share power with the school board raises state constitutional questions.

Nor does the model address the existing collective bargaining agreements of any unions. It indicates that the teachers union and school district would negotiate a "compact"

*The union's model
does not address
their existing
collective bargaining
agreements.*

concerning how the union plan will co-exist with union collective bargaining agreements; however, other unions are not mentioned.

Despite these concerns, it is clear that to succeed in breaking out of Program Improvement, teachers and teachers unions will have to be “enrolled” to participate in Alternative Governance Plans. No plan should be discounted out of hand, and perhaps a hybrid of plans will be presented by school districts now reaching the decision stage.

No action. Some school districts have made the mistake of taking no action at all, only to suffer consequences at a later date. By the end of the 2004-05 school year, each district with YR 4 PI schools must submit its plan to the Department of Education, should any of its schools move to YR 5 PI.³⁴ In the school year 2005-06, each school district with YR 5 schools will receive a State Coordinated Compliance Review. The state will investigate whether a school district voted on a plan in YR 4 and implemented its plan in YR 5. Failure to vote on or implement a plan would violate NCLB on its face; it could lead to the loss of Title I funding.

Now for the Bad News

Little known and almost never discussed are the provisions of NCLB that go beyond the radical changes that must occur at school sites. The act also mandates a three-stage process for classifying an *entire* school district as a Program Improvement district, and the final year is more extreme than anyone could imagine.

A school district goes into PI if it fails district-level AYP for two consecutive years. This is determined by looking at both test results and participation rates for all numerically significant subgroups. NCLB has a three-year track for school districts in PI, as opposed to a five-year track for individual schools.

In California, the U.S. Department of Education and the California Department of Education recently agreed that districts which do not meet the AYP criteria districtwide in the same content area for two consecutive years will be preliminarily identified as PI.³⁵ However, if the district can show that its students at either grade spans of elementary 2-5, middle grades 6-8, or high school grade

10 did meet the AYP criteria in either of the two years in the content areas that the district failed as a whole, the district will not be identified as PI.³⁶

Under this criterion, the California Department of Education recently has indicated that there now are 150 school districts in the first year of Program Improvement in the current academic year.³⁷ This does not count the school districts that will enter PI in August 2005 for failing the districtwide AYP

The salient point about school district PI is that in YR 3, the California Department of Education, known in federal parlance as the State Educational Agency, is mandated to take drastic measures against the school district, known as the Local Educational Agency, as a whole. The CDE must take at least one of the following corrective actions:

- Defer programmatic funds or reduce administrative funds;
- Institute and fully implement new curriculum and professional development for staff;
- Replace the LEA staff personnel who are relevant to the failure to make AYP;
- Remove individual schools from jurisdiction of the LEA and establish alternative arrangements for public governance and supervision of schools;
- Appoint a receiver or trustee in place of the superintendent and school board;
- Abolish or restructure the LEA.³⁸

Conclusion

As more public schools reach YR 4 PI, they will be forced to create a YR 5 Alternative Governance Plan. Those plans will hand over control of public schools to private and teacher charters, contract schools of all types, and other private institutions and universities. The familiar structure in the nation's schools will change radically. Gone will be the days when a school is managed by a superintendent and principals overseeing public teachers and support staff, all governed by negotiated collective bargaining agreements. Ultimately, federal law may force the state to step in to direct the academic performance of the school or the entire district, replace the superintendent and school board, and appoint a

state trustee — not as a result of the financial uncertainty of the school district, but because the district could not pass the No Child Left Behind pass-fail test known as AYP. *

1 The law was signed as P.L. 107-110, and became effective on July 1, 2002.

2 U.S. Department of Education, Office of the Secretary, *No Child Left Behind: Expanding the Promise, Guide to President Bush's FY 2006 Education Agenda*, Washington, D.C., February 2005.

3 The subgroups are (a) economically disadvantaged students; (2) students from major racial and ethnic groups in the school district; (3) students with disabilities; and (4) low English-performing students, known in California as English Language Learners.

4 This is a significant difference from California's testing standard, the Academic Performance Index. Under API, student achievement is measured by a student's progressive improvement, not by a rigid pass-fail hurdle, as in NCLB. NCLB, Sec. 1116.

5 NCLB, Sec. 1116.

6 Schools that make AYP targets remain in place on the continuum. If a school makes AYP for two consecutive years, it exists in Program Improvement.

7 NCLB, Title I, Sec. 1116 (b)(8)(A)(B); U.S. Department of Education, *No Child Left Behind, LEA and School Improvement*, Non-Regulatory Guidance, January 7, 2004; California Department of Education, Jack O'Connell, State Superintendent of Public Education, *Important Requirements, Title I, Part A, Program Improvement: Requirements for Local Educational Agencies With Program Improvement Schools*, August 26, 2004.

8 NCLB, Sec. 1116 (b)(8)(B).

9 California Department of Education, Jack O'Connell, State Superintendent of Public Education, *Important Requirements, Title I, Part A, Program Improvement: Requirements For Local Educational Agencies With Program Improvement Schools*, August 26, 2004, Attachment A, p. 4. California Department of Education advisories on different aspects of NCLB can be found on its website at <http://www.cde.ca.gov/>.

10 NCLB, Sec. 1116(d).

11 Until recently, it was thought that special education students could take the AYP tests with modifications indicated in the student's Individualized Educational Plan. However, the U.S. Department of Education now has disallowed California's use of IEP modifications. See Association of California School

Administrators, State Board of Education Meeting Highlights, January 12-13, 2005, p. 6.

12 Department of Education, State of California, Jack O'Connell, State Superintendent of Public Instruction, *Program Improvement*, December 14, 2004.

13 It is ironic that these schools are the most impacted, being the very schools it was assumed would increase most in academic performance under NCLB. The National Conference of State Legislators, made up of both Republican and Democratic state legislators across the United States, issued a task force report on NCLB on February 23, 2005, calling for a review of the law's "foundations." The report attacks many NCLB elements, including a call to "remove the one-size-fits-all method that measures student performance and encourages more sophisticated and accurate systems that gauge the growth of individual students and not just groups of students." The report also attacks the AYP pass-fail system.

14 California Department of Education, *2004-2005 Title I Program Improvement Status Reports*, current as of February 14, 2005.

15 Oakland Unified School District, *A Call to Action and Request for Letters of Interest*, January 10, 2005, p. 9.

16 California Department of Education, *2004-05 Title I Program Improvement Status Reports*, current as of February 14, 2005.

17 San Diego City School District, *Request for Proposals for Restructuring Schools*, September 29, 2004; Oakland Unified School District, *A Call to Action and Request for Letters of Interest*, January 10, 2005. The San Diego City School RFP called for final board action in selecting proposals by February 22, 2005. However, with the election of a new school board, at the time of this writing, the school district has yet to award any contracts to take over its YR 5 schools. The OUSD RFP letters of interest were due February 1, 2005, with the district then starting the process of deciding which institutions to award schools to. The SDCSD and OUSD websites contain the full versions of their RFP proposals.

18 SDCSD, *Request for Proposals for Restructuring Schools*, September 29, 2004, p. 5; OUSD, *A Call to Action and Request for Letters of Interest*, January 10, 2005, p. 14.

19 The OUSD RFP states: "The District will consider variations of employment rights in the proposed charter(s), including but not limited to: the District leasing employees (e.g., the principal or school secretary) to the charter school and allowing the employee "leave of absence status" while working in the charter school; *the charter hiring all non-district employees*, or a combination of both." OUSD, *A Call to Action and Request for Letters of Interest*, January 10, 2005, p. 14 (emphasis added).

- 20 OUSD, *A Call to Action and Request for Letters of Interest*, January 10, 2005, p. 15.
- 21 See Education Code Secs. 47601 et. seq.
- 22 The Thomas B. Fordham Institute, Ronald C. Brady, *Can Failing Schools Be Fixed?* January 1, 2003, Appendix B “The Intervention Experience.”
- 23 Center on Education Policy, *Makeovers, Facelifts, or Reconstructive Surgery, An Early Look at NCLB School Restructuring in Michigan*. Washington, DC: CEP, November, 2004, p. 6.
- 24 The Thomas B. Fordham Institute, Ronald C. Brady, *Can Failing Schools Be Fixed?* January 1, 2003, pp. 20-25, Appendix B “The Intervention Experience”; Center on Education Policy, *Makeovers, Facelifts, or Reconstructive Surgery, An Early Look at NCLB School Restructuring in Michigan*. Washington, DC: CEP, November, 2004, pp. 8-11. The Fordham report contains studies of several interventions, including restructuring the schools by changing staff in Prince Georges County, Maryland. Appendix B lists scores of interventions from mild to strong, being implemented nationwide to comply with NCLB. These may be helpful to practitioners and school districts struggling for ideas. The report is available in full on the institute website, <http://www.edexcellence.net/>.
- 25 SDCSD, *Request for Proposals for Restructuring Schools*, September 29, 2004, p. 5; OUSD, *A Call to Action and Request for Letters of Interest*, January 10, 2005, p. 16.
- 26 OUSD, *A Call to Action and Request for Letters of Interest*, *supra*, pp. 16, 26.
- 27 *Ibid.*
- 28 *Education Week*, “Universities Team Up With Urban Districts to Run Local Schools,” January 19, 2005, p. 6.
- 29 *Supra.*
- 30 California Department of Education, Jack O’Connell, State Superintendent of Public Education, *Important Requirements, Title I, Part A, Program Improvement: Requirements For Local Educational Agencies With Program Improvement Schools*, August 26, 2004.
- 31 *Id.* at Attachment A, p. 4.
- 32 *Id.* at Attachment A, p. 5.
- 33 The proposal described is from the West Contra Costa Unified School District.
- 34 The plan is part of the consolidated application for state and federal funds, which must be signed by the superintendent of the school district.
- 35 The test score rises yearly. The score for passing in August 2004 was 560; for August 2005, it will rise to 590.
- 36 *Fiscal Report*, School Services of California, vol. 25, March 18, 2005.
- 37 *Id.* at p. 2.
- 38 NCLB, Title I, Sec. 1116(c)(10)(C).

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Recent Developments

Local Government

Nurses Win a Round in Their Battle With the Governor

Governor Schwarzenegger's effort to delay plans to impose more stringent nurse-to-patient ratios was thwarted in March when Sacramento Superior Court Judge Judy Holzer Hersher ruled that the California Department of Health Services had abused its discretion and acted outside its rulemaking authority. The department had submitted an emergency regulation to the Office of Administrative Law in November, hoping to sidestep implementation of the one-to-five nurse-to-patient minimum staffing ratio set to take effect on January 1, 2005. The California Nurses Association filed a lawsuit on December 21, 2004, asking the court to set aside the emergency regulation and enforce the one-to-five ratio on schedule.

CNA's success before Judge Hersher revitalizes the first nurse-to-patient acute care staffing law in the United States. But equally important, it filled the sails of the California Nurses Association, which has been in a testy fight with the governor over this issue for months.

Background

The Department of Health Services has considered the imposition of staffing ratios for registered nurses in acute care hospitals since 1992. Back

then, however, it opted not to impose minimum ratios and instead elected to enact regulations requiring hospitals to implement a patient classification system. The PCS was intended to ensure that the number of nursing staff was aligned with the health care needs of patients while still allowing flexibility for the efficient use of staff.

CHA urged that hospitals could not afford to hire more nurses.

Based on a survey conducted in 1998, however, CNA concluded that the PCS was not meeting its intended purpose, and the union sponsored legislation, A.B. 394, to mandate nurse-to-patient ratios for acute care public and private hospitals. That bill, passed by the legislature and signed by then-Governor Gray Davis in 1999, added Sec. 1276.4 to the Health and Safety Code. The statute directed the department to adopt regulations that establish "minimum, specific, and numeri-

cal licensed nurse-to-patient ratios by licensed nurse classification and by hospital unit." The new law also instructed the Department of Health Services to adopt minimum staffing regulations.

The California Hospital Association, which had opposed the legislation, continued to vigorously object to any minimum staffing ratios and made its opinions known. During the rulemaking process, CHA repeatedly urged that hospitals could not afford to hire more nurses because of fiscal constraints and a statewide nursing shortage.

The department listened to these concerns but proceeded with its rulemaking orders because it believed the statute did not allow for the option of declining to implement the staffing ratios, notwithstanding the nursing shortage and the hospitals' financial concerns.

DHS enacted regulations in 2003 that adopted specific ratios representing the minimum staffing permitted on any shift. As a starting point, DHS required that the nurse-to-patient ratio in medical, surgical, and combined units be one-to-six or fewer at all times. A one-to-five ratio was set to take effect on January 1, 2005.

New Governor Brings New Regulations

In November 2004, one year after Davis was recalled and replaced by Schwarzenegger, DHS gave notice that it had adopted an emergency regulation which would postpone until January 1, 2008, the one-to-five ratio. DHS

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

Mae West

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claimed that the emergency regulation was "necessary for the immediate preservation of the public health and safety." DHS also pointed to the hospitals' claims that they were unable to hire enough nurses for continuous compliance with the old regulations because of the state's nursing shortage. Hospitals also charged that they did not have sufficient funds to meet the one-to-five ratio.

CNA and its members were not happy about the department's move. At a rally in Sacramento in December, about 2,500 nurses showed their displeasure and pledged to sue the depart-

The department's emergency regulation exceeded the scope of its authority.

ment for acting in excess of its authority in promulgating the emergency regulation. CHA fired back, airing a television ad that thanked the governor for relaxing the staffing levels. Then, later that month, in Long Beach, the governor and the nurses squared off again at the California Governor's Conference on Women and Families. Insinuating the sexual harassment accusations made against the governor during the recall campaign, nurses attending the conference sported placards reading, "Hands off our ratios." The

governor fanned the flames by instructing the audience to pay no attention to these "special interests," saying that the nurses don't like him because "I always kick their butt."

CNA staged a second rally in January. This time, the assembled nurses carried coffins as a New Orleans jazz band played a death march. A few weeks later, on Super Bowl Sunday, CNA sent another message by hiring a blimp to fly over the governor's Santa Monica home.

Judge's Ruling

On March 4, Judge Hersher handed down a preliminary injunction vacating the department's emergency regulation. The judge also denied a request by CHA to postpone enforcement of her order pending an appeal.

The basis for the ruling was twofold. First, she concluded that the department's emergency regulation exceeded the scope of its authority because Sec. 1276.4 does not allow for decisions that accommodate perceived nursing shortages or conflicting economic interests. Those considerations are inconsistent with the fundamental purposes of the statute to ensure that nurses be "accessible and available to meet the needs of patients." In sum, the court ruled that the statute does not permit DHS to consider the effect that ratios will have on the state's nursing shortage or on hospitals' budgets.

Judge Hersher also found that enactment of the emergency regulation was an abuse of the department's dis-

cretion. Even before adopting the original staffing regulation, said the court, the department anticipated the consequences of nurse-to-patient ratios, including the “heavy burden” they would place on hospitals’ financial reserves. The court discounted the reliability of subsequent reports the department considered in assessing the impact of existing ratios, finding no evidence that the cited hospital closures were the proximate cause of the prior staffing regulation.

The department and CHA plan to appeal the superior court ruling, but for now, the DHS emergency regulations no longer exist, and the one-to-five ratio has been reinstated.

Needless to say, CNA was elated by the ruling. However, given the acrimonious attacks by the parties to date, it most assuredly is not the last round in this battle. ❁

gaged primarily in active law enforcement activities. To establish the presumption, the employee must show that he or she developed cancer during their employment (or within prescribed periods thereafter) and that the officer was exposed during service to a known carcinogen. Based on this showing, the statute establishes a presumption that the cancer is job-related. The law expressly provides that the presumption is disputable and allows the agency to controvert the presumption “by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer.” The statute further mandates: “Unless so controverted, the appeals board is bound to find in accordance with the presumption.”

Employer Bears Heavy Burden to Rebut Cancer-Job Presumption

In order to rebut the statutory presumption that a police officer who contracts cancer while on the job is entitled to workers’ compensation benefits, an employer must prove there is no link between exposure to the known carcinogen and the type of cancer that develops. The mere showing that no studies exist which reveal a positive link between exposure and the particular cancer does not rebut the presumption, said the Second District Court of Appeal in *City of Long Beach v. Workers’ Compensation Appeals Board*. By operation of Labor Code Sec. 3212.1, once an employee demonstrates he has been exposed to a known carcinogen while on duty, the presumption that his cancer was caused in the course and scope of employment is conclusive unless the employer can muster evidence to show

the specific disease is not reasonably linked to the cancer-causing agent.

Several Labor Code provisions provide that if police and firefighters develop certain illnesses during their employment, there is a presumption that the illness arose out of, and in the course of, their employment. As a result of this presumption of industrial causation, these employees are entitled to workers’ compensation benefits. These presumptions reflect public policy. Their purpose is to permit additional compensation to employees who provide hazardous services by easing their burden of proof in the workers’ compensation arena.

Labor Code Sec. 3212.1 is one such statute. It applies to active firefighters and certain peace officers who are en-

Garcia demonstrated he had been exposed to a known carcinogen.

In this case, Dave Garcia, a police officer employed by the City of Long Beach, contracted kidney cancer during his employment and filed a claim for workers’ compensation benefits, which the city denied. A hearing was conducted by a workers’ compensation judge to determine whether Garcia’s illness arose out of his employment.

The judge determined that Garcia had demonstrated he had been exposed

to a known carcinogen, benzene, when he pumped gasoline into his vehicle. Since there was no dispute that the cancer arose during the term of Garcia's employment, the workers' compensation judge ruled that the presumption created by Sec. 3212.1 applied. The judge also concluded that the city had failed to controvert the presumption because it had failed to satisfy its "admittedly difficult burden" of proving that Garcia's cancer was not linked to his occupational exposure.

*The city contended
the statute imposes
an almost
impossible burden.*

When the Workers' Compensation Appeals Board refused to reconsider the administrative law judge's decision, the city petitioned the court to vacate the agency's ruling. That effort proved unsuccessful.

The Court of Appeal first fielded the city's contention that the statute imposes an almost impossible burden by requiring the city to prove a negative through evidence that conclusively shows no link between the exposure and the cancer. The court rejected the city's argument based on the language of the statute and its legislative history.

Section 3212.1 requires the employer to prove that the carcinogen to

which the employee has demonstrated exposure is "not reasonably linked" to the cancer. The employer demonstrates the absence of a reasonable link if it shows no connection between the illness and the carcinogenic exposure. But, said the court, "the statute does *not* require the employer to prove the absence of *any possible* link. The statute requires proof no *reasonable* link exists." Therefore, a link that is remote, hypothetical, or statistically improbable is not a reasonable link, instructed the court. The employer need not prove the absence of a link to a scientific certainty; it simply must show no such connection is reasonable.

The court further elaborated:

An employer does not meet its burden merely by showing that no studies exist showing a positive link between the exposure and the particular form of cancer. That no studies exist — perhaps because they have not been undertaken or completed, or because their results were inconclusive — does not prove or disprove anything. The *absence* of medical evidence linking a known carcinogen with a particular form of cancer simply represents a void of information, and cannot be considered proof a reasonable link does *not* exist.

The court also defended the statutory allocation of the burden, finding "no inherent reason why the employee, rather than the employer, should bear the burden of an absence of scientific knowledge," especially in the face of the directive that workers' compensation laws be construed liberally with the

purpose of extending benefits to those injured at work.

The court found the legislative history of the statute enlightening. When legislation to create this presumption first was drafted in 1982, the bill did not contain a requirement that the employee demonstrate a reasonable link between the exposure and the cancer. However, in response to pressure from self-insured state and local agencies, the bill that became law imposed on the employee the burden to prove

*The court said the
burden is difficult,
but not impossible
to meet.*

that the carcinogen was reasonably linked to the disabling cancer.

In 1999, however, the law was amended to eliminate the requirement that a firefighter or peace officer prove a reasonable link between a carcinogen and the disabling cancer before the illness is presumed compensable. Lawmakers were concerned with the unfairness to firefighters and peace officers who were exposed to carcinogens while doing their jobs but were denied benefits because it was not possible to prove the genesis of the cancer. "The statute's history suggests the Legislature has made a policy decision that, when it is not possible to determine

whether the carcinogenic exposure caused the cancer, the employer, not the employee, should bear the burden of ambiguity.”

The court acknowledged that the burden placed on the employer is a difficult one, but found it not impossible to meet. If, for example, medical studies are available demonstrating that particular cancers have been shown not to be caused by certain carcinogens, that evidence, if credited, would suffice.

Garcia did not have to prove there was a link between his exposure and his cancer.

In other cases, the court suggested, the employer will be able to demonstrate it is highly unlikely the cancer was industrially caused because the period between exposure and manifestation of the cancer is not within the cancer’s latency period.

