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letter from the guest editor

Dear CPER Readers,

The labor-management community lost an inspired but modest giant when Don Vial passed away on May 1.

Most remember Don from his eight years as director of the California Department of Industrial Relations in Governor Jerry Brown's Administration. But he had made his mark long before then. Don came to the Institute of Industrial Relations at U.C. Berkeley in 1964, serving as chair of the newly created Center for Labor Research and Education within the Institute. As research and education director for the California Labor Federation (1950-64), having earned a masters degree from U.C. in labor economics, he helped bring the labor movement and the university together to create the Labor Center. (A sister center also was formed at UCLA.)

Under his direction for over 10 years, the Labor Center utilized the university's resources to educate union leadership, enhance labor-management relations, and address workplace issues. Among the many new programs he advanced were the Labor Occupational Health Program, the Minority Union Leadership Training Program, and a curriculum of union leadership training classes offered through community colleges. He also helped initiate the Institute's arbitrator training program for minority group members and women in the early 1970s, many of whom became leading arbitrators and judges.

Don had a special relationship with the California Public Employee Relations Program, being instrumental in launching the project back in 1968. With enactment of the Meyers-Milias-Brown Act, which introduced "meet and confer"-style collective bargaining to cities and counties, Don and Institute Director Lloyd Ulman and Associate Director George Strauss encouraged IIR labor economist Betty Schneider to write a little newsletter, dubbed "CPER." The idea was to report on what various public agencies and employee groups (some declined to be called "unions" in those days) were doing to adapt to this new way of dealing with each other. This "clearing house" of information allowed practitioners to learn from others' achievements and missteps. It grew from a typed newsletter, mailed free to anyone who asked, to the *CPER Journal* we have today. Don kept an active interest and wrote articles for *CPER*.

In his years at DIR (1975-82), Don continued to build consensus on many reforms affecting workers and employers. Farm workers were a major concern, and he is credited with eliminating use of the short-handled hoe and fostering other improvements in working conditions. When appointed to the PUC (1983-88), he pursued his other major interests in consumer, conservation, and environmental issues. He then became chairman of the California Foundation on the

Environment and the Economy, where he worked on his two interrelated concerns — environment and employment. During the recent power crisis, Governor Davis named him to the board of the Consumer Power and Conservation Financing Authority. He also served on the Fair Political Practices Commission, in addition to many community organizations involved with consumer rights, public television, and disabilities.

Don brought boundless energy, dedication, and unshakable ethical standards to everything he did, and accomplished twice what any average person could in his 81 years. Born in Stockton from immigrant parents, he was a brilliant but pragmatic idealist, who believed the world could be made better and set out to make that happen. And he never quit, right up until the time of his death. A passionate advocate who sometimes ruffled feathers, he was universally liked and respected by people on both sides of an issue for his fairness, honest standards, and conviction that people could work together for the common good.

Don had a way of changing people's lives, and I am one of the lucky ones. He opened my mind to new ideas; I learned more in the five years I was his assistant at the Labor Center than I had in my university education. He encouraged me to study labor law before many women were labor lawyers, and told me I could become an arbitrator despite the perceived handicaps of youth and gender. He never ceased to inspire and amaze me in our 40 years of friendship.

Bonnie Bogue
CPER Program (1970-93)

Bonnie Bogue currently is an arbitrator and mediator. She was on the staff of CPER from 1970 to 1993. The last two years of her tenure, she served as director.

Interesting Times — Los Angeles County and Fringe Benefit Negotiations

Rhonda Albey

Rhonda Albey has worked in the Employee Relations Division of Los Angeles County's Chief Administrative Office for 15 years, primarily with the Department of Health Services. She holds a Ph.D. from UCLA in Education/Management, teaches classes in organizational management and conflict resolution for the University of Phoenix, and is the author of CPER's Pocket Guide to the Basics of Labor Relations. For information about L.A. County and copies of MOUs, visit <http://cao.co.la.ca.us/erd/erd.htm/>.

An ancient curse exerts, “May you live in interesting times.” The fall of 2003 definitely was “interesting” for California employers and labor unions. Costs for health insurance premiums had begun to rise at double-digit rates, and employers were finding it difficult to maintain the existing level of health benefits. As a result, nearly 80,000 public and private sector employees in Southern California walked off the job after failing to reach agreement while bargaining over those benefits. Employers and union officials around the country were monitoring the strikes because their outcomes could set a precedent for other workers in Southern California, and perhaps nationally.

In the private sector that October, the three major supermarket chains in Southern California — Vons (Safeway), Ralphs, and Albertsons — began a five-month strike and lockout over the issue of employer contributions to health insurance for store workers and their families. Supermarket owners proposed that employees pay 50 percent of the cost of health premiums. They claimed they could not maintain health benefits and compete with discounters like Wal-Mart.

On the other side, supermarket employees enjoyed a decent wage and benefit package, and the grocery workers' union, United Food and Commercial Workers, Local 770, saw this as a fight they could not afford to lose. In light of the frequent invocation of “Wal-Mart,” UFCW worried that the employers' position was just a step away from the low-wage, no-benefit model commonly associated with the huge shopping chain. The parties ultimately settled on a two-tier system, in which current employees will begin to make payments for health insurance for their families in the third year of the contract. New employees receive lower wages and limited health coverage.

That fall, the public sector faced similar pressures. Employees of the Metropolitan Transit Authority, which operates buses and light rail for the Southern

California region, engaged in a month-long strike after negotiations broke down over employer contributions to health insurance premiums. Under past agreements, the employer paid the full cost of health insurance.

Like their counterparts in the private sector, public employee unions saw themselves as trying to hold the line against eroding health benefits as rising health care premiums forced changes in coverage. For example, in 1991, the state paid the full cost of insurance for single employees, and 90 percent of the cost for family coverage. By 2003, the state contributed just 80 percent for both single employees and families.

At the time of the MTA strike, employees were paying a minimal monthly amount for health insurance, but the agency claimed it could no longer afford the existing level of subsidy. Public unions and agencies watched from the sidelines, believing that the outcome in the MTA strike could set a pattern for future employee concessions. Eventually, the strike ended without a settlement, when the parties agreed to submit the dispute to arbitration.

This was the charged atmosphere in which the County of Los Angeles came to the table to reach agreement with its labor unions on fringe benefits for the 2003–06 term.

County of Los Angeles and County Labor Unions

As if the pressure to maintain benefits were not enough, the state's worsening financial condition made the situation even more difficult. The budget proposed by Governor Gray Davis in January 2003 resulted in increased costs for Los Angeles County. And, after Davis was recalled that October, Governor Schwarzenegger reduced vehicle license fees, which had been an important source of revenue. While reeling under this double hit, the county then had to cope with the word from insurance providers that health premiums would increase by 13 percent in 2004.

In the face of this perfect storm of bad news, the county's initial position in contract negotiations for both salaries and fringe benefits was simply, "No." There would be no increase in salaries and no increase in county contribution toward health insurance premiums for the 2003-06 contract term. Naturally, this position was unacceptable to the unions since it would have meant a decrease in workers' actual take-home pay. The unions' initial position was to maintain the status quo — to have the county pick up the full cost of health premium increases, with no change in plan design for the term of the three-year agreement.

The county's position was a departure from recent practice. As health premium costs increased in the late 1990s and early 2000s, the county had avoided passing on the increases to employees. In the stark economic climate of fall 2003, however, the Los Angeles County Board of Supervisors determined that employees had to share more of the cost. Despite pressure from Local 660 and the coalition, the board did not waver.

While it is not easy to reach agreement when both sides hold mutually exclusive positions, the county and its labor unions eventually forged new contracts. There were some scattered sickouts and work slowdowns, but labor unrest in Los Angeles County did not reach the crippling levels experienced by the supermarket chains or MTA. How agreement was reached in a relatively painless manner may provide lessons for other agencies.

Background

To appreciate the transformation in county labor relations that took place during the 2003 negotiations, it is instructive to understand the background in which bargaining occurred. There are 17 different unions representing 54 bargaining units in the County of Los Angeles. Many years ago, for administrative convenience, the county and its unions decided to bargain fringe benefits separately from salaries

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and operational issues. Fringe benefits such as retirement, paid leave, mileage reimbursement, and health, dental, and life insurance, are contained in two agreements. One is negotiated with the Coalition of County Unions, a group of 12 unions that represents approximately 30,000 employees. The other is negotiated with Service Employees International Union, Local 660, which represents another 40,000 county employees. Every bargaining unit, including four independent unions, must choose to take either the Coalition or the Local 660 fringe benefit package.

Historically, the county has not negotiated separate fringe benefit agreements with the different bargaining units. While this arrangement poses advantages in terms of ease of administration and economy of scale, it has not encouraged employees to think in terms of a comprehensive compensation package or total integrated bargaining. In other words, employees do not consider what they receive in fringe benefits as compensation; they look only at salaries. If there were substantial increases to the fringe benefit package but modest salary increases, employees felt they got “nothing.”

This was a crucial issue during the 2003 negotiations. At a time when the county faced a significant financial crisis, it was under pressure from the unions to absorb a 13 percent increase in health premiums. There was no way the county could cover health plan costs and, at the same time, offer salary increases. And, even if the county were fully responsive to union demands to maintain health insurance benefits, this would have been perceived as giving nothing, and would have made it almost impossible to reach agreement on the bargaining unit contracts. In order to resolve this dilemma, Los Angeles County needed a “paradigm shift.”

The Shift

For a cohesive shift in vision to occur, each side has to change its point of view. In the case of Los Angeles County, the shift on the union side came from SEIU, Local 660. SEIU

had studied the health insurance issue on a national level and had educated its locals about the implications for bargaining. As Bart Diener, Local 660’s assistant general manager, observed, the union was looking at the big picture. The issue was not simply that the county was refusing to fund benefits at previous levels, but that external forces were putting financial pressures on local government, making it harder for the county to meet union demands. Since there was no money to be had, it would benefit everyone if the parties could work together.

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In the case of county government, the paradigm shift came from the new chief of employee relations, Jim Adams. He arrived from Montana in August 2003, with considerable labor relations experience as both a union official and a government representative. He brought a new approach — integrated bargaining — in which salaries and benefits were negotiated in a strategic, coordinated manner.

Also new to the process was Cathy O’Brien, who had helped develop an employee benefits coalition in Multnomah County, Oregon, that included all county unions. Building on the principle that two heads are better than one, the unions in Oregon were given all the information they needed to make benefits decisions. The coalition established a floor benefit package and designed plans to fit employees’ various needs. This process ultimately resulted in significant savings for Multnomah.

In L.A. County, fringe benefit negotiations were made easier by the fact that the county and unions have had long-standing benefit advisory committees. These committees (referred to as “BAC” by Local 660 and as “EBAC” by the Coalition) are labor-management partnerships that flesh out the county’s benefit plans. The fringe agreements spell out terms such as what is included in plans, who is eligible, and when coverage can be changed. It is the role of the BAC/EBAC to facilitate the many details of plan design and administration not covered in the contract.

The advisory committees have built bridges between county management and union representatives, and have

enabled both parties to study benefits over the long term. Local 660's BAC brought in representatives from the insurance carriers to discuss ways that health plans might be redesigned to mitigate costs. The committee hired experts to make recommendations.

Negotiations

In preparing for 2003 negotiations, the county knew it had to slow its escalating health care costs by placing a cap on its contributions to health premiums in each of the three years of the contract. After doing its own research, Local 660 knew it would have to accept such a cap. The question was where the cap would be placed.

Knowing that the premium increase for 2004 would be 13 percent, Local 660 initially proposed that the cap be placed at 13 percent over the existing rate. The county proposed a cap of 5 percent. While this gave the parties room to maneuver, they did not have a lot of time. The new premiums were set to go into effect on January 1, 2004.

For the county to officially increase the amount of its health premium contribution, the board of supervisors needed to approve the memorandum of understanding by its last meeting of 2003, which was to be held on December 16. In order to allow time for ratification and processing of the MOU, this really meant the parties had to reach agreement by mid-November 2003. If they failed, employees would be forced to pick up the entire 13 percent premium increase.

Because neither party wanted that outcome, county and union representatives and outside experts met around the clock for days. A compromise was reached at the last moment. The county agreed to pick up the full 13 percent premium increase for 2004, but there would be no salary increase. Also, the county's future liability for premium increases would be limited to 7.5 percent each year for 2005 and 2006. In exchange, Local 660 employees would receive salary increases of 2.5 percent each year in January of 2005 and 2006, contingent on the following language:

The county knew it had to slow escalating health care costs by placing a cap on its contributions.

It is understood by the parties to this MOU that Los Angeles County receives revenue from sources that are unpredictable, and over which the County has no control. It is further understood that any significant reductions in these revenues could create a financial emergency for Los Angeles County.

For the sole purpose of modifying [the salary article] no later than October 1 of each year the Board may declare a financial emergency. Such a declaration will be made only in the event of a significant reduction in ongoing local revenues, significant State or Federal reduction in revenues, and/or a shift in costs resulting in major increased expenditures having a Countywide implication.

If a declaration of financial emergency is made, then any prospective scheduled salary increases for the fiscal year found in [the salary article] are cancelled and the parties shall reopen negotiations on all economic issues.

No financial emergency shall be declared without meeting and consulting with the Union. The declaration of a financial emergency shall not be subject to the grievance or arbitration process found in any MOU between the parties.

In other words, the agreement provided that employees would get a 2.5 percent salary increase every year, unless the county's financial situation were to deteriorate further and the board of supervisors were forced to declare a financial emergency.

Despite this language, the union remained concerned about the rising costs of healthcare premiums. Many employees it represents are in relatively low-paying clerical and service positions, and if the cost of health care premiums were to go up substantially more than 7.5 percent in 2005 and 2006, these employees would be faced with difficult-to-manage decreases in their monthly take-home pay. The county and Local 660 therefore agreed to the following language:

At SEIU Local 660's sole option, the Union may reopen the 2003-2006 Fringe Benefit MOU and the Individual Unit Contracts (Salary Article) for the purpose of

negotiating a shift of general movement salary dollars to increase the County's Options (Health Insurance) contribution in 2005 and/or 2006.

This meant the union could ask that the 2.5 percent salary increase be diverted to cover increases in health insurance premiums. The provision codified Jim Adams' idea of a total compensation package: money designated for salary increases can be used for benefits and vice versa, allowing for flexibility in response to changing employee needs and economic conditions.

The last issue to the parties was the overarching problem of how to control health benefit costs. While the 7.5 percent cap limited the county's liability, it did not address how the county and union could keep health premium increases close to the cap.

In response, the parties added an appendix to the fringe benefit contract, entitled "Health Insurance Cost Mitigation Criteria." Employing principles of openness and employee empowerment, the BAC has been charged with developing and implementing a plan for County Benefit/Local 660 programs. Its mandate is to control costs, reduce unnecessary and inappropriate health care use, and improve employee health. Towards those goals, the BAC will collect data on health conditions, and use it to design a program and measure the effectiveness of changes. Furthermore, the BAC will implement a wellness, risk reduction, and disease management program to boost employee health and reduce the use of health care facilities.

Lessons Learned

The success of Los Angeles County and its unions can provide a bargaining blueprint for other agencies.

The process starts before negotiation begins. In order to have meaningful discussions, parties need to develop a relationship of trust. If the county and union representatives had not had a long history of working together, and if there had been no BAC/EBAC, with its well-informed and thoughtful participants, it is likely the agreement would not have been achieved.

Before a new concept is introduced into official negotiations, plenty of time should be given for informal talks so

that bargaining counterparts can fully research ideas and discuss them among themselves. A standing work group, such as a BAC, is one way to accomplish this. Absent such a group, parties need to establish and maintain other channels of communication.

The three most important considerations in fringe benefit negotiations: information, information, and information. People cannot make good decisions without information; this is particularly true in fringe benefit negotiations. When both parties put their information on the table, everyone understood exactly what was achievable and what was not. Having everyone informed meant that more people could contribute to the decisionmaking process, thereby generating more and better alternatives.

Work together. The parties were able to put aside the traditional adversarial relationship to work toward a common goal. Everyone recognized it was neither party's fault that the county was having financial difficulties, or that the cost of health premiums was going up. It was not about winning or losing. By refraining from game playing, and focusing on the real issues, both sides had their absolute needs satisfied. *

People cannot make good decisions without information; this is particularly true in fringe negotiations.

Bargaining Failure: Lessons From the Major Leagues

Ruben L. Ingram

There is much to be learned in the public sector labor relations field from other areas of collective bargaining and negotiations. The grocery strike in Southern California in the spring of 2004, for example, brought many people into the labor-management arena on a personal basis. The situation broadened opinions when patrons were confronted with picket lines and came face-to-face with grocery store clerks with whom they had a familiar and friendly relationship.

Even more pervasive in our culture is the phenomenon of sports, where labor relations can be particularly instructive. In this 2004-05 sports year, the National Hockey League season was cancelled because the owners locked out the players and negotiations never got off the ground. In recent years, other labor problems have interrupted sports seasons including major league baseball and, in 1994, the nation's hallowed institution, the World Series, was cancelled.

Interested citizens follow not only the negotiations of the various professional players' associations regarding terms and conditions of employment, but also specific issues such as controlling the use of drugs. Finally, sports fans — and almost all working people in the nation — are aware of the enormous salaries and long-term contracts negotiated between individual players, their agents, and the teams' owners.

Because of the prominent national role of sports and those who make it run, public sector practitioners can gain a better understanding of the collective bargaining process, how negotiations occur, and how the outcomes are decided. This article focuses specifically on how such knowledge can benefit those in the field of education.

Ruben L. Ingram is the executive director of School Employers Association of California, a joint-powers agency, serving school/community college districts and county offices of education in collective bargaining and human resources management. He is the former executive director of the California Commission on Teacher Credentialing, and former superintendent, Fountain Valley School District.

Major League Baseball Study

For those involved in collective bargaining in California public schools, the sports analogy points to the need for a better understanding of the collective bargaining process by the public and all stakeholders. For too long, the negotiating process in the state's school districts has been a de facto closed and overly confidential process. Both management and unions tend to hide their hands from each other until forced to reveal their bottom line. The public is left out of the process to the detriment of the students and their interests. By shedding light on the collective bargaining process and forcing the parties to fully disclose their positions, the clients whom the schools serve can become partners in the process.

Toward this end, a recent study from the University of Alabama, *The Causes of Bargaining Failure: Evidence From Major League Baseball*,¹ draws conclusions that can be informative to our public schools and others who are involved in the public sector negotiation processes. The study looked at two possible causes of bargaining failure: optimism and asymmetric information.

Optimism. For the purposes of the baseball study, the authors used the term “optimism” to express the attitude held by each party when, without a factual foundation, it made demands and offers that served its self-interests.

Researchers reported that when both parties — the players and their agents, and the owners — bargained with excessive optimism, they were unable to reach an agreement without going to arbitration. When players and their agents came to the table with demands that exceeded what the facts supported, they ended up worse off than if they had completed the negotiations process. In turn, when the owners entered the negotiations process with offers that fell short of what the facts supported, they too ended up worse off in arbitration than if they had completed the negotiations process. In school district negotiations, too, unions often present initial proposals that are overly optimistic, and that in effect “high

ball” the district. In turn, districts “low ball” the initial offers, which can be considered overly optimistic.