Also rejected was the city’s argument that the burden of proving a negative is contrary to good public policy because it imposes a crippling expense on taxpayers. Noting that the employee must demonstrate exposure to a known carcinogen, the court found the statute requires “more than a mere coincidental showing that the employee contracted cancer while employed or within the specified time limits there-

after.” But, in any event, said the court, “the wisdom of the statute, from a fiscal standpoint, is a question for the Legislature alone, not for this court.”

Applying these principles to the present case, the court found Garcia had presented sufficient evidence to prove he regularly was exposed to benzene while pumping gas at work and that benzene is a known human carcinogen usually found in gasoline. Garcia did not have to prove there was a link between his exposure to benzene and his cancer. This established the statutory presumption and the burden then shifted. However, the city failed to show a reasonable link did not exist. A medical expert testified that, to a reasonable medical probability, there was no logical connection between benzene exposure and kidney cancer, and that the cancer was non-occupationally related. However, the basis for the expert’s testimony was that no medical studies had established a positive link between ben-

zene and kidney cancer, and that there was no established cause for kidney cancer. “The fact that no existing medical studies show a positive link between the cancer and the exposure does not rebut the presumption,” the court concluded.

Finally, the court acknowledged, the legislature may not have envisioned that the presumption would apply where the exposure arose not from activities generally viewed as hazardous police work, but instead from filling a vehicle with gasoline, an activity no different than that routinely performed by members of the general public. However, said the court, “the statutory language is clear and specific, and represents the Legislature’s policy judgment. If the Legislature believes the statute is overbroad, it is for the Legislature, not this court, to amend it.” (*City of Long Beach v. Workers Compensation Appeals Board* [1-31-05] B173437 [2d Dist.] 126 Cal. App.4th 298, 2005 DJDAR 1287.) ♦

Dismissal of ‘De Facto’ Regular Employee Violated Due Process Rights

Riverside County wrongfully terminated an employee who, while designated as temporary, scored high enough on civil service exams to be hired for a permanent position. In doing so, the Ninth Circuit Court of Appeals ruled, the county deprived the employee of her property right in continued public employment in violation of constitutional due process protections.

The court’s ruling concerned Evelyn Jenkins, who was hired by the county as an office assistant in May 1992. She initially was hired to work at a local hospital to deal with a backlog of fetal monitoring strips that had been stored in the hospital basement. When she finished that task, she was trained and assigned to work with the regular staff and performed the ongoing work

of the nursing department. The position Jenkins held was designated as temporary.

While Jenkins was employed by the hospital, she received exemplary performance reviews and worked well in excess of the annual 1,000-hour ceiling imposed on temporary workers by county ordinance 440. During her employment, Jenkins applied for regular employment with the county, and on

The lower court was criticized for interpreting the word 'qualified' too narrowly.

seven occasions passed the written exam required of all civil service applicants. Each time, she was interviewed for a regular position but was passed over.

In May 1998, Jenkins was summarily terminated from her position without cause, notice, or a hearing. She filed suit in federal court alleging that the dismissal deprived her of her property right in continued public employment. The district court sided with the county, finding that Jenkins had never acquired the status of a permanent employee nor was she ever qualified for such status. According to the district court, Jenkins' claim was defeated by the facts that she had never been offered a regular position and had never com-

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

Lily Tomlin

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pleted a fixed probationary period during which she would have been employed "at will."

On appeal, the Ninth Circuit criticized the lower court for interpreting the word "qualified" too narrowly in light of California case law. As the court noted, the parties do not dispute that Jenkins worked far more hours than the maximum authorized for temporary employees by the county ordinance.

Jenkins had a property right in continued public employment.

Nor was there a dispute that Jenkins had passed the written civil service exam on several occasions. There was agreement, too, that Jenkins was interviewed for a permanent position, reflecting the fact that her score on the exam was high enough for her to qualify.

The court also noted, in contrast to the facts in *Villain v. Civil Service Commission of San Francisco* (1941) 18 Cal.2d 851, that ordinance 440 does not require that county jobs go to the very-highest scoring applicants. The appointing authority can choose from among those who attain high scores. In this case, noted the Ninth Circuit, Jenkins was selected for an interview based on her high scores on the civil service tests. "That it would have been

permissible to hire an applicant under the applicable rules is all that California law requires for an applicant to be considered 'qualified' for a permanent civil service position," said the court.

The court also rejected the claim that Jenkins did not qualify for a regular position because she had not completed a six-month probationary period during which her employment would have been at will. As the court observed, Jenkins had been given performance reviews at regular intervals during the course of her employment and submitted to an annual evaluation the same as regular county employees who have attained permanent status. "The fact that the county has consistently reviewed her performance in the exact manner in which it reviews that of *de jure* 'regular' employees is sufficient to satisfy the probation requirement," said the court.

Based on its finding that Jenkins was a *de facto* regular employee within the meaning of the county ordinance at the time she was summarily terminated, she had a property right in continued public employment under the Fifth and Fourteenth Amendments, said the court. Therefore, concluded the court, the county violated her due process rights by terminating her without notice or hearing. (*Jenkins v. County of Riverside* [9th Cir. 2-9-05] No. 03-55412, ___ F.3d ___, 2005 DJDAR 1624.) ❁

Public Schools

Schwarzenegger Declares War on Teachers' Retirement System

Governor Schwarzenegger has taken aim at the California State Teachers Retirement System as a source of funds to balance the budget. He has proposed several modifications to the plan, including shifting responsibility for \$469 million in annual contributions from the state to local school districts and

Teachers' sole work-related pension is through CalSTRS.

changing it from a defined benefit to a defined contribution plan. The governor's plan has been criticized by not only school employees and their unions, but also by the nonpartisan legislative analyst and by the governor's own appointees to the board of the California Teachers Retirement System. Schwarzenegger fired back with all guns blazing.

The Plan

CalSTRS is the nation's third largest retirement plan, with approximately \$125 billion in assets; it provides benefits to 754,000 retired teachers. The

plan is managed by a 12-member board made up of both elected officials and individuals appointed by the governor.

CalSTRS is a defined benefit plan, meaning that each participant is guaranteed a regular, life-time benefit based on years of service and ending salaries. California's teachers do not pay into Social Security and do not get Social Security benefits when they retire. Their sole work-related pension is through CalSTRS. The average monthly benefit is \$2,448, less than \$30,000 a year. As with Social Security, payments to retirees are funded largely by the contributions from working teachers. Working teachers contribute 8 percent on the dollar into the plan, school districts pay 8.5 percent, and the state pays 2 percent. The rest is made up from investment income.

The Governor's Proposals

Schwarzenegger has made reforming CalSTRS one of his main goals. There are two parts to his proposal. First, he wants to stop the state's contributions to the plan and force local school districts to make up the difference. Second, taking President Bush's concept for Social Security one step further, he would *require* all new em-

ployees hired after July 2007, to contribute to a 401k-style retirement plan. If adopted, the new plan would be a defined contribution plan, meaning that benefits upon retirement would depend on how much money the contributions and investments gain or lose over time. This type of plan shifts the investment risk from the state to the worker.

Assembly Member Keith Richman (R-Northridge) introduced legislation incorporating the governor's proposals, applying to both CalSTRS and the California Public Employees Retirement System. (See story in *CPER* No. 170, pp. 28-32.) The legislation was not

The governor is trying to get the measure on the ballot through the initiative process.

acted on by the governor's March 1 deadline, so he now is moving forward with his plan to get the measure on the ballot through the initiative process. The initiative was filed by the Howard Jarvis Taxpayers Association.

The Opposition

Not surprisingly, teachers and their unions have come out strongly against Schwarzenegger's proposed reforms. As Mary Bergan, president of the California Federation of Teachers, wrote for

the *Sacramento Bee*, “few public education employees — teachers or school support staff — embark on their careers to achieve great financial gain. But they do expect and deserve fair compensation within the constraints of public budgets. One of the consolations offsetting less-than-stellar paychecks has been the anticipation of a secure retirement benefit at the end of the work rainbow. Until now.” “Privatizing pension funds is as distasteful to teachers and other school employees as the idea of privatizing Social Security is to most Americans,” she wrote.

‘[Teachers] deserve fair compensation within the constraints of public budgets.’

On its website the California Teachers Association lists a number of reasons why it opposes the governor’s proposals:

A recent report by the Center for the Future of Teaching and Learning estimates that California will need to hire an additional 100,000 teachers over the next 10 years. The Governor’s proposal is a step in the wrong direction and will make it much more difficult to attract the highly qualified professionals our students deserve and that the Governor claims he wants in our classrooms.

The Governor’s proposed retirement system will not save the state or local governments any money and could actually cost taxpayers more than the current system through increased administrative and setup costs. It could also increase existing pension plan costs, because without new employees paying into the current system, the existing plan will have fewer assets to invest, driving up costs.

Rising pension costs were overwhelmingly caused by the stock market crash — not benefit increases. In fact, the State of California still owes CalSTRS \$500 million it took from the retirement fund to help balance the budget two years ago.

Opposition to Schwarzenegger’s proposals has come from other quarters as well. Elizabeth G. Hill, the non-partisan legislative analyst, issued a report stating that the governor’s plan to withhold the state’s contributions to CalSTRS probably is illegal, and would not result in any savings to the state. It was the analyst’s conclusion that, if the state stops making its share of the retirement payments, it would be constitutionally obligated to make up that money to school districts elsewhere. Hill also disputed the governor’s claim that enactment of his proposal would leave school districts with enough money to pay for enrollment growth and cost-of-living adjustments. Hill estimated the governor’s proposal would leave schools about \$500 million short.

Schwarzenegger’s biggest blow, however, came from his own appointees to the CalSTRS board. The board

voted ten to two against his plan to begin privatizing the system. It voted eleven to zero, with one abstention, against the plan to stop the state’s contributions to the system. Five of the twelve board members were appointed by Schwarzenegger. All but one of those voted against the privatization proposal, and all voted against the second proposal.

Board members cited a number of concerns. CalSTRS would face a monumental task revamping its accounting system, at an estimated cost of \$330,000 for a computer upgrade alone, they

Hill estimated the governor’s proposal would leave schools about \$500 million short.

said. One CalSTRS consultant predicted that the state and school districts would end up paying \$5.9 billion *more* over the next decade to fund benefits for future employees and to close a \$23 billion long-term shortfall in the fund if the proposal were adopted. The board also voiced concern that the plan would put teachers at greater risk than other public employees because they do not have Social Security to fall back on. The proposed change also would eliminate

a major incentive for experienced teachers to continue teaching, they said.

The Reaction

Schwarzenegger retaliated by firing the four appointees who voted against the privatization plan. He named all four to the board last year, but withdrew their names from consideration one week before they were set to have a confirmation hearing. According to a spokesperson for the governor, these appointments were not best suited "to implement his agenda for reform." Schwarzenegger has responded to the legislative analyst's contention that if

Schwarzenegger fired the four appointees who voted against the plan.

the state stops contributing to the plan, it would have to make up the difference to the districts elsewhere. Administration officials assert that before 1970, the state had never made payments to the retirement plan, and once the state began doing so, there was agreement that the practice would stop after 30 years. It also is the governor's position that the Proposition 98 formula guaranteeing payments to schools does not require the state to continue the retirement payments. "The state's contributions to the retirement fund have never been part of the Prop. 98 calculations,"

said an administration spokesman. "Retirement compensation for teachers has been the functional responsibility of school districts." The governor argues that the shift from a de-

defined benefit to a defined contribution plan is necessary because the current plan is "outdated" and simply too expensive for the state to maintain. ❁

No Child Left Behind Act Is Challenged on National, State Levels

The No Child Left Behind Act, signed into law by President Bush on January 8, 2002, is under attack in Washington and elsewhere in the nation, including California. The National Conference of State Legislatures is calling for fundamental changes. The organization's 77-page report, a bipartisan statement from all 50 legislatures, is based on a year-long study, including hearings held in six cities. It is a scathing rebuke of the act, calling it coercive and unconstitutional. The act, according to the report, sets an unreachable goal of getting every child up to par in reading and math. (See "No Child Left Behind: A Test No District Can Pass," by Alan S. Hersh, pp. 29-36, in this edition of *CPER*, for a full explanation of the act's requirements and sanctions.)

The report contends that NCLB leads to unintended consequences to which the federal government is insensitive: lowered academic standards, increased segregation in schools, and greater flight of top teachers from needy schools. It claims that the act unconstitutionally coerces state compliance. It also alleges that the law's account-

ability system, which punishes schools whose students fail to improve steadily on standardized tests, undermines many states' school improvement efforts and relies on the wrong indicators. It points

The National Conference of State Legislatures is calling for fundamental changes.

out that the act's requirements for educating disabled students conflict with other federal laws.

The report recommends that states be given the power to decide how much weight to give to standardized tests and any other measures of student performance used by the schools, rather than relying on tests as the primary measure, as is now required. States should be allowed to measure the academic growth of students as they move among grades, as opposed to comparing the test scores

Pocket Guide to K-12 Certificated Employee Classification and Dismissal

By Dale Brodsky

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of the current year's students to last year's, as required by the act, the report concluded. In addition, states should be permitted to decide when teachers can be exempted from the requirement that they be "highly qualified" under the law.

Legislators said that NCLB's goal of getting 100 percent of children proficient in reading and math by 2014 "is admirable but absolutely unattainable."

The NCSL report is the latest voice in a growing chorus of criticism.

Representatives from the National Conference of State Legislators indicated a willingness to work with the administration, Congress, and Education Secretary Margaret Spellings to institute the recommended changes. However, there has been little interest coming from those quarters. Ray Simon, Education Department assistant secretary for elementary and secondary education, said, "the report could be interpreted as wanting to reverse the progress we've made. President Bush, Secretary Spellings and the team at the Department of Education believe every child can learn...No Child Left Behind is bringing new hope and new opportunity to families throughout America and we will not reverse course."

The NCSL report is the latest voice in a growing chorus of criticism of NCLB. Nine state legislatures are considering bills that would challenge the act. In Utah, proposed legislation would require state education officials to give higher priority to Utah's education laws than to the federal law. One Illinois school district recently filed suit against the Education Department in federal court, claiming that NCLB contradicts provisions of the federal Individuals With Disabilities Education Act.

At least 26 states, including California, have filed official protests with the federal government over NCLB funding. When Congress passed the act in 2001, it provided a six-year funding stream, authorizing the federal government to spend up to a certain amount each year. The cap for the first year was \$18.5 billion; for 2004, it had not increased. However, the administration has spent only \$11 billion on the law since it was enacted, less than the amount authorized for the first year. Because of the disparity between what it costs each state to implement the requirements of NCLB and the amount provided by the federal government to do so, schools are getting poorer. For example, New Hampshire estimated that the Bush administration is paying \$77 per student while it costs the state \$575 per student to implement NCLB.

California has had its own problems with implementation of the act. Last fall, the U.S. Department of Education instructed California to tighten the criteria it uses to punish school dis-

tricts for their failure to meet the law's goals. Compliance with those instructions would have increased the number of districts on the failing list from 14 to 324 — almost one-third of all school districts in the state.

NCLB requires states to place districts on a watch list if for two years in a row the number of students doing well on standardized math and English tests

California has had its own problems with implementation of the act.

fails to increase to preset levels, or if the district does not test enough students. California sought to avoid this consequence by exempting a district if low-income students met a certain threshold on standardized math and English tests, even if overall student performance did not meet the NCLB targets.

The U.S. Department of Education insisted that California follow the NCLB requirements. State officials argued that they did not have the resources to handle large numbers of failing districts and sought a compromise. The state proposed a change to make it easier for districts to meet NCLB targets by reducing the categories of students who had to score at the proficient

level in English and math. It also sought more time for districts to improve after they are identified on the watch list.

After a meeting between Governor Schwarzenegger and Secretary Spellings, federal officials announced that they would ease the restrictions. Under the agreement, California will avoid financial penalties. And, the number of districts put on the watch list was reduced to 184. Assistant Secretary of Education Simon, who announced the compro-

This is another example of the federal department's inflexibility and one-size-fits-all approach to the states.

mise, said that federal officials had determined that California's Board of Education had made an "honest mistake."

State officials were not happy with the resolution. "The current methodology is crazy. It's upside down," said State Superintendent of Public Instruction Jack O'Connell. "This is a temporary resolution with a gun held to our head."

Included among the 184 districts now on the watch list is the Los Angeles Unified School District. If it does

not improve, it could face sanctions, including a ban on providing federally funded supplemental tutoring services to its students. The district currently spends about \$25 million in federal funds tutoring more than 16,000 students. Next year, those students may have to go somewhere else for help. Ironically, the district recently was lauded by the U.S. Department of Education for its tutoring program, and it was recognized by the State Board of Education for its schools that have posted significant gains on state tests.

The case of one district on the watch list is another prime example of why some state officials call the law "schizophrenic." The 15,800-student Cupertino Union School District is located in the wealthy "Silicon Valley" area of the state. One of its schools received a perfect 1,000 on the state's Academic Performance Index. Under NCLB, Cupertino, like all other districts, must meet testing and other requirements on 33 subgroups of students in order to receive federal funds to help poor children. There, 32 of the 33 subgroups satisfied all the requirements. But the district landed on the list because only 94 percent of its special education students took the math portion of the test, whereas NCLB requires 95 percent participation. It did not meet this benchmark because some of the parents "opted out" of the testing, as they are permitted to do under state law.

"You have to question the policy of dedicating time and resources to the Cupertinos of the state," said

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O'Connell. "I would much rather see us narrow our focus on the challenging, truly needy school districts. This

is another example of the federal department's inflexibility and one-size-fits-all approach to the states." ❁

Teacher Gets Split Decision on Permanent Status, Wins Reinstatement and Attorneys' Fees

With trepidation, the Third District Court of Appeal once again dove into the complexities of the Education Code and emerged to render its opinion in the case of *Reis v. Biggs Unified School District*, concerning a teacher's claim that he was tenured and should not have been terminated. The case revolved around the interpretation of several code sections as they applied to an individual teaching in two different positions at the same time.

Background

Tony Reis obtained a teaching credential in 1997. In August of that year, he began working for the district in two positions: as a teacher in a .57 full-time-equivalent regular position and as a maintenance employee in a .43 FTE noncertificated position. The district notified Reis in a written employment contract for the 1997-98 school year that he was a "Probationary I" employee in his .57 FTE position.

During the 1998-99 school year, Reis continued as a .57 FTE teacher in the regular education program and also served as a Regional Occupational Program teacher in a .43 FTE position.

According to his employment contract, he was classified as a "Probationary II employee," without distinguishing between the two positions. The contract also stated, "this is considered a temporary assignment." A salary notice issued in September 1998, stated that Reis' status was "Probationary 1" in the .43 position and "Probationary 2" in the .57 position.

Reis was reemployed in the same two positions during the 1999-2000 school year. In August 1999, he received a certificate congratulating him "upon receiving tenure as a member of the instructional staff of Biggs High School." His employment contract notified him that he was "classified as a Tenured .57 FTE and Temporary .43 FTE Teacher."

He continued in the same two positions during the next two school years. His July 2001 employment contract stated that his status was "temporary" in the .43 position.

Reis again filled these two positions in the 2002-03 school year. He did not receive a written contract for that year and received no notice that he was considered anything other than a

fully tenured teacher. In March 2003, the district sent Reis a notice that it was not reelecting him to either of the two positions.

After attempting to get the district to rescind its action, Reis went to court. The trial court determined that Reis was a tenured employee in both positions. It ordered the district to reinstate him and provide him with a teaching position and salary for the 2003-04 school year and every year thereafter. It also awarded him \$7,500 in attorneys' fees, the maximum allowed under Government Code Sec. 800.

The district appealed.

.43 FTE Position

The Court of Appeal disagreed with the trial court's conclusion that Reis was a permanent teacher in his .43 position at the time he was terminated.

As the court explained, under Education Code Sec. 44929.21, "a teacher generally obtains permanent status after two years of continuous employment as a probationary teacher in a position requiring certification upon his or her reelection to the district for the third consecutive year." After that point, "a teacher's rights are vested automatically as a matter of law independent of any action by the employing district."

Section 44910 provides:

Service by a person as an instructor in classes conducted at regional occupational centers or programs...shall not be included in computing the service required as a prerequisite to attainment of, or

eligibility to, classification as a permanent employee of a school district.

This section shall not be construed to apply to any regularly credentialed teacher who has been employed to teach in the regular education programs of the school district and subsequently assigned as an instructor in regional occupational centers or programs, nor shall it affect the status of regional occupational center teachers classified as permanent or probationary at the time this section becomes effective.

‘Reis was not the sort of employee the Legislature was seeking to protect....’

The court recognized that Reis’ “service as a ROP teacher cannot be counted as part of the two probationary years needed to attain permanent status, unless one of the two exceptions in that statute applies.” It found that Reis did not fall within either exception.