In California, the parties can declare impasse and, after mediation fails, can engage in a “factfinding” procedure. Factfinding is somewhat like arbitration, but is not binding on the school district or the union. In many cases, however, factfinding reports “split the baby,” and if the report is adopted by the parties, the outcome is the same as reported in the

University of Alabama study: The bargaining process fails, and neither party achieves what it might have if both sides had made the process work.

Health benefits is a subject about which a number of districts and unions have learned to curb their tendency to be overly optimistic when trying to reach agreement. In this area, where costs have skyrocketed, joint union and management health benefit committees have studied the health care industry. After comparing programs and services, and working cooperatively to become “buyers” of health services rather than “payers,” compromises and trade-offs begin to make more sense.

This underscores the validity of the baseball study. Unrealistic optimism can lead to frustration and failure, while collaborative study and joint understanding of the facts can bring about successful negotiations.

Moving in the right direction, the Federal Mediation and Conciliation Service recently awarded a grant to fund the California Joint Labor-Management Committee on Health Benefits. This 18-month stipend will enable the committee to search for a collaborative statewide solution to the health benefit problem. Committee members include representatives of the California Teachers Association, California Federation of Teachers, California School Employees Association, Service Employees International Union, Association of California School Administrators, California Association of School Business Officials, California School Boards Association, and School Employers Association of California.

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Asymmetric information. The *Glossary of International Economics*² defines “asymmetric information” as “the failure of two parties to a transaction to have the same relevant information.”

Results of the University of Alabama study — that overly optimistic proposals produced less than optimal results for both sides — are inconsistent with models of asymmetric information where one would expect the more aggressive party to outperform the more conservative side.

However, evidence suggests that learning occurred over time, with the owners catching on much more quickly than the players and their agents. Of great importance is the finding that the party who continued to make mistakes in both optimism and asymmetric information came out of negotiations with less than the party who eliminated those mistakes. Researchers posit that asymmetric information may play a greater role as the parties better understand the facts and gain more experience with negotiations.

Findings concerning asymmetric information are pertinent to school district negotiations. The Educational Employment Relations Act³ specifies that good-faith bargaining requires districts to give unions the information they need to engage in the bargaining process. If districts do not provide what is required by statute, there is then a serious asymmetrical information gap where relationships between unions and management are strained. Unions often accuse management of “hiding” money, and under these circumstances, unions can make allegations to both their members and the public that are not supported by evidence. Similarly, if unions do not provide the district with complete and reliable information supporting their demands, an equally unbalanced and problematic information gap is created. A full-disclosure approach is needed if both parties are serious about making the negotiations process work.

Heavy Hitters

The University of Alabama study demonstrates that optimism must be tempered with facts and reality; asymmetric information must be replaced with common terms and a mutual understanding of the facts on the part of both parties and the public.

Attention to detail. Both parties need to be conscientious when dealing with information. They need to spend time collecting and reporting relevant information, and equally important, they need to spend time working to understand those reports.

A recent example demonstrates the critical importance of information. During a negotiating session, the union and the school district requested a facilitator to help them reach agreement. The district’s chief business official presented budget figures. Observing the union representatives’ lack of interest and attention to the discussion, the facilitator surmised that the budget presentation was far too complex for people who did not work with numbers, charts, and numerical concepts on a regular basis.

The facilitator asked the two parties to retire to separate rooms for private discussions with him. The facilitator asked the management negotiating team to restructure the budget presentation to be more understandable. The facilitator then met with the union negotiating team and asked them to openly discuss what they did not understand about the budgeting language and fiscal concepts. The facilitator was able to provide a crash course on the intricacies of the budget language, and to secure the union’s commitment to come to the next session ready to ask questions about what they did not understand. When the negotiating session resumed, these efforts paid off. Within a relatively short time, a mutually acceptable solution was found and agreement on that topic was reached.

The party who continued to make mistakes in both optimism and asymmetric information came out of negotiations with less than the party who eliminated those mistakes.

This example of unintentional asymmetric information demonstrates how a brief, but effective, educational lesson produced positive results. The outcome supports the findings in the University of Alabama study. Better and more-balanced information, as well as experience and learning on the part of both parties, helps achieve a mutually beneficial agreement.

Interest-based bargaining. In the public school arena, positive results also can be achieved through a form of principled negotiations, such as interest-based bargaining. The hallmark of this approach features full disclosure of information in a format that is understandable to everyone. Where an honest and sound rationale is articulated on every topic, a sincere effort is made by everyone to “understand before trying to be understood,” and a trust level is built on open communication and willingness to accept mistakes when they are unintentional.

During negotiations, management has an obligation to reach agreements that are supportive of student achievement and their educational programs; that maintain the financial health of the district; that protect management rights; and that, to the extent possible, provide fair and equitable salaries, benefits, and working conditions for all employees.

Unions have the obligation to garner the best possible wages, benefits, and terms and conditions of employment permitted by law for its members.

When these interests are pursued independently and without shared understanding by both parties, the public, and other stakeholders to the educational system, too often the result is traditional, adversarial negotiations. Only when both parties give serious consideration to each other’s obligations — and factor in the interests of the public and other stakeholders — can a more collaborative and mutually satisfactory outcome be achieved.

Core values. One of the newer concepts used to achieve bargaining goals is the development and sharing of both parties’ core values. Core values are defined as the beliefs and commitments that one lives by and uses to make decisions. If parties to negotiations would articulate their core values to one another, and indeed to the communities they serve, negotiating proposals or interests being pursued might lead to better understanding, less rancor, and more long-term stability in labor-management relations.

‘Sunshining.’ Finally, one of the major differences between private sector bargaining, such as in major league baseball, and public sector bargaining is the public’s right to know what each side is proposing, and what elected representatives’ positions are on the district’s and the unions’ proposals.

The Government Code specifically states, “Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to express itself regarding the proposal at a meeting of the public school employer.”⁴

This provision is a statutory effort to overcome the “asymmetric information problem” between the community, their elected representatives, and the represented employees. But, this provision, more commonly referred to as “sunshining,” has not been used as intended. Often the proposals are presented to a public hearing where few, if any, citizens are informed or prepared to comment on them.

The California legislature in its last session passed a bill requiring school district officials to sign off that any negotiated agreement can be paid for during the life of that agreement.⁵ Obviously, the people of California want more transparency and more information on which to hold their elected officials accountable.

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In Conclusion

School districts, communities, and unions would be well served to openly share their core values, their goals and objectives, and indeed their specific proposals, including the rationales used to back them up. It is time to take public school collective bargaining out of the back room and allow it to see the light of day. Much like sports fans and the players, citizens of any community want a balance between investment in students' educational programs and opportunities, and motivated, rewarded, and appreciated employees. *

- 1 Farmer, A. and P. Pecorino, V. Stango (2000), "The Causes of Bargaining Failure: Evidence From Major League Baseball," *The University of Alabama*, Working Paper No. 00-08-04.
- 2 Deardorff, A. (2004) *Deardorff's Glossary of International Economics*, University of Michigan.
- 3 Bogue, B., C. Ventrillo, D. Bowen, and E. Borgerson. (April 2001) *Pocket Guide to the Educational Employment Relations Act*, California Public Employee Relations, Institute of Industrial Relations, University of California, Berkeley.
- 4 California Gov. Code Sec. 3547(b).
- 5 A.B. 2756, now in California Gov. Code Sec.3547.5(b)(c).

Privacy in the Workplace: Employer Medical Inquiries Under State and Federal Law

Claudia Center and Elizabeth Kristen

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State and federal laws limit the type of disability-related information employers can seek from an applicant or employee. The Americans With Disabilities Act applies to employers with 15 or more workers, and the Fair Employment and Housing Act to employers with five or more.¹

Employers with fewer than five workers still may be constrained from unlimited medical inquiries by the California state constitutional right to privacy.² While both applicants and employees are protected by the right, which encompasses a privacy interest in medical information,³ the California Supreme Court has ruled that the constitutional privacy rights of applicants are diminished compared to employees who already are on the job.⁴

The statutory and constitutional prohibitions limiting medical inquiries and exams apply to disabled and non-disabled job applicants alike.⁵

Unlawful Questions and Examinations During the Application Process

Both the ADA and the FEHA prohibit employers from making disability-related inquiries on the application form, during the interview, or at any other pre-job-offer stage of the application process.⁶ For example, it is unlawful for employers to ask an applicant whether she has ever had a particular disability, has suffered from a mental health condition, or has received workers' compensation.⁷

It is also unlawful for an employer to ask general questions that are likely to elicit disability-related information. For example, questions such as, "What impairments do you have?" or "Have you ever been hospitalized?" are not permitted.⁸ Additionally, questions about prescription drug use (e.g., "Do you take antidepressants?") and inquiries that are likely to lead to information about *past* illegal drug addiction or *past or current* alcoholism also are barred.⁹

Employers are not permitted to ask questions about an applicant's ability to perform major life activities such as sitting, standing, or walking, unless the question is about the ability to perform a job-related function.¹⁰ In the context of mental health conditions, the relevant major life activities may be sleeping, concentrating, and interacting with others.¹¹ Similarly, employers cannot ask questions about an applicant's history of workers' compensation claims or job-related injuries since these types of questions may elicit disability-related information.¹²

Employers also are prohibited from asking how many days an applicant missed work in his previous job due to an illness because it potentially could reveal information related to a disability.¹³ However, an employer is permitted to ask questions that are not likely to elicit disability-related information such as whether an applicant is able to meet attendance requirements.¹⁴ An employer also may ask about an applicant's previous attendance record (e.g., "How many days were you absent from your last job?") and whether the applicant abused his medical leave at previous jobs ("e.g., "How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?").¹⁵

The ADA and FEHA also bar pre-offer medical examinations.¹⁶ The FEHA as amended in 2000 more broadly bars both medical *and psychological* examinations at the pre-offer stage.¹⁷ Neither law bars testing for illegal drugs, as drug testing is not considered in this context to be a medical exam.¹⁸

In addition, employers cannot seek to obtain information from third parties that they cannot lawfully obtain from the applicant.¹⁹

Exception: Inquiries about qualifications, past work experience, and ability to perform job. An employer is permitted to ask an applicant about his ability to perform tasks that are relevant to the job he is applying for (e.g., the ability to lift 50 pounds) and, according to the Equal Employment Opportunity Commission, this inquiry is *not* limited to ques-

tions regarding "essential functions" of the job provided all applicants are asked the same questions.²⁰ Additionally, an employer can ask applicants to describe or demonstrate how they will perform a specific job function.²¹ Such a question may be asked of a particular disabled applicant (as opposed to all applicants, disabled or not) where the employer reasonably believes that the applicant will not be able to per-

form the function because of a known disability.²² An employer also may ask about an applicant's non-medical qualifications and skills (e.g., educational background, required licenses, etc.).²³

As noted above, an employer may inquire as to whether the applicant can meet the employer's attendance requirements, and may ask questions designed to determine whether the applicant previously has abused leave.²⁴

An employer also may review an applicant's employment history and question the circumstances of any gaps or sudden departures of employment.

This is permitted even if the applicant was unemployed or terminated due to disability-related reasons. Although these questions may elicit information regarding an applicant's disability, they are permissible.²⁵

Additionally, an employer is permitted to ask generally whether the applicant can perform the essential functions of the job. However, an employer may not require an applicant to disclose whether she needs reasonable accommodation to perform the job, or to check a box indicating whether she can do an essential function "with ___ or without ___ reasonable accommodation."²⁶

Exception: Known or 'obvious' disability and reasonable accommodation. Some disabilities may be obvious to the employer before or during the interview process. If the employer knows that an applicant has a disability, and has a reasonable belief that the individual will need reasonable accommodation, the employer may lawfully ask the applicant narrowly tailored questions about whether an applicant can perform the job with or without reasonable accommodations.²⁷ This is set forth in enforcement guid-

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ance issued by the EEOC rather than in statutory or regulatory language.

Exception: Testing for, and questions about, illegal drug use. Employers can lawfully ask about current illegal drug use.²⁸ Similarly, testing for illegal drugs is not considered a medical exam, and is not barred by the ADA or the FEHA at any stage of the application process or during employment.²⁹ (Drug testing is limited by the state and federal constitutional rights to privacy, and on-the-job testing generally requires individualized suspicion or a safety-sensitive job.³⁰)

Past drug addiction, however, may be a disability if it meets the state or federal definition. As a result, inquiries about past illegal drug use are improper if they are likely to elicit prohibited information.³¹ For example, questions such as “How often did you use illegal drugs in the past?” “Have you ever been addicted to drugs?” or “Have you ever been treated for drug addiction?” are impermissible.³²

Because past use of illegal drugs that did not rise to the level of addiction is not considered a disability, questions about past *casual* use of illegal drugs may be lawful.³³ For example, questions such as “Have you ever used illegal drugs?” “When is the last time you used illegal drugs?” and “Have you used illegal drugs in the last six months?” might be permissible because they do not reveal addiction.³⁴ At the same time, the use of such questions to eliminate applicants is vulnerable to the charge that it “screens out or tends to screen out” persons with the disability of past drug addiction.³⁵

Questions likely to elicit information about alcoholism — past *or* current — are prohibited at the pre-offer stage.³⁶ Thus, an employer may not ask an applicant how much alcohol he drinks, but may ask *whether* she drinks.³⁷ Unlike drug tests, alcohol tests are prohibited medical exams during the pre-offer stage.³⁸

As part of testing for illegal drugs, an employer or its representative (usually a drug testing company) may ask an

applicant or employee to disclose all prescribed drugs to determine whether a “positive” test result is caused by a lawful drug.³⁹ These lawful drugs — e.g., anti-psychotics, AZT — may reveal intimate medical information. Under federal and state privacy laws, employers and drug testing companies should take steps to ensure that information about prescription drug information is protected. Drug testing companies should reveal only the fact of a “positive” for illegal drugs, and no other information.⁴⁰ An employer performing its own drug testing should erect a firewall to ensure that information about lawful prescription drug usage is not disclosed.⁴¹

Numerous unanswered questions exist regarding drug testing and prescribed medical marijuana, including whether and under what circumstances positive results for prescribed medical marijuana can be disclosed as a “positive” for illegal drugs, and whether and under what circumstances such results can be a basis for adverse action if the marijuana is prescribed for a disability as defined by the FEHA.

Exception: Non-medical tests, such as psychological and physical fitness exams. Certain types of non-medical

inquiries are permissible, which may include some psychological or personality tests and physical fitness exams. It can be difficult to distinguish medical from non-medical exams, and the EEOC has provided a list of factors to consider when making this determination. These factors include whether:

- (1) the test is administered by a health care professional;
- (2) the results are interpreted by a health care professional;
- (3) the test is designed to reveal an impairment or information about physical or mental health;
- (4) the test is invasive;
- (5) the test measures an applicant’s physiological responses to performing a task;
- (6) the test is usually given in a medical setting; and
- (7) medical equipment is used.⁴²

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Consistent with these factors, psychological and personality tests may be considered medical, and impermissible, if they solicit answers that identify a mental impairment documented in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.⁴³ For example, tests that measure anxiety or depression are medical, yet tests that measure honesty and habits are non-medical.⁴⁴ Pre-offer psychological examinations are more likely to be allowed under the ADA than the FEHA.

Physical agility and physical fitness tests generally are permissible and not considered medical exams.⁴⁵ As a result, an employer may require that an applicant prove he has the ability to perform an actual or simulated task of the job. For example, an applicant for a police officer position may be required to run through an obstacle course intended to simulate a chase scene.⁴⁶ Additionally, an applicant may be required to prove her physical fitness by running or lifting, provided the tests do not measure physiological or biological responses to the activity.⁴⁷ However, these tests are likely to screen out applicants with certain disabilities, and may be challenged if not job-related and consistent with business necessity.⁴⁸

Exception: Voluntary affirmative action. An employer may ask an applicant to voluntarily self-identify as a person with a disability in order to comply with a local, state, or federal affirmative action program, or because the employer will use the information to benefit the disabled employee.⁴⁹ If the employer seeks to have applicants lawfully self-identify, the employer must clearly state that this information is (1) solely for the purpose of affirmative action; (2) voluntary; and (3) confidential in accordance with federal law. Furthermore, the employer must (4) document this information on a different form than the application; and (5) explain that refusal to provide such information will not adversely affect the applicant.⁵⁰

Disclosing a disability or need for accommodation at the application stage is not required; it is the applicant's choice whether and when to disclose. However, an applicant who

discloses a disability at the application stage may harm his chances of being hired. To avoid this, many people with hidden disabilities wait, and disclose only when and if they need to — for example, when they are seeking an accommodation (even if it is months or years later)⁵¹ — or after they have established themselves on the job.

If an applicant chooses to disclose disability-related information or a need for reasonable accommodation during the application process, it is unlawful for the employer to use that information as a reason for not hiring the person unless the employer can prove a legal defense.⁵² Proving discrimination in the selection of a new hire can be difficult, however; the employer often can articulate a facially legitimate reason for preferring another candidate.

Practical and legal issues concerning responses to prohibited questions. As a practical matter, an applicant should become familiar with illegal questions that may be asked on application forms or during interviews.

For example, a pre-interview form asking the applicant to check boxes revealing her medical history is impermissible but continues to be used by some employers. Unlawful questions also may be posed during the job interview. Therefore, it is prudent for an applicant to anticipate the types of questions and examinations she may face, and to have a plan for responding to any illegal questions that may come up. A person can do this by deciding ahead of time how to answer if asked about protected issues such as medical history, sick leave, or disability.

If an employer asks the applicant an illegal question, either on a form or in the interview, the applicant may (1) answer the question honestly; (2) answer the question dishonestly or incompletely; (3) decline to answer, stating the question is illegal or inappropriate; or (4) side-step the question by writing in "N/A" (Not Applicable) on the form, or making an analogous statement in the interview (e.g., stating, "Oh, no, that wouldn't apply to me"). Additionally, in the context of an interview, the applicant may attempt to change the focus of the conversation to his ability to do the job.

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An applicant who answers an illegal question truthfully by disclosing a medical condition may risk being discriminated against in the hiring process, and proving such discrimination can be very difficult.⁵³ This challenge may be especially difficult when the impairment is one that is viewed negatively — for example, cancer, seizure disorders, a psychiatric condition, HIV, or even carpal tunnel — or when it previously interfered with working full-time. Still, despite this obvious drawback, some individuals may decide that honesty is the best of the available imperfect options. When implementing this choice, the applicant should consider the simplest and least alarming manner to respond to the question. A detailed recitation of one's medical history is likely never the best course of action. A short, positive statement — e.g., “I had some health problems but am now completely recovered” — is best.