The second exception had no application to Reis’ status because the statute became effective in 1977, long before he was employed by the district. Reis, however, argued that he *did* fall within the first exception. Reis claimed he was “a regularly credentialed teacher who taught first in the regular programs of the District and was *subse-*

quently assigned to teach ROP programs” because during the 1997-98 school year he taught in a “regular” .57 FTE position and in the next year he began teaching as an ROP instructor. “Thus, according to Reis, his time spent teaching as an ROP instructor counted toward permanent status.”

The court rejected this argument, finding that the exception applies only when a regularly credentialed teacher who had been employed in regular educational programs then was terminated from that assignment and reassigned as an ROP instructor. “Thus, a probationary teacher in the regular education program of a school district who was accruing credit toward permanent status, but who was then assigned to teach in an ROP, could keep counting his or her service toward the attainment of permanent status even while teaching ROP.”

Because Reis remained in his .57 FTE position and was assigned to teach ROP only as a “second, concurrent, part-time assignment,” he continued to accrue credit toward permanent status in the .57 FTE position. Prior to his assignment to the ROP position, he was a noncertificated maintenance employee in the .43 position. “Thus, Reis’s assignment to teach ROP did not interrupt any accrual of service credit toward permanent status in his .43 FTE position. Consequently, in his .43 FTE position, Reis was not the sort of employee the Legislature was seeking to protect by the exception upon which he seeks to rely,” said the court.

Nor was the court persuaded by

Reis’ argument, adopted by the trial court, that he had obtained permanent status because the district identified his status in the .43 position as “Probationary 1” for the 1998-99 school year and, in subsequent years, failed to delineate his status in the .43 position. Then, the district failed to state anything about his status when it retained him for the 2002-03 school year. The trial court concluded that his service for the 2002-03 school year was deemed probationary under Sec. 44916. That provision

The Court of Appeal upheld the trial court’s award of attorneys’ fees.

provides that, if a written statement of employment status does not indicate temporary status, a certificated, nonpermanent employee is deemed probationary. Because he was deemed probationary for the 2002-03 school year, by operation of Sec. 44916, he also must be considered probationary for the prior year under Sec. 44918(a), which provides that a temporary employee who performs a certain amount of duties and is a probationary employee the following year may have this temporary year deemed probationary too. The trial court combined the 1998-99 school year and the 2001-02 school year, and concluded

that Reis met Sec. 44929.21's requirement of two consecutive years of continuous employment as a probationary teacher to achieve permanent status effective the first day of school 2002.

The Court of Appeal derided the trial court's reasoning:

Unfortunately for Reis, this statutory path goes nowhere; it does not even rise to the level of a dead-end. Most glaringly, it ignores the specific statute directly on point — section 44910. And even putting aside section 44910, section 44929.21, subdivision (b), requires the qualifying probationary service to have been consecutive, which is not the case under this approach.

.57 Position and Attorneys' Fees

The Court of Appeal upheld the trial court's award of attorneys' fees under Gov. Code Sec. 800. That section permits a fee award, not to exceed \$7,500, in any civil action to appeal or review the award, finding, or other determination of any administrative proceeding where it is shown that the determination "was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity."

The court, quoting from *Kreutzer v. County of San Diego* (1984) 153 Cal.App.3d 62, explained that "the phrase 'arbitrary or capricious' encompasses conduct not supported by a fair or substantial reason, a stubborn insistence on following unauthorized conduct, or a bad faith legal dispute."

The Court of Appeal agreed with the trial court's conclusion that the district's conduct in not reelecting Reis to the .57 FTE position constituted arbitrary and capricious conduct because the district did not offer the court any defense or rationale for its actions. Reis' entitlement to his .57 FTE employment was undisputed, but the district refused to withdraw its non-reelection stance.

Dissenting Opinion

Justice Robie wrote a separate opinion, concurring in part and dissenting in part. He disagreed with the majority's conclusion that Reis did not fall within the first exception in Sec. 44910. In his opinion, "Reis is precisely the type of teacher the Legislature intended to exempt from section 44910."

Justice Robie read the word "subsequently" appearing in the statute as unambiguous, meaning "following in time, order or place." Because Reis was appointed to the ROP position after he was appointed to the regular teaching position, i.e., following in time, he fell within the exception according to the clear language of the statute, reasoned Justice Robie. He found nothing in the legislative history to indicate otherwise.

As the district did not classify Reis otherwise, Justice Robie also concluded that Reis' initial ROP service must have been as a probationary teacher and that after two years in that position, he became a permanent teacher on the first day of school in 2000. (*Reis v. Biggs Unified School Dist.* [2-9-05] C046351 [3d Dist.] ___ Cal.App.4th___, 2005 DJDAR 1652. ✪

Teacher Denied Second Paid Leave But Need Not Submit to New Medical Exam

The Court of Appeal for the Second District has determined that a certificated school employee is not entitled to a second round of differential-pay sick leave for injuries suffered more than two years prior when the subsequent injury was known and potentially treatable during the first leave. However, the district was wrong to refuse to reinstate her to her position upon a determination by her personal physician that she was able to return to work, held

the court in *Veguez v. Long Beach Unified School District*.

Bonita Veguez worked for the district as a special education teacher from 1972 to 1998. In July and November 1998, she suffered work-related injuries to her back and both knees. She filed workers' compensation claims for both accidents, and she was off work from November 1998 to May 2000. She used all of her accumulated sick leave and then asked for and received five

months of “differential-pay sick leave.” Under Education Code Sec. 44977, this is the amount of her regular salary less the amount actually paid to a substitute teacher in her absence.

The injuries aggravated a degenerative arthritic condition that existed in both Veguez’s knees. She had an operation to correct the condition in her right knee in 1999. However, she received no treatment for the condition in her left knee.

Veguez was not required to exhaust the internal grievance procedure.

She returned to work in May 2000 as a resource specialist, an accommodation to her medical condition. Her left-knee pain began to worsen in December 2000 and continued to develop through 2001. At the advice of her physician, she was off work in March 2002. She again used all her accumulated sick leave and then requested differential pay under Sec. 44977. The district refused, claiming that she had exhausted her rights under the statute. The district put her on a 39-month reemployment list pursuant to Sec. 44978.1.

Her personal physician released her to return to work effective August 26, 2002, but the district refused to reinstate her, arguing that it could not do

so until the workers’ compensation medical examiner released her.

The trial court denied Veguez’s claim for differential pay, finding that she was not entitled to more pay for the same injury. It ordered her to submit to an examination by a doctor appointed by the district and, if she was found able to return to work, that the district reinstate her as of September 4, 2002, with backpay.

Both parties appealed.

Court of Appeal Decision

The Court of Appeal first addressed two of the district’s arguments that had nothing to do with the merits of the case. The district’s first argument was that Veguez was required to exhaust the internal grievance procedures in the collective bargaining agreement prior to filing with the court. Because Veguez was not claiming the right to differential-pay leave provided for in the collective bargaining agreement, but rather was seeking to enforce her rights under the statute, she was not required to exhaust the internal grievance procedure, held the court. “Lawsuits to enforce rights guaranteed by the Education Code are not subject to internal exhaustion requirements.”

The court also summarily dismissed the district’s argument that Veguez’s claim was barred by the exclusivity provisions of the workers’ compensation law. The court explained that “while common law tort claims are generally preempted, claims for sepa-

rate injuries under distinct statutory schemes are not.”

Claim for Differential Pay

Veguez took the position that she was entitled to another round of differential-pay leave because the left-knee injury was separate from the one to the right knee, and was the result of cumulative trauma from a series of accidents. The appeals court rejected this argument, pointing out that Sec. 44977 lim-

Veguez was statutorily ineligible for additional differential pay.

its the availability of differential-pay benefits “not in terms of severable ‘injuries,’ but rather in terms of a distinct ‘illness or accident.’” Therefore, the question in this case “is not whether the injuries Veguez sustained to her knees in 1998 were different in degree and severity...but whether the left knee injury...is a product of the same ‘illness or accident’ for which she received differential pay in 1999.”

Veguez contended that the phrase “per illness or accident” should be interpreted to mean “each injury or condition that temporarily incapacitates an employee and prevents her from being able to fulfill her job duties.” According to this interpretation, “once the employee returns to work, the inca-

pacitating 'illness or accident' has effectively concluded; and any subsequent medical condition, whether or not related to the prior illness or accident, triggers the employee's right to an additional five-month period of differential pay."

The court found no support for this interpretation in the legislative history of the statute. "If anything, the legislative history indicates a desire to nar-

The trial court erred when it ordered a new medical examination.

row the circumstances under which a certificated employee may obtain differential-pay leave by limiting the employee to one differential-leave period 'per illness or accident' as well as one leave period per school year regardless of the cause for the leave."

The court dismissed as absurd Veguez's argument that, because her knee problems were caused by a series of accidents, she was entitled to a separate period of differential leave for each accident. This interpretation would mean that "a teacher who repeatedly fell (say, on 10 occasions) without serious injury but who finally sought medical treatment would be entitled to 10 five-month differential pay periods, whether or not she had suffered more than one discrete injury and whether or not she

ever returned to work." There is no basis for this position in the language or legislative history, held the court.

Veguez contended that her left knee must be considered a separate illness under the statute because the condition did not exist in 1998, at least to the same degree as it existed in 2002. The court found that, in the abstract, this argument had merit:

Section 44977 does not necessarily preclude a second period of differential pay for a new medical leave simply because the teacher's current illness relates in some way to a prior accident. A serious accident could not only cause immediate injury but also create a predisposition for, or serve as a causative element of, an illness that does not manifest itself until months or even years after the employee has apparently recovered from the accident and successfully returned to work. For example, a head injury sustained in an accident may bear some relationship to a stroke suffered years later. It can hardly be said, however, that the stroke itself is an injury suffered in the initial accident.

In this case, however, there was evidence that the left-knee condition existed and could have been treated in 1999 when Veguez received treatment for the right knee. The court found that this evidence supported the trial court's conclusion that Veguez was statutorily ineligible for additional differential pay.

New Medical Examination

The court found that the trial court was correct in rejecting the district's argument that it was not obliged to reinstate Veguez until such time as the medical examiner in the workers' compensation case issued a formal release. That physician's opinion related only to Veguez's entitlement to workers' compensation benefits. However, the trial court erred when it ordered Veguez to submit to a new medical examination by a doctor appointed by the district prior to her reinstatement to the position under Sec. 44978.1, held the court:

The evidence concerning Veguez's medical ability to return to work as of September 4, 2002 was presented and established at trial. Nothing in either section 44978.1 or the collective bargaining agreement permits the District yet another opportunity, two and one-half years after the fact, to challenge the undisputed evidence that Veguez was medically able to return to work on September 4, 2002.

(*Veguez v. Governing Board of the Long Beach Unified School Dist.* [3-7-05] B172414 [2d Dist.] ___Cal.App. 4th___, 2005 DJDAR 2815.) ❁

L.A. Teachers Oust Union Leaders

Rank-and-file members of United Teachers of Los Angeles voted out the incumbent leadership and voted in a slate of Los Angeles classroom teachers, many of whom ran on a social justice platform. It was the first time in the union's 35-year history that an incumbent president and his slate had been defeated.

By more than 2,000 votes, union members elected A.J. Duffy, a 35-year district veteran and a middle school education teacher, as the union's new president. About 11,300 teachers, or 27 percent of the 46,000 union members, voted. Duffy was supported by the new United Action slate that pushed for what one UTLA leader called "militant rank-and-file unionism." Joshua Pechthalt, a teacher at Manual Arts High School, was elected vice president. Another slate winner was David Goldberg, nephew of former teacher and current Assembly Member Jackie Goldberg (D-Los Angeles), who heads the Assembly Education Committee.

The newly elected officials have pledged to deliver on traditional union issues: a 7 percent pay increase, preservation of the current benefit packages, and improvement on quality-of-life issues. They want to take on bigger issues as well, such as workers' rights, the funding of public education, and a challenge to the federal No Child Left Behind Act. They say that NCLB is a con-

servative plot to decrease money to schools and to eradicate public education in favor of vouchers and private schools.

Most of the winners are active teachers, rather than career union bureaucrats. Several teach in schools where the students are poor. Julie Washington, who will be the union's elementary vice president and who teaches kindergarten at one such school, said, "there is too wide of a variance between what children get at sites like mine and what they get in Brentwood or Palos Verdes or the west valley area. It's not fair. Many of my students are doomed to low-paying jobs or prison because they are not getting what they want out of the system."

The incoming slate criticized the incumbents for an 18-month delay in negotiations over a new contract. It is reported the union and the district are close to reaching an agreement that would give teachers a 2 percent raise. When asked whether he would accept the salary offer, Duffy replied, "I don't know what my position is going to be." He added, "I stand by my campaign materials. When I said I thought there was 7 percent, I meant it — I meant that there is more money — I think it would be very wise for [Superintendent] Roemer and the people who sit on that side of the table to go back and find a little more money. They'd get labor peace." ❁

Higher Education

Plaintiff Must Exhaust U.C.'s Internal Whistleblower Remedies

An employee who files whistleblower claims against the University of California under the state False Claims Act and the Labor Code must have exhausted specific internal whistleblower complaint procedures before filing suit, the California Supreme Court has announced. Filing a complaint using general grievance procedures was not sufficient to meet the exhaustion requirement, the unanimous court said in *Campbell v. Regents of the University of California*. The internal policy and procedures are within the regents' jurisdiction and provide adequate remedies. Neither of the anti-retaliation statutes under which Campbell sued abrogated the rule of exhaustion of administrative remedies.

Wrong Procedure Used

Janet Campbell was a senior architect at the university's San Francisco campus. Her duties included reviewing plans for campus construction projects to ensure the projects complied with competitive bidding laws. She claimed that her supervisor directed her to prepare bid documents with restrictions that limited competition. Campbell objected to the regents several times that the use of the documents violated state competitive bidding laws.

Eventually, she reported her claims of wrongdoing to the Federal Bureau of Investigation.

In 1997, soon after the FBI questioned UCSF officials about the bidding process, the university assigned her to less-challenging projects. Within a short time, Campbell took an extended disability leave. Soon after she returned

The regents' policies of self-governance are equivalent to state statutes.

to work in 1999, she was discharged, purportedly due to downsizing of her department. Campbell charged, however, that the university retained less-senior and less-qualified employees.

Campbell's attorney filed an internal complaint under UCSF's Personnel Policies for Staff Members. The university notified the attorney that the PPSM procedure excluded allegations of retaliation for whistleblowing. The letter stated, "Alleged violations of state and federal laws will be excluded from

the [PPSM's] complaint resolution process." It informed the attorney that the proper procedure was to file under the Policy and Procedures for Reporting Improper Governmental Activities and Protection Against Retaliation for Reporting Improper Activities, a copy of which was enclosed. Campbell never filed her complaint under the Policy and Procedures.

Campbell sued in superior court, seeking damages for retaliatory discharge under the False Claims Act and Labor Code Sec. 1102.5. Her first amended complaint alleged she had filed under the PPSM, and that the university had not informed her that her failure to file under the Policy and Procedures would preclude her lawsuit. She also asserted that the False Claims Act and the Labor Code did not require her to exhaust administrative remedies. The regents moved to dismiss the complaint on the grounds that Campbell had failed to exhaust administrative remedies. The court ruled in the regents' favor, but it granted Campbell leave to amend her complaint to allege that use of the Policy and Procedures was futile or that the university had not advised her properly of the applicable complaint process. When her second amended complaint still was insufficient to meet the requirements of the exhaustion doctrine, the trial court dismissed it.

The Court of Appeal affirmed the dismissal for failure to exhaust administrative remedies. The Supreme Court granted Campbell's petition for review of the appellate court decision.

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Pocket Guide to the Higher Education Employer-Employee Relations Act

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

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U.C.'s Constitutional Status

The Supreme Court first observed that the state Constitution grants the regents broad power to govern the university and gives them both quasi-judicial and quasi-legislative powers, subject to limited regulation by the state legislature. Judicial precedent holds that the regents' policies of self-governance, such as the whistleblower policy, are equivalent to state statutes.

Adequate Remedy

Where a statute provides a procedure for obtaining a remedy from an administrative body, the rule of exhaustion of administrative remedies requires a plaintiff to seek relief from the administrative body before filing a claim in court. Failure to exhaust administrative remedies deprives the courts of jurisdiction, the court emphasized. The exhaustion doctrine recognizes the expertise of the administrative body, promotes the discovery of relevant evidence, provides a record of the evidence if the matter is reviewed by a court, and gives the parties the opportunity to mitigate damages.

Campbell argued that any administrative remedy provided under the whistleblower policy and procedures would be inadequate compared to the damages remedy available under the False Claims Act and the Labor Code. But the court dismissed that argument because the policy permits the university to provide the complainant with "any appropriate relief." In addition, the court instructed, inadequacy of the

remedy is not sufficient reason to dispense with the exhaustion rule since administrative procedures still serve the purpose of judicial economy by unearthing relevant evidence and providing a record of evidence. The inadequacy exception has applied, the court noted, where the agency lacks authority to hear the complaint, such as when the controversy falls outside the scope of the grievance procedure.

The inadequacy exception has applied where the agency lacks authority to hear the complaint.

Procedures Within U.C.'s Powers

The court also rejected Campbell's claim that the regents lacked jurisdiction to provide the remedies she sought. Campbell was not requiring an internal review panel to decide the legality of employer policies, the court observed. The regents' whistleblower policy and procedure is equivalent to a statute and requires an employee to use its internal complaint procedure before resort to the courts.

False Claims Act

Campbell contended that the absence of an exhaustion requirement in the employee anti-retaliation section of

the False Claims Act indicated the legislature intended to abrogate the exhaustion requirement. Government Code Sec. 12653, under which Campbell sued, prohibits discharge of employees in retaliation for reporting false claims to law enforcement authorities and authorizes an aggrieved employee to file suit in superior court. It does not mention an exhaustion requirement. By contrast, argued Campbell, the section of the act that allows informers to bring a "qui tam" suit to protect public funds and recover damages for themselves and for the public entity contains an exhaustion requirement. So does the section of the California Whistleblower Protection Act that applies to U.C., she observed. The rules of statutory construction lead to the conclusion that the legislature intended to permit direct court action, she asserted.

The court, however, construed the language of the qui tam section of the False Claims Act differently. Under Sec. 12652, a public employee must report false claims through official channels prior to filing suit. But this is a disclosure requirement to prevent unjust enrichment of employees who are uniquely situated to detect fraud, not an administrative remedy exhaustion requirement, the court explained. It is therefore irrelevant to the question whether Sec. 12653 exempts employees alleging retaliation from the exhaustion rule.

The presence of explicit requirements to file an internal complaint in Sec. 8547.10 of the Whistleblower Pro-

tection Act also did not convince the court that the exhaustion doctrine does not apply in False Claims Act anti-retaliation suits. The court interpreted the administrative complaint prerequisite in the Whistleblower Protection Act as an exception to the usual administrative remedy rule. “The Legislature’s language in the context of section 8547.10 says nothing about its intent under section 12653, subdivision (c),” reasoned the court, and silence on the exhaustion requirement does not demonstrate an intent to eliminate it in Sec. 12653.

The court distinguished *Hentzel v. Singer* (1982) 138 Cal.App.3d 290, where the employee had alleged common-law claims for wrongful discharge in retaliation for seeking a smoke-free working environment. The Court of Appeal had held that the employee was not required to pursue the administrative remedies of the California Occupational Safety and Health Act before filing his non-statutory claims in court, even though his allegations were within Cal-OSHA’s jurisdiction. The *Hentzel* court had explained that an administrative exhaustion requirement is implied when a statute creates a right that did not exist in common law and provides a system of administrative enforcement, but not where a new statutory remedy is enacted for enforcement of an existing common-law right.

Campbell did not file a common-law tort action, noted the court. And the regents’ whistleblower policy is equivalent to a statute that provides a system of enforcement for a new right

that did not exist at common law. Under this rationale, the court “infer[red] a requirement that Campbell exhaust administrative remedies.”

Labor Code Sec. 1102.5

The Labor Code prohibits retaliation against an employee who reports violations of law to a government or law enforcement agency. Section 1105 states, “Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation

Silence on the exhaustion requirement does not demonstrate an intent to eliminate it in Sec. 12653.

of this chapter.” Campbell contended that this provision, along with the chapter’s silence about administrative remedies, indicates that administrative remedy exhaustion is not a prerequisite to a lawsuit under the Labor Code.

Because the quoted provision followed immediately after a provision that provides criminal penalties for chapter violations, the court construed Sec. 1105 as language intended merely to preserve employees’ rights to file civil actions. The court reiterated the principle that courts should not find that

the legislature intended to supersede long-established legal doctrines unless that intention clearly appears “either by express declaration or by necessary implication.”

The court rejected Campbell’s contention that Labor Code Sec. 1106 demonstrated legislative intent to exempt U.C. employees from the administrative exhaustion rule. That section defined “employee” in Sec. 1102.5 to include U.C. and other public employees. It only extended to public employees rights that private employees already enjoyed, the court found.