In the alternative, an applicant can choose to answer dishonestly by responding with “no” or “none.” In this situation, the applicant may face a moral and ethical dilemma, but more importantly, she may face subsequent legal repercussions if the employer learns of this dishonesty. Court rulings vary with respect to whether lying in response to an illegal, pre-employment medical question can justify an employer's decision to take action against the employee. While some courts have ruled that the employee who lies to an unlawful question is protected from subsequent adverse action,⁵⁴ other courts have disagreed.⁵⁵

Further, applicants may have difficulty discerning between a legal and an illegal question. If the applicant errs by lying in response to a lawful question that she mistakenly believes is illegal, and later faces adverse consequences, there are virtually no legal protections.⁵⁶

Practical issues regarding responses to lawful questions. Questions about a person's resume, including questions about gaps in employment, are virtually always lawful. To alleviate this potential problem, the applicant should consider certain techniques that might state her work history

differently by focusing on her strengths. For example, she may decide to use a resume format that focuses on experience rather than chronology. A vocational counselor can give advice and feedback about resume writing for disabled individuals with gaps in employment.

Even with a creative resume, however, the applicant should be prepared to answer questions about time spent outside of formal employment. The applicant may explain truthfully that she took time off of work to accomplish personal goals such as volunteering, traveling, or spending time with family. She may mention that while the time away from work was positive, she is excited to be returning to the workforce. It also is helpful to emphasize relevant qualifications and enthusiasm for the job for which she is applying.

If the applicant chooses to disclose disability-related information when responding to a lawful question, it is unlawful for the employer to use that information as a reason for not hiring the person unless the employer can prove a legal defense (e.g., that the applicant is unqualified for the job, even with reasonable accommodation).⁵⁷ However,

as noted, it is difficult to prove that an employer discriminated by selecting a different applicant.

Post-Offer, Pre-Employment Questions and Examinations

The ADA and FEHA differ markedly in the protections they provide for medical inquiries and exams required of applicants who have been offered a job on the condition that they pass a medical exam.

Post-offer questions under the ADA. Following an official job offer, the ADA allows employers to require medical examinations and/or medical questionnaires, including psychological examinations.⁵⁸ Employers are permitted to ask a variety of questions, even if they are unrelated to job performance, provided that the information is kept confi-

Court rulings vary with respect to whether lying in response to an illegal, pre-employment medical question can justify an employer's decision to take legal action.

dential and all entering employees in the same job category are subjected to the same inquiry.⁵⁹ Unlike the FEHA, the ADA imposes no limits on the scope of such medical inquiries.⁶⁰

At this stage the ADA permits inquiries about workers' compensation history, use of sick leave, illness, and general physical and mental health.⁶¹ The employer also is permitted to ask particular individuals for more information, provided that it has asked all offerees the same basic medical questions.⁶² The employer also can ask whether the person needs — or has needed in the past — reasonable accommodation.⁶³

To ensure that the ADA scheme functions as designed, post-offer examinations must be conducted as a "separate, second step of the selection process, after an individual has met all other job prerequisites."⁶⁴ The job offer must be "real" — the employer must evaluate "all relevant non-medical information that it reasonably could have obtained and analyzed prior to giving the offer."⁶⁵ The segregation of medical screening from all non-medical selection considerations, and its scheduling *after* the making of a bona fide job offer, is essential. Where pre-employment medical questionnaires and examinations are merely one stage in a multi-stage process, unsuccessful applicants with hidden disabilities cannot discern "whether the reason for rejection was information revealed by the medical exam or inquiry (which may not have any relation to this person's ability to do the job), or whether the rejection was based on some other aspect of the selection process."⁶⁶

If an employer uses the results of such examinations or inquiries to revoke the job offer, the employer may be required to prove that its reasons are "job-related and consistent with business necessity."⁶⁷ For example, if the employer says that safety considerations required revocation of the job offer, the employer may be required to show that the individual is unqualified or poses a "direct threat."⁶⁸

Post-offer questions under the FEHA. The FEHA provides greater protection than the ADA by prohibiting medical exams or inquiries at this stage of the process unless the

employer can show that the questions are "job related and consistent with business necessity," and that all entering employees in that classification are subject to the same exams or inquiries.⁶⁹ Many, if not most, of the post-offer medical examinations and questionnaires used in California continue to violate state law by seeking broad information about medical history, medications, hospital stays, and current impairments.

Because the law is not yet firmly developed, it is not entirely clear what sort of medical questions will be considered "job-related and consistent with business necessity" at the post-offer, pre-employment stage. Lawful questions or examinations may include (1) inquiries into conditions that either enable or prevent the performance of essential job functions (e.g., lifting abilities, lifting restrictions); (2) inquiries into conditions that are directly relevant to safety in the context of the particular job (e.g., vision abilities in the context of a driving position); (3) inquiries necessary for the provision and administration of employer benefits, including health insurance and workers' compensation insurance; and (4) inquiries necessary to evaluate and implement accommodations *immediately* required by the new employee.⁷⁰

On-the-Job Medical and Psychological Questions and Inquiries

Under both the ADA and the FEHA, on-the-job medical inquiries and examinations must be "job-related and consistent with business necessity."⁷¹ The FEHA also requires that on-the-job *psychological* inquiries and examinations meet the job-related, business necessity standard.⁷²

The employer bears the burden of establishing the requisite showing, which is a question of fact.⁷³ Additionally, even if the inquiry is job-related and necessary, the employer may request only the particular information necessary to meet its business need.⁷⁴ Federal and state laws also require that the information generated through lawful inquiries be

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maintained as a confidential file, and the laws limit the extent to which such information may be shared.⁷⁵

Following are examples of lawful, on-the-job medical inquiries.

Request for documentation supporting reasonable accommodation. If an employee requests an accommodation and the disability or need for accommodation is not obvious, the employer may request “reasonable documentation” showing the employee’s right to accommodation.⁷⁶ Reasonable documentation means documentation from an appropriate health care professional (e.g., a doctor’s note) that verifies the disability and the need for the accommodation.⁷⁷ The employer may submit a list of queries tailored to the question of disability, limitations, and need for accommodation.⁷⁸ Absent unusual circumstances, a request for a complete release of medical records exceeds the employer’s legitimate need for information and is not permitted.⁷⁹

According to the EEOC, documentation under the ADA is sufficient if it (1) describes the nature, severity, and duration of the employee’s impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee’s ability to perform the activity or activities; and (2) substantiates why the requested accommodation is needed.⁸⁰ Documentation under the FEHA would be similar, except that information about the extent of limitation would not be required as the definition of disability requires only a “limitation” and not a “substantial limitation” of a major life activity. (A sample form supporting a request for reasonable accommodation under the FEHA is found at the end of this article.)

Documentation may be insufficient where it (1) does not verify the existence of a “disability” (e.g., does not specify functional limitations) or does not explain the need for accommodation; (2) the health care professional lacks relevant expertise; or (3) circumstances indicate fraud or lack of credibility.⁸¹ If an employee provides insufficient informa-

tion to support the request for reasonable accommodation, the employer may request that the employee be examined by a health professional of the employer’s choice.⁸² Prior to making this request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner.⁸³ Any examination must be limited to verifying a disability, the need for reasonable accommodation, and related limitations.⁸⁴

Absent unusual circumstances, a request for a complete release of medical records exceeds the employer’s legitimate need for information and is not permitted.

Medical inquiries and exams in response to ‘objective evidence’ of inability to perform essential job functions. If an employer has a “reasonable belief, based on objective evidence” that a medical condition is interfering with an employee’s ability to perform the essential duties of the job, the employer may ask related medical questions or request a job-related “fitness-for-duty” examination.⁸⁵ The Sixth Circuit has opined, in *dicta*, that such an examination must be supported by “significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.”⁸⁶ According to the EEOC, objective evidence may include reliable information received from a credible third party such as a coworker or customer.⁸⁷

For example, if an employee is seeking to return to work following a disability-related leave of absence, and the employer has a reasonable and objective basis for believing that the employee’s ability to perform essential job functions continues to be impaired, then the employer may ask medical questions or require a fitness-for-duty exam.⁸⁸ Such inquiries or examinations “must not exceed the scope of the specific medical condition and its effect on the employee’s ability, with or without accommodation, to perform essential job functions or to work without posing a direct threat.”⁸⁹

Medical inquiries and exams in response to ‘objective evidence’ of direct threat. If an employer has a “reasonable belief, based on objective evidence,” that an employee may pose a “direct threat” due to a medical condi-

tion, then the employer may ask limited medical questions or request an examination directed toward evaluating any threat.⁹⁰ Again, such inquiries or exams may not exceed the scope of the specific medical condition and its effect on the employee's ability to work without posing a direct threat.⁹¹

Periodic, tailored medical inquiries or examinations for safety-sensitive jobs. For certain safety-sensitive jobs, periodic medical inquiries or exams, if appropriately tailored, may be "job-related and consistent with business necessity," even without an individualized, objective basis for believing that there is some sort of medical problem interfering with the job.⁹² For example, it may be permissible to make periodic medical inquiries or require medical examinations of persons in positions affecting public safety, such as airline pilots, police officers, and firefighters.⁹³ The inquiries or exams should be tailored to obtaining only that information necessary to ensure that the person can safely perform the functions of the job.⁹⁴ Also under this exception would be periodic testing for tuberculosis or other highly contagious conditions required of persons working in hospital, health care, or school environments.

Medical inquiries and exams in response to workplace injury. If an employee has a work-related injury, the employer may ask medical questions or request an examination to assess its liability under workers' compensation.⁹⁵ The inquiries or exams may not go beyond an assessment of workers' compensation liability.⁹⁶ A work-related injury also may create an objective basis for medical inquiries or exams regarding whether the individual may return to the essential functions of work without posing a direct threat.⁹⁷

Entrance examinations for new position. The EEOC has issued guidance stating that employees who apply for a new job should be treated as an "applicant," and may be subjected to post-offer, pre-employment inquiries (which under the ADA are not limited by the job-related, business necessity standard).⁹⁸ This interpretation is contrary to the plain language of the statute,⁹⁹ and in our opinion should be rejected.¹⁰⁰ Under the statutory language, medical examina-

tions for transferring employees should be scheduled after a genuine job offer is extended, and also should then be job-related and consistent with business necessity.

Of course, regardless of this dispute, employers regulated by the FEHA may only require job-related and necessary examinations and inquiries of applicants in the post-offer stage.

Voluntary wellness programs. The employer may conduct voluntary medical examinations as part of workplace health programs.¹⁰¹

Insurance forms. Some employers may provide health insurance coverage through group plans that use medical questionnaires to calculate premiums or to implement a pre-existing condition exclusion. Still other employers self-insure and use medical information to administer benefits. Under federal and state privacy laws, employers and insurers should take steps to ensure that such medical information is protected. Employers should permit employees to provide medical questionnaires directly to insurers, and insurers should reveal only information necessary to enable the employer to maintain its contract.¹⁰² An employer performing its own insurance administration should erect a firewall to ensure that medical information is not disclosed.¹⁰³

The employer may conduct voluntary medical examinations as part of workplace health programs.

Medical Information and Confidentiality

Under the ADA, any medical information the employer obtains must be kept confidential and stored in a separate medical file (not with the employee's regular personnel file).¹⁰⁴ Medical files should be stored in a locked cabinet. Access by others to an employee's confidential medical files should be strictly limited. An employer may inform supervisors or managers about necessary restrictions on the work or duties of an employee and necessary accommodations. Also, first-aid and safety personnel may be informed if a disability will require emergency treatment or certain evacuation measures are needed in times of emergency to accommodate an employee's disability.¹⁰⁵ The state constitutional right to privacy, as well as the California Medical Information Act, also place limits on the disclosure of medical information regarding employees.¹⁰⁶ *

ADA COMPARED TO FEHA

STAGE OF EMPLOYMENT	ADA RULE	FEHA RULE
<p>Application or pre-offer stage. This stage includes any written application, job interview, reference checks, and any non-medical procedures such as a background check.</p>	<p>NO medical or disability-related questions may be posed, and NO medical examinations may be required.</p> <p>EXCEPTIONS. This rule does not prohibit: (1) inquiries about qualifications, past work experience, and ability to perform job; (2) narrow questions about reasonable accommodation in the context of a known or “obvious” disability, where the employer “reasonably believes” that the applicant will need accommodation; (3) questions about and testing for current illegal drug use; (4) “non-medical” tests such as a physical fitness test; and (5) requests for voluntary disclosures pursuant to an affirmative action program that benefits people with disabilities.</p>	<p>NO medical, psychological, or disability-related questions may be posed, and NO medical or psychological examinations may be required.</p> <p>EXCEPTIONS. This rule does not prohibit: (1) inquiries about qualifications, past work experience, and ability to perform job; (2) narrow questions about reasonable accommodation in the context of a known or “obvious” disability, where the employer “reasonably believes” that the applicant will need accommodation; (3) questions about and testing for current illegal drug use; (4) “non-medical,” “non-psychological” tests such as a physical fitness test; and (5) requests for voluntary disclosures pursuant to an affirmative action program that benefits people with disabilities.</p>
<p>Post-offer, pre-employment stage. This stage begins after a “real” job offer has been made that is conditional upon the results of a medical or psychological examination, and ends when the person begins working.</p>	<p>NO LIMITATIONS on medical, psychological, or disability-related inquiries or examinations, so long as all entering employees in the same job classification are subjected to the same inquiries and/or examinations.</p>	<p>LIMITATIONS: Medical, psychological, or disability-related inquiries and examinations must be JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY. Additionally, all entering employees in the same job classification must be subjected to the same inquiries and/or examinations.</p>
<p>On the job. This stage begins when the person begins working.</p>	<p>LIMITATIONS: Medical and disability-related inquiries and examinations must be JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY.</p>	<p>LIMITATIONS: Medical, psychological, or disability-related inquiries and examinations must be JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY.</p>

MEDICAL FORM VERIFYING DISABILITY AND NEED FOR ACCOMMODATION UNDER THE FEHA

MEDICAL DOCUMENTATION

Regarding Employee's Request for Reasonable Accommodation Under California's Fair Employment and Housing Act (FEHA), Gov. Code Sec. 12940

Disability as Defined by FEHA.

Does this person have a physical or mental impairment? ___Yes. ___No.

If yes, describe briefly:

Please read: In assessing whether an impairment limits a major life activity, the positive effects of medication and assistive devices should not be considered. In other words, if a person is not limited because he or she uses medication or assistive devices, but would be limited in the absence of such measures, then the person is limited in a major life activity. However, an individual may be limited because of the negative side effects of medication.

Does this physical or mental impairment, or the negative side effects of medications or an assistive device prescribed for the impairment, limit one or more major life activity? "Limit" here means to make more difficult. " Yes. " No.

If no, stop. If yes, check the major life activity/activities that are limited.

- | | | |
|--|---|--|
| <input type="checkbox"/> Caring for oneself | <input type="checkbox"/> Learning | <input type="checkbox"/> Thinking |
| <input type="checkbox"/> Performing manual tasks | <input type="checkbox"/> Sitting | <input type="checkbox"/> Sleeping |
| <input type="checkbox"/> Walking | <input type="checkbox"/> Standing | <input type="checkbox"/> Eating |
| <input type="checkbox"/> Seeing | <input type="checkbox"/> Lifting | <input type="checkbox"/> Reproduction |
| <input type="checkbox"/> Hearing | <input type="checkbox"/> Reaching | <input type="checkbox"/> Sexual relations |
| <input type="checkbox"/> Speaking | <input type="checkbox"/> Concentrating | <input type="checkbox"/> Another major life activity |
| <input type="checkbox"/> Breathing | <input type="checkbox"/> Interacting with | |

(describe)

If none of the above activities is limited, does the physical or mental impairment limit the major life activity of working? " Yes. " No.

Describe how the identified activities are limited:

Please describe the duration of this person’s condition – how long it has existed, whether it is permanent, whether it is chronic, whether it is episodic or recurring, etc.

Need for Reasonable Accommodation.

Please read: Reasonable accommodations are adjustments made to a job or the workplace, and may include: modification of facilities; equipment or devices; a part-time schedule; a modified schedule; time away for therapy or treatment; job restructuring; modified supervision; extra or modified training; an unpaid leave of absence; a modification of an employer policy; and a transfer to a vacant position. An accommodation cannot eliminate an essential function of the person’s job.

Does this person need a reasonable accommodation because of disability? Yes. No.

Please describe the accommodation sought:

What is the purpose of the accommodation sought? Check as many as apply.

- To enable the person to perform the essential functions of the job.
- To enable the person to recover or to protect his or her health.
- Other (describe)

How will the accommodation sought further these purposes?

Signature of Health Care Provider.

Dated: _____ By: _____

Signature

Print

1 42 USC Sec. 12111(5)(A); Gov. Code Sec. 12926(d).

2 California Constitution, Art. 1, Sec. 1.

3 *Division of Medical Quality v. Gherardini* (1979) 93 Cal.App.3d 669, 678-79 (“A person’s medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected.”); *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 842 (“The ‘zones of privacy’ created by Article I, Section 1, extend to the details of one’s medical history.”); *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853 (medical records are protected by the right of privacy); *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 458 (detailed medical information revealed by employee seeking disability leave to employer’s psychiatrist protected by state Constitution); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory* (9th Cir. 1998) 135 F.3d 1260, 1269 (“One can think of few subject areas more personal and more likely to implicate privacy interests than that of one’s health or genetic makeup.”); see also *Loder v. City of Glendale* (1997) 14 Cal.4th 846.

4 *Loder*, 14 Cal.4th at 896-97 (drug testing of applicants “unquestionably implicates privacy interests protected by the state Constitution,” but privacy interest diminished and employer demonstrated reasonable justification for testing).

5 See, e.g., *Griffin v. Steeltek, Inc.* (10th Cir. 1998) 160 F.3d 591, 592 (Congress was concerned with the “potential stigmatizing effect of medical inquiries and examinations” and therefore non-disabled individuals also deserved protection from such inquiries); *Roe v. Cheyenne Mountain Conference Resort* (10th Cir. 1997) 124 F.3d 1221, 1229; *Fredenburg v. Contra Costa County Department of Health Services* (9th Cir. 1999) 172 F.3d 1176, 1182 (“We...hold that plaintiffs need not prove that they are qualified individuals with a disability in order to bring claims challenging the scope of medical examinations under the ADA.”); *Peacock v. County of Orange* (9th Cir. 2003) 60 Fed.Appx. 174, 176; cf. *Armstrong v. Turner Industries* (5th Cir. 1998) 141 F.3d 554, 562 (violation of 42 USC Sec. 12112[d][2][A] did not give rise to cause of action without “injury in fact”).

6 42 USC Sec. 12112(d)(2); Gov. Code Sec. 12940(e)(1); 2 CCR Sec. 7294.0(b)(2).

7 See, e.g., *Doe v. Syracuse School Dist.* (NDNY 1981) 508 F.Supp. 333, 335 (finding discrimination in the application process after applicant truthfully disclosed his history of mental health problems when answering an illegal question on a pre-employment application form); *Griffin v. Steeltek*, 160 F.3d at 592 (employer’s pre-employment questions asking whether the applicant received workers’ compensation or disability payments violated the law even though plaintiff was not disabled); *Canto v. Cal State Patrol Service* (N.D. Cal. April 6, 2000) Case No.

C-99-05072 CRB, 2000 WL 375233 (default judgment with damages entered on complaint that job applicant was required to fill out application with illegal questions regarding “physical defects,” “major hospitalizations,” and any “treatment for a mental or nervous problem”).