Nor did language in an Assembly committee report persuade the court. Although an early report did state that the legislation would give public employees the right to file a private action without having to exhaust administrative remedies, that language did not appear in the Senate committee analysis. The Senate analysis did comment that public employees had little existing protection because they often had to file complaints following the agency’s procedures with the supervisor responsible for the retaliation. But a later fact sheet from the Assembly committee stated, “A public employer may still require whistleblowers to follow their current procedures.” The court found this equivocal legislative history insufficient to justify reading into the statute an intent to depart from the exhaustion doctrine.

Other Grounds Rejected

The court also turned aside Campbell’s argument that she should

be able to choose between pursuing an administrative or a judicial remedy. The court acknowledged that the administrative exhaustion doctrine does not apply where a statute provides an administrative remedy and also an alternative judicial remedy. But it found inapposite the case Campbell cited in support of her argument, *City of Susanville v. Lee C. Hess Co.* (1955) 45

Campbell's free speech claims also missed the mark.

Cal.2d 684. In that case, the statute provided a detailed procedure for an appeal of an agency's decision to the courts in one section even though it contained a provision for appeal to the agency itself in a separate section. Here, the statutes Campbell invoked do not provide detailed procedures for judicial remedy.

Campbell's free speech claims also missed the mark, the court held. Requiring public employee whistleblowers, but not private employee whistleblowers, to exhaust administrative remedies was not unlawful content-based discrimination because the exhaustion doctrine does not restrict freedom to disclose false claims, the court said. Campbell also argued that the exhaustion doctrine resulted in viewpoint discrimination because it precluded suits only against public entities. But the court found the contention was based on a false premise

because judicial review of the agency's administrative determination is available through administrative mandamus.

In *Palmer v. Regents of the University of California* (2003) 107 Cal.App.4th 899, 160 CPER 54, a U.C. whistleblower employee's tort claim for wrongful termination in violation of public policy was dismissed for failure to exhaust internal U.C. remedies. This case, together with *Palmer*, leaves little room for a lawsuit by a U.C. employee who has not filed a complaint under university whistleblower policies. Although the Supreme

Court did not mention the *Palmer* case, its statement that UCSF's whistleblower policy and procedures "create a right that did not exist at common law" would seem to signal that any employee who attempts to argue exemption from administrative exhaustion under *Hentzel* would be unsuccessful in the Supreme Court. (*Campbell v. Regents of the University of California* [3-7-05] Supreme Ct. S113275, ___ Cal.4th ___, 2005 DJDAR 2707.) ❁

PERB Chairman Says Statutory Bases for Discipline Not Within Scope of Bargaining

Two recent decisions written by Public Employment Relations Board Chairman John Duncan raise a question once thought settled. In both cases, the Academic Professionals of California challenged the implementation of California State University policies that the union asserted would subject employees to discipline. The majority holding in each case was that the "new" policy was not in fact a change. But the chairman inserted his own view that, because causes of discipline for CSU employees are enumerated in the Education Code, they are not within the mandatory scope of bargaining under the Higher Education Employer-Employee Relations Act.

Stanislaus Decision

In *Academic Professionals of California v. Trustees of California State University (Stanislaus)*, PERB Dec. No. 1705-H, the Stanislaus campus administration had distributed by email a policy concerning appropriate use of university computers and state property. The email reminded employees that Government Code Sec. 8314 restricts use of state resources for personal purposes and campaign activity other than minimal or incidental uses. It stated that violations of the law or "applicable policy will be reported and dealt with by the appropriate disciplinary body, which in the case of employees, shall be handled in accordance with the collective bargaining agreement, CSUS

Stanislaus policy and applicable law.”

APC charged that the email constituted a unilateral change in policy affecting the negotiable matter of discipline and other items. The board agent found the email did not amount to a change in disciplinary policy because the reference to disciplinary action stated the university would act in accordance with the collective bargaining agreement. APC argued that the

HEERA’s scope of representation does not expressly include causes of discipline.

new aspect of the policy was to discipline employees for violations of a code section that provided only civil remedies and only if sought by a district attorney or the State Attorney General. But the board agent dismissed the portions of the charge that alleged a new disciplinary policy.

PERB upheld the partial dismissal, but the chairman’s decision was not based solely on the lack of a change to the policy. Although the chair referred to PERB precedent that implementation of a new rule of conduct is negotiable, citing *San Bernardino City Unified School Dist.* (1982) PERB Dec. No. 255, 55 CPER 72, he found the case inapplicable. *San Bernardino* was an

interpretation of the Educational Employment Relations Act, which soon afterward was amended to clarify that discipline other than dismissal was subject to negotiations. In contrast, said the chair, HEERA’s scope of representation does not expressly include causes of discipline. Instead, Education Code Sec. 89535 enumerates causes for which CSU employees can be disciplined. “Where the Legislature has already set forth causes of discipline the topic is not within the mandatory scope of representation,” the chair announced.

The board also found that the rule of conduct was not new because the email made discipline subject to the collective bargaining agreement, which in turn referred to the Education Code statutes governing discipline. “Whether discipline can be sustained...for violating section 8314 depends on whether CSU can prove one of the enumerated reasons listed,” it advised. Member Neima concurred with the opinion that there was no new rule of conduct, but he thought it was unnecessary to address the scope issue.

Curiously, neither the board agent nor the chairman addressed the prior decision in *Academic Professionals of California v. Trustees of the California State University* (2003) Dec. No. 1507-H, 158 CPER 85, in which PERB had relied on the *San Bernardino* case to hold that a computer use policy was within the scope of negotiations because it established new grounds for discipline. In that case, PERB had rejected CSU’s argument that the mere

possibility of discipline did not make the work rule subject to bargaining. Because portions of the challenged policy involved “ill-defined criteria for discipline,” it was a negotiable item. In addition, the board had held that the absence of Ed. Code Sec. 89535 in HEERA’s supersession clause did not preclude mandatory negotiation of a subject, such as discipline, that is otherwise related to wages, hours, or other

San Bernardino had held criteria for discipline were within the scope of bargaining.

negotiable terms and conditions of employment. The supersession clause lists statutes that the collective bargaining agreement supersedes when there is a conflict between the agreement and the law.

It was Member Whitehead’s dissent in *Stanislaus* that referred to the earlier computer use policy case. Whitehead first commented that the majority had found no policy change only because it focused too narrowly on the process for discipline, rather than the criteria for discipline. He then turned to the scope question. He emphasized that *San Bernardino* had held criteria for discipline were within the scope of bargaining before any change

in EERA, and that later PERB cases found that the amendment did not indicate that disciplinary grounds were outside of scope in the original act. Unlike the scope of bargaining provisions in EERA, the definition of scope in HEERA serves to exclude specific items instead of enumerating the items within scope, the dissent reasoned. And even though EERA does enumerate items for negotiation, the California

The dissent contended that APC should be able to negotiate details of the disciplinary provision.

Supreme Court has rejected the contention that the scope of negotiations is strictly limited to the listed items, Whitehead pointed out, citing *San Mateo City School Dist. v. Public Employment Relations Board* (1983) 33 Cal.3d 850, CPER SRS 23.

Furthermore, the dissent continued, in *San Mateo*, the court held that negotiability of an item is not precluded when the Education Code contains provisions addressing the matter unless the language of the statute “clearly evidences an intent to set an inflexible standard or insure immutable provisions.” The dissent contended that APC should be able to negotiate details of

the disciplinary provision of the Stanislaus campus policy, such as the meaning of the term “state resources,” which is defined differently than in the Government Code.

Non-Discrimination Policy Decision

The scope question reappeared in another CSU case, *Academic Professionals of California v. Trustees of California State University* (2005) Dec. No. 1751-H. At the Sonoma campus, the administration implemented a non-discrimination policy for students who believed they had been subjected to discrimination. The policy expressly referred employees who had discrimination complaints to the grievance procedures in the applicable collective bargaining agreement or to an external agency. The policy provided that findings might obligate the university to take disciplinary action against an employee. It continued, “If the University pursues disciplinary action..., Title V, HEERA or the appropriate Collective Bargaining Agreement will govern if a hearing is required.” APC contended that the policy subjected employees to potential discipline, impermissibly governed off-campus activities, did not address employee representation, and unlawfully required employees to cooperate in discrimination investigations.

The board agent dismissed the charge, finding it was not within the scope of representation. However, PERB found that the non-discrimination policy did not constitute a change in policy or practice. The board noted

that discrimination against students was prohibited by law before enactment of the policy. Because the complaint procedures apply only to students, they did not constitute a change for employees. Member Whitehead concurred with this ruling because the policy was consistent with the collective bargaining agreement.

The board instructed that the allegations regarding employee representation and mandated cooperation in

A prohibition on discrimination is imposed by statute, not by CSU.

investigations had been found invalid in *Trustees of the California State University* (2004) PERB Dec. No. 1658-H, 168 CPER 104, which involved a whistleblower policy. In that case, the board had held that it is always presumed that an employee should cooperate during an investigation. It also had held that the university did not need to notify employees of their representation rights.

Once again, the chairman discussed the scope of representation in a portion of the opinion in which the other members did not join. For purposes of analysis, he separated the policy into three components. The first component, a prohibition on discrimination, is imposed by statute, not by CSU, and therefore is not governed by

the principle that a rule of conduct is within the scope of representation, he said.

The second aspect of the policy, the complaint procedure, applies only to students. It is not negotiable because it has no effect on the conditions of employment of APC unit members. The chair distinguished the complaint policy at issue in *Compton Community College Dist.* (1990) PERB Dec. No. 798, 84X CPER 21. The board had found the Compton policy negotiable because the outcome of a student complaint investigation was placed in the file of the faculty member under investigation. In this case, however, as the board agent noted, the policy required the complaint and corrective action plan to remain confidential.

The chair acknowledged that the third component of the policy, disciplinary procedures, is negotiable. But he agreed with the board agent that because the policy referred to the collective bargaining agreement in the event of disciplinary action, it did not amount to a change in practice or policy.

Member Whitehead concurred in the decision, but criticized the scope discussion in an opinion in which he reiterated the reasons for his dissent in *Stanislaus*. In the lead decision, the chairman addressed Member Whitehead's opinion concerning the scope of bargaining. At first, he agreed that rules of conduct are within the scope of bargaining, citing *San Bernardino*. Nevertheless, he distinguished the non-discrimination policy on the ground that the rule at issue was im-

posed by law, not by the employer. He cited *Stanislaus* for the proposition that "where the rule of conduct is imposed by statute, it is not within the scope of representation."

The chair asserted that Whitehead's reasoning, taken to its logical conclusion, would be tantamount to requiring negotiation of a work rule and also negotiation over whether violation of the rule could lead to employee discipline. The chair found it "axiomatic that violating a work rule can lead to discipline. Otherwise, they would not be work rules but rather 'suggestions.'" An employer would be required to negotiate over hundreds of penal and civil statutes that govern individuals while at work. Just as an employer should not have to negotiate whether it can discipline an

employee convicted of embezzling from his employer, the chair found that an employer should not be required to negotiate whether it can discipline an employee for violating anti-discrimination laws.

It is unclear whether Chairman Duncan's position is that causes for discipline are not negotiable at CSU because they already are enumerated in the Education Code, as he asserted in *Stanislaus*, or that rules of conduct imposed by law are not negotiable as he stated in the second case. The latter principle would appear to apply beyond CSU to all bargaining relationships governed by PERB. At present, neither principle is PERB law because neither is endorsed by a majority of the board. ❁

Factfinding Panel Recommends Raises for Clerical Employees

For years, even during the state budget crisis, the Coalition of University Employees has said that the University of California has plenty of money to boost clerical employees' lagging salaries. U.C. refused to agree to higher raises than were bargained for other bargaining units. It asserted it could not give employees more than the legislature allocated for salary increases in its annual apportionments to the university. Now, in impasse proceedings on 2003-04 reopener negotiations, a factfinding panel has sided with CUE.

But a leak of a draft of the report has U.C. calling for an investigation by the Public Employment Relations Board.

Reopener Negotiations

CUE represents about 15,500 clerical and child-care center employees. In August 2003, the union and U.C. began negotiations on 2003-04 wages, health benefits, and parking fees. CUE demanded a 3 percent raise, a new, top step on the salary range, and market-based salary adjustments for library assistants and police dispatchers. The

union wanted funding for the merit-based Incentive Award Program shifted to provide general salary increases. It also proposed no increases in employee health premium contributions, copays, or parking fees.

The university acknowledged that it had financial resources, but insisted that money was not available for staff increases because the funds either were not recurring or were committed to other projects. U.C. repeatedly asserted that its salary programs are governed primarily by the amount of salary funding it receives from the state. Since the 2003-04 state budget provided no funding for systemwide salary increases, it would not agree to general salary increases, although it did agree to give police dispatchers on some campuses equity adjustments. The university proposed parking fee increases of about \$8 per month in some locations.

In April 2004, the parties reached impasse. Mediation was not successful, and the parties entered factfinding in July 2004.

Inconsistent Labor Policy

U.C. told the panel that its labor policy, not an inability to pay, was at the root of its refusal to agree to a salary increase for the CUE unit. The university's stated policy is to grant employee increases only when the state gives U.C. money for this purpose. In 2003-04, the state gave the university no money earmarked for wage boosts, and instead, cut its funding by \$1 billion.

The panel found a major flaw in the application of this policy to the

clerical unit since nearly 68 percent of CUE unit members are in positions that are not funded by the state. In addition, state funding constitutes only 15 percent of the university's overall revenues.

The panel also found it "difficult to reconcile" U.C.'s position with its actions. U.C. had in fact granted wage increases to about 42,000 employees, even though the state had not apportioned any money for raises, according to the panel. Research employees had

State funding constitutes only 15 percent of the university's overall revenues.

bargained an increase of .7 percent. The senate faculty, lecturers, librarians, and academic student employees had received approximately 1.7 percent increases. Employees in the hospitals and health centers had negotiated raises of 1.5 to 2.5 percent. Police and safety employees had garnered a wage boost of 5 percent. Nearly all police and academic employees are paid almost entirely with state funding, but they received raises while U.C. refused to agree to salary increases for the clerical unit, which is paid mostly with non-state money.

Non-State Funding Available

Although the state provided U.C. with \$1 billion less than it requested in

2003-04, the university's revenues did not decline. Non-state funding accounts for most of the university's overall revenues.

Testimony at the hearing revealed that the university had requested from the legislature a 6 percent increase for employees and had budgeted non-state funds amounting to 68 percent of the money necessary for a 6 percent clerical wage increase. However, the university admitted that, when the state did not give the funding for a 6 percent increase, it redirected the money for other purposes, such as dormitories, parking, and academic support. The panel recognized that the university has "many good places to spend its money," but questioned whether denying raises to clerical employees who are paid lower than market rates is a justifiable policy.

The panel rejected U.C.'s position that it could not pay salary increases that will continue into the future without the ongoing funding provided by state revenues. The university's discretionary revenues have continued to rise, it pointed out, despite a decrease in state money. In 2003-04, the university's income after all expenses was nearly \$786 million, \$225 million higher than its net income the previous year. It had shown an increase in net income every year for the prior 14 years. Besides, the panel commented, the state's recent budget cutting indicates that state funding is not guaranteed to be ongoing.

Wages Under Market Rate

Witnesses at the hearing agreed that university clerical workers are paid

at least 10 percent less than employees in comparable positions outside the university. Although the generous benefits provided to U.C. employees have in the past brought clerical workers' total compensation close to market levels, two campus studies, in Los Angeles and San Diego, have concluded that compensation for CUE unit members is no longer competitive even when benefits are considered.

Comparisons of the salary ranges for similar workers at the California State University and U.C. showed that library assistants at CSU are paid 33 percent more than their counterparts at U.C. Other workers, "blank assistants," earn 22.7 percent less than comparable employees at CSU. Police dispatch employees at the Irvine campus earn 25 percent less than labor market rates. And nutrition workers in San Diego still are suffering from a 20 percent pay cut inflicted in the 1990s.

No General Increases

The panel chair wrote:

The position of the University regarding their offer of neither a wage increase nor any equity adjustments for the clerical workers, who are among the lowest paid of all the employees at the University, seemed unfair to the majority of the Factfinders.

But while the factfinders did not accept the university's "no increases" position, they did heed the argument that U.C. had not agreed to general raises for most of its employees. The small salary boosts in many instances

were merit pay or equity adjustments rather than across-the-board increases. The panel also accepted the argument that a general salary increase for clerical employees would create strong pressures for similar raises in other units, which eventually would cost U.C. more than it could afford.

In line with this evidence, the panel did not recommend general raises for the CUE unit. Instead, it recommended small increases in particular titles to rectify the most egregious instances of

University clerical workers are paid at least 10 percent less than employees in comparable positions.

below-market pay. It suggested that library assistant pay match blank assistant pay. Lower-level blank assistants should receive 2 percent increases while higher blank assistants should receive 1 percent increases, the panel advised. The panel recommended a 17 percent increase for Irvine dispatchers and a 2 percent increase for San Diego nutrition workers. The factfinders rejected CUE's demand for merit pay increases.

The panel was not unanimous in these findings and recommendations. The CUE representative on the panel joined the neutral factfinder in recom-

mending the equity adjustments, but contended that across-the-board raises also were appropriate. The U.C. factfinder filed a dissenting opinion on all the wage issues.

No Health Benefits and Parking Changes

U.C. has a systemwide healthcare program that offers the same benefits to all employees. Employee contributions are at the same rates for all employees of the same wage level. The university also charges the same parking fees to all employees at each campus.

The union proposed a decrease in employee premium payments and a stipend for employees in rural areas without access to cheaper health maintenance organizations. CUE also demanded no parking increases at the six campuses where the university proposed parking fee hikes.

The panel weighed the burden of fees and contributions to these low-paid employees against the complexity and expense of altering the systemwide and campus-wide fees. The factfinders decided that the issue was more appropriate for coordinated bargaining with all the employee representatives than for resolution in a factfinding report. Again, only a majority of the panel reached these conclusions. The CUE representative filed a dissenting opinion on the health benefit and parking recommendations.

Panel Deliberations Leaked

Several weeks elapsed after the factfinding hearing while the factfinders

drafted and revised the report. During that time, the university met in negotiations with the University Professional and Technical Employees. According to the university, an UPTE representative began to read from a draft report during bargaining. Excerpts from the draft report also appeared in the *San Francisco Recorder*:

The panel sent a letter of rebuke to CUE for disclosing the draft report. Not only was the excerpted portion of

*The panel sent a letter
of rebuke to CUE
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draft report.*

the draft not in the final opinion of the panel, the chair wrote, the Higher Education Employer-Employee Relations Act prohibits public release of the report during a 10-day period after the issuance of the report to the parties.

In mid-February, U.C. asked PERB to investigate the matter pursuant to its "broad remedial powers under Government Code section 3541." In addition to the leak of the neutral panel member's draft report, which had been circulated only to the other two factfinders, the university complained that the CUE chief negotiator had told a reporter about confidential post-report negotiations several days before the expiration of the confidentiality period.

At the time *CPER* went to press, PERB had not yet taken any action on the letter.

No Settlement

The factfinding report was made public on February 17. On March 3, the university offered CUE a 10 percent salary increase for police dispatchers at the U.C. Irvine campus and a 2 percent raise for clerical employees in the nutrition services department at the San Diego medical center. U.C. spokesperson Noel Van Nyhuis continued to assert that lack of funding had prevented the university from offering

across-the-board increases for the past two years. He estimated that CUE's demand for general increases would "create a permanent unfunded liability...of more than \$10 million per year."

CUE rejected the offer. CUE negotiator Amatullah Alaji-Sabrie told *CPER* that the offer would give raises to 10 or 15 people. Implementation of the factfinders' report would increase the wages of about 90 percent of the unit, according to the dissenting report of the U.C. member on the panel. As *CPER* went to press, the union was deciding whether to call a strike. ❁

U.C. Regents to Allow Staff Representative on Two Committees

Three minutes during the public comment period is just not enough time to educate the Regents of the University of California about staff employee views. So, for at least the next two years, two non-Senate employees will be allowed to join meetings of the regents on two committees. The regents approved U.C. President Robert Dynes' proposal for a pilot program rather than the request of the Council of University of California Staff Assemblies for creation of a staff advisor position.

The state Constitution provides for a 25-member board of regents, which includes ex-officio members such as the governor and two officers of the alumni association as well as members appointed by the governor. In

addition, the Constitution allows the regents to appoint a student and/or faculty member. The regents have appointed a voting student member. But their bylaws generally prohibit a regent from holding a position for which the regent receives pay from the university. Therefore, the two faculty members appointed by the regents, the chair and vice-chair of the Academic Council, sit on the board as non-voting members. The Academic Council is the governing body of the Academic Senate.

In January 2003, Regent Ward Connerly reintroduced a proposal first made by the CUCSA a decade ago. He requested a study of the feasibility of having a staff advisor to the regents who would play a role similar to the faculty

senate representatives. However, President Dynes decided not to recommend a staff advisor seat because of the prohibition against direct dealing imposed by the Higher Education Employer-Employee Relations Act. The Office of General Counsel had advised against appointing any represented staff employee to the board. President Dynes noted that HEERA exempts the Academic Senate from prohibitions on direct dealing. But, he believed the gen-

The Office of General Counsel had advised against appointing any represented staff employee to the board.

eral counsel's restriction on represented staff would undermine the regents' desires to hear concerns of a broad range of staff and non-senate academic employees.

Instead, President Dynes suggested a pilot program that will allow committee representation. During the first year, 2005-06, representatives will be the current and immediate past presidents of CUCSA. A method of selection will be determined to choose two representatives from all staff and non-senate academic employees for the second year. There are about 108,700 non-management professional and

support staff employed by the university and 46,600 non-senate academic employees, such as academic student employees, professional researchers, and non-senate faculty.

President Dynes will have authority to determine which two committees will be included in the program. He has indicated that the staff representatives may sit on the Committee on Educational Policy and the Committee on Grounds and Buildings. Staff representatives will not attend closed sessions of the board.

CUCSA was founded in 1974. It has grown from a group of employee association representatives with no systemwide role to a group of 32 delegates that makes an annual report to the regents and participates on systemwide committees that advise the president. Its pursuit of a seat on the board is unlikely to succeed without U.C. support. As U.C. and the composition of its board is established by the Constitution rather than by statute, a constitutional amendment would be required to allow a voting representative of non-senate employees to sit on the board. In contrast, staff at the California State University nearly garnered representation on the CSU Board of Trustees last year. A.B. 2849 (Lowenthal, D-Long Beach), a bill that would have added a non-faculty employee covered by HEERA to the Board of Trustees, passed the legislature but was vetoed by the governor. ❁

State Employment

Will the Governor's Emphasis on Rehabilitation Mean Anything for Prison Teachers?

The governor plans to rename the Youth and Adult Correctional Agency the Department of Corrections and Rehabilitation, but prison educators in the state's bargaining unit 3 still feel like unloved stepchildren. The reorganization scheme does not specify how rehabilitation and education inside prison walls would be boosted without the money to hire teachers. Governor Schwarzenegger's budget proposes cuts of 27 percent to rehabilitation programs while it increases the overall correctional budget. Prison teachers still are in shock at Schwarzenegger's veto last fall of A.B. 1914 (Montanez, D-Mission Hills), the most recent in a series of bills to enhance prison education. And they have fared little better at the bargaining table.

Reorganization But No Money

The governor's correctional department reorganization plan grew out of the report of the California Performance Review's corrections panel. In part, the report attributed the huge size of the prison system to the department's failure to prepare inmates "for a successful return to society." It recommended expansion of vocational and

education programs, and access to them at the time an inmate enters the correctional system.

The plan the governor presented to the Little Hoover Commission in January is one of the first steps toward implementing the recommendations of

*There currently are
1,200 educators and
162,000 adult
inmates.*

the CPR corrections report. Under the proposal, educational and vocational programs currently handled separately by the Department of Corrections and the Department of the Youth Authority would be consolidated into a Division of Education, Vocations, and Offender Programs. The new division would report to a chief deputy secretary of the Department of Corrections and Rehabilitation.

Prison teacher Cindy Fonseca, who is active in the union that represents bargaining unit 3, Service Em-

ployees International Union, Local 1000, CSEA, testified before the Little Hoover Commission. She noted the plan is "long on lingo" but "short on concrete reforms." Fearful that this first step will be the only step, she criticized the paucity of programs for inmates and the lack of adequate staffing for the programs that do exist. There currently are 1,200 educators and 162,000 adult inmates in the Department of Corrections.

The Legislative Analyst's Office issued a report that said the same thing but in different words. The LAO applauded the decision to place the management of inmate programs at the executive level. The move should improve oversight and control of resources for rehabilitative programs and reduce the likelihood that they "take a back seat" to prison operations." But the legislative analyst chided the governor for the inconsistency of his words and actions:

At the same time that the administration is presenting a reorganization plan that proposes to provide a higher level of rehabilitation services, the Governor's budget reduces CDC inmate and parolee programs by \$95 million. This represents a 27 percent decrease compared to current-year spending. The proposed reduction raises concerns about the administration's commitment.

When the Little Hoover Commission recommended the reorganization plan to the legislature in late February, it warned that the proposal represents a fundamental shift in policy that would require a substantial investment in re-

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.

habilitative programs. Focusing on the \$95 million reduction, the commission protested, "If reducing the number of offenders who return to prison is the goal, programs to help them succeed cannot be the first to be cut."

Richard Rios, chair of the negotiating team for the prison educators unit, told *CPER* that the corrections department always has seen the education budget as a "piggy bank." For example, out of \$200,000 that was appropriated in 2002-03 for academic and vocational programs, Rios points to a sum of \$50,000 that was diverted to cover cost overruns in other parts of the correctional system.

Legislation Vetoed Again

To concentrate efforts on inmate education and avoid the diversion of funds, SEIU Local 1000 sponsored A.B. 1914 in 2004. The bill would have set up a correctional education committee to develop a plan for educating inmates, but it would not have increased spending. Like three similar bills introduced since 2000, A.B. 1914 passed the legislature but was vetoed by the governor. Prison educators were stunned. Not only had the governor emphasized a shift toward rehabilitation in his speeches, the union had met with him and had incorporated his suggestions into the legislation. In his veto message, Schwarzenegger explained that he opposed the bill because it would have eliminated accountability and created another layer of bureaucracy. His reorganization plan would place only a

deputy secretary between the Division of Education, Vocations, and Offender Programs and the secretary of the agency. But, the legislative analyst noted, there is little management infrastructure in place or proposed to accomplish the vision of rehabilitation.

Bargaining Stalled

The governor's rhetoric has not done much for educators' pocketbooks either. Their last contract expired in July 2003. Bargaining unit 3 decided not to settle with former-Governor Davis' administration that summer because the offer did not satisfy their demand for more pay or fewer workdays. The 2,000 educators the union represents work in prisons, mental health centers, developmental centers, special schools, and occupational centers. Their salaries are comparable to public school teachers in the first four years of employment, even though they work 248 days a year instead of 184 days. But the schedule tops out quickly.

Because they did not agree to the same deal as other bargaining units represented by SEIU Local 1000, they did not lose the 5 percent pay increase that the other groups traded for 12 personal leave days and increased employer-paid health premium contributions. (See story in *CPER* No. 162, pp. 42-45.) But the bargaining team for the educators has not returned to the table to negotiate a successor contract since October 2003.

Rios points out that Local 1000 wrested a 2 percent increase for the unit as part of its deal with the governor to

accept the alternate retirement program for new state hires. (See story in *CPER* No. 167, pp. 56-57.) The unit is in no hurry to return to the bargaining table in the current climate. When Rios asked the Department of Personnel Administration if they could negotiate higher employer premium contributions like those the other units receive, he was told that the governor only was interested in *cutting* those contributions. Since then, the governor has demanded more take-aways. In January, the governor sunshined proposals for 14 bargaining units that would cut two holidays, require greater employee contributions to the retirement system, eliminate all paid leave from the calculation of hours

worked for purposes of overtime pay, and allow the governor to furlough employees during emergencies.

Rios questions whether the governor's plan for rehabilitating prisoners will succeed without better compensation. Schwarzenegger is proposing that new employees would not be eligible for employer health care contributions for the first six months of employment. At least 150 teacher vacancies have not been filled. And Rios warns that many teachers will be eligible for retirement next year. "The state will need to agree to some improvement to hire the teachers necessary to ensure that inmates successfully re-enter society." ❁

170, pp. 28-32, and in the Public Schools section of this issue, pp. 45-47.) The boards of both CalPERS and the State Teachers Retirement System oppose shifting new employees to a defined contribution plan, which does not provide a specific pension amount to employees at retirement. Saying the legislation "is not well thought out," Rob Feckner, president of PERS, explained that it was the PERS board's "fiduciary duty to oppose this legislation because it harms the retirement security of future members and because, long term, it will hurt our ability to invest assets appropriately." The proposed reforms would cut off contributions for new employees that help meet the liability of the retirement fund and that allow it to maintain its investments.

Pension Legislation to Avoid Defined Benefit Ban

The governor is sure to sign pension reform legislation this year, but it may not be the ban on defined benefit plans that he is pushing. Both Democrats and Republicans are introducing bills that would trim costs and stabilize employer retirement contribution rates, but without forbidding defined benefit plans for new employees. To address the rising costs that are driving the pension reform train, the board of the California Public Employees Retirement System is considering changing its actuarial methods in order to "smooth" the fluctuations in rates. On a separate track out of legislative control are two pro-

posed pension ban initiatives. The newest proposal, by Dwight Read, chair of the Faculty Association at the University of California, Los Angeles, would allow only U.C. to continue to offer its new employees a defined benefit plan.

Legislation by Assembly Member Keith Richman (R-Northridge) that the governor backs, as well as an initiative being circulated by the Howard Jarvis Taxpayers Association, would amend the California Constitution to 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. (See story in *CPER* No.

Adjustments Proposed

There is no dispute that public employers are having trouble meeting pension obligations because of stock market losses from 2000 through 2002 and recent benefit enhancements. (See story in *CPER* No. 157, pp. 20-22.) However, the governor's team has exaggerated the extent of the problem by citing the increase in employer contribution rates starting from one of the lowest points in history — 0 percent of payroll in 2000 for state miscellaneous employees to 17 percent this year — without disclosing that those rates have averaged in the double-digits and were at a high of 19.5 percent in 1981-82. Nevertheless, recent pension costs have put such a strain on public agency bud-

gets that PERS has been studying since September changing its actuarial and amortization policies to limit the volatility of changes in contribution rates and minimize average employer rates. The board will vote this month on new methods that will affect state and school employer contribution amounts in 2005-06, and other public agency rates in 2006-07. It also is considering rules that would require an employer to continue making contributions even when its fund has a surplus from stock-

State law has reserved the legislature's right to change employee contributions.

market gains in order to moderate the spikes in contributions that are needed when the market value of assets declines.

PERS insists it can stabilize employer contribution rates without a constitutional amendment. The Legislative Analyst's Office also concluded that concerns with the current system could be addressed by tinkering with benefit formulas and funding methods. It mentioned minimum funding obligations as one way to avoid repetition of the current skyrocketing rates.

Its February report also suggested making new employees ineligible for recently enhanced benefit formulas that result in pensions which are more gen-

erous than those in other states and, in some cases, pay out more income than the employee earned while working. Specifically mentioned were the "2.7 percent at 55" and "3 percent at 60" formulas for non-safety employees, and the "3 percent at 50" formulas for public safety employees, which became available to employees between 2000 and 2002. (See stories in *CPER* No. 144, p. 40, and No. 151, pp. 33-34.) PERS attributes about 20 percent of the increases in employer contribution rates to these enhanced benefit formulas.

The report observed that one problem with the recent benefit enhancements was that they were applied retroactively to employees' past service even though the employer had not made contributions necessary to fund the higher benefits. The LAO suggested that the legislature prohibit retroactive enhancements to benefits or require that retroactive enhancements be funded at the time they are enacted.

Another avenue the LAO identified for cost cutting is calculating the benefit on the basis of the last three years of compensation rather than the final year's pay. Years ago, California pension benefits were based on the final three years of salary, like benefits in other states. But in 1990, the legislature changed the definition of final compensation to include only one year. As a result, a large salary increase or promotion in the last year of employment can result in a significantly higher benefit than was predicted and funded.

Life is a very imperfect arrangement.

Robert Maddock

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

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

Pocket Guide to the Family and Medical Leave Acts

See back cover for price and order information

The legislative analyst also observed that state law has reserved the legislature's right to change employee contributions, which currently are set at fixed percentages of salary. While collective bargaining would be necessary to change the employee rates for represented employees, the legislature could enact a system in which employee contribution obligations rise and fall with the rates of their employers.

Legislators have introduced more than 25 bills along these lines. Some are just ideas — they merely state the intent of the legislature to pass measures that would attack a particular flaw in the current pension system. Others are less-drastic alternatives acceptable to the labor constituency or fallback positions in case the defined pension ban does not pass the legislature or popular vote.

Rolling Back Recent Enhancements

One of numerous retirement bills introduced by Senator Roy Ashburn (R-Bakersfield) is S.B. 883, which would make non-safety employees hired after January 1, 2006, ineligible for the recently enacted "2 percent at 55" and "3 percent at 60" formulas. It would provide only the "2 percent at 60" retirement rights that existed until 2001 and 2002. This bill would confine the availability of the most generous benefits to current employees.

Another Ashburn bill seeks to mitigate the problem of funding retroactive benefit enhancements. State employees hired in the 1990s were re-

stricted to a less generous Tier 2 retirement plan. Recent legislation allows Tier 2 employees to switch to Tier 1 benefits at any time prior to retirement if they pay the employee contributions, but it does not address the fact that past employer contributions were too small to fund the more generous benefits. S.B. 881 would require employees to convert to the Tier 1 plan at least three years before retirement, which would result in at least three years of employer contributions at the higher Tier 1 rate.

Two bills would change the definition of final compensation.

Two bills would change the definition of final compensation, one of the factors that goes into the calculation of a defined pension benefit. Senator Ashburn's S.B. 882 would define "final compensation" as the employee's highest earnable compensation in the final 36-month period prior to retirement. Assembly Member Richman has introduced A.B. 214, which would change that definition to the average compensation earnable during the final three years of employment. Both would apply to all employees who retire or die on or after January 1, 2006. Their retroactive application to current employees raises the question whether they

would violate the state Constitution's contract clause. The Constitution protects the retirement benefits promised to employees during their employment from changes that are detrimental to the employees unless the modifications are offset by beneficial changes.

Other bills attempt to control costs with minor changes in current law. A.B. 456 (Torrico, D-Fremont) would make it a crime to make false statements to obtain PERS benefits or knowingly keep benefits that have not been earned. S.B. 887 (Ashburn) would limit the proliferation of employees entitled to higher-cost safety employee pensions. It would require legislative approval before the state Department of Personnel Administration agrees in collective bargaining that certain employees are safety employees for retirement purposes. S.B. 1093 (Soto, D-Ontario) would prohibit safety status for craft and maintenance employees in state bargaining unit 12.

So far only one hearing has been held on the Assembly retirement legislation. A hearing in the Senate is scheduled for April 18. As of mid-March, the Howard Jarvis Taxpayers Association needed 600,000 signatures by July 28 to qualify the pension ban for the November election. The deliberate process of the legislature may produce reforms too slowly to take the steam out of the movement to dismantle public pension plans. *

Discrimination

HIV-Positive Applicants Can Sue for Discrimination

Three flight attendant applicants, who were required to undergo medical tests, including an HIV-test, prior to being hired, can sue the airline for discrimination and violation of their constitutional right to privacy, according to a recent Ninth Circuit Court of Appeals decision. The three individuals had failed to reveal their HIV-positive status during the application process. When the medical tests came back, the airlines rejected the applicants, citing their failure to disclose information.

The decision is a clear signal to all employers that, in order to comply with applicable non-discrimination statutes, the medical exam always must be conducted *after* all other steps in the application process and *after* making a job offer conditional only on the results of that examination. Further, if the employer wants to include any testing as part of the medical examination, it should notify applicants in writing of the nature of the tests to be performed and obtain their prior consent.

The ADA and the FEHA

The Ninth Circuit found that American Airlines' application process violated the federal Americans With Disabilities Act and California's Fair Employment and Housing Act. Both of

those statutes prohibit medical examinations and inquiries until after the employer has made a "real" job offer to the applicant. In this case, the airlines made a conditional offer of employment to each applicant at the conclusion of their interviews. The offer was contingent on successful completion of a drug test, a medical exam, and a background

The medical exam always must be conducted after all other steps.

check. The applicants immediately were given a medical exam that included a blood test, which indicated HIV status. They were asked about medications they were taking and any "blood disorders" that they had. None of them revealed their HIV-positive status. They were not informed of the nature of the blood tests and did not give their written consent to the testing. When each was contacted with the result of the blood test, they disclosed their HIV-positive status. At that time, the airlines

withdrew its conditional offers, stating that the company "will not tolerate willful omissions of fact on its employment applications."

Both statutes define a "real" job offer as one where "the employer has evaluated all relevant nonmedical information which it reasonably could have obtained and analyzed prior to giving the offer."

The court explained the rationale behind the requirement that medical exams be the last part of the application process:

This two-step requirement serves in part to enable applicants to determine whether they were "rejected because of disability, or because of insufficient skills or experience or a bad report from a reference...." When employers rescind offers made conditional on both nonmedical and medical contingencies, applicants cannot easily discern or challenge the grounds for rescission. When medical considerations are isolated, however, applicants know when they have been denied employment on medical grounds, and can challenge an allegedly unlawful denial.

The two-step structure also protects applicants who wish to keep their personal medical information private. Many hidden medical conditions, like HIV, make individuals vulnerable to discrimination once revealed. The ADA and FEHA allow applicants to keep these conditions private until the last stage of the hiring process. Applicants may then choose whether or not to disclose their medical information once they have been assured that as long as they can perform the job's essential tasks, they will be hired.

Get the new, **SECOND EDITION!**
**Pocket Guide to
Workplace Rights of
Public Employees**
(2005)

By Bonnie G. Bogue and Liz Joffee

- ◆ explains the many **rights afforded all public employees** in California — state, local government, and public schools.
- ◆ 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.
- ◆ covers **personal rights** that public employees enjoy, such as free speech, equal protection, due process, privacy, and protections against wrongful termination.
- ◆ 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.

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

In this case, American made the offers contingent on both medical and nonmedical components, including background checks. “Thus,” found the court, “the offers were not real, the medical examination process was premature and American cannot penalize the appellants for failing to disclose their HIV-positive status — unless the company can establish that it could not

If American’s argument were to prevail, the legislative purpose would be circumvented.

reasonably have completed the background checks before subjecting the appellants to medical examinations and questioning. It has not done so.”

The court made short shrift of American’s assertion that it accelerated the medical examinations because it was important to minimize the time to complete the application process, and that this was done for the convenience of the applicants. “Competition in hiring is not in itself a reason to contravene the ADA’s and FEHA’s mandates to defer the medical component of the hiring process until the nonmedical component is completed,” said the court. Further, “applicants’ supposed convenience

does not justify reordering the hiring process in a manner contrary to that set out by the ADA and FEHA.” The court, however, did indicate that if American can show at trial that it could not reasonably have completed the background checks before initiating the medical examinations, it might be excused from the statutes’ sequencing requirement.

The court was equally unimpressed with the airline’s argument that, even if it did conduct the medical exams before the last step in the process, it did not violate the ADA or the FEHA because it *evaluated* the applicants’ nonmedical information before it considered their medical information. The court pointed out that the statutes plainly require that no medical examination or inquiry as to physical fitness or medical condition or history be made until after a real offer has been extended. The EEOC explicitly addressed this argument, said the court, when it stated in its ADA enforcement guidelines that “an employer may not ask disability-related questions or require a medical examination, *even if* the employer intends to shield itself from the answers to the questions or the results of the examination until the post-offer stage.”

If American’s argument were to prevail, the legislative purpose would be circumvented, explained the court:

The focus on the collection rather than the evaluation of medical information is important to the statutes’ purposes. Both the ADA and FEHA deliberately allow job appli-

cants to shield their private medical information until they know that, absent an inability to meet the medical requirements, they will be hired, and that if they are not hired, the true reason for the employer’s decision will be transparent. American’s attempt to focus on the evaluation rather than the collection of medical information squares with neither the text nor the purposes of the statutes.

The focus on the collection rather than the evaluation of medical information is important.

Constitutional Right to Privacy

The applicants argued also that American violated their right to privacy under Art. I, Sec. 1, of the California Constitution by administering the blood test without their knowledge or consent.

The court found that the applicants had demonstrated a legally protected privacy interest and that American had caused them each to suffer a serious invasion. The question to be determined was whether they could show they had a reasonable expectation of privacy under the circumstances.

“To assess the reasonableness of the appellants’ expectations, we consider the customs, practices and physi-

cal settings surrounding the blood tests, placing particular emphasis on any notice provided or consent obtained,” said the court. In this, the appellants had “little reason to expect that comprehensive scans would be run on their blood,” the court concluded.

The applicants were rushed through the medical exam. Nowhere in the forms that they completed were they

*Nowhere in the forms
were they told that
the examinations
included blood tests.*

told that the medical examinations would include blood tests or, if so, the nature of the blood tests. While they were informed that the examination would include a urine test and they gave written consent for certain specified tests to be run on their urine specimens, no such form was given to them regarding blood tests.