8 EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities (“Psychiatric Disability Guidance”), March 1997, at p. 13, question 13. Note: Page number citations for the Psychiatric Disability Guidance are to the “hard” copies distributed by the EEOC; page numbers for the Internet version of the guidance will differ.

9 ADA Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Examination (“Preemployment Questions Guidance”), October 1995, at pp. 10-11. Note: Page number citations for the Preemployment Questions Guidance are to the “hard” copies distributed by the EEOC; page numbers for the Internet version of the guidance will differ.

10 *Id.* at pp. 9-10.

11 Psychiatric Disabilities Guidance, *supra*, note 8, at p. 5, question 3.

12 Preemployment Questions Guidance, *supra*, note 9, at p. 9.

13 *Id.* at p. 8.

14 *Ibid.*

15 *Ibid.*

16 42 USC Sec. 12112(d)(2); Gov. Code Sec. 12940(e)(1).

17 Gov. Code Sec. 12940(e)(1).

18 Preemployment Questions Guidance, *supra*, note 9, at p. 17 cf. *Loder*, 14 Cal.4th at 896 (under state Constitution, job applicant may not be subjected to pre-employment drug testing “in the absence of a reasonable justification for the testing”).

19 Preemployment Questions Guidance, *supra*, note 9, at p. 13.

20 EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act (“TAM”), Jan. 1992, at V-6; Preemployment Questions Guidance, *supra*, note 9, at pp. 2, 4.

21 TAM, *supra*, note 20, at V-13; Preemployment Questions Guidance, *supra*, note 9, at p. 5.

22 Preemployment Questions Guidance, *supra*, note 9, at p. 5.

23 *Id.* at pp. 2, 9.

24 *Id.* at p. 8.

25 *Id.* at pp. 2, 4.

26 *Id.* at pp. 4, 6 and n. 11; Psychiatric Disabilities Guidance, *supra*, note 8, at p. 14, question 14.

27 Preemployment Questions Guidance, *supra*, note 9, at pp. 6-8; Psychiatric Disabilities Guidance, *supra*, note 8, at pp. 14-15, question 14.

28 Preemployment Questions Guidance, *supra*, note 9, at p. 10.
 29 42 USC Sec. 12114(d); 29 CFR Sec. 1630.16(c); 29 CFR App. Sec. 1630.16(c); Preemployment Questions Guidance, *supra*, note 9, at p. 17.

30 *Loder*, 14 Cal.4th at 880-81.

31 Preemployment Questions Guidance, *supra*, note 9, at p. 11.

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 42 USC Sec. 12112(b)(6).

36 Preemployment Questions Guidance, *supra*, note 9, at pp. 11-12.

37 *Ibid.*

38 *Id.* at p. 17.

39 See *id.* at p. 11.

40 See, e.g., *Pettus v. Cole*, 49 Cal.App.4th at 458; Cal. Civil Code Secs. 56.10(a), (c)(8)(b); see also 45 CFR Parts 160 and 164 (HIPAA privacy rules).

41 *Ibid.*; 42 USC Sec. 12112(d)(4)(C); 29 CFR Secs. 1630.14(c)(1); 1630.14(d)(1); 29 CFR App. Secs. 1630.14(c)(1), (d)(1).

42 Preemployment Questions Guidance, *supra*, note 9, at pp. 14-15; see also EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (“Guidance on Inquiries and Exams of Employees”), July 2000, questions 1, 2.

43 Preemployment Questions Guidance, *supra*, note 9, at pp. 16-17.

44 *Ibid.*

45 *Id.* at pp. 15-16.

46 *Id.* at p. 15.

47 *Id.* at pp. 15-16.

48 42 USC Sec. 12112(b)(6); Preemployment Questions Guidance, *supra*, note 9, at p. 15 at n. 17; see also *Hendricks-Robinson v. Excel Corp.* (7th Cir. 1998) 154 F.3d 685, 699 (“In our view, the separate criterion of ‘physical fitness’ — unrelated to job requirements — as a qualification standard for promotions, layoffs and recalls tends to screen out, whether intentionally or unintentionally, disabled employees.”).

49 Preemployment Questions Guidance, *supra*, note 9, and pp. 12-13.

50 *Ibid.*

51 See Psychiatric Disabilities Guidance, *supra*, note 8, at pp. 21-22 & n. 51, question 20; see also *id.* at pp. 12-14, question 14.

52 Preemployment Questions Guidance, *supra*, note 9, at p. 4 at n.10.

53 See e.g., *Doe v. Syracuse School Dist.* (NDNY 1981) 508 F. Supp. 333, 337-38 & n. 4 (rejected applicant demonstrated that

application questions regarding mental illness violated Rehabilitation Act regulations, but court also opined that “common sense does not necessarily establish that the defendant...violated the prohibitions of the statute,” meaning “engaged in discriminatory conduct within the meaning of the Act”).

54 See e.g., *Downs v. Massachusetts Bay Transp. Auth.* (1998) 13 F.Supp.2d 130, 140 (bus driver who falsely responded in the negative to pre-employment inquiries regarding prior workers’ compensation injuries could not be terminated once dishonesty was discovered, as original questions violated EEOC regulations and guidelines, and questions not related to ability to drive bus); *Kraft v. Police Commissioner of Boston* (1991) 410 Mass. 155, 157, 571 N.E.2d 380 (employer could not terminate police officer five years after hire for falsely responding to pre-employment application seeking information about “nervous, mental, or emotional” disorders, mental illness, and hospitalizations — plaintiff could not be terminated “for giving false answers to questions that the commissioner under law had no right to ask”); cf. *Huisenga v. Opus* (1992) 494 N.W.2d 469, 474 (false answers to broad, pre-employment medical inquiries did not provide employer with defense to subsequent workers’ compensation claim).

55 See e.g., *Pinckard v. Metropolitan Government of Nashville* (6th Cir. 2001) 1 Fed. Appx. 359, 2001 WL 45285 (unpublished) (termination of police officer who fainted twice on the job due to syncope disorder upheld based on his prior false responses to pre-employment inquiries regarding dizziness, fainting spells, or seizures); see also, *Hartman v. City of Petaluma* (N.D. Cal. 1994) 841 F.Supp. 946, 949-50 (“lack of candor” regarding prior drug use during application process constituted legitimate basis for rejecting applicant for police officer position); *Jones v. GA Pacific* (2003) 355 S.Ct. 413, 420, 586 S.E.2d 111 (workers’ compensation settlement reversed in light of false statements regarding medical history made on unlawful, pre-offer employment application: “the ADA does not have a section that provides protection to an applicant who commits fraud in the application process”); *Caldwell v. Aarlin/Holcombe Armature Co.* (1997) 267 Ga. 613, 615-16, 481 S.E.2d 196 (denial of workers’ compensation benefits upheld where worker falsely answered pre-employment inquiry regarding prior back problems: “Misrepresenting the truth on an improper job application is not one of the avenues provided by the ADA and the ADA does not authorize or countenance the use of knowing and wilful misrepresentations by employees in response to improper questioning by an employer.”); cf. *Lysak v. Seiler Corp.* (1993) 614 N.E.2d 991, 993, 415 Mass. 625 (employer may terminate employee who offered unsolicited false statements during pre-offer interview).

56 See e.g., *Fusco v. American Airlines* (N.D. Cal 2003) Case Numbers C-00-1439, 2597 and 3842 PJH (dismissing claims of applicants who failed to disclose HIV status on questionnaire purportedly administered during “post-offer” phase) (unpublished) (appeal pending [9th Cir.]); cf. *Smith v. Chrysler Corp.* (6th Cir. 1998) 155 F.3d 799, 808 (employer’s reasonable albeit mistaken belief that plaintiff falsely answered post-hire question on a “Driver’s License Examination” form constituted legitimate, nondiscriminatory basis for termination and was not pretextual).

57 Preemployment Questions Guidance, *supra* note 9, at p. 4 & n. 10.

58 42 USC Sec. 12112(d)(3); Psychiatric Disabilities Guidance, *supra* note 8, at p. 15, question 14.

59 42 USC Sec. 12112(d)(3); Preemployment Questions Guidance, *supra* note 9, at p. 18.

60 *Ibid.*; Psychiatric Disabilities Guidance, *supra*, note 8, at p. 15, question 14; see also *Norman-Bloodsaw v. Lawrence Berkeley Laboratory* (9th Cir. 1998) 135 F.3d 1260, 1273 (reviewing statutory scheme).

61 Preemployment Questions Guidance, *supra*, note 9, at p. 18; Psychiatric Disabilities Guidance, *supra* note 8, at p. 15, question 14.

62 Preemployment Questions Guidance, *supra*, note 9, at p. 20.

63 *Ibid.*

64 TAM, *supra*, note 20, at VI-4.

65 Preemployment Questions Guidance, *supra*, note 9, at p. 18.

66 TAM, *supra*, note 20, at VI-4; see also *Downs v. Mass. Bay Transp. Auth.* (D. Mass. 1998) 13 F.Supp 2d 130, 138 (requirement of a genuine job offer prior to any medical inquiry is “intended to ‘ensure that an applicant’s possible hidden disability...is not considered before the employer evaluates an applicant’s non-medical qualifications.’”); *Barnes v. Cochran* (S.D. Fla. 1996) 944 F.Supp. 897, 905 n.3 (“important” distinction between pre/post-employment medical examination[s]... “allows an applicant to demonstrate that he has the necessary job qualifications without regard to any disability...[and] forces employers to demonstrate that their reason for not hiring an applicant is job related, or a business necessity”).

67 29 CFR Sec. 1630.14(b)(3); 29 CFR App. Sec. 1630.14(b); Preemployment Questions Guidance, *supra*, note 9, at p. 18 n. 19; Psychiatric Disabilities Guidance, *supra*, note 8, at p. 15 n. 37, question 14.

68 Preemployment Questions Guidance, *supra*, note 9, at p. 20 n. 22.

69 Gov. Code Sec. 12940(e)(3).

70 Cf. Preemployment Questions Guidance, *supra*, note 9, at p. 8 (“An employer may only ask about reasonable accommoda-

tion that is needed now or in the near future. An applicant is not required to disclose reasonable accommodations that may be needed in the more distant future.”).

71 42 USC Sec. 12112(d)(4)(A); Gov. Code Sec. 12940(f).

72 Gov. Code Sec. 12940(f).

73 *Ibid.*; *Fredenburg v. Contra Costa County Dept. of Health Services* (9th Cir. 1999) 172 F.3d 1176, 1182.

74 See, e.g., Psychiatric Disabilities Guidance, *supra*, note 8, at pp. 14, 16, question 14.

75 29 CFR Sec. 1630.14(c)(1); Cal. Const. Art. 1, Sec. 1; Cal. Civil Code Secs. 56.10(a), (c)(8)(b) (California Medical Information Act); *Pettus v. Cole*, 49 Cal.App.4th at 432-34, 445-48 (1996) (detailed medical information revealed by employee to employer’s psychiatrist protected by state Constitution and CMIA from disclosure to employer).

76 Psychiatric Disabilities Guidance, *supra*, note 8, at pp. 14, 22-23, questions 14, 21; EEOC Enforcement Guidance, Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (“Reasonable Accommodation Guidance”), October 2002, at questions 6, 7, 8.

77 Reasonable Accommodation Guidance, *supra*, note 76, at question 6.

78 *Id.* at question 6; Psychiatric Disabilities Guidance, *supra*, note 8, at pp. 22-23, question 21, example B.

79 *Ibid.*

80 Guidance on Inquiries and Exams of Employees, *supra*, note 42, at question 10.

81 *Id.* at question 11.

82 Reasonable Accommodation Guidance, *supra*, note 76, at question 7.

83 *Ibid.*

84 *Ibid.*; Guidance on Inquiries and Exams of Employees, *supra*, note 42, at question 11.

85 Guidance on Inquiries and Exams of Employees, *supra*, note 42, at question 17; Psychiatric Disabilities Guidance, *supra* note 8, at pp. 15-17, question 14.

86 *Sullivan v. River Valley School Dist.* (6th Cir. 1999) 197 F.3d 808, 811 (“An employee’s behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can ‘perform job-related functions.’”).

87 Guidance on Inquiries and Exams of Employees, *supra*, note 42, at questions 5, 6.

88 Guidance on Inquiries and Exams of Employees, *supra*, note 42, at question 17; Psychiatric Disabilities Guidance, *supra*, note 8, at p. 17, question 14, example D.

89 *Id.* at p. 16; see also *id.* at p. 17, question 14, example D.

90 *Id.* at p. 15-16, question 14.

91 *Id.* at p. 16.

92 Guidance on Inquiries and Exams of Employees, *supra*, note 42, at questions 8, 18.

93 *Ibid.*

94 *Ibid.*

95 EEOC Enforcement Guidance: Workers' Compensation and the ADA ("Workers' Compensation Guidance"), Sept. 1996, question 8.

96 *Ibid.*

97 *Id.* at question 7. See Subsections 2 and 3, *supra*.

98 Guidance on Inquiries and Exams of Employees, *supra*, note 42, at question 4.

99 42 USC Sec. 12112 (d)(4)(A); see also 29 CFR Sec. 1630.14(c)

100 See, *Sutton v. United Airlines*, 527 U.S. 471, 483-84 (1999)
101 42 USC Sec. 12112(d)(4)(B); 29 CFR Sec. 1630.14(d); 29 CFR App., Secs. 1630.14(d).

102 See, e.g., *Pettus v. Cole*, 49 Cal.App.4th at 458; Cal. Civil Code Secs. 56.10(a), (c)(8)(b); see also 45 CFR Parts 160 and 164 (HIPAA privacy rules).

103 *Ibid.*; 42 USC Sec. 12112(d)(4)(C).; 29 CFR Secs. 1630.14(c)(1); 1630.14(d)(1); 29 CFR App. Secs. 1630.14(c)(1), (d)(1).

104 42 USC Sec. 12112(d)(4)(C); 29 CFR Secs. 1630.14(c)(1); 1630.14(d)(1); 29 CFR App. Secs. 1630.14(c)(1), (d)(1).

105 *Ibid.*

106 Cal. Const. Art. 1, Sec. 1; Cal. Civil Code Sec/ 56.10(a), (c)(8)(b); *Pettus v. Cole*, 49 Cal.App.4th at 432-34, 445-48.

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Recent Developments

Public Schools

Schwarzenegger Pushes Tenure Change, Backs Off of Merit Pay, Abandons Pension Reform

Governor Schwarzenegger, in his state of the state speech earlier this year, outlined a number of proposals that would have directly impacted teachers, including increasing the length of time required for tenure, introducing a merit pay system, and changing the teachers' retirement system from a defined-

*Tenure says you
cannot be fired at the
whim of the principal.*

benefit to a defined-contribution plan. (See stories at *CPER* No. 170, pp. 35-39; and No. 171, pp. 45-47.) He threatened to take these measures to the voters through the initiative process if the legislature refused to enact them.

Since that time, Schwarzenegger has changed his tune. Although he has submitted signatures to get tenure reform before the voters in a yet-to-be-scheduled special election, he has reduced the number of years he would require to reach tenure from 10, as initially proposed, to five. He has indicated that he will not seek a vote on a merit pay initiative, but rather will try

to negotiate salary changes through the legislature. And, he has abandoned proposed changes in the California State Teachers' Retirement System altogether.

Schwarzenegger's tenure reform initiative would extend the time limit under which school principals could determine whether teachers are tenured from about 18 months to five years. He claims that the current system makes it virtually impossible to get rid of a bad teacher who has gained tenure: "If you're a lousy teacher, no one can get rid of you. If you're the worst teacher, no one could get rid of you. So what tenure reform would do is weed out [bad teachers] and reward the good teachers." But Steve Hopcraft, a spokesperson for the American Federation of Teachers, called the initiative "an attack on teachers that is going to make it more difficult to recruit and retain the teachers that we need." He explained that there are other ways to get rid of bad teachers. "There is no such thing as a guaranteed job for life, that's not what tenure is. Tenure gives you due process and says you cannot be fired at the whim of the principal."

Schwarzenegger's initiative threat seems designed to pressure the legislature into negotiating a deal. He said

that he has until the middle of this month to call a special election for early November, giving the legislature time to come to a compromise with him. "But if they don't do their job then we go to special election without any doubt," said Schwarzenegger. Assembly Speaker Fabian Nunez (D-Los Angeles) said that, by bringing this and other initiatives, the governor is "leading the state into political chaos." "The onus is on the proponents of the proposal to tell us what's wrong" with the current tenure system, he said. "We have a hard enough time retaining teachers." It may be difficult for the leg-

*Schwarzenegger's
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islature to stand up to the pressure, however. Over 50 percent of voters support the governor's tenure proposal, according to a survey released by the Public Policy Institute of California.

The same survey shows even greater public support for a merit-based pay system for teachers, with 64 percent saying that they favor the idea. However, the governor's aides have said that he does not plan to pursue a merit pay measure for a special election ballot. He will focus instead, they indicated, on bonus pay for high-achieving

teachers. Schwarzenegger has said that he would offer teachers extra money, or what he has termed “combat pay,” to work in poorly performing schools. “I think our inner-city schools have been getting the short end of the stick,” he said. “There are a lot of great teachers that maybe would want to go there. All they need is a financial incentive or better school principals in some.”

Barbara Kerr, president of the California Teachers Association, disagrees. “What we need are safe and clean schools, lower class sizes, and all the best, up-to-date textbooks. It’s not about an extra \$5,000 for teachers. It’s about having the stuff kids need to learn.” Teachers point to a failed plan in the Los Angeles Unified School District in the early 1980s, that offered incentives for teachers to go to low-performing schools. John Perez, president of United Teachers of Los Angeles, explained that the program had not been a success because teachers make decisions about where to work for a variety of reasons: a cooperative relationship with administrators, a good principal, their own safety, good materials and textbooks, and commute time.

Bowing to political pressure, Schwarzenegger has completely dropped his plan to change the State Teachers’ Retirement System to a defined-contribution plan in the face of the unified opposition of teachers unions and other public employee unions whose pensions were threatened. *

PERB Upholds Teachers’ Right to Wear Union Buttons in Students’ Presence

The Public Employment Relations Board has affirmed earlier rulings that teachers have the right to wear bargaining-related buttons in the presence of their students absent special circumstances and that the wearing of union buttons is not “political activity” within the meaning of Education Code Sec. 7055. The decision in *East Whittier Education Assn. v. East Whittier School Dist.* resolves a contentious issue that has concerned school districts and teachers. No notice of appeal was filed, and the decision is now final. Member Ted Neima authored the decision and was joined by Member Al Whitehead. Chairperson John Duncan wrote a lengthy dissent.

The board’s decision in *East Whittier* closely parallels its prior decision in *Turlock Joint Elementary School Dist.* (2002) Dec. No. 1490, 156 CPER 28, and fills the void left when the Court of Appeal ordered the board to vacate its *Turlock* ruling. In that case, the board also held that buttons worn during school hours cannot be banned as “political activity” under Ed. Code Sec. 7055. It also reaffirmed a prior determination in *State of California (Dept. of Parks and Recreation)* (1993) Dec. No. 1026-S, 104 CPER 55, that the right to wear union buttons is protected under the Educational Employment Relations Act unless special circumstances can be shown.