As to American’s argument that its medical questionnaire should have put the applicants on notice of the comprehensive blood test, the court stated, “we have already rejected this argument,” quoting from its opinion in *Norman Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 129 CPER 53:

It is not reasonable to infer that a person who answers a questionnaire upon personal knowledge is put on notice that his employer will take intrusive means to verify the accuracy of his answers....Indeed, a reasonable person could conclude that by completing a written questionnaire, he has reduced or eliminated the need for seemingly redundant and even more intrusive laboratory testing....

Accordingly, the court found that American did not refute the reasonableness of the applicants’ expectations that it would not perform specific tests on their blood samples. The court sent the case back to the lower court for trial on this claim as well as the discrimination claims, specifying that “if the appellants prove that they had reasonable expectations of privacy as a threshold matter, the district court must then conduct a traditional balancing test,” weighing the airline’s justification for its conduct against the intrusion on the applicants’ privacy. (*Leonel v. American Airlines, Inc.* [9th Cir. 3-4-05] 03-15890, ___ F.3d ___, 2005 DJDAR 2652.) ❁

General

Coalition Pushes Ballot Measure to Restrict Use of Union Dues

Among the initiatives facing voters come November may be one that would place restrictions on the political activities undertaken by public employee unions. The effort is being pushed by a coalition of business and anti-tax groups aligned with Governor Schwarzenegger's agenda and calling itself "Citizens to Save California."

In filing with the Secretary of State, the organization has signaled its intention to gather signatures in support of a ballot measure that would prohibit public employee labor organizations from using union membership dues or fees for political contributions unless the employee provides prior written consent and does so on an annual basis. The prohibition would not apply to dues or fees collected for charitable organizations, health care, insurance, or other purposes directly benefiting the public employee.

The proposed initiative also would require labor organizations to maintain and submit to the Fair Political Practices Commission the records concerning an individual employee's political contributions. Those records would not be subject to public disclosure.

Through the proposed initiative, the coalition also hopes to require unions to pay for political activities

from a separate fund registered as a political committee. Solicitations for contributions to that fund would have to disclose the political purpose of the fund and inform the employee that contributions are voluntary.

Understandably, public sector unions are opposed to the initiative and see it as part of the governor's attack on labor. On the record in opposition are

the California State Employees Association, the California School Employees Association, the California Teachers Association, and the California Professional Firefighters Association.

In June 1998, labor faced a similar measure that would have required both employers and employee organizations to obtain permission from employees and union members before withholding pay or using union dues or fees for political contributions. Unions mounted a successful battle to defeat Prop. 226, but reportedly spent nearly \$25 million doing so. (See *CPER* No. 13, pp. 4-7, for a summary of the "No on 226" campaign.)

perb gets new member

On March 16, Governor Schwarzenegger appointed Sally M. McKeag to the Public Employment Relations Board. Prior to her appointment, McKeag served as chief deputy director of the California Employment Development Department since January 2004.

McKeag spent two years in Washington, D.C., at the U.S. Department of Labor where she served as chief of staff to the Employment and Training Administration Assistant Secretary. There, she assisted in the creation of the Business Relations Group, charged with applying innovative approaches to business and industry.

Before working at the Labor Department, McKeag served in a variety of posts for the California State Senate and Governor Pete Wilson. She served as Deputy Director of Operations for the Department of Consumer Affairs, Acting Deputy Director of the Department of Fish and Game, and Director of Constituent Affairs.

Before coming to California to work for Governor Wilson, McKeag served in the Reagan and Bush administrations in Washington, at the Environmental Protection Agency and the Department of the Interior.

McKeag's term with the board runs through December 31, 2006.

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

William James

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

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

Pocket Guide to Unfair Practices: California Public Sector

See back cover for price and order information

McMonigle Joins ALJ Ranks at PERB

Effective December 2004, Bernard McMonigle has been appointed as an Administrative Law Judge for the Public Employment Relations Board. He has been with PERB since 1988, where he served as a senior counsel and on temporary ALJ assignments.

McMonigle has worked as a labor relations neutral since 1977 when, after six years with organized labor, he joined the Federal Mediation and Conciliation Service as a mediator. Before joining PERB, he was board counsel for the California Agricultural Labor Relations Board. He also has served as an arbitrator and an ad hoc hearing officer for the Sacramento Council Civil Service Commission.

McMonigle has a B.A. in Economics from the University of Georgia and an M.S. in Employment Relations from American University in Washington, D.C. He is a 1984 graduate of the University of the Pacific McGeorge School of Law. A member of the State Bar Labor and Employment Law Section, he served as the 1999 chair of the Sacramento County bar's labor section.

"I've enjoyed my career as a neutral in public sector labor relations and involvement in the wide variety of issues addressed by PERB. I feel honored by the appointment to a respected group of ALJs and look forward to the challenges ahead," McMonigle stated.

Chief Administrative Law Judge Fred D'Orazio said: "Judge McMonigle has had a distinguished career in all areas of labor relations, especially the public sector, and we are very pleased that he has joined our ALJ staff." ❁

Public Sector Arbitration

Union Loses Bid to Compel Arbitration

The grievance procedure set out in the memorandum of understanding between the Metropolitan Water District of Southern California and the American Federation of State, County and Municipal Employees, Local 1902, is not an agreement for final and binding arbitration, the Court of Appeal has reasoned, because it permits judicial review of a hearing officer's decision under Code of Civil Procedure Sec. 1094.5.

The case involved the district's decision back in 2000 to reorganize its workforce and create new management positions. To fill these new posts, the district determined that certain current supervisory employees would be considered incumbents to particular management slots and would not have to bid. Other openings, designated as new positions, would be filled by competitive bidding.

The union had a variety of concerns about the changes and asked the district to meet and confer. According to the union, the district's plan to create the incumbent list reduced the number of job opportunities for its members. The district maintained that the supervisory positions were not in the bargaining unit represented by the union and, consequently, it had no obligation to meet and confer with the

union before designating the incumbent positions.

No agreement was reached, and the union filed a grievance under the appeal procedure in the MOU. The district refused to proceed, claiming that the grievance was untimely filed. In response, the union filed a petition to compel arbitration. The trial court denied the union's petition, and it appealed.

An arbitrator's decision generally is not reviewable for errors of law or fact.

The parties' MOU contains a multi-step grievance and appeal procedure. After an informal meeting between the parties, there is a two-level formal process. Level one is initiated by the filing of a written grievance within 30 days of the event giving rise to the grievance. If unresolved, the grievance advances to level two, where it is addressed by the next level of management. Pursuant to Sec. 6.7.4, management's determination after level

two may be appealed to a neutral hearing officer.

Section 6.7.6.B states that the "decision of the Hearing Officer shall be final and binding on the parties." The MOU also provides at Sec. 6.7.6.C that the decision of the hearing officer can be appealed to a court pursuant to Code of Civil Procedure Sec. 1094.5.

The Court of Appeal observed that the "very essence" of the term "arbitration" connotes a binding award. Quoting the Supreme Court in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, the court said that expanding the availability of judicial review of arbitration decisions would tend to deprive the parties "of the very advantages the process is intended to produce." "Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration."

In this case, said the court, the hearing officer's decision is not final and binding because it is reviewable by a trial court under Code of Civil Procedure Sec. 1094.5. That section permits the trial court to examine whether the decisionmaker acted in excess of his or her jurisdiction, and determine whether there was a fair trial or any prejudicial abuse of discretion. The trial court also is authorized to consider the weight of the evidence. In contrast, arbitration awards are subject to very limited judicial review. The courts are not permitted to review the merits of the contro-

New Edition
**Pocket Guide to
Public Sector Arbitration:
California**

(Third edition, 2004)

By Frank Silver and Bonnie G. Bogue

This **revised and expanded** edition is easy to use and more useful than ever. Each chapter is updated and includes:

- Clear, yet detailed, explanation of procedures — filing the grievance, selecting an arbitrator, and the steps leading to arbitration.
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versy or the sufficiency of the evidence supporting the award. Again citing *Moncharsh*, the court noted that, with limited exceptions, an arbitrator's decision generally is not reviewable for errors of law or fact. "Even an error of law causing substantial injustice is not a ground for vacation or correction of an award."

Therefore, the Court of Appeal ruled, since Sec. 6.7.6 of the MOU allows for judicial review under Sec. 1094.5, the hearing officer's decision is not final and binding on the trial court, and the MOU is not an agreement to arbitrate.

In support of its conclusion, the court noted a declaration of the district's general counsel, who asserted that the district steadfastly has refused to reach

agreement on any language providing for binding arbitration and has insisted on not waiving the right to judicially challenge any decision reached through the MOU procedure. Although the court conceded that the union had submitted a declaration in direct contradiction to the district's, it found that the district's declaration provided substantial evidence to support the trial court's conclusion that the MOU appeal procedure was not intended to be final, but appealable to the courts via Sec. 1094.5. (*American Federation of State, County and Municipal Employees, Loc. 1902 v. Metropolitan Water District of Southern California* [1-31-05] B166179 [2d Dist.] ___ Cal.App.4th ___, 2005 DJDAR 1280). ❁

in light of her financial circumstances at the time she elected to forgo COBRA coverage. At the time of her layoff, her family was purchasing her home. The grievant has three children, one of whom works and contributes to household expenses. Her husband is a self-employed auto mechanic. The family's finances essentially existed on a month-to-month basis, with no formal budget or expense tracking.

*The arbitrator
examined the
grievant's conduct in
light of her financial
circumstances.*

Employer Must Pay Emergency Medical Costs for Improperly Laid-Off Employee

Arbitrator Tom Angelo ordered the Pasadena Unified School District to reimburse the grievant for all medical benefit costs incurred when she was laid off despite her seniority status.

The grievant sought reimbursement of over \$20,000 in medical expenses since she had not obtained coverage under COBRA or any other medical insurance plan following the termination of her benefits. The district claimed she was obligated to purchase coverage as part of her duty to mitigate her damages.

The district argued that the grievant was not entitled to reimbursement because she ignored the statutory protection created precisely for people in her situation. The district cited other cases where employees have been denied payment or reimbursement for COBRA. Arbitrator Angelo was not persuaded, noting that the grievant did not claim the district should have paid for her COBRA coverage after her involuntary separation.

The arbitrator examined the reasonableness of the grievant's conduct

Comparing family income to expenditures, Angelo determined that the family barely was subsisting at the time of the grievant's layoff. Every month, only some bills were paid; the grievant faced a constant threat of foreclosure on her home. Despite the district's claim that the family was hiding income in order to extract payment of the grievant's medical expenses, Angelo found no reasonable basis to conclude that the family would risk losing their home or willingly incur late charges on other bills if they truly were able to meet all of their financial obligations.

At the time of her layoff, the grievant undertook a cost-benefit analysis before deciding whether to elect coverage. Because her husband had a history of dental problems, dental insurance was essential. She was not ill at the time of the layoff and did not expect to have her own medical problems. If she had known of the forthcoming surgery at the time of her layoff, the arbitrator reasoned, rejection of COBRA coverage would have been unreasonable. But without that knowledge, the grievant's behavior was not unusual. Angelo concluded that she had made a choice faced by many other people in this country who cannot afford both their day-to-day living expenses and health insurance. Accordingly, the district was ordered to reimburse the grievant for her medical expenses. (*Pasadena Unified School Dist. and California School Employees Assn.* [11-6-04] 11 pp. *Representatives:* D'Vora Mayer, labor relations representative, for the union; Nate Kowalski, Esq., James C. Romo, Esq., and Tina L. Kannarr, Esq. [Atkinson, Andelson, Loya, Ruud & Romo] for the district. *Arbitrator:* Thomas Angelo.) ❁

Arbitration Log

• **Contract Interpretation**

Chula Vista Educators/CTA/NEA and Chula Vista Elementary School Dist. (6-10-04; 22 pp.) *Representatives:* Mark R. Bresee, Esq. (Parham & Rajcic), for the district; Tim O’Neill, CTA staff consultant, for the union. *Arbitrator:* William E. Riker.

Issue: Did the district misapply the contract in the way it compensated teachers who attended in-service training outside of the regular school year?

Union’s position: (1) The district violated the collective bargaining agreement when it required various teachers to attend five days or 40 hours of training for the state-administered “Reading First” program. This training took place outside of the 185-day contractual work-year requirement, and as such, the district did not compensate appropriately the teachers who attended.

(2) Article 52.6 of the CBA requires that in-service days be strictly voluntary. It further requires written posting or a general announcement of the opportunity to participate in the in-service training during an employees’ non-work, non-paid days. Because the district chose which schools would be participating in the program, this mandated teachers’ participation.

(3) Options given to teachers who could not or did not want to participate in the program were illusory. One re-

quired the teacher to choose between compliance or transfer to another work assignment. The second option merely provided alternative periods for when to take the training. These options did not render the in-service training voluntary.

(4) Notice was provided only to teachers for whom participation in the training was relevant. However, Article 52.6 requires notice to all teachers.

(5) Rather than payment at the lower rate specified in Art. 52.6, Art. 52.1.5 entitles unit members who participate in work assignments beyond the 185-day work year to per diem compensation for additional workdays. The requirements associated with the Reading First program include training beyond the 185-day limit. They are similar to other extended-year positions within the unit.

District’s position: (1) Attendance at the in-service training was strictly voluntary. The pursuit of extra work like the Reading First program, including summer school, intersession, and ex-

tended school, all are voluntary because they fall outside the range of the 185-day year. The language regarding voluntary work was inserted into the CBA because some employees felt pressure to attend in-service training outside of the regular work year.

(2) Teachers who attended the reading program training made the conscious and voluntary decision whether to attend during or outside their regular work year. The union did not prove that the 200 teachers who attended the training outside of their work year did so involuntarily. Those teachers who chose to do so were notified of the available options. Supervisors informed teachers that the decision of when to attend was up to them.

(3) Article 52.1.5 is inapplicable to in-service training. It applies to extended-year contracts that call for extra workdays within the same job classification or duties the employees perform throughout the 185-day year.

(4) The school-based decision to participate in Reading First was voluntary. The training element of the grant was known to school staff at the time the decision was made to participate. The schools individually made the choice whether to participate.

Attention Attorneys and Union Reps

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(5) Article 52.6 historically has been applied to in-service training where teachers participate outside of their regular work year. State-mandated reading and language arts training has been compensated at the Art. 52.6 rate. Reading First is a similar program and subject to the same compensation practice.

(6) The union is attempting to achieve through arbitration what it twice was denied in negotiations. The union repeatedly has tried to have additional commitments outside the contractual work year compensated at the employee's full rate. Article 52.6, with its reduced rate, was a compromise.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) Interpretation of the "strictly voluntary" language requires an assessment of the district's motivations in implementing the Reading First program. Although the staff at some schools had voted against participation, once the district received the grant, it needed to train teachers in order to be fully compliant. All teachers were expected to embrace the new curriculum, and true freedom of choice was not an option.

(2) Teachers who attended the training did so because it was a mandatory activity for the Reading First program. The choice of attending training during a particular period may have been afforded, but there is no doubt the training itself was required.

(3) Implementation of the program significantly changed teacher duties; an additional 40 hours of training per year

are required. The grant guidelines specify that the training is required for participants.

(4) It would be inappropriate to impose the lower per diem rate to compensate the teachers' for the training. Rather, compensation for an extended work year is most appropriate under Sec. 52.1.5, which extends the normal daily rate to extra workdays. Utilization of this section should be retroactive to compensate the teachers who already attended.

(5) Implementation of Reading First has a significant effect on the curriculum. Classification of teachers' jobs should include the new schedule and compensation commensurate to the increased workload.

(Binding Grievance Arbitration)

• Contract Interpretation

Sacramento Area Fire Fighters, Loc. 522, AFL-CIO, and City of Sacramento (7-21-04; 18 pp.) *Representatives:* William D. McPoil, business agent (ERS, Inc.), for the union; Angela M. Casagrande, Esq., deputy city attorney, for the city. *Arbitrator:* John F. Wormuth (CSMCS ARB-03-1894).

Issue: Is the city required to give cumulative credit to the grievant's final composite score on the captain's examination?

Union's position: (1) The grievant was eligible to participate in the captain's promotional examination. It consists of 150 written questions and a leadership appraisal comprised of six individual problems. Each portion of the exam is weighted and makes up a

percentage of the total score. A minimum composite score of 70 percent is required for promotion.

(2) The grievant participated in the exam in October and November 2002. He was informed in November of his disqualification, but the actual reason for disqualification was not known to the grievant until May 2003. The grievant's composite score did not include 60 points he received for one problem or seniority points as specified by the collective bargaining agreement. With those points, the grievant was eligible for promotion.

City's position: (1) The grievant simply failed to pass the examination or to file a timely appeal pursuant to the civil service rules.

(2) The union violated the civil service rules by failing to respond to the city's attempts at discovery in anticipation of arbitration.

(3) The union is seeking to compel the city to amend its testing and scoring procedures through the arbitration process. However, the city is entitled to control its testing procedures.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The applicable civil service board rule was changed to allow a candidate to participate in all phases of the test regardless of the score received on a particular element. The change had the intended result of allowing candidates to achieve a final passing score despite failing an individual section.

(2) The grievant promptly responded to the notice of disqualifica-

tion, and he should not be penalized for the time it took the city to answer his inquiry. The current civil service rule, which imposes a 15-calendar-day limit to file an appeal, cannot be reconciled with the change in examination scoring. The city could not simultaneously notify an applicant of his disqualification and provide a complete breakdown of scores. Imposition of the time limit effectively would preclude a grievance from being heard.

(3) The city did not waive its right to disqualify candidates who fail to achieve the minimum composite score by modification of the rule that permits candidates to proceed through the entire exam despite failure of one part. The change in scoring affected the methodology, not the passing score requirements. A candidate who fails a section of the exam still must achieve the minimum composite score by achieving higher marks in other sections.

(4) Proper testing is a reasonable measure of a candidate's basic fitness to fulfill the minimum requirements of a position. If the grievant's remedy were adopted, it would eliminate any objective means of determining the minimum

level of competency. The pass/fail standard is unequivocal and an integral part of the testing process that the city has the right to control.

(5) Because the city failed to raise discovery violations during the hearing or in its moving papers, no violation was found.

(Binding Grievance Arbitration)

• Contract Interpretation

San Francisco Unified School Dist. and United Teachers of San Francisco (9-27-04; 14 pp.) *Representatives:* Stewart Weinberg, Esq. (Weinberg, Roger & Rosenfeld), for the union; Namita S. Brown and Lozano Smith for the district. *Arbitrator:* Bonnie G. Bogue.

Issue: Was the district contractually required to place the grievant in the position of athletic director at Mission High School as of June 2, 2003, and to compensate him accordingly?

Union's position: (1) The grievant was assigned to the athletic director classification at Mission High School following a consolidation by the district on June 2, 2003. On June 6, the district human resources department informed the grievant the assignment

was in error and he should have been assigned to Physical Education. When the grievant reported to work at Mission High on August 22, 2003, the principal told him the school already had an athletic director. That individual held an emergency credential, whereas the grievant held a regular credential.

(2) The grievant's pay stubs revealed that he initially was assigned to the athletic director position, and this information remained in the system even though the grievant was not performing those duties. The extra pay was discontinued once the payroll system was corrected.

(3) The district is obligated to place the grievant in the athletic director position. The position was vacant because teachers with emergency credentials are employed on a year-to-year basis. Under the Education Code, the district must search for a credentialed teacher to fill the position.

District's position: (1) The grievant is not entitled to be consolidated to the athletic director position because that would be considered "promotive." An athletic director is selected from among certificated personnel at the school and may be any teacher deemed appropriate by the site administrator. The athletic director position is not full-time, but rather an extra-duty assignment for an existing teacher.

(2) Arbitration is an improper forum if the union believes the district has committed a violation of the Education Code.

(3) Under the collective bargaining agreement, the grievant is entitled

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to placement only in the physical education teacher position because only that position was consolidated. The district acted properly when it placed him there.

(4) The posting of the athletic director position as a vacancy and the grievant's initial assignment to the position were in error. The grievant was so notified four days after his placement in the position. The fact that he received supplementary pay was a payroll error. It does not give him any claim to the position.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The grievant was a physical education teacher at his former school but was consolidated to the open P.E. position at Mission High. He received his contractual entitlement when he selected that position.

(2) The athletic director position is an extra-duty assignment, not a full-time position. Because this position carries added compensation, selection is considered a promotion. The union conceded that teachers are not entitled to be placed in a promotional position when they are consolidated. Moreover, as athletic directors are always filled on-site, there was no vacancy for the grievant. Only the vacant P.E. position should have been posted.

(3) The argument regarding the existing athletic director's emergency credential has no contractual basis, as the contract is silent regarding whether credentialed teachers are to be given

priority over emergency-credentialed teachers in filling vacancies.