The district appealed PERB’s decision in *Turlock*. The Fifth Circuit Court of Appeal, disagreeing with PERB, found that teachers’ wearing of union buttons during instructional times constitutes political activity that can be prohibited under Sec. 7055. However, it agreed with the board that a ban on union buttons violates EERA unless the employer can show special circumstances to justify the restriction.

Union members wore buttons to work that stated, ‘It’s Double Digit Time!’

The Supreme Court refused to review the Court of Appeal decision, but ordered that it be depublished, meaning it had no legally binding effect except on the parties to the lawsuit. And, because the Court of Appeal ordered PERB to vacate its decision in *Turlock*, that case, too, was no longer good law. Therefore, prior to its decision in *East Whittier*, there was no precedential ruling on the question of whether wearing union buttons is “political activity” within the meaning of Sec. 7055. (For a complete discussion of the procedural

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history of both cases, including the ALJ's decision in *East Whittier*, see story in *CPE*No. 169, pp. 30-32.)

In *East Whittier*, the dispute arose during contract negotiations between the district and the union in 2000. The union was seeking a 10 percent salary increase, and some union members wore buttons to work that stated "It's Double Digit Time!" In response, the district's board adopted a policy stating, "all matters related to collective bargaining negotiations shall be kept out of the classroom and other instructional areas in the presence of students." It also approved an administrative regulation prohibiting employees from initiating any discussion with students related to collective bargaining negotiations, or to wear or display "in the classroom or in other instructional areas in the presence of students, any signs, buttons or other objects that favor or oppose any matter that is the subject of negotiations."

EERA Violation

In considering whether the district policy or regulation violated EERA, the board reiterated its holding in *Parks and Recreation* that, "it is well-settled under the statutes administered by PERB that employees have a protected right to wear union buttons at the workplace," and that "the wearing of union buttons is a protected right, absent special circumstances." This rule is derived from the Supreme Court's opinion in *Republic Aviation Corp. v. NLRB* (1945) 324 U.S.793, decided under the Na-

tional Labor Relations Act on which EERA is modeled.

The board noted that *East Whittier* was the first opportunity it had to discuss the issue of what constitutes "special circumstances." Turning to private sector cases decided under the NLRB, the board found a variety of "special considerations" have justified a prohibition on union insignia. Some examples include "where the insignia could exacerbate employee dissension,

What constitutes 'special circumstances' depends on the setting and involves a balancing of interests.

jeopardize employee safety, or damage machinery or products." Work demanding great concentration, the need to project a certain type of image, and concerns for safety, discipline, and disruption also have been cited as possible "special circumstances" justifying prohibitions.

"What constitutes 'special circumstances' depends on the setting," said the board, and "necessarily involves a balancing of the various interests."

On one hand, PERB must weigh the statutory rights of employees under EERA. Central to this consideration must be the maintenance of clear and open

communication between the employer and employees. It is important to assure that employees can freely voice their perspectives so that the parties can construct an agreement everyone may support. It is also important to assure that employers can ascertain the relative importance of their employees' concerns at the workplace, so that they can properly develop and weigh bargaining proposals during the process of negotiations. Such communication fosters the purpose of "improving employer-employee relations within public schools" by ensuring that bargaining proposals are consistent with what the ratifying parties desire and will tolerate, and that the resulting contract will facilitate a stable relationship during a period of time, thereby promoting enhanced public service.

On the other hand, PERB must weigh the interests of the school district in educating its students in classrooms free of undue distraction and disruption. In this regard, the Board is cognizant of the cases, cited by the dissent, giving special treatment to classrooms in a variety of situations. While the board is open to the possibility that certain instructional settings may constitute a per se special circumstance, the Board does not believe that "special circumstances" are inherent to all instructional settings. Instead, the Board holds that as a general rule the right to wear union buttons attaches in instructional settings as it does elsewhere.

Finding that the district bears the burden of demonstrating that a special circumstance exists, the board examined the claim that distraction was a

special circumstance justifying the prohibition. Relying on *Fabri-Tek, Inc. v. NLRB* (8th Cir. 1965) 352 F.2d 577, where a high degree of concentration was required in the manufacture of complex devices, the board found the district had not shown the classroom work required such a degree of concentration that distractions could have dire consequences. The board noted the district permitted other articles of clothing and activities that were at least as distracting as the buttons at issue.

The district failed to establish special circumstances to justify its policy.

The board made clear, however, that, in order to demonstrate the special circumstance of disruption, the district need not show actual disruption. The test is an objective one based on the button at issue, held the board, in order “to avoid pulling students and other third parties into unfair practice proceedings.” It cautioned the administrative law judges to “take great care” to avoid eliciting testimony from students or expert witnesses.

The board set out additional guidelines for ALJs. They should examine the button “in its given context to determine whether an objectively

reasonable person would find it unduly distracting or disruptive.” And, they “should also compare the buttons to other distractions prohibited or allowed by the employer.”

Applying these guidelines, the board found that the district failed to establish special circumstances to justify its policy and regulation with regard to bargaining-related buttons, and therefore had violated EERA.

Political Activity

The board also addressed the district’s argument that it had the right to ban the buttons as “political activity” within the meaning of Ed. Code Sec. 7055. That section provides:

The governing body of each local agency may establish rules and regulations on the following:

- (a) Officers and employees engaging in political activity during working hours.
- (b) Political activities on the premises of the local agency.

Consistent with its original decision in *Turlock*, the board found that the wearing of union buttons is not “political activity” within the meaning of Sec. 7055:

When examined in light of adjacent statutory provisions and the purposes of EERA, the scope of the definition of “political activities” in Section 7055 cannot reasonably be construed so broadly as to encompass the exercise of concerted activity through the wearing of a button communicating employees’

bargaining demands, expressing unity and support for the union, and building solidarity. Such a finding would fail to distinguish between the trustees’ role as the *employer* under EERA and their activity as *candidates* for elected office or as incumbents seeking preservation of their offices or reelection.

The board found that, though the Education Code does not specifically define “political activities,” Secs. 7050-7058, read in their entirety, “clearly associate political activity with an elec-

The wearing of union buttons is not ‘political activity’ within the meaning of Sec. 7055.

tion of a candidate or a ballot measure.” It found support for this view in *California Teachers Assn. v. Governing Board of San Diego Unified School Dist.* (1996) 45 Cal.App. 4th 1383, 119 CPER 44, where the prohibition on the “political activity” of teachers in the classroom setting was limited to the election of a candidate or ballot measure. It distinguished *Wilmar Union Elementary School Dist.* (2000) Dec. No. 1371, 141 CPER 57, where the teachers association created buttons in support of three school board candidates. In *East Whittier*, the buttons communicated support for the association and its bargaining demands, not support for or opposition to electoral candidates.

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

John F. Kennedy

That includes equal access to the rights and obligations conferred by EERA. Here in one concise guide, CPER provides summaries of all major decisions of the Public Employment Relations Board and the courts that interpret and apply the law, the history and complete text of the act, and a summary of PERB regulations.

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“Such communication facilitates the flow of information between teachers and the trustees regarding matters important to achievement of harmonious employer-employee relations. In this case, unlike *San Diego* and *Wilmar*, the collective-bargaining-related speech on the buttons is clearly not attributable to the District,” said the board.

The board observed that a central purpose of EERA is to promote stable labor relations, and that “promoting clear and open communication between the parties during labor negotiations in an effort to achieve continuous public service throughout every step of the bargaining process” was “a classic means” of achieving that stability. It announced that it would not expand the definition of “political activity” in any way that would disrupt these important purposes and so rejected the district’s argument that the buttons could be banned under Sec. 7055.

The Dissent

Chairman Duncan disagreed with the majority, finding that the district’s policy had been “narrowly tailored” and did not violate EERA. In his dissent, he included a complete history of “button cases” before both PERB and the courts. He also examined cases from other states, such as *Green Township Education Assn. v. Rowe* (2000) 328 N.J. SUPER. 525, 746 A.2d 449. There, the court upheld a restriction in the classroom against buttons in support of a teachers union, reasoning that “as innocuous as the buttons may seem, their

message is a political grievance, and there is no useful purpose in subjecting whole classrooms of children, who are a captive audience for most of the day and who cannot vote, to that message.” Duncan approved of the court’s holding, and stated, “the restriction was related to what teachers were supposed to be doing in class, namely teaching the curriculum, not furthering their own financial interests.”

This collective-bargaining-related speech clearly is not attributable to the district.

Duncan found it “significant that the students are required to be in the classroom and have no option of leaving.” In addition, he said, “elementary schools are not public places”; members of the public are not allowed in classrooms. Although he recognized that EERA covers protected activity, “when the employee deviates from the duty at hand, the activity is not protected,” he stated, citing *Konocti Unified School Dist.* (1982) Dec. No. 217, 54 CPER 66. In that case the board found unprotected the activity of a school bus driver who stopped his bus and urged students to stay home if the union went on strike.

For Duncan, “the key is not whether the buttons are disruptive but rather, more importantly, that they are not part of the curriculum and there is no one in the classroom to which a presentation of a viewpoint on collective bargaining is relevant or appropriate.” In coming to his position, Duncan relied on the *Republic Aviation* test, as set forth in *State of California (Employment Development Dept.)* (2001) Dec. No. 1365a-S, 140 CPER 60, and *Richmond Unified School Dist./Simi Valley Unified School Dist.* (1979) Dec. No. 99, 43 CPER 88, for the proposition that union activities “may be restricted by the employer if they do not occur during nonwork time in nonwork areas.”

Applying this proposition, Duncan concluded:

The District has not prohibited the right of teachers to wear union buttons on campus. Instead, they have been restricted to non-instructional times and places. Under the *Republic Aviation* test, the District has crafted a narrowly tailored restriction that is appropriate. The Association should be required to show the restriction is unreasonable in order to prevail. With this rule in mind, let us emphasize that each policy must be reviewed on a case-by-case basis. Let us emphasize also that here the District has not set out a policy forbidding the wearing of union buttons at work. The Association has not convinced us that the District restrictions are unreasonable.

(East Whittier Education Assn. v. East Whittier School Dist. [12-21-04] PERB Dec. No. 1727.) *

Judge Orders State to Reimburse CalSTRS \$500 Million

The state legislature acted illegally when it withheld a payment from the California State Teachers’ Retirement System two years ago. Now the funds must be paid back, ruled Sacramento Superior Court Judge Judy Holzer Hersher.

In spring 2003, then-Governor Gray Davis signed an emergency package of bills that cut state spending by \$3.6 billion in an attempt to lower a potential \$34 billion deficit. Included in the deal was S.B. 20x, which made a one-time reduction in the state’s contribution to a special fund that makes supplemental payments to 63,000 older retirees whose basic CalSTRS pensions have been eroded by inflation. Under the applicable formula, the state’s payment should have been \$559 million, but the legislature reduced the payment to about \$59 million.

The state argued that the reduction would not cause any harm because the fund could still meet its financial obligations without the \$500 million. Judge Hersher rejected that argument, ruling that the state had reneged on a “promise to pay a fixed and determinable sum of money, and nothing less.” She found that the cut in the payment was unconstitutional because it violated the retirees’ contract with the state.

A spokesperson for the state Department of Finance said the administration was reviewing the ruling and is contemplating an appeal. Carolyn Widener, chair of the state Teachers’ Retirement Board, said that CalSTRS was reluctant to sue but believed there

The cut in the payment violated the retirees’ contract with the state.

was no other recourse. “The board is very sensitive to the state’s very real budget difficulties,” she said. “But in the end, our focus must be on California’s educators — on what’s best for them, not just now, not in the near term, but in the future.” *

College Had Legitimate Interests in Restricting Instructor's Attendance at Protest With Students

The Ninth Circuit Court of Appeals held that a community college's legitimate concerns for student safety and its own reputation outweighed an instructor's right to attend a protest against the World Trade Organization with some of her students. *Hudson v. Craven* presented the court with an issue of first impression: the appropriate test for evaluating a hybrid claim involving both speech and associational rights under the First Amendment. The court settled on the balancing test developed by the Supreme Court in *Pickering v. Board of Education* (1968) 391 U.S. 563.

Background

Barbara Hudson was an economics instructor at Clark College, a community college in Vancouver, Washington. She planned to attend the November 1999 rally against the World Trade Organization with her students as an official college field trip. Dr. James Craven, the lead economics professor, told Hudson that attending the rally would put the students in danger and that he would have her terminated if she went ahead with her plan. However, Craven said, it was fine if Hudson or the students attended the rally independently, without any affiliation to Clark College. The vice president of the college issued a letter to all faculty mem-

bers two days prior to the protest, stating, among other things, that the participation of any faculty member or student must be as an individual and not as a representative of the college, and that there could not be any connection or participation in this event to any grade or activity in the class.

Hudson backed off her plan of an official field trip. She did, however, organize transportation for herself and her students to go to the protest, and told students attending the rally to "observe information" as it "might be on the test." And, in the final exam, she included questions about union critiques of the WTO.

Hudson's contract was not renewed. She brought a lawsuit against Craven and four other college administrators, alleging retaliation against her for exercising her First Amendment rights of free speech and association under 42 USC Sec.1983. The district court dismissed her case, and she appealed.

Court of Appeals Decision

Characterizing Hudson's allegations as a "hybrid speech/association claim," the court determined that "the deprivation of First Amendment rights that Hudson asserts is...very narrow — essentially the right to associate with a small group of students during a spe-

cific time frame for the particular purpose of attending an anti-WTO rally." But, the court recognized, her claim is not purely associational because "the very purpose of the rally was to speak out against the WTO, an exercise that implicates core speech rights."

The court struggled with the nature of the test that should be applied to the facts before it: "We are presented with an issue of first impression, namely the appropriate test for benchmarking this hybrid right." It reviewed several

We see no reason to distinguish this hybrid circumstance from a case involving only speech rights.

of its sister circuits' decisions and determined that the test set out by the Supreme Court in *Pickering*, as expanded by *Connick v. Meyers* (1983) 461 U.S. 138, 22 SRS 4, was the appropriate test even though *Pickering* and *Connick* involved only freedom of speech. "The speech and associational rights at issue here are so intertwined that we see no reason to distinguish this hybrid circumstance from a case involving only speech rights," concluded the court. The *Pickering/Connick* test requires courts to "arrive at a balance between the interests of the teacher, as

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a citizen, in commenting upon matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.”

The threshold issue was whether Hudson’s activity involved a matter of public concern, instructed the court. It found that the Supreme Court had provided guidance in *United States v. National Treasury Employees Union* (1995) 513 U.S. 454, where the court explained that it “applied *Pickering’s* bal-

The threshold issue was whether Hudson’s activity involved a matter of public concern.

ancing test only when the employee spoke *as a citizen* upon matters of public concern rather than *as an employee* upon matters only of personal interest.” In this case, the court concluded, there was no question but that Hudson’s speech and associational activities qualified because “the WTO meeting and the issues surrounding it were quintessentially matters of public concern.”

It was the second prong of the *Pickering* test that Hudson could not meet. The court found that her “associational interests in this context are

strongly outweighed by the legitimate administrative interests of Clark College.” Evaluating the harm to Hudson, the court determined that “the actual curtailment of her First Amendment rights was minimal.” It emphasized that Hudson was free to go to the rally on her own, free to communicate her ideas about the WTO to her students or anyone else, and free to associate with her students in the classroom. “The only claimed abridgement of her First Amendment rights was that she was not permitted, under the de facto auspices of the College, to associate with a handful of students during a discrete event for a limited duration.” Balancing this “limited restriction” on Hudson’s rights against the college’s “compelling interests” of student safety and in maintaining its political neutrality, the college won out, said the court.

The court rejected Hudson’s argument that the college’s safety concerns were expressed only after the fact to justify her firing, finding that the vice president advised the faculty before the protest that her major concern was the safety of the students and faculty. Nor was the court persuaded by Hudson’s argument that safety was not a real concern as shown by the fact that none of the students attending the protest were harmed. It stated:

The court is not called upon to make a retrospective analysis of the College’s position, but instead to assess whether the stated justification for limiting Hudson’s association was reasonable at the time....Courts should not require

government employers to demonstrate that an employee’s speech *actually* disrupted efficient office operation; rather, reasonable predictions of disruption are sufficient.

Regarding what it called the college’s interest in its “pedagogical oversight,” the court found that “the decision of a public institution of higher education to avoid sanctioned political entanglement is a judgment that is best left to the institution.” Although Hudson maintained that she and her

It was the second prong of the Pickering test that Hudson could not meet.

students were not engaged in an official Clark College field trip, the court determined that the trip was closely linked to Hudson’s classroom teaching. “As structured, from Hudson’s organization of the trip to her integration of the trip into the final examination, it was impossible to separate the trip from the College,” concluded the court. “It was apparent that regardless of the trip’s label, Hudson viewed the experience as an educational opportunity for the students, one that she promoted through her teaching.” (*Hudson v. Craven* [9th Cir. 4-6-05] No. 03-35408 ___ F.3d ___, 2005 DJDAR 4066.) *

Public Records Act Does Not Require Disclosure of Performance Goals

Performance goals mentioned in, but not incorporated into, a school superintendent's employment contract, are not subject to disclosure under California's Public Records Act, held the Fourth District Court of Appeal in *Versaci v. Superior Court*. In reaching this conclusion, the court looked to the intent of the parties to determine whether the performance goals were part of the contract.

Background

Dr. Sherrill Amador was hired by the district as its superintendent in May 2001, under a four-year contract. Paragraph 4 of the contract read, in part: "Dr. Amador will receive an annual written evaluation by the Governing Board...based on overall performance and mutually agreed upon goals and objectives established each year prior to July 1....All evaluations will be held in a closed session."

In June 2002, Amador and the board mutually established her performance goals for the 2002-03 academic year. The goals were included in her personnel file, and the district maintained their confidentiality. Closed sessions were held in 2003 to evaluate Amador's performance. At a May 2003 open hearing, the board voted to extend her contract to 2007, by a vote of three to two. In June 2003, Rocco Versaci, president of the district's fac-

ulty union, asked the district for a copy of Amador's "eleven job goals" pursuant to the Public Records Act. A major issue for the faculty had been the salary increases given when public resources are scarce. The board refused, based on the act and on Amador's right to privacy under the California Constitution. Versaci petitioned the superior court for disclosure of the goals. The court denied the petition, and Versaci appealed.

Sec. 6254.8 did not apply because the goals were not part of the contract.

Court of Appeal Decision

Versaci argued that the performance goals were part of Amador's employment contract because paragraph 4 refers to goal setting in conjunction with the yearly evaluations and, therefore, the written goals are "key terms" of the contract. And, he argued, because Government Code Sec. 6254.8 provides that "every employment contract between a state or local agency and any public official or public employee is a public record," for which there is

no exemption or exception, the goals must be disclosed.

The court rejected this argument, finding that Sec. 6254.8 did not apply because the goals were not part of the contract. Relying on *Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, the court found that "whether a document is incorporated into the contract depends on the parties' intent as it existed at the time of contracting." "The parties' intent must, in the first instance, be ascertained objectively from the contract language," said the court. And, the court added, "for the terms of another document to be incorporated into the document executed by the parties, the reference must be clear and unequivocal."

Here, the mere reference to future goal setting in conjunction with Amador's evaluation process did not "clearly and unequivocally" evidence the parties' intent that the goals, which had not yet been determined, be incorporated into the contract. In addition, the court found that the parties' intent was revealed in paragraph 14 of the contract, where they agreed that the contract could be amended by mutual agreement of the parties. The parties never amended the contract to include Amador's personal performance goals.

The court upheld the trial court's finding that the goals were exempt from disclosure under Sec. 6254(c) of the act, which gives a public agency discretion to withhold "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted inva-

sion of privacy.” Because the act was modeled after the federal Freedom of Information Act, and because Sec. 6254(c) is identical to Exemption 6 of the FOIA, the court adopted the same analysis used by the federal courts in determining the applicability of the exemption. In applying Exemption 6, the court first must determine whether the records sought constitute a person-

*Disclosure of the goals
would ‘compromise
substantial privacy
interests.’*

nel file, a medical file, or other similar file. If so, the court then must determine whether disclosure of the information would compromise substantial privacy interests. Lastly, the potential harm to privacy interests must be weighed against the public interest in disclosure.

The threshold requirement — that the records be determined to constitute a personnel, medical, or similar file — is minimal, said the court. The documents sought need not contain intimate details or highly personal information. Rather, the “exemption was intended to cover detailed Government records on an individual which can be identified as applying to that individual.” The court noted, “it is undisputed that em-

ployee performance evaluations fall within the ambit of Exemption 6.”

Versaci asserted, however, that the performance goals must be disclosed because “the District did not dispute the goals related to her official duties.” The court disagreed, citing *Metropolitan Life Insurance Co. v. Usery* (D.D.C. 1976) 426 F.Supp. 150, where the court held “personal preferences and goals, as well as evaluations, are similar files within the meaning of Exemption 6, even where they do not contain derogatory information, in that they reflect highly personal details about employees.” The court concluded that Amador’s personal performance goals constitute a personnel or other similar file within the meaning of Sec. 6254(c).

The court also found that disclosure of the goals would “compromise substantial privacy interests.” Again quoting from *Metropolitan Life*, the court said:

The disclosure of negative comments or information about an employee on these subjects [including personal preferences and goals] could be quite embarrassing and painful to the employee. While many of the comments and much of the information is favorable or neutral, [Exemption 6] was designed to protect individuals from a wide range of embarrassing disclosures, not just the disclosure of derogatory information. Indeed, the disclosure of favorable information could place the employee in a very embarrassing position with other, possibly jealous, employees.

Turning to the last prong of the analysis, the court explained that in weighing Amador’s privacy interest against the public’s right to know, it must determine “the extent to which disclosure of the requested item of information will shed light on the public agency’s performance of its duty.” Versaci argued that disclosing the goals would allow the public to review and comment on relevant aspects of Amador’s performance. The public’s interest in Amador’s performance was moot said the court, because Amador had retired by the time the case was before the court. Versaci also argued that disclosure would allow the public to evaluate how the board members performed when they gave Amador satisfactory evaluations, raises, and contract extensions. The court acknowledged that the public has “a legitimate interest in how the trustees conduct the District’s business and manage public revenues.” However, it noted, that it can consider “whether the public interest can be substantially advanced by means other than the requested disclosure.” Citing a number of documents adopted in open session, the court reasoned that “without resorting to her personnel file, a substantial amount of information is available to assist the public in assessing the trustees’ conduct vis-à-vis Dr. Amador.”

The court also found that Amador had a reasonable expectation of privacy in her personal performance goals. Amador believed the goals were part of her performance evaluation and was

aware that the district customarily kept performance goals confidential. Moreover, noted the court, the Brown Act expressly authorizes a public agency to meet in closed session regarding the consideration of “the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee.” The underlying purposes of that section are to protect the employee from public embarrassment

Amador had a reasonable expectation of privacy in her personal performance goals.

and to permit free and candid discussions of personnel matters by a local government body, instructed the court. The court concluded that “Dr. Amador’s personal performance goals were an integral part of the confidential evaluation process,” and that her privacy interest in that process outweighed the public’s “minimal” interest in the matter. (*Versaci v. Superior Court [Palomar Community College Dist.]* [3-21-05] No. D044899 [4th Dist.] ___ Cal.App.4th ___, 2005 DJDAR 3278.) *

Personnel Commission’s Staff Are Employed by Community College District

Classified employees who work for a community college’s personnel commission are employees of the community college district, not the personnel commission, held the Court of Appeal for the Second District in *Hood v. Compton Community College*.

The aggrieved employees, all of whom worked for the personnel commission, sued the district for constructive discharge and other employment-related claims. The trial court dismissed their case finding no liability because they were employees of the personnel commission, not the district. The employees then sued the personnel commission. The trial court dismissed that case for failure to file a tort claim and exhaust administrative remedies. Undeterred, the employees appealed.

The Court of Appeal reversed the trial court’s findings. Education Code Sec. 88084 expressly provides that a personnel commission’s staff shall “be classified employees of the community college district,” and the trial court’s finding to the contrary “was erroneous as a matter of law,” stated the court.

In reaching its conclusion, the court relied on a basic principle of statutory construction, instructing that “the individual portions of a statute should be harmonized with each other and the entire statute should be harmonized with the body of law of which it

forms a part.” It determined the trial court’s conclusion was in error “because it effectively negates and renders superfluous section 88084’s pronouncement that the personnel commission’s staff are classified employees of the community college district, and are entitled to

Sec. 88084 expressly provides that a personnel commission’s staff shall ‘be classified employees of the community college district.’

all the rights, benefits, and burdens of any other classified employee.” The trial court’s reading of the statute also ran afoul of the statutory rule of construction urging that effect be given to all of the statute’s provisions, “leaving no part superfluous or inoperative, void or insignificant and so that one section will not destroy another.”

The court distinguished *United Public Employees v. Public Employment Relations Board* (1989) 213 Cal.App.3d 1119, 83 CPER 32, where the court found that the City and County of San

Francisco and the San Francisco Community College District were joint employers. However, that situation involved a community college district whose boundaries were “coterminous with the boundaries of a city and county” and, under Sec. 88137, classified employees of such districts are governed by the provisions of the city charter. Section 88137 did not apply in this case, said the court, because there were no coterminous boundaries and the personnel commission was far different from a municipal civil service commission, said the court.

The court found the district’s reliance on *Personnel Commission of the Lynwood Unified School Dist. v. Board of Education* (1990) 223 Cal.App.3d 1463, 87 CPER 49, misplaced because it did not address whether a personnel commission’s staff members are classified employees of the district. It also dismissed language in *Personnel Commission v. Barstow Unified School Dist.* (1996) 43 Cal.App. 4th 871, 117 CPER 26, that *Lynwood* involved a personnel commission’s staff member who was employed by the personnel commission. In reality, said the court, “*Lynwood* said nothing on that point.” The court also rejected the district’s argument that the plaintiffs’ state of mind as to whether they were employed by the department or the commission, as reflected in deposition testimony, should be determinative. “Such testimony is irrelevant...due to the legal pronouncement in section 88084 that employees of the personnel commission’s staff are,

by definition, classified employees of the district.” (*Hood v. Compton Community College Dist.* [3-24-05] No. B169632 [2d Dist.] ___ Cal.App.4th ___, 2005 DJDAR 3467.) *

Local Government

Supreme Court Hears Oral Arguments in MMBA Statute of Limitations Case

On May 4, the California Supreme Court heard oral arguments in *Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Board*. The case involves the statute of limitations period applicable to unfair practice charges brought under the Meyers-Milias-Brown Act.

The dispute involves an unfair practice charge filed by the California School Employees Association shortly after the passage of S.B. 739 in 2000, when PERB acquired jurisdiction over local government entities covered by the MMBA. In reviewing the charge, which involved conduct that had occurred in 1999, PERB applied a three-year statute of limitations period. It derived the three-year limitations period from Code of Civil Procedure Sec. 338, which it asserts was applicable to MMBA cases before jurisdiction was transferred to the board.

The district has argued that PERB's jurisdiction is bound by the six-month statute of limitations period set out in the Educational Employment Relations Act and that the board cannot issue a complaint in reliance on the retroactive application of S.B. 739. When the district raised these arguments in a petition for a writ of mandate, however, a Riverside County su-

perior court sided with PERB, ruling that the three-year statute of limitations was appropriate and that retroactive application of S.B. 739 was not prohibited.

The district appealed that ruling and was successful in reversing the lower court decision. In 2003, the Fourth District Court of Appeal ruled that MMBA unfair practice charges are subject to a six-month statute of limita-

Justice Kennard asked, 'What's different about the MMBA?'

tions period, and the court declined to apply S.B. 739 retroactively. PERB, in turn, successfully petitioned the California Supreme Court to review the Court of Appeal decision. (For a complete discussion of the Court of Appeal decision, see *CPER*No. 164, pp. 25-28.)

Oral Argument

General Counsel Robert Thompson led off the presentation before the high court by focusing on whether the legislature intended to shorten the three-year limitations period when it

enacted S.B. 739 and gave PERB jurisdiction over MMBA disputes. He argued that lawmakers were aware of the existing statute of limitations period applicable to MMBA cases when they passed S.B. 739, and that PERB lacked the authority to change the existing period. He also pressed the point that the legislature knew how to install a six-month statute of limitations period, having done so both before and after passage of S.B. 739, and purposefully had chosen not to do so in the case of the MMBA. At that point, Thompson was cut off by Justice Joyce Kennard, who asked why every other statute within the board's jurisdiction has a six-month statute of limitations. "What's different about the MMBA?" she wanted to know.

In response, Thompson returned to his point that the legislature had provided clear directive in every other statute, but had failed to do so in the case of the MMBA. When the Winton Act was replaced by EERA and when the Brown Act was replaced by the Dills Act, he said, the legislature expressly set out a six-months statute of limitations period. And, Thompson added, the legislature may have thought the MMBA was different since it had operated successfully for 30 years under a three-year period.

In questioning from Justice Ming Chin, Thompson conceded that CCP Sec. 338 does not apply to administrative proceedings. However, he said, PERB lacks the jurisdiction to impose a statute of limitations period on its own

initiative and, under the express directive included in S.B. 739 that the board follow case law developed under the MMBA, the three-year statute of limitations is appropriate.

Justice Marvin Baxter asked Thompson if the board had tried to take the issue back to the legislature, rather than “attempting to read tea leaves.” Thompson said the board had not done so, and he pointed out that there have been approximately 10 amendments to the MMBA since PERB acquired jurisdiction and that the legislature had not availed itself of the opportunity to install a six-month statute of limitations period.

Justice Baxter asked if the board had tried to take the issue back to the legislature.

Attorney Sonja Woodward, representing CSEA, addressed the retroactivity aspect of the case. She argued that, with the enactment of S.B. 739, prospective charging parties had a right to rely on the preexisting three-year statute of limitations and on PERB's conclusion, as an expert agency, that the three-year limit was correct. That assertion, Justice Kennard remarked, assumes the Court of Appeal acted “willy nilly” in finding that the shorter, six-month period was appropriate. Kennard

posited that the legislature looked at the other statutes enforced by PERB and concluded, “lo and behold,” that the applicable statute was six-months, not three years.

Woodward responded, “in all due respect,” that S.B. 739 was different than the other statutes because it did not expressly impose a six-month statute and it directed PERB to apply prior case law that had utilized the three-year limitations period. The appropriate analysis, Woodward said, is not what the legislature did with regard to other statutes, but what prior cases had determined to be the statute of limitations under the MMBA.

The discussion then turned to the relevance of case precedent. Kennard argued that *Giffin v. United Transportation Union* (1987) 190 Cal.App.3d 1359, was not persuasive authority because there was no specific mention of the MMBA statute of limitations in that case and because *Giffin* was a duty of fair representation case. Holding her ground, Woodward responded that *Giffin* is the case practitioners consistently have looked to as establishing the three-year statute of limitations period under the MMBA.

Up next was Lisa Garvin Copeland, representing the district. She referred to the legislative history of S.B. 739, pointing out that the purpose of transferring the MMBA to PERB was to shorten the delays in hearing long-standing disputes of the parties. Imposing a three-year period perpetuates the evil the statutory amend-

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

Mae West

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Pocket Guide to the Meyers-Milias-Brown Act

(12th edition)

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ment was intended to cure, she said. In contrast, a six-month statute of limitations period promotes constructive labor relations by forcing charging parties to bring their disputes forward promptly.

Given these concerns, asked Kennard, why did the legislature not address the statute of limitations period? Copeland replied that that is based on the erroneous conclusion that there was a preexisting three-year statute of limitations in place when S.B. 739 was drafted. Again, the discussion returned to the persuasiveness of *Giffin* and the absence of clear judicial authority establishing a three-year limitations period under the MMBA.

Carol Flynn, assistant city attorney for the City of Anaheim, and appearing on behalf of the League of Cities and other “friends of the court,” brought the justices back to the 1970s, when the legislature first took up public sector collective bargaining rights. Walking the court through the enactment of EERA, the Dills Act, and the Higher Educational Employer-Employee Relations Act, Flynn underscored the point that all of these statutes are administered by PERB in the same manner and all operate under a six-month statute of limitations period. S.B. 739 must be read as part of that statutory scheme, she said.

In a brief rebuttal, Thompson responded to the assertion that enforcing a three-year statute in MMBA cases would stand it apart from the other laws under the board’s jurisdiction. True, he said, but each statute must stand on its own. Where, as in the case of the

MMBA, there are differences as compared to other statutes, the board has to give those differences a meaning.

Appeal Court Orders Release of Oakland Salary Information

The right to privacy does not prevent the release of public employees’ salary data, the First District Court of Appeal ruled in a thoroughly reasoned opinion authored by Justice Joanne Parrilli. Over objections raised by the International Federation of Professional and Technical Engineers, Local 21, and the Oakland Police Officers Association, the court ordered the City of Oakland to divulge the names and gross salaries of all city employees who earned more than \$100,000 in fiscal year 2003-04. The court concluded that “well-established norms of California public policy and American public employment exclude public employee names and salaries from the zone of financial privacy protection.”

At the outset, the court recognized the tension between privacy rights and openness contemplated by the California Public Records Act. The legislature came down on the side of disclosure by requiring the government agency in possession of the public record to shoulder the burden of establishing an exemption to the statutory scheme. In this case, the city relied on the exemption for personnel files the release of which would “constitute an unwarranted invasion of personal privacy.”

With that, the matter was submitted to the Supreme Court. A decision is expected within 90 days. *

Guided by the Supreme Court ruling in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 105 CPER 20, the Court of Appeal sought proof of a legally protected privacy interest and reviewed California case law favoring the disclosure of public employee salary information.

The court relied on *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, where the court re-

The court recognized the tension between privacy rights and openness.

jected the city council’s assertion that it be permitted to discuss personnel issues, including employee salary levels, in private executive session. The Fourth District Court of Appeal in *San Diego Union* reasoned that “salaries and other terms of compensation constitute municipal budgetary matters of substantial public interest warranting open discussion.... With ever-increasing demands on public funds which have

dwindled so drastically since the passage of Proposition 13, secrecy cannot be condoned in budgetary determinations, including the establishment of salaries." In agreement with the *San Diego Union* ruling, the First District said, "The public interest in budgetary transparency is incompatible with the notion that public employees have a right to keep their salaries private. Certainly, the pressures on government budgets are at least as great a concern today as they were in 1983, when the *San Diego Union* decision was published."

*In other states,
disclosure 'is
overwhelmingly
the norm.'*

The court also was influenced by case law from other states where the disclosure of public employee names and salaries "is overwhelmingly the norm." State court decisions cited in the opinion include cases from Alaska, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New York, Ohio, Pennsylvania, Tennessee, Utah, Washington, and Wisconsin.

Regulations implementing the federal Freedom of Information Act likewise require disclosure of the name and salary rate of present and former fed-

eral employees. "Both the CPRA and the Freedom of Information Act embody a public policy favoring disclosure of public records, and protect personnel files only insofar as their release would constitute an unjustified invasion of privacy," said the court. "The federal act has not been applied to protect public employees' names and salaries from disclosure."

The court also observed that the CPRA specifically identifies as a public record every employment *contract* between a state or local agency and any public official or public employee. While the court recognized that public employment in California is held by statute, not by contract, this statutory provision demonstrates that the legislature "does not consider the information found in employment contracts with public officials or employees, which would certainly include names and salary information, to be protected from disclosure by social norms or the constitutional right to privacy."

As further evidence favoring disclosure, the court turned to the legislative declaration of intent found in the open meeting provisions of the Brown Act. "The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know."

Provisions of Oakland's "sunshine" ordinance also afforded support for disclosure of city employee salaries.

It requires release of "the exact gross salary and paid benefits available to every public employee" and of all "records of payment obligations, as well as records of actual disbursements showing the amount paid, the payee and the purpose for which payment is made...." "Read together," said the court, "these provisions require the disclosure of salaries actually paid to city employees."

The court rejected the assertion that recently enacted federal and state

*'The people do not
yield their sovereignty
to the agencies which
serve them.'*

financial privacy legislation supports the right of public employees to keep their salary information private. Those statutes apply only to information obtained by financial institutions, explained the court, and do not shield public employee salaries from disclosure. "Public employees have the same privacy rights as their fellow citizens in the details of their transactions with financial institutions," said the court, but "salaries are not merely personal finances; they are public expenditures."

The court flatly rejected the contention that disclosing names and salaries exposes public employees to the

risk of identity theft. During the previous eight years when Oakland disclosed the names and salaries of its employees, the court said, there were no problems with identity theft. The court also was unconvinced that the benefits of disclosing salaries could be obtained without linking salaries to the names of specific individual employees. “The public has a right to know not only how much it is spending on salaries, but also who the recipients are. Salary information stripped of personal identification would leave the public in the dark as to possible instances of nepotism, favoritism, inefficiency, and fraud.”

In reaching its conclusion, the court distinguished the present case from *City of Los Angeles v. Superior Court* (2003) 111 Cal.App.4th 883. There, the issue was not the public’s right to disclosure of public finances, but the discovery rights of a litigant in a marital dissolution proceeding, and the court did not consider the guidelines set out in *Hill* for determining the existence of a legally protected informational privacy interest.

The court also was forced to deal with the reasoning set out in *Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal.App.4th 1500, 163 CPER 34, where Division One of the same district court concluded that the unions had established that publication of employee names and salaries would be an invasion of privacy. The court found fault with the *Priceless* court’s analysis, noting that it “gave insufficient consider-

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

Lily Tomlin

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by Dieter Dammeier

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ation to the burden placed on parties resisting disclosure under the CPRA, and to the limited nature of the intrusion into personal finances occasioned by the release of gross salary data for named public employees.”

Finally, the court rejected the POA’s contention that the salary data which pertains to police officers is protected from disclosure as a “personnel record” by Penal Code Sec. 832.8. The court rejected the recent ruling in *California Commission on Peace Officer Standards and Training v. Superior Court* (2005) ___ Cal.App.4th ___, where *The Los Angeles Times* sought to compel disclosure of peace officer employment history records maintained by POST. The court in that case ruled that since the records were “obtained from” the personnel files maintained by police departments, they were confidential under the Penal Code provisions (see pp. 52-54 of this issue of *CPER*).