(4) The Education Code and the parties' agreement require the district to act in a manner consistent with any duty imposed by law, limited by the terms of the contract. Contract language appears to refer directly to the Education Code, which requires the district to make reasonable efforts to recruit a fully credentialed teacher. The district satisfied this duty when it consolidated the grievant and gave him his choice of assignment. Both the grievant and the existing athletic director were assigned to open positions.

(5) The grievant did not have priority for the athletic director position because it is not linked to the P.E. position to which the grievant was entitled. The evidence demonstrated that any Mission teacher could have been assigned to the extra-duty position. The Education Code does not require the district to give priority to fully credentialed teachers when selecting teachers for such extra-duty positions.

(6) Adopting the union's position would add a contract provision about which the parties did not negotiate. There is no established past practice to support the union's arguments.

(Binding Grievance Arbitration)

• **Contract Interpretation – Overtime Pay**
City of Los Angeles Harbor Dept. and Los Angeles Port Pilots Assn. (ILWU), Loc. 68, AFL-CIO (12-15-04; 10 pp.) *Representatives:* Elizabeth Garfield, Esq. (Holguin &

Garfield), for the union; Gene Bell, management consultant (Becker & Bell, Inc.), for the city. *Arbitrator:* Philip Tamoush.

Issue: Were employees entitled to call-back pay?

Union's position: (1) Eight port pilots were scheduled to attend a two-hour training program during their off-duty time. All received at least two days' notice of the training. All of the off-duty employees in attendance received three hours of overtime pay. However, the training should have been treated as a call back, meaning the off-duty employees were entitled to four hours of overtime pay.

(2) Article 35 of the MOU requires call-back pay whenever an employee returns to duty after the termination of his shift and departure from the work location. Call-back pay should be awarded regardless of its purpose or whether the call back is mandatory or voluntary, planned or unplanned. The MOU has no exception for non-pilot-specific duties.

(3) At least one pilot was paid call-back pay for a meeting with the Los Angeles city attorney regarding an accident he witnessed.

(4) The call-back language has been expanded. Before 1977, such pay was limited to piloting duties; no agreements since then have contained such a limitation.

City's position: (1) Article 35 is inapplicable to pre-scheduled overtime for the purposes of attending meetings or training. The purpose of the provision is to compensate port pilots who

are called back to duty on short notice to perform licensed pilots' duties.

(2) Port pilots attended similarly pre-scheduled training in 2000 and 2001 without incident. No grievance was filed.

(3) Call back is an individual condition of employment, where pilots are called to work on a rotating basis. If one pilot refuses, as is his right, the work is offered to the next pilot on the list. In contrast, the training session was mandatory, with no right of refusal.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) Call backs, as a principle, involve an unplanned call to return to work when employees are off-duty and have left the work location. The MOU article essentially is a penalty imposed on management for the inconvenience caused to employees who are off-duty. There also is a clearly established right of refusal for call-back work.

(2) The training seminar was known, planned, and mandated without the voluntary nature that characterizes the call-back procedure. The expanded language to which the union refers in post-1977 agreements was to allow for an expanded definition of what duties would qualify for call-back pay, to be evaluated on a case-by-case basis. Rarely would a planned training program be the kind of event that would justify a four-hour pay penalty.

(3) The union's position would eliminate any application of overtime pay provisions not contiguous to the

regular work shift. Because the MOU defines overtime as any hours worked over 84 in a biweekly pay period, some overtime could be mandated on a planned basis.

(Binding Grievance Arbitration)

• Discipline

Los Angeles County Metropolitan Transportation Authority, Div. 7, and United Transportation Union (1-14-05; 13 pp.) *Representatives:* Denice Findlay, labor relations arbitration specialist, for MTA; Lawrence Drasin, Esq. (Lawrence Drasin & Associates), for the union.

Issue: Was the termination of the grievant for just cause?

MTA's position: (1) The grievant, a bus operator, was involved in an incident with a bus patron who took two books of transfers and would not return them to the grievant upon request. The grievant restrained the patron while attempting to retrieve the books. The two women struggled, leaving the grievant with a black eye.

(2) The incident was captured on videotape by a security camera on the bus. It portrayed the grievant as the aggressor.

(3) The grievant did not have to use physical force. She could have activated her silent alarm or contacted bus operations control for assistance. BOC was not called until after the patron exited the bus.

(4) This incident was the grievant's second physical encounter with a patron. It demonstrates her inability to control her behavior when dealing with the public.

(5) The grievant received a Skelly hearing in connection with the disciplinary action. She had a full and fair opportunity to respond to the charges.

Union's position: (1) The primary evidence against the grievant consists of a poor-quality video. It does not readily reveal the primary aggressor.

(2) The grievant did not know where the silent alarm was located on her vehicle. She felt it was better to deal with the situation on her own, rather than call BOC and delay the bus even longer.

(3) The grievant was denied due process prior to termination. At the initial meeting with management, it had not yet produced its evidence against her. At a second level-one hearing, evidence against the grievant still was unclear. The grievant was unable to attend a third level-one hearing. The grievant received no notice of the fourth level-one hearing, and thus did not attend; her union representative was present to defend her. This hearing was the basis for her notice of termination. One month later, the grievant attended a second-level hearing, but the termination was upheld.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The union failed to demonstrate that the grievant's pre-termination rights were not satisfied because she received no notice of the fourth level-one hearing. She simply was not present to respond to the charges against her that formed the basis for her termination. However, be-

cause she was present at the level-two hearing the following month, her Skelly rights were satisfied.

(2) The video of the incident persuaded management that the grievant, not the patron, was the physical aggressor.

(3) The grievant does not believe she did anything wrong. Her actions were motivated to protect MTA property. However, she had more reasonable options available besides physical contact.

(4) The grievant's overreaction, coupled with her previous disciplinary history, justified termination.

(Binding Grievance Arbitration)

Public Employment Relations Board

Orders & Decisions

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

Dills Act Cases

Duty of Fair Representation Rulings

No DFR breach found where contract provisions were not violated: CSEA.

(Sandberg v. California State Employees Assn., No. 1694-S, 9-24-04; 2 pp. + 10 pp. R.A. dec. By Member Neima, with Chairman Duncan and Member Whitehead.)

Holding: The union did not breach its duty of fair representation because the charging party failed to show the union acted arbitrarily or in bad faith with respect to any of its actions.

Case summary: Karen Sue Sandberg filed an unfair practice charge alleging that the California State Employees Association breached its duty of fair representation by interfering with her rights and failing to represent her properly. Sandberg is employed by the Department of Justice.

Sandberg alleged that CSEA failed to file a grievance on her behalf regarding the creation of a hostile work environment and harassment from her superiors. According to the charge, CSEA did not attempt to investigate the merit of her complaints or provide information on the grievance filing process.

Sandberg documented her attempts to have CSEA pursue her complaints and alleged that she repeatedly asked the union to provide information. Various emails showed that the union responded substantively to some of her demands

but ultimately rejected her request to file a grievance because the relevant contractual time period had passed.

No facts were provided as to when “repeated verbal requests” were made, when the contract violations occurred, or what provisions of the contract were violated. The regional attorney found that these specific facts were necessary to determine whether CSEA had breached its duty of fair representation. Moreover, the R.A. determined that the charging party’s claims likely were not covered by the contract.

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

Failure to seek waiver of grievance timeline does not constitute DFR breach: CSEA.

(Harris v. California State Employees Assn., No. 1696-S, 9-28-04; 2 pp. + 7 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Neima.)

Holding: The union did not breach its duty of fair representation by failing to seek a waiver of the timeline for a grievance filing.

Case summary: Melodi Harris filed an unfair practice charge alleging that the California State Employees Association breached its duty of fair representation by failing to seek a waiver of the contractual deadline for filing a

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grievance and failed to pursue reimbursement of educational expenses. Harris had been pursuing reimbursement since 2002.

The grievance procedure outlined in the memorandum of understanding specifies that a formal grievance must be filed within 21 days of the affected employee learning of the events leading to the grievance. The union representative chose not to file the grievance after her request because it was untimely and without merit. The union further declined to seek a waiver of the contractual timeline to file her grievance.

Although Harris asserted that these incidents constituted a breach of the fair duty of representation, she failed to allege facts that demonstrated the union's decisions were without a rational basis or otherwise devoid of honest judgment. The regional attorney dismissed the charge.

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

EERA Cases

Unfair Practice Rulings

Charge dismissed for untimeliness: Salinas Union HSD.

(*Montoya and Salinas Valley Federation of Teachers, AFT Loc. 1020, AFL-CIO v. Salinas Union High School Dist.*, No. 1692, 9-17-04; 2 pp. + 8 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The charge was dismissed because it was filed after the six-month statute of limitations period elapsed.

Case summary: Rosa Montoya and the Salinas Valley Federation of Teachers filed an unfair practice charge alleging that the Salinas Union High School District retaliated against Montoya by scheduling a performance evaluation because she exercised protected rights. Montoya served as a union representative and has filed a number of grievances on behalf of the federation.

In her 2001-02 evaluation, issued in May 2002, Montoya was rated as "unsatisfactory" in the category of "required duties and professional responsibilities." She filed

a grievance concerning the evaluation because she believed it was not issued within the contractual time limits. However, at the Level I meeting, the district did not agree that the contract had been violated. At the Level II meeting, the district conceded that the evaluation was not completed within the appropriate timeline; it advised Montoya that a new evaluation would be conducted during the following school year. Montoya's principal reminded her of this at the beginning of the 2002-03 year.

The regional attorney rejected Montoya's contention that the Level II response was not a specific remedy. The R.A. noted that the letter clearly responded to the grievance and Montoya did not pursue the grievance to Level III.

Montoya also claimed that she did not receive the district's response until the beginning of the 2002-03 year. However, the R.A. observed that when she met with the district, she knew the district had 10 days to respond to the Level II meeting. Her failure to file at Level III rendered the Level II outcome final and binding on the parties in early-July 2002. Montoya did not file her charge until March 26, 2003, and as such, the charge was untimely.

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

HEERA Cases

Unfair Practice Rulings

No unfair practice absent nexus between adverse action and protected activity: CSU.

(*Cornelius v. Trustees of the California State University*, No. 1697-H, 9-30-04; 2 pp. + 11 pp. R.A. dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

Holding: Mere mention of the impact of planned protected activity after a termination decision has been made is insufficient to demonstrate nexus.

Case summary: Charolette Cornelius filed an unfair practice charge alleging that the California State University discriminatorily refused to provide her with training opportunities, failed to reclassify her, denied her merit raises, re-

refused to allow her to use the title of executive assistant, transferred her duties to a white woman, terminated her, and refused to rehire her. Cornelius was employed as an administrative support coordinator in the Water Resources Institute. She originally was hired on a temporary basis, which evolved into two one-year appointments.

The regional attorney found the only allegations that occurred during the statute of limitations period were those concerning the university's termination and its refusal to rehire her. Cornelius engaged in protected activity by being active within the California State Employees Association, and her superiors were aware of her desire to participate in stewards' training. However, the R.A. found insufficient evidence to connect her CSEA participation with the termination and refusal to rehire.

Cornelius' termination was prompted by her participation in two staff development seminars after her superior instructed her not to do so because her job did not require the training. Although her superior mentioned the impact of her termination on her participation in the stewards' training, the R.A. did not find the termination to be connected to her planned attendance at the training. No facts demonstrated how her protected activity was the cause of the university's refusal to rehire her.

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

Union access ban must be narrowly drawn in time, place, and manner: U.C. Regents.

(*University Professional and Technical Employees, CWA Loc. 9119, AFL-CIO v. Regents of the University of California*, No. 1700-H, 11-1-04; 9 pp. + 99 pp. ALJ dec. By Member Neima, with Member Whitehead; Chairperson Duncan dissenting.)

Holding: University's limitations on union access were overly broad.

Case summary: UPTE filed an unfair practice charge alleging that the University of California denied the union access to its facilities on several occasions. The university's

actions took place at the Davis campus and medical center, and at the U.C. Office of the President in Oakland.

The complaint alleged that at Davis, the university prohibited UPTE from conducting demonstrations inside a central administration building, and barred an UPTE representative from entering the campus and medical center for 30 days. The union also alleged that the university prohibited an UPTE representative from conducting a contract ratification meeting on the Davis campus, announced a sweeping new access policy, and then unilaterally implemented the new policy by denying access in a series of actions at the campus and medical center.

Concerning UCOP, the complaint alleged the university unilaterally implemented a new access policy and refused to provide related information that was relevant and necessary for the union to represent employees.

According to UPTE, the university's conduct interfered with the right of employees to have UPTE representation, and with UPTE's right to represent its employees. It also alleged that the university refused to negotiate the changes to the access policy.

In *Regents of the University of California, UCLA Medical Center* (1983) No. 329-H, 59 CPER 60, the board held, "HEERA provides employee organization representatives, employee and non-employee alike, with a presumptive right of access to employees at reasonable times in areas where they work. However, the access afforded must be reasonable in light of particular needs of the workplace in question." An employer may rebut the presumption by demonstrating that a regulation is necessary to prevent disruption of operations.

UPTE and the university have negotiated three collective bargaining agreements with provisions governing access to university property. These provisions permit non-employee union representatives to visit university facilities at reasonable times and with notice. Without a previously scheduled meeting, union representatives must give notice upon arrival in accordance with local procedures. The agreement specifies that union representatives have access to patient care areas only as necessary for travel to and from union business; such areas may not be used for union business un-

less the campus and union agree that such a visit is necessary to address grievances or contract issues.

With respect to the new UCOP access policy, UPTE argued that its provisions are unlawful under HEERA. For example, restricting access to UCOP offices such that a union representative may meet with an employee only by pre-arranged appointment limits casual and anonymous contact with employees. UPTE also alleged that unilateral changes in practice were implemented without offering UPTE the opportunity to negotiate.

The university countered that UCOP has not implemented a new access policy. It met and conferred with UPTE prior to deciding not to implement the policy. Moreover, some of the alleged changes have been in place for several years. The restriction on access to the UCOP offices applies to all visitors and was implemented for safety reasons.

The administrative law judge found that no formal change in policy occurred because it never was implemented. As for the related changes that UPTE claimed were unlawful, the only evidence provided concerned the security policy that had been in place for almost four years prior to the filing of the charge. Accordingly, the record did not demonstrate evidence of unilateral change.

The ALJ also addressed UPTE's claims that the UCOP access policies interfered with employees' representation rights. In *Long Beach Unified School Dist.* (1987) Dec. No. 608, 72 CPER 73, the board held that a public school employer could require visitors to its school sites to identify themselves to school administrators. The reasonableness standard requires the method of identification for union and unrelated visitors be the same. The access practices at the UCOP offices apply to employee organizations and the general public alike. Requiring a union representative to sign in upon entering the building is consistent with the board's standard in *Long Beach* and with the MOU. In *Long Beach*, the board also held an employer may require visitors to identify themselves to protect the employer's interest in monitoring on-site visitors. The ALJ found that the sign-in procedure for union representatives is an acceptable extension of this rule.

UPTE challenged the ban at the Davis campus against all demonstrations inside Mrak Hall. Demonstrations were peaceful and did not disrupt activities. UPTE claimed the ban was overbroad and discriminatory because it restricted expression related to labor relations while permitting other organizations to have a full range of speech rights within the building. UPTE also argued that the ban constituted a unilateral change of the campus access policy, as the university did not meet and confer with UPTE over the change.

The university claimed that demonstrations like the ones led by UPTE never were permissible because the existing access policy disallowed demonstrations inside buildings. Moreover, demonstrations may be banned on operational necessity.

Given the nature of the UPTE-led demonstrations, the ALJ reasoned that the university's concerns about safety, obstruction of the building's ingress and egress, and general disruption of operations were legitimate. The regulation itself, however, was an overly broad restriction on all demonstrations. The same results could have been achieved through narrowly drawn rules regulating the timing of the demonstration, the number of demonstrators, the location, appropriate noise levels, and enforcement mechanisms. The university conceded that non-disruptive peaceful demonstrations are protected conduct prohibited by the blanket ban. The ALJ found that the ban was imposed unilaterally, that access rights are a matter within the scope of representation, and UPTE did not have the opportunity to bargain.

UPTE also challenged the campuswide ban of union representative Pilar Barton. The university banned Barton from access to the entire Davis campus and medical center for 30 days as a result of her protected conduct in connection with a peaceful UPTE demonstration in the Ophthalmology Department. The university enforced the sanction by charging Barton with trespass and having campus police physically escort her from campus while the ban was in effect. The forcible removal, said UPTE, violated Barton's First Amendment rights of freedom of speech and association.

The university believed the ban was lawful because HEERA and the MOU permit sanctions on non-employee

union representatives for violations of local access regulations. The demonstration led by Barton was not protected by HEERA because it grossly violated the access rules. Moreover, the ban was not overbroad because it was limited in time and was supported by the operational need to protect employees and patients from dangerous, disruptive conduct.

The ALJ did not determine whether Barton's conduct violated the access rules because the campuswide ban already was an overbroad restriction. On its face, the ban applied to areas where no operational concerns existed, as well as to areas where no access problems existed. The ban went beyond areas where any reasonable concern about disruption or operational necessity existed.

UPTE alleged that the university imposed unlawful access restrictions on unit employees by requiring a union representative to contact the human resources analyst before visiting the work site and by restricting union contact to non-work areas. The ALJ found these requirements to be within the parameters of the MOU governing access by non-employee union representatives.

The application of restrictions on contact to non-work areas was reasonable, according to the ALJ, because the unit employees have access to confidential and sensitive employee information, and the university has the right to protect the security of its operations.

Other requirements were deemed unreasonable. For example, the provision that required all meetings to be scheduled in advance is in conflict with the MOU, which allows a procedure for unscheduled meetings.

The board affirmed the partial dismissal. In response to the university's claim that access rights are not within the scope of representation under HEERA, the board cited long-standing PERB precedent to the contrary. The university also argued that the campuswide ban of Barton was justified, relying on *Regents of the University of California (Berkeley)* (1985) No. 534-H, 67X CPER 9. There, the board upheld the ban of an employee from a campus library because it was an example of a narrowly drawn time, place, and manner regulation. Had the university imposed a similar ban on

Barton, it may well have withstood scrutiny under HEERA, said the board.

Chairman Duncan dissented. Time, place, and manner restrictions are included within local access rules because they are necessary to avoid disruption of university business. UPTE was well aware of the regulations and violated them repeatedly. The university was within its rights to sanction violators. Barton's ban did not deprive the union of access to employees on campus or bar Barton from access to employees at off-campus sites. Barton was able to communicate with employees in other ways, and the union should have sent another employee in Barton's place to conduct her business. The ban here is justifiable according to the result in *U.C. Berkeley* because the violation there was limited to one place on campus, whereas the violations here were campuswide. Moreover, the university issued a warning before the ban was put into place. The limited-time ban was an appropriate and common-sense response to the violations of university policy.

Representation Rulings

Faculty unit definition clarified to exclude degree-seeking graduate students: CSU.

(*Trustees of the California State University, and California Faculty Assn. and California Alliance of Academic Student Employees/UAW*, No. Ad-342-H, 9-29-04; 3 pp. + 16 pp. R.A. dec. By Chairperson Duncan, with Members Neima and Whitehead.)

Holding: The unit modification was clarified to exclude students who are employed to perform instructional activities, but whose employment status is not solely and exclusively dependent on their status as degree-seeking students in the department in which they are employed.

Case summary: The California State University and the California Faculty Association filed a unit modification petition seeking clarification from PERB regarding the composition of a faculty bargaining unit represented by CFA. The parties' petition cited confusion over the precise definition of excluded employees. When originally created, the

unit definition excluded degree-seeking graduate students in the academic department in which they are employed as instructors and who are employed because they are degree-seeking students in that department. The dispute concerned unit placement of students who are employed to perform instructional activities but whose employment is *not* solely dependent on their status as degree-seeking students in the department in which they were employed.

CFA argued that the parties had agreed during negotiations that unit exclusion would be permissible only if the particular graduate program within that department had a component necessitating teaching experience.

CSU argued that CFA's view concerning unit composition merely was a subjective opinion, and not supported by evidence from the actual negotiations or documents exchanged by the parties. CSU also alleged that CFA failed to establish substantial changes in the duties of graduate students employed in the classification.

The California Alliance of Academic Student Employees/UAW argued that the petition should be dismissed as untimely because it was filed after the proper intervention period and without any evidence of support for CFA. Alternatively, UAW contended that CFA was attempting to rewrite the original unit modification order, rather than modify it. The original exclusion was not as narrow as CFA now claims, and CFA has never represented graduate students holding teaching positions. Moreover, the teaching associate position that was created in 1991 after the unit modification did accurately reflect the exclusion.

In *Union Electric Co.* (1975) 217 NLRB 666, the National Labor Relations Board determined that unit clarification is appropriate for resolving two types of ambiguities. One concerns individuals in newly established classifications. The other concerns existing classifications whose duties and responsibilities have undergone recent, substantial changes so as to create real doubt as to whether the individuals in those classifications continue to fall within the previously defined category. Clarification is not appropriate to upset an established practice between the union and the employer concerning the unit placement.