The court in the present case found the *California Commission* ruling overbroad, charging that it would make confidential *any* information from *any* file containing *any* item relating to confidential information. “We do not believe the Legislature intended to paint with so broad a brush,” the court admonished. (*International Federation of Professional and Technical Engineers, Loc. 21 v. Superior Court of Alameda County; Contra Costa Newspapers, Inc., RPI*; [4-18-05] A108488 [1st Dist.] ___ Cal. App.4th ___, 2005 DJDAR 4423.)

The salary data sought in the Oakland case was made public prior to the

Court of Appeal ruling because a request to stay the trial court decision was denied in December. But, while the dispute in Oakland may be resolved, a similar case is pending in San Jose, where the *San Jose Mercury News* is

seeking salary data from city officials. In the end, given the conflict between the Oakland case and the *Priceless* ruling, it may be that the California Supreme Court will have to weigh in to resolve the matter. *

The parties returned to the table, but as is typically the case, little progress was made during the cooling-off period, and the Bay Area girded for a strike. Over the Labor Day weekend, a small group of Bay Area elected officials intervened and, just hours before the cooling-off period was set to expire, agreements were reached between BART and these two unions. (See *CPER* No. 150, pp. 17-21, for a wrap-up of the 2001 talks.)

As a result of these negotiations, SEIU and ATU agreed to four-year contracts that included wage increases totaling 22 percent over the life of the agreements. Reactions to the settlement varied. The unions heaped praise on the

BART, Unions Gear Up for Another Round of Contentious Talks

From the look of it, negotiations between the Bay Area Rapid Transit District and the unions that represent BART workers may be headed for some rough water. Preliminary budget projections released in April predict a defi-

cit in excess of \$50 million. As a result, the transit district has proposed a variety of revenue-generating possibilities that have been jeered by the general public, and cost-cutting options — like layoffs and wage freezes — that have met similar disapproval from the unions.

Recent discussion focused on ways to enhance the transit district's coffers.

SEIU Local 790 has questioned management's fiscal projections, claiming that the district has inflated its deficit numbers and that its cries of alarm are just pre-bargaining posturing. With

contracts set to expire at the end of the month, the unions are gearing up for what SEIU has labeled "the most crucial BART negotiations in years." Five labor unions represent BART employees. SEIU Local 790 represents the maintenance, clerical, and professional workers, the largest group; Amalgamated Transit Union Local 1555 represents train operators and station agents; AFSCME Local 3993 represents supervisory employees; the BART Police Officers Association represents the sworn officers and cadets; and the BART Police Managers Association bargains on behalf of middle-management sworn officers.

In 2001, when bargaining reached an impasse late in June, SEIU and ATU invoked provisions of the Labor Code and called on then-Governor Gray Davis to impose a 60-day cooling-off period. The governor convened a board of investigation, which recommended that the attorney general enjoin any union work-stoppage or management lockout for 60 days. (See *CPER* No. 149, pp. 31-33, for a complete report on the cooling-off period.)

Unions describe a top-heavy management workforce.

local politicians who used their influence to push for the agreements that averted what would have been a disruptive transit strike. Others were critical of management for "caving in" and acceding to what was perceived to be out-of-line wage increases. Still others faulted the ineffectiveness of the cooling-off period dictated by the Labor Code and called for an outright ban on transit strikes.

It is against this backdrop that the current talks have gotten underway.

SEIU began to prepare for these negotiations early. Last fall, it sent a delegation of labor leaders to Washington, D.C., and New York City to discuss issues common to the transit industry and strategies that could be applied with BART. The delegation met with SEIU President Andy Stern. With union backing, two labor-friendly candidates were elected to the district's nine-member board of directors.

Union protesters were present at recent public budget hearings conducted by the board, where the discussion focused on ways to enhance the transit district's coffers. Ideas under consideration include fare increases, parking fees at certain BART stations, and a reduction to the discounts currently offered to senior and disabled riders.

The district says that its budgetary difficulties stem from the general downturn in the economy, slow growth in ridership, and the rising cost of employee benefits. The unions have called on the district to eliminate what it describes as a top-heavy management workforce.

With BART management pointing to the hefty raises that came along with the last contract and the rising cost of employee health benefits, and with the union challenging the credibility of the very budget figures that are driving the discussion, it seems possible that history could repeat itself. If so, San Francisco Bay Area residents once again will have to face the prospect of a transit strike as the parties go down to the wire during another 60-day cooling off period. *

POST-Held Information Shielded From CPRA Disclosure

Information obtained from peace officer personnel records that is conveyed to the California Commission on Peace Officer Standards and Training is exempt from disclosure under the California Public Records Act, announced the Third District Court of Appeal. In another case that pits the public's right to information against a public employee's privacy rights, the court determined that *The Los Angeles Times* could not compel disclosure of peace officers' names and appointment or termination dates. While not maintained in a personnel file or by an employing agency, the information was shielded from disclosure, held the court, because it was "information obtained from" peace officers' personnel files.

The California Commission on Peace Officer Standards and Training, known as POST, is a state agency that serves as a repository for employment data supplied by 626 participating law enforcement entities. Whenever a peace officer is appointed, promoted, demoted, or terminated, POST is informed of changes to employment status through a law enforcement agency's submission of a Form 2-114.

The newspaper asked POST to release data derived from these forms. When POST denied the request, *The Times* filed a petition under the California Public Records Act. The trial

court ordered POST to release the information, and POST appealed.

Finding that POST records are "public records" within the meaning of the CPRA, the Court of Appeal turned to the specific exceptions to the general disclosure requirements of the stat-

The CPRA does not strip peace officer personnel files of statutory protections.

ute. The court first rejected the claim raised by POST that the records sought by the newspaper are confidential peace officer personnel records within the meaning of Penal Code Secs. 832.7 and 832.8. Those sections provide that disclosure can be compelled only through discovery provisions of the Evidence Code in an underlying civil or criminal action. That statutory scheme, first enunciated in *Pitchess v. Superior Court* (1973) 11 Cal.3d 531, balances peace officers' rights of confidentiality against the rights of criminal defendants and civil litigants to gain access to relevant information contained in personnel records.

But in this case, the court noted, *The Times* requested public records

under the CPRA, not through a discovery motion. Relying on *City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 113 CPER 81, the court instructed that compliance with *Pitchess* procedures is not mandatory when a non-litigant requests public records that might be classified as peace officer personnel files. The procedures set out in the CPRA provide an appropriate method for requesting personnel records where there is no underlying lawsuit.

However, the Court of Appeal cautioned, “the fact that CPRA provides an independent mechanism to obtain law enforcement records outside the litigation framework does not strip peace officer personnel files of the statutory protections accorded to them by the Penal Code.”

Penal Code Sec. 832.7 provides that peace officer personnel records are “confidential and shall not be disclosed in any criminal or civil proceeding” except in compliance with the Evidence Code procedures, noted the court. By using the conjunctive, the legislature intended both to confer confidential status on peace officer personnel records and to establish a procedure for their discovery in pending litigation. Therefore, the court reasoned, Penal Code Sec. 832.7’s use of the term “confidential” has independent significance “and imposes a general privilege of confidentiality on peace officer personnel records.”

The CPRA, through Sec. 6254(k), exempts from inspection any records, “the disclosure of which is exempted or prohibited pursuant to federal or state law.” Penal Code Sec. 832.7 is such a provision of law, said the court, and therefore the peace officer personnel records protected by Sec. 832.7 properly may be withheld in response to a CPRA request. With that, the court focused on whether the records sought by *The Times* constitute peace officer personnel records.

All information sought constitutes ‘employment history.’

Penal Code Sec. 832.8 defines “personnel records” to mean “any file maintained under that individual’s name by his or her employing agency and containing records relating to” five specified categories, including at paragraph (a): “Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.” Penal Code Sec. 832.7 renders confidential not only peace officer personnel records themselves but also “information obtained from these records.” Therefore, the court reasoned, while POST’s files are not records maintained under an individual officer’s name and POST is not an employing agency, the data it collects is derived

from forms submitted by participating departments and the information is obtained from peace officers’ personnel records.

Based on the declaration of Paul Harman, the chief of POST’s information services bureau, and on “common sense,” the court found the data sought by *The Times* is information obtained from peace officer personnel records within the meaning of Penal Code Secs. 832.7 and 832.8, and is “categorically exempt from disclosure under the privilege established in section 6254, subdivision (k) of CPRA.”

The Court of Appeal rejected the newspaper’s argument that because the names of peace officers, their departments, and their dates of employment are not expressly listed in Sec. 832.8, they do not constitute personnel records under the CPRA. Under the plain language of these statutes, said the court, the protection afforded by Sec. 832.7 is not limited to information enumerated in subdivisions (a) through (f) of Sec. 832.8. Rather, the court explained, a confidential personnel record is defined as “any file...containing records relating to” the enumerated items. “This means that if a file otherwise meeting the definition in Penal Code section 832.8 contains records relating to items specified in subdivisions (a) through (f) of that section, then the entire file is a personnel record and all of the items in the file are confidential.”

Rejecting a contrary conclusion reached in *City of Los Angeles v. Superior Court* (2003) 111 Cal.App.4th 883,

the court further explained: “It is not the enumerated items that are protected, but *any information* in a file maintained by the employment agency that contains records relating to any of the items specified in subdivision (a) through (f).”

In any event, added the court, even if the privilege applies only to the type of information specified in Sec. 832.8, all the information sought by *The Times* constitutes “employment history” within the meaning of subdivision (a). “Dates of hire, promotion, demotion, departmental assignments, and other such events occurring during a person’s employment as a peace officer, including his or her status as a peace officer, are all literally part of a peace officer’s employment history.”

The court defended its position in the face of the argument that a public agency could shield a record from public disclosure simply by placing it in a personnel file. “That is not what happened here,” said the court. “The data sought by *The Times* from POST’s personnel database is derived from employing agencies’ existing personnel records and is comprised of information ordinarily found in personnel files.”

In a concurring and dissenting opinion, Justice Kathleen Butz concluded that because POST had not carried its burden of demonstrating that the Form 2-114 information was derived entirely from categorically exempt peace officer personnel records, it was not justified in withholding the

requested data under Sec. 6254(k) of the CPRA.

Justice Butz also affirmed *The Times*’ interest in seeking the POST information based on an unusually high rate of attrition within the Los Angeles Police Department. “These concerns are valid,” she said, and “there is a clear public interest in making visible the employment trends of law enforcement agencies, which are funded by and ultimately accountable to the people.” (*California Commission on Peace Officer Standards and Training v. Superior Court; The Los Angeles Times Communications, RPI* [4-7-05] C045494 [3d Dist.] ___Cal.App.4th___, 2005 DJDAR 4098.) *

State Employment

Court Says CHP Cannot Require Permit for CSEA Leafleting

In August 2004, a California Highway Patrol officer arrested Jim Hard, president of SEIU Local 1000, CSEA, as he handed out the *Union Update* to state employees in a building leased by the Department of General Services. But Sacramento Superior Court Judge Lloyd Connelly has ruled that the officer violated Hard's freedom of speech when he invoked CHP permit regulations to arrest Hard. The judge turned aside arguments that Local 1000 had failed to exhaust contractual remedies under the collective bargaining agreement and administrative remedies of the Public Employment Relations Board.

Salary, Retirement Pact Announced

The *Update* Hard was distributing announced a deal he had just reached with the governor concerning the alternate retirement program and pay raises for two bargaining units the union represents. The CHP officer had been called by building management, which claimed Hard could not leaflet without a permit from the CHP. Hard was arrested after he refused a California Highway Patrol officer's order to stay on the sidewalk, 50 yards from the door of the building, which houses only state employees.

Because Local 1000's collective bargaining agreements with the state allow leafleting during meal and rest breaks, and placement of newsletters in employee in-boxes, the union sought an injunction prohibiting the CHP, the Department of General Services, and the Department of Personnel Admin-

*The union's
communication
constitutes
protected speech.*

istration from requiring the union to obtain a permit to leaflet. In December, a superior court judge in Sacramento issued a preliminary injunction prohibiting the CHP from enforcing its permit regulations in response to leafleting activity to the extent the distribution of material was allowed by the memorandum of understanding.

Freedom of Speech Abridged

Local 1000 also filed a challenge to the permit requirements on freedom of speech grounds. In a petition for writ of mandate, the union claimed the per-

mit regulations in Secs. 1851-1860 of Title 13 of the Code of Regulations were unconstitutional both on their face and as applied to Hard's leafleting activities. In May, the judge rejected the facial challenge to the regulations. But his peremptory writ of mandate ordered the CHP to refrain from applying the permit requirements to the union's distribution of written materials to state employees near the entrances and in the lobbies of state-owned or state-leased buildings when the materials discussed matters affecting their employment.

First, the court found the permit regulations did not pertain to the union's leafleting because they apply only to demonstrations or gatherings of more than two persons "having the effect, intent or propensity to draw a crowd or onlookers." The court criticized the CHP's lack of factual support for its action and found that leafleting, in contrast, involves one or two union representatives distributing flyers to passing employees, with no further interaction.

The court stressed that the state is limited in restricting the union's communication of information and viewpoints about matters affecting employment because the union's communication constitutes protected speech under the state and federal Constitutions. Although the state may regulate the time, place, and manner of distributing literature on state property in areas open to the public, it may restrict leafleting "only to the narrow extent necessary to avoid interference with the specific

purposes and normal activities of those public areas.” The CHP, however, had not shown that Hard’s leafleting had caused or created a risk of injury, threatened damage to property, or impeded the performance of public business by causing noise or blocking passageways inside or outside the building. Local 1000 pointed out that it had complied with provisions of the collective bargaining agreement that were designed

DPA later apologized for the arrest.

to allow union distribution of materials without disruption of state business. To apply the permit requirements to leafleting therefore was unconstitutional, the court concluded.

CHP Regulations Valid

The court stopped short of invalidating the CHP permit regulations altogether. The state interest in maintaining peace and order in the streets justifies time, place, and manner restrictions on demonstrations and gatherings that are protected by the rights to freedom of speech and association, the court explained. As long as the specific criteria for issuance of a permit do not discriminate against persons on the basis of the content of their speech, the regulations are lawful.

The court rejected Local 1000’s contention that the terms “demonstra-

tion and gathering” allow the CHP to make a content-based assessment of whether a permit is required for an activity and whether a permit can be denied because an activity is primarily commercial in purpose. It also turned aside the assertion that there were no standards to guide the determination of how much insurance would be required for a demonstration. The court did not agree with the union that the regulations lack criteria that govern the CHP’s ability to revoke a permit due to “previously unknown circumstances.” The provisions refer back to the criteria set out for the original issuance of a permit, explained the court.

The court found reasonable a requirement that an organization request a permit 10 days in advance of an activity. The exemptions from the regulations for bake sales by state employees at their worksite to raise money for charitable causes also is justifiable, explained the court, because state employers and building managers can reasonably be expected to impose necessary restrictions on such activities at the worksite.

Administrative Exhaustion Not Required

The CHP and DGS, along with DPA, which represents the state in negotiations, attempted to derail the litigation by arguing that Local 1000 should use the grievance and arbitration procedures of the collective bargaining agreement or seek administrative remedies from PERB to resolve the dispute. But the court concluded that

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

Isaac Asimov

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

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the permit regulations were not subject to interpretation or enforcement through the arbitration procedures of the contract, and the lawsuit did not involve the provisions of the collective bargaining agreement. An unfair practice charge before PERB would not resolve questions about the constitutionality of permit regulations, the court observed.

Criminal Charges Dismissed

In the separate criminal court proceeding, the charges against Hard were dismissed in the interests of justice. The irony, says Hard, was that the *Update* was trumpeting the governor's agreement. Hard told *CPEP* that DPA later apologized for the arrest. *

ant for the local, asserts that two groups of safety employees approached the Teamsters because they were dissatisfied with CAUSE representation. Safety employees complained they were unable to reach CAUSE staff and that the union's affiliate structure insulated CAUSE officers from accountability to its members.

Structure Blamed

CAUSE is an umbrella organization for 19 subgroups of employees who work in separate departments of state agencies. Each of these groups votes for its own president, who serves on the

Teamsters Campaign to Decertify CAUSE

Acting on requests from some disgruntled state employees, Teamsters Local 228 is gathering signatures in a move to decertify the California Union of Safety Employees. CAUSE, which represents about 6,500 protective service officers and regulatory enforcement employees in over 40 departments statewide, has represented employees in state bargaining unit 7 since 1981. Complaints concerning access to union representatives and questions about the retroactivity of recent retirement benefits enhancements fueled the decertification drive. As the battle heated up, each union charged the other with corruption and incompetence.

Who's More Corrupt and Greedy?

Early in 2004, Teamsters Local 228, which represented staff employees of CAUSE, began collecting signatures for an election to decertify CAUSE. CAUSE launched a counter-attack, reminding safety employees of

the corrupt history of the Teamsters. "How could CAUSE members ever agree to be represented by organizations with such blatant disregard for the law? Laws that, in some cases, our members may actually be charged with upholding and enforcing?" asked CAUSE President Alan Barcelona. The CAUSE website posted links to news articles about the Teamsters' alleged ties to organized crime and criminal charges stemming from contributions to the Clinton-Gore campaign in 1996. In turn, the Teamsters posted a news article insinuating that the Federal Bureau of Investigation and the Franchise Tax Board were inquiring into CAUSE's use of member dues and released time spent on non-union business.

CAUSE also painted the decertification drive as a grab for union dues. But a spokesperson for Teamsters Local 228 says that characterization is untrue. Steve Booth, a labor relations consult-

The Teamsters emphasizes that its dues are controlled by a vote of its members.

CAUSE board. The board elects the CAUSE president. It also sets general dues with no direct vote by the members. Dues increases are correlated with pay raises.

The Teamsters emphasizes that its dues are controlled by a vote of its members. Local 228 claims that dues for some unit 7 members would decrease with Teamsters representation since some CAUSE affiliates charge additional dues set by the affiliates' boards.

Dissatisfied unit members charge that their interests are ignored in negotiations and that CAUSE has not taken

action on their legal issues and grievances. Kasey Clark, chief legal counsel for CAUSE, counters that members can contact legal staff directly, and that CAUSE's lawyers have filed grievances on behalf of members. He explained the difficulty of pleasing everyone in such a diverse bargaining unit. "Unlike the California Association of Highway Patrolmen, which represents only a few classifications of employees in

*DPA assured members
that past service
'will be changed to
the State Safety
retirement
classification.'*

one agency, CAUSE represents employees in 170 classifications who work in 45 different departments."

CAUSE Pummeled on Retroactivity

One issue CAUSE is fighting on two fronts is the refusal of the Department of Personnel Administration to apply retroactively recently acquired retirement benefit enhancements. In 2002, S.B. 183 (Burton, D-San Francisco) made most bargaining unit 7 employees in the miscellaneous retirement category eligible for a safety pension effective July 1, 2004. CAUSE told its

members that the more lucrative benefit formula of the safety retirement would apply retroactively to past service. Teamsters Local 228 charges that many employees delayed retirement until last summer based on the representation. But DPA announced in July that it would not grant credit toward a safety retirement for service rendered while a miscellaneous member of the retirement system. The dispute has plunged CAUSE into drawn-out litigation, as DPA claims the issue is not arbitrable.

S.B. 183 was based on a March 2002 agreement between CAUSE and DPA that miscellaneous members would be transferred to the safety retirement plan. CAUSE insists that it had the word of former DPA Director Marty Morgenstern that the safety pension entitlement would be applied retroactively. CAUSE points to a DPA memorandum of questions and answers for unit 7 members regarding the retirement reclassification for miscellaneous members, issued in October 2002, just before Arnold Schwarzenegger became governor. DPA assured members that past service "will be changed to the State Safety retirement classification if you continue employment in a position subject to reclassification."

Highlighting DPA's current refusal to credit past service, Local 228 contends that unit 7 employees' dues went toward a mediocre improvement. Beyond the issue of financial stewardship, the Teamsters union assures employees that it would have dealt with the is-

Life is a very imperfect arrangement.

Robert Maddock

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

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

Pocket Guide to the Family and Medical Leave Acts

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sue “up front” and would not have misled employees.

Time Line Uncertain

Booth would not tell *CPER* how many signatures Local 228 has gathered, only that the Teamsters union attempts to obtain signatures from a majority of the employees in a unit before asking for a decertification election. Booth claims that support for the decertification has grown to include employees in about two-thirds of the de-

partments that employ unit 7 members. The Public Employment Relations Board requires only a 30 percent showing of interest.

However, CAUSE chief legislative advocate Tim Fries doubts the campaign ultimately will succeed. PERB regulations provide that signatures are valid for only one year for purposes of calculating proof of support. “They’re losing signatures,” he said, because the Teamsters campaign has lasted more than a year. *

The judge denied the motion on the grounds that Public Contract Code Sec. 10337(d) provides the relief the union sought. Section 10337 enables an employee organization representing state employees to file an SPB challenge to a contract that purportedly is justified by an exception other than cost-savings. Subdivision (d) states simply: “Contracts subject to State Personnel

*Contracts that a
union challenges
before the SPB are
not effective until
approved.*

Union Challenge Stays Contracting-Out Plan Pending SPB Approval

Service International Employees Union, Local 1000, CSEA, lost a motion but won an important interpretation of a statute that governs when the state can contract out for services that civil service employees normally perform. The trial court in Sacramento County ruled that the union did not need a temporary restraining order to prevent the Department of General Services from contracting out janitorial services at the Franchise Tax Board because, under state law, contracts that a union challenges before the State Personnel Board are not effective until approved.

The state cannot outsource services usually performed by civil service employees unless it can show a cost savings or meet one of 10 exceptions to the general rule against personal services contracts. The department argued

that it could save costs by entering into a three-year janitorial services contract with a private building-maintenance corporation. In March, the department entered into a 90-day contract for janitorial services while it waited for SPB approval of the long-term contract. It contended it had an urgent need for the 90-day contract for custodians because of the additional activity at the Franchise Tax Board during the tax season.

The union challenged the 90-day contract before the SPB, claiming that the emergency was caused by the department’s own decision not to fill custodian vacancies in anticipation of the three-year contract. When the department indicated it would proceed with the short-term contract, the union moved for a temporary restraining order in the superior court.

Board review under this section shall not become effective unless and until approval is granted.” CSEA’s counsel, Anne Giese, says the union now will send out “cease and desist” letters when it files requests that the SPB review a personal services contract. “If the department refuses to stop its action, we’ll take them to court.”

The union did agree that the department could hire 33 limited-term employees while the SPB considered the contracts. In late April, the SPB disallowed both the long-term and the 90-day contracts. As *CPER* went to press, Matt Bender, spokesperson for the Department of General Services, told *CPER* the department was still evaluating whether to appeal the decisions. *

Higher Education

After AFSCME Strike, U.C. Settles

Less than a week after a systemwide, one-day strike, the University of California and Local 3299 of the American Federation of State, County and Municipal Employees reached agreement on a three-year contract for university service workers. U.C. considers the strike illegal, but AFSCME insists it met its obligation to bargain after receiving a factfinding report during stalled negotiations for a successor contract.

AFSCME gained equity increases for many of the 7,300 custodians, food service workers, groundskeepers, building maintenance workers, and parking attendants it represents, but was unable to win guaranteed raises. It also negotiated language regarding career ladders for service unit employees that is stronger than the provisions it garnered for patient-care workers in U.C. medical facilities last summer. (See story in *CPER* No. 167, pp. 46-48.) Against AFSCME's demands for no cost increases, the university held the line on its uniform health benefits program for all employees.

Factfinding Report Not Released

Issues raised during successor negotiations echoed those the parties had discussed in reopener bargaining for 2003-04 wages — career development, seniority-based promotions, a demand

for conversion to a step-based pay structure from an open-range salary system, and layoffs. Those wage reopener negotiations ended late last year with an agreement for two bonus leave days during the winter break, three additional days of training and development leave for 2003-04, and extension of the prior contract from its original expiration date of July 1, 2004, to January 31, 2005. (See story in *CPER* No. 170, pp. 64-66.)

U.C. maintained the same position as it had in the CUE factfinding.

Wage issues again stalled negotiations for the successor contract. In January, the university offered no increase for 2004-05, 2 percent for 2005-06, and 3 percent each for 2005-06 and 2007-08, all conditional on state funding, even though the governor's budget contained a 3 percent increase for U.C. in both 2005-06 and 2006-07, and a 4 percent increase for 2007-08. The parties reached impasse when AFSCME announced its demand for pay boosts amounting to 20 percent over three

years, which U.C. contended would cost \$36 million.

Unsuccessful in mediation, the parties proceeded to factfinding in March, just after release of a factfinding report on the impasse between the university and the Coalition of University Workers. AFSCME researcher Faith Raider told *CPER* that U.C. maintained the same position as it had in the CUE factfinding — that its policy was not to agree to raises unless the state provided funding for increased employee compensation. The CUE factfinding panel found the university's stance inconsistent with its actions in granting or agreeing to raises for about 42,000 employees. (See story in *CPER* No. 171, pp. 64-67.)

After seven days of factfinding on nearly every article of the contract, the parties received a lengthy report at the end of March. "We liked the report," says Raider, but the parties agreed not to release it to the public, even after the mandatory 10-day confidentiality period expired. Although they met to negotiate on April 4, the parties did not reach agreement.

One-Day Strike

Well before the factfinding hearing was finished, AFSCME conducted a strike vote. Ninety-two percent of its service unit members opted to strike. On April 4, the union announced it would strike on April 14. The Coalition of University Employees, which is representing U.C. clerical workers in bargaining for a successor to its expired

contract, immediately informed U.C. that it would honor picket lines. Other unions representing university employees expressed support as well. AFSCME distributed letters to professors in Berkeley that asked them to cancel classes or hold them off campus.

U.C. sent warning letters to CUE and the other unions that the AFSCME strike was illegal because the parties had not completed the impasse process. According to the university, impasse

U.C. custodians made 15 percent less than janitors at CSU.

procedures had not been exhausted because the university still had not had time to fully consider the factfinders' recommendations. The April 8 letters also reminded the unions that no-strike clauses in their contracts forbid sympathy strikes.

Despite the warnings, clerical workers, nurses, researchers, technical workers, students, and lecturers joined the picket lines. Most of the unions do not have clauses that specifically outlaw sympathy strikes. They contended that participation in the strike was protected under PERB's decision in *Oxnard Harbor Dist.* (2004) No. 1580-M, 165 CPER 80, where the board found a general "no strike" clause did not prohibit sympathy strikes.

The strike coincided with the inauguration of U.C. Berkeley's new chancellor, Robert Birgeneau. Birgeneau told picketers that he supported their demands for a living wage, but he ultimately pointed to Sacramento as the source of the problem. AFSCME promulgated statistics that more than 90 percent of single-parent workers with a child were not earning enough to pay for basic needs. Thirty-five percent of U.C. service workers were earning less than is necessary for a single adult to be self-sufficient. The self-sufficiency standard is determined for each county of residence using a methodology developed by University of Washington professor Diana Pearce. Even in a two-child family with both parents working, 46 percent of service unit members were making less than necessary for self-sufficiency. The union also charged that its custodian members made 15 percent less than janitors at the California State University and 22 percent less than their counterparts at community college districts. Newspaper articles throughout the state juxtaposed the low pay with bonuses and pay increases of tens of thousands of dollars for top university management.

Some Pay Boosts

The new contract, which runs through January 2008, grants no guaranteed raises. But the university did agree to pass on increases of 3 percent in both 2005-06 and 2006-07, as well as a 4 percent pay boost in 2007-08, if the state meets those funding increases

the governor promised in his compact with U.C. last year. AFSCME retained its right to negotiate and strike if the raises are not forthcoming.

The union did establish a \$9 minimum hourly wage for all service workers, which will result in raises for 600 employees in October. Service workers also will be paid a lump sum of \$250, an amount the union characterized as equivalent to a 2 percent raise retroactive to January 31, 2005. Custodians,

The union did establish a \$9 minimum hourly wage for all service workers.

who constitute about half the unit, will receive a 1 percent increase on October 1, 2005. Additional market equity adjustments of 1 percent and .5 percent will be made in 2006 and 2007 to all employees if the parties are unable to agree otherwise. Workers' wages will be raised to the minimum \$9 per hour before calculating the other pay increases.

Food service workers gained a minimum of one free meal period per shift; at several campuses on which the dining halls were run by auxiliary organizations, meal costs had been deducted from paychecks whether or not the employee wished to eat at the facility. There also will be shift differential

Finally...a resource to the act that governs
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By Carol Vendrillo, Ritu Ahuja and Carolyn Leary
(1st edition 2003)

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

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increases of \$.35 over the life of the contract for all classifications. The maximum extra pay for the night shift will be \$2.

AFSCME did not prevail in its quest to end the open-range pay system although the parties will conduct a joint study to gather data on the costs of various step-based pay models and suggest the performance-based mechanisms for movement on the pay scale. The university fought off attempts to exempt AFSCME workers from the health benefits premium contributions all other

The university fought attempts to exempt AFSCME workers from health benefits premium contributions.

U.C. employees pay. Contribution amounts vary by medical plan and are higher for employees earning greater salaries.

Career Advancement

For the first time, employees will be entitled to paid time off for career development. They can use 24 hours for training or education for advancement to any university position. Language similar to the AFSCME patient-

care workers' contract establishing a committee to identify career ladders is stronger in the service employees' agreement, says Raider. The new provisions provide opportunity to qualified internal applicants to be granted an interview for open positions in the their department. Hiring authorities must consider U.C. experience and must choose the most-senior employee if the best candidates are equally qualified. The contract also will require a joint review of hiring decisions to ensure that positions are appropriately being filled by internal candidates.

Raider emphasized that the U.C. workforce is racially stratified, with immigrants and people of color occupying service jobs that are the lowest-paid positions at U.C. AFSCME attempted to negotiate provisions that would enhance service workers' abili-

ties to advance into positions outside the unit, but U.C. balked. It anticipated that skilled trades unions would claim the university was allowing AFSCME to write hiring language that would affect their unit members.

The new agreement also will strengthen the use of seniority in layoffs by closing a "loophole" in the contract that U.C. used to keep junior employees. The "special skills" exception to the seniority rule now cannot be used unless the skills cannot be learned on the job in fewer than six months.

Raider attributes the successful negotiations outcome to the support the union received from the campus and the community. Other employees walked picket lines. Politicians attended rallies. "And," she says, "good press paid off." *

CSU, APC in Factfinding After Two Years of Bargaining

In January, the governor announced increased funding for the California State University, but for the employees represented by the Academic Professionals of California, LIUNA Local 1002, the pot of gold might as well be at the end of a rainbow. The promise of money for salary increases has done nothing to nudge the parties closer to an agreement. Besides salaries, the parties are at a standoff over a savings clause, sympathy strike language, disciplinary ramifications of recent CSU

policies, and the process for disciplinary appeals.

APC represents 2,100 academic support professionals such as student service professionals and lead library assistants, at the 23 CSU campuses. In June 2003, the parties began bargaining for a successor contract to the one that was set to expire at the end of that month. At the beginning, APC was not optimistic that salary increases were achievable. The union decided to obtain for its unit members some favor-

able contract provisions that other CSU employee unions had won in prior negotiations. The union also demanded an appeal for employees rejected from probation, streamlined grievance and arbitration procedures, and disciplinary due process provisions.

CSU's main goal was to clarify the administration's right to implement routine policies during the term of the contract. Over the last several years,

The university announced that an express prohibition on sympathy strikes is necessary for agreement.

APC and some other unions have filed numerous unfair practice charges alleging that new policies at various campuses constitute unilateral changes in working conditions. Recently, the university announced that an express prohibition on sympathy strikes is necessary for agreement.

Proposed Raises Not Guaranteed

At the beginning of factfinding, CSU had no formal salary offer on the table. When mediation failed, CSU withdrew its proposal for compensation increases of 3.5 percent for 2005-

06, 3 percent in 2006-07, and 4 percent in 2007-08. The 2005-06 offer was more than the 3 percent increase the governor's budget gives the university for the 2005-06 year, but the offer was contingent on the university actually receiving a minimum increase in state funding.

APC is not willing to agree to a conditional raise without a clause reopening the whole contract if the enacted budgets do not meet the university's conditions. APC President Charles Goetzl told *CPER* that APC's approach is what the Higher Education Employer-Employee Relations Act envisions in Government Code Sec. 3572. Under the act, he says, the parties should finish negotiations in time for the university to make a request for the agreed-on salary increases in its budget for the following year. If the university does not receive the requisite amount from the state, the parties should return to the table. Goetzl acknowledged that collective bargaining at CSU never has followed that time line. CSU is willing to reopen the contract on compensation, but not other articles, says CSU Assistant Vice Chancellor for Human Resources Sam Strafaci.

The salary disagreement is compounded by CSU's insistence on apportioning part of the compensation pool to merit increases that APC views as entirely discretionary. While APC does not favor merit increases for next year because there have been no across-the-board raises for the past two years, the

union is amenable to part of the compensation pool being distributed through the merit salary increase program in the expired contract. A merit increase would go to all employees who have a satisfactory or better evaluation. The university, however, wanted 1 percent of the compensation pool for a merit pay program in which campus officials decide who receives merit pay boosts and how much they get. Goetzl says that the program, which the uni-

APC does not favor merit increases for next year.

versity first used nine years ago, is "very divisive and destructive for morale."

The parties also are wrangling over health plan contributions. APC wants to maintain the current rate of employee premium contributions. CSU is advocating for the current language, which obligates it to pay only the minimum contributions under a formula set in the Government Code.

Bargaining Over New Policies

A major issue in the negotiations has centered on CSU's mid-contract implementation of policies. Although it has lost recent bids to stop new policy declarations (see *CPER* No. 168, pp. 102-105, and No. 171, pp. 61-64), APC successfully challenged several policies

before the Public Employment Relations Board. In 2001, PERB found that a new rule requiring employees to wear nametags was within the scope of bargaining. (See *CPER* No. 149, p. 76.) In 2003, PERB ruled that unilateral changes to policies that subjected employees to discipline for personal use of university computers, fax machines, and telephones were unlawful. (See *CPER* No. 158, pp. 85-87.) To avoid frequent unfair practice charges, the university is seeking language that would allow it to implement routine policies during the term of the agreement without bargaining. CSU negotiator Sharyn Abernatha told *CPER* that one of the problems has been that APC invokes the zipper clause of the contract and refuses to bargain over policies during the contract term. For example, a new student non-discrimination policy was the result of a directive from the United States Office of Civil Rights to revise procedures for complaints. CSU had notified the unions of the policy, but APC refused to meet based on its zipper clause. The university implemented the policy.

Prior to factfinding, the parties tentatively agreed to bargain new policies that affect a mandatory subject of bargaining. If they cannot agree on implementation of a new policy, the dispute will go to an arbitrator. The university's agreement with the California Faculty Association already contains a similar provision.

The point of disagreement now has shifted to the disciplinary appeals process and the grievance procedure. Many of the policies have disciplinary implications. APC wants employees to be able to appeal disciplinary action to a board of adjustment; CSU insists on maintaining the current statutory process, which channels appeals to the State Personnel Board. The university also wants to restrict APC's right to

APC wants employees to be able to appeal disciplinary action to a board of adjustment.

grieve a new CSU policy until the policy has affected a unit member.

Many disputes remain concerning previously implemented policies. Goetzl indicated that APC is willing to drop challenges to those policies for "something of comparable import."

Savings Clause

A similar struggle between the parties involves the wording of the savings clause of the contract. The current language invalidates any provision of the agreement that a court or administrative agency finds contrary to law. CSU does not want to experience the kind of stalemate that arose with APC when

Proposition 209 banned racial preferences in employment. At that time, CSU announced that it would no longer use contractual affirmative action criteria for layoffs, but APC balked, claiming the savings clause applied only if a court ruled on a provision of the contract. CSU insists on language that would require the parties to bargain in situations where questions of validity arose and allow the university to disregard the suspect provision. Any disputes over the university's action could be submitted to arbitration. Goetzl told *CPER* he is perplexed as to why the language is so important for CSU: "There was only one dispute about the savings clause, and it was settled two years ago."

New Issue Raised in Mediation

Another "dealbreaker" is a recent issue in the negotiations. Goetzl claims that CSU raised for the first time during mediation a demand that APC acquiesce to language which would ban sympathy strikes by the union. Goetzl understands why the university would like to have the new language, since bargaining with CFA and other units is beginning. But, he says, "We like the status quo." *

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U.C. Keeps Contract to Run Berkeley Lab

Employees at Lawrence Berkeley Laboratory are no longer wondering who their next employer will be. In late April, the federal Department of Energy announced that the University of California had been awarded a contract to run the lab for at least the next five years. The university still must compete to retain control of the other two DOE labs it operates, Lawrence Livermore National Laboratory and Los Alamos National Laboratory. Employees at the two labs are apprehensive about their pension benefits, even if U.C. continues to manage the facilities.

First Competition

U.C. has been the Berkeley lab's only manager since it was established in 1931. The federal government, which acquired the facility in 1942, never before has required the university to compete for the opportunity to run the lab. But a series of safety and security lapses at U.C.'s other labs, topped off by the termination of two Los Alamos whistleblowers in 2002, angered Congress. As a result, it mandated competitive bidding for any DOE laboratory contracts that had been awarded and renewed without competition for more than 50 years. (See stories in *CPER* No. 167, pp. 49-50, and No. 159, pp. 40-44.) Under this criterion, U.C. must compete for all three labs.

Employees at the laboratories, particularly Los Alamos, have been apprehensive about losing U.C. retirement

benefits if a different entity is awarded the contract. Worried about losing scientists, DOE required in its request for proposal for the Berkeley lab that bidders retain the current workforce with the exception of senior management. It also mandated that offerors provide

Northrup and other companies have also expressed renewed interest in running LANL.

comparable total compensation to the lab's 4,000 employees and establish a retirement plan that credited service under the U.C. retirement system. The successful bidder was required to honor existing collective bargaining agreements until they are renegotiated