The regional director found that CFA failed to demonstrate either that the teaching associate classification was "newly established" or that a substantial change in the duties of the position had occurred. The R.D. found the attempt to clarify the original unit modification order was contrary to the holding of *Union Electric Co.*

However, the R.D. also found that a bona fide dispute existed that fell within PERB's statutory authority. The essential difference in the positions taken by CSU and CFA concerned whether the exclusion of student employees is contingent on the instructional employment being a requirement for the student to obtain a graduate degree in his or her academic department. CFA claimed the exclusion was contingent; CSU disagreed. The R.A. found CSU's characterization of the exclusion to be correct.

Accordingly, the board issued an order to clarify the original unit modification, specifying that the unit exclusion pertains to graduate students who are employed in their academic departments because they are degree-seeking students in that department.

MMBA Cases

Unfair Practice Rulings

Dismissal of unilateral change allegations upheld: City of Ontario.

(*AFSCME v. City of Ontario*, No. 1695-M, 9-27-04; 2 pp. + 21 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The charging party failed to demonstrate an alteration in policy that would constitute a unilateral change.

Case summary: AFSCME filed an unfair practice charge alleging in part that the city of Ontario unilaterally changed existing disciplinary procedures. The dispute arose out of the dismissal of two maintenance employees. According to the city, the two men failed to complete their job assignments and had falsified paperwork. Each employee received a notice of intent to terminate. The notice informed

the employees of their right to respond to the charges against them and imposed a deadline for presenting such a response.

AFSCME complained that the city imposed a deadline for making an oral presentation when no such term existed in the parties' memorandum of understanding. According to Art. VII and past practice, the union claimed that employees have 10 working days to respond to such a notice. The city took the position that the MOU merely granted employees the right to respond before the discharge was finalized. Moreover, the city claimed that Art. VII, Sec. E, of the MOU already allowed a serious disciplinary action to be appealed to an independent hearing officer, thus rendering another contract provision unnecessary.

AFSCME alleged that the city's position illustrated its intent to unilaterally impose new disciplinary procedures and time lines. Specifically, the charge alleged that the city made three unilateral changes to the disciplinary procedure. First, AFSCME contended that the city's statement that one provision of the MOU was "unnecessary" amounted to a unilateral change. Other than this statement, however, AFSCME provided no facts demonstrating a change in policy or that the Art. VII appeal hearing was denied by the city.

Second, AFSCME alleged that the city reduced the number of days an employee is given to respond orally to proposed discipline in violation of Art. VII and the parties' past practice. Article VII does not provide a time line for an employee's response to proposed discipline. The only time frame refers to the 10-day advance notice that the city must give before implementing a disciplinary action. No facts established a past practice whereby employees were allowed 10 working days to respond orally to potential discipline. Even if such a practice did exist, the regional attorney reasoned, the employees here were given more than 10 working days to respond. No change in policy, and thus no unilateral change, occurred.

Finally, AFSCME argued that the city made a unilateral change when it terminated the employees prior to the completion of the contractual appeal procedure. According to the union's interpretation of Art. VII, an employee may not be terminated until the appeals process has been ex-

hausted. The R.A. found this interpretation to be at odds with the actual language of the contract, which specifies that an employee has the right to appeal within 14 days after the imposition of serious disciplinary action. Accordingly, the R.A. also dismissed this portion of the charge.

The board affirmed the partial dismissal of the charge.

Contract bar rule will not be imposed where the legislature declined to do so: City of San Rafael.

(Service Employees International Union, Loc. 949 v. City of San Rafael, No. 1698-M, 10-20-04; 4 pp. + 8 pp. R.A. dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

Holding: The charging party failed to demonstrate that the city's local rule was unreasonable.

Case summary: Service Employees International Union, Local 949, filed an unfair practice charge alleging that the City of San Rafael violated its local rules by allowing a petition to modify the miscellaneous unit represented by Local 949.

The city received a petition from the San Rafael Confidential Unit, seeking to sever 10 classifications from the miscellaneous unit. The petition was accompanied by all of the required information set out within the applicable city rules, including a certified copy of SRCU's bylaws and authorization cards signed by all of the proposed bargaining unit members.

Local 949 made two separate allegations regarding the city's conduct. First, it claimed that the city violated its local rules by accepting the petition because SRCU is not an employee organization under city rules and the petition did not conform to those rules. Second, Local 949 contended that the local rule is unreasonable because it allows a bargaining unit to be modified while a contract between the parties is in effect.

The regional attorney found the evidence demonstrated that SRCU filed its petition during the appropriate time period and with the proper documentation, stating that its primary purpose was the representation of employees. As Local 949 failed to provide any evidence demonstrating oth-

erwise, the R.A. dismissed the allegation. Moreover, contrary to the claims of Local 949, neither the MMBA nor PERB case law requires an employee organization to have an affiliation with a local, state, or national employee organization.

In evaluating a local rule, the question is whether it is consistent with, and effectuates the purposes of, the express provisions of the MMBA. Local 949 argued that because a contract bar exists in EERA, HEERA, and the Dills Act that supercedes the right of public employees to vote on a question of majority representation every 12 months, a similar doctrine should apply to those public agencies covered by the MMBA.

The R.A. disagreed. In *SEIU v. City of Santa Barbara* (1981) 125 Cal.App.3d 359, the Court of Appeal refused to assume the legislature intended the contract bar doctrine to apply where it had not expressly authorized its application. In fact, as the board noted, the legislature specified contract bar rules of varying lengths in EERA, HEERA, and the Dills Act. The city's rule provides a limited amount of time during which a petition may be filed, and the R.A. found it to be in accordance with the purpose of such contract bar provisions. The allegation was dismissed.

The board dismissed the charge, finding that Local 949's appeal failed to explain why the board ought to impose a contract bar rule where the legislature had remained silent.

No unilateral change where union agreed to new proposal: Yuba County.

(*Yuba County Employees Assn., Loc. No. 1 v. County of Yuba*, No. 1699-M, 10-20-04; 2 pp. + 9 pp. R.A. dec. By Chairperson Duncan, with Members Neima and Whitehead.)

Holding: The county's action did not constitute a unilateral change because the charging party agreed to the change in policy.

Case summary: The Yuba County Employees Association, Local No. 1, filed an unfair practice charge alleging that Yuba County unilaterally changed salary differentials between eligibility supervisors and two other classifications.

According to the charge, the salaries of system support analysts and program specialists must be set at approximately 5 percent below that of eligibility supervisors. This differential was agreed to when the positions were created. In 2000, the county initiated a major classification and salary review, and subsequently approved a preliminary salary increase for the eligibility supervisors that increased the differential to 9.5 percent. The association sought to restore the salary alignment, but the county asked to delay salary discussions until completion of the study. The county's conclusions from the study included a proposal for a revised pay-range table that did not reinstate the pay alignment.

The association alleged that it did not have the opportunity to negotiate the salary alignment issue, and that a unilateral change occurred when the county failed to maintain the alignment. However, the parties entered negotiations for a new memorandum of understanding in early 2003, well before expiration of the existing MOU. During those negotiations, the county submitted a pay-band proposal based on the new pay-range table, and while it offered other concessions to the association, it refused to negotiate on the subject of salary alignment.

The association agreed to submit the county's offer to its members, minus any mention of the restoration of the alignment. The contract was approved, including the pay-band proposal.

The regional attorney determined that the association did not present a prima facie case of unilateral change. She reasoned that the association had been aware that the county's MOU proposal did not include a salary alignment, but submitted it to the members for approval regardless. The membership considered and approved the pay-band proposal with the understanding that it did not include the alignment. Thus, the ratification of the proposal eliminated any further obligation on the part of the county to specifically negotiate elimination of the salary alignment.

The board affirmed the R.A.'s dismissal of the charge, but did so on the theory that there was no evidence the county's commitment to maintaining the 5 percent salary differential was more than a one-time salary adjustment.

Duty of Fair Representation Rulings

No DFR violation absent bad faith, arbitrary conduct: SEIU.

(*Hessong v. Service Employees International Union, Loc. 250*, No. 1693-M, 9-17-04; 2 pp. + 13 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: There was no violation of the duty of fair representation because the union diligently pursued the questioned grievances.

Case summary: Timothy Hessong filed an unfair practice charge alleging that the union violated its duty of fair representation with respect to several pending grievances. Hessong is employed as a pharmacy technician at San Francisco General Hospital.

The primary focus of the charge was Hessong's grievance regarding the hospital's policy on varicella, the virus that causes chicken pox. The hospital required all employees to receive an immunization against chicken pox; if an employee was not immune and consequently was exposed to the virus, he was required to be quarantined from the hospital environment for 11 days. Both the city's civil service rules and the parties' collective bargaining agreement require an afflicted employee to use sick leave for this purpose.

After Hessong was exposed to chicken pox in October 1999, he was ordered to leave the hospital. He missed five regular days of work and was charged for sick leave pursuant to the contract. He filed a grievance concerning the quarantine, which the union pursued through Step III. At that point, he communicated with the union regularly about his grievance and asked that it be elevated to binding arbitration. Confusion ensued over the union's true intention and feeling over the merits of the grievance, but at the time the charge was filed, the possibility of arbitration had not yet been foreclosed.

Hessong complained that a number of other class grievances were not handled properly by the union. These grievances concerned the existing shift-bidding procedure, the use of "as-needed" employees in the pharmacy, and the use

of pharmacy registry technicians to do the work of pharmacy technicians. The union had elevated all three grievances to Step III at the time the charge was filed.

The regional attorney found that the union had not breached its duty of fair representation. While the processing of the chicken pox grievance had taken over two years, the delay was the result of the hospital's failure to respond in a timely manner and the number of representatives who had come and gone from the union. The union stewards' council had voted that the grievance was worthy of arbitration, but the union's informed decision not to pursue the grievance further did not breach the duty of fair representation. The standard for evaluation of alleged breach is whether the decision was arbitrary or irrational. The chicken pox grievance decisions were neither.

Similarly, the union's treatment of the other three grievances did not demonstrate bad faith or arbitrary conduct. Each grievance had been pursued diligently by the union through Step III, and although resolution took longer than Hessong expected, there was no support for his belief that the union had abandoned them without resolution.

Accordingly, the board dismissed the charge.

Activity Reports

ALJ Proposed Decisions (by Region), November 1, 2004 - February 28, 2005

Sacramento Regional Office — Final Decisions

Wheatland Elementary Teachers Assn. v. Wheatland Elementary School Dist. Case SA-CE-2204-E. ALJ Allen R. Link. (Issued 12-7-04; final 1-7-05; HO-U-864-E.) The district unlawfully retaliated against a union activist by issuing her a letter of reprimand for the way she handled the examination of a student's head for lice. The ALJ found the basis for the letter pretextual.

San Francisco Regional Office — Final Decisions

University Council-American Federation of Teachers v. Regents of the University of California, Case SF-CE-587-H. ALJ Fred D'Orazio. (Issued 8-9-04; final 1-24-05; HO-U-587-H.) During negotiations for a successor agreement, the university unilaterally changed a collective bargaining agreement that mandated post-six-year appointments for lecturers if the lecturer has taught on the same campus for six years, instructional need exists, and the lecturer is rated excellent. The ALJ found that an instructional need existed within the meaning of the contract and the university unlawfully refused to evaluate eligible lecturers to determine if they met the standard of excellence.

Los Angeles Regional Office — Final Decisions

Lennox Teachers Assn. v. Lennox School Dist., Case LA-CE-4669-E. ALJ Allen R. Link. (Issued 11-8-04; final 12-6-04; HO-U-862-E.) There was no duty to negotiate about the decision to implement a block schedule for teachers that did not increase non-contractual work time; however, a duty exists to negotiate about the effects of the decision. The ALJ also found that the district unlawfully refused to provide information necessary and relevant to negotiating about the effects of the schedule, including data about class size and master schedules. The claim that the district had a duty to provide information concerning its notification of the new schedule to teachers was rejected as not directly relevant to effects bargaining.

Shannon v. Los Angeles Unified School Dist., Case LA-CE-4728-E. ALJ Donn Ginoza. (Issued 11-15-04; final 12-13-04; HO-U-863-E.) The district did not retaliate when it issued an allegedly negative evaluation against an employee who had a long history of filing grievances and unfair practice charges. The ALJ found no unlawful intent, and the evaluation was not an adverse action because it was not negative in relation to previous evaluations.

Mohseni v. United Teachers of Los Angeles, Case LA-CO-1165-E. ALJ Donn Ginoza. (Issued 12-31-04; final 1-27-05; HO-U-866-E.) The district offers teachers out-of-classroom assignments, including the position of dean, and the collective bargaining agreement requires that deans be selected by an election process to avoid favoritism. After Mohseni lost an election for dean, he charged that the union breached its duty of fair representation in the way it administered the election process. The ALJ found no fault in how the union handled election-related issues, and there was no evidence of bad faith on the part of the union.

Bass v. United Teachers of Los Angeles, Case LA-CO-1156-E. ALJ Thomas Allen. (Issued 1-13-05; final 2-8-05; HO-U-867-E.) An employee alleged that a union breached its duty of fair representation when the union and district appointees to a dispute resolution "flipped a coin" to resolve an issue about the employee's assignment. The appointees testified that they reached a consensus and did not flip a coin. The charge was dismissed.

Academic Professionals of California v. Trustees of the California State University, Case LA-CE-776-H. ALJ Fred D'Orazio. (Issued 1-28-05; final 2-23-05; HO-U-868-H.) The university breached its duty to bargain in good faith when it unilaterally altered released-time provisions in the collective bargaining agreement. The ALJ found that the agreement provided for two types of released time: exercise of union rights and grievance processing. He also found that separate restrictions attached depending on the type of released time used, and the university unlawfully lumped both into one category and applied a single set of restrictions. The ALJ also found that the university had no duty to bargain about the decision to preclude nonemployees such as family members and friends from entering the workplace

where employees actually perform duties, but the effects of the decision are negotiable.

Sacramento Regional Office — Decisions Not Final

No proposed decisions became final.

San Francisco Regional Office — Decisions Not Final

California Faculty Assn. v. Trustees of the California State University, SF-CE-784-H. ALJ Fred D’Orazio. (Issued 12-20-04; exceptions filed 2-7-05.) Education Code Sec. 89542.5 provides for a grievance procedure to resolve disputes about faculty status and states that the decision of the arbitrator “shall be final.” For years, the agreements between the parties contained restrictions on arbitral authority. The legislature enacted S.B. 1212, which amended the HEERA supersession clause to add Sec. 3572.5(b)(1). S.B. 1212 provides that Ed. Code Sec. 89542.5 may be superseded by a memorandum of understanding only if the agreement provides “more than the minimum level of benefits or rights set forth in that section.” Based on S.B. 1212, the ALJ found that the university breached its duty to bargain in good faith when it insisted to impasse on a proposal that would restrict the authority of the arbitrator. The ALJ found the legislature established the right to a final decision by the arbitrator as a statutory minimum that may not be insisted on to impasse.

Doherty v. San Jose/Evergreen Community College Dist. Case SF-CE-2312-E, and *O’Neil v. San Jose/Evergreen Community College Dist.*, Case SF-CE-2313-E. ALJ Donn Ginoza. (Issued 1-5-05; exceptions filed 2-25-05.) The ALJ found that the consortium, a joint powers agency of several districts, established to provide training in the area of public safety, is a joint employer with the district. The ALJ also found that the consortium retaliated against employees because of their protected activity of challenging work rules and representation by the union attorney when a coordinator/supervisor refused to assign employees’ hours.

Coalition of University Employees v. Regents of the University of California, Case SF-CE-663-H. ALJ Donn Ginoza. (Issued 2-10-05; exceptions due 3-2-05.) The university discriminated against the union at its Riverside campus in de-

nying use of the campus list-serve system known as Scotmail, where policy permits use for “official University business” and the university permits social, educational, and mutual aid announcements of other organizations. The ALJ found that the university has “opened the forum” to use of Scotmail. The university’s claim that the discrimination allegation was time-barred was rejected. The ALJ found the conduct to be a continuing violation. The ALJ also found an independent statutory right to use Scotmail because it falls within the definition of “other means of communication” in HEERA, and evidence does not show that use of Scotmail would be disruptive. The claim that the university unilaterally changed systemwide policy was rejected where the policy allows for “incidental use” but Scotmail grants access only for “official business” on behalf of an organization, department, or other campus entity.

Vacaville Teachers Assn. v. Vacaville Unified School Dist., Case SF-CE-2385-E. ALJ Timothy Yeung. (Issued 2-25-05; exceptions due 3-18-05.) The district breached its duty to negotiate in good faith by unilaterally converting the method of paying teachers who elect to be paid on a 12-month basis. It switched from calculating their gross salary and deductions on a 12-month basis to a “deferred net” system that permits calculating gross salary and deductions on a 10-month basis.

Los Angeles Regional Office — Decisions Not Final

Temple City Educators Assn. v. Temple City Unified School Dist., Case LA-CE-427-E. ALJ Ann Weinman. (Issued 12-9-04; exceptions filed 1-3-05.) The district did not breach its duty to bargain when it failed to ratify a tentative agreement on health benefits and salary where the governor announced mid-year budget cuts shortly before the scheduled ratification. The ALJ found the district breached its duty to bargain when its governing board subsequently ratified a second district proposal on health benefits and salary before securing union agreement, notwithstanding the fact that the union later ratified the proposal because it was under pressure to maintain the benefits. The ALJ also found the district did not breach its duty to bargain when it refused to

implement an on-schedule salary adjustment to which it had not agreed. But it breached its duty to bargain when, without justification, it abruptly withdrew an off-schedule salary adjustment to which the parties had agreed.

Torrance Craft and Trades Assn. v. City of Torrance, Case LA-CE-159-M. ALJ Allen Link. (Issued 2-24-05; exceptions due 3-16-05.) An extension of a collective bargaining agreement between the union and the city six months before expiration of the agreement constitutes a premature extension that does not bar a valid decertification petition filed within the window period under local employee relations rules. The petition to revoke support of the decertification filed by the incumbent union was rejected in the absence of a notice challenging the union and evidence that the petition and signatures thereon were based on fraud.

Report of the Office of the General Counsel

Injunctive Relief Cases

Three injunctive relief requests were filed between November 1, 2004, and February 28, 2005.

San Bernardino Public Employees Assn. v. County of San Bernardino, IR No. 476, Case LA-CE-200-M. The injunctive relief request was filed on 10-29-04 and was withdrawn on 11-08-04.

Union of American Physicians and Dentists v. State of California, IR No. 477, Case SF-CE-228-S. An injunctive relief request was filed on 12-17-04 and was denied on 12-28-04. Issue: UAPD requested that PERB seek an injunction to prevent implementation of a physician evaluation program by the Department of Corrections prior to the completion of bargaining.

Union of American Physicians and Dentists v. State of California, IR No.478, Case SF-CE-228-S. An injunctive relief request was filed on 2-23-05 and was withdrawn on 3-1-05. Issue: UAPD requested that PERB seek an injunction to prevent implementation of a physician evaluation program by the Department of Corrections prior to the completion of bargaining.

Litigation Activity

Two new cases opened and three cases closed between November 1, 2004, and February 28, 2005.

International Association of Fire Fighters Loc. 188, AFL-CIO v. PERB and City of Richmond, Court of Appeal First Appellate District, Case Number A108875 (Case SF-CE-157-M, No. 1720-M). Issue: Did PERB err in partially dismissing a portion of the unfair practice charge. On 1-12-05, the writ of mandate was filed, and the court denied the writ on 1-28-05.

Ferguson v. PERB, Superior Court of Alameda County, Department 31, Case Number RG 04-186166 (Case SF-CE-2364-E, No. 1645). Issue: Did PERB err in dismissing the unfair practice charge. On 10-7-04, Ferguson requested that PERB provide the administrative record. On 1-10-05, Ferguson served PERB with the petition for writ of administrative mandamus, notice of hearing, and proposed order. On 1-20-05, PERB filed its preliminary opposition.

Jeffers v. Public Employment Relations Board, Court of Appeal, First Appellate District, Case Number A107722 (Case SF-CO-23-M, No. 1675-M). On 9-17-04, Jeffers filed a civil writ seeking to overturn the board decision. The court denied the petition of writ of review on 1-12-05.

Regulation Adoption and Modification

On December 15, 2004, PERB filed proposed permanent regulation changes with the Office of Administrative Law in response to the enactment of PERB jurisdiction over the Trial Court Employment Protection and Governance Act and the Trial Court Interpreter Employment and Labor Relations Act.

A public hearing was held on February 10, 2005. A 15-day notice that PERB was considering additional related changes to the proposed regulations was mailed on February 11, 2005, with the comment period closing on March 4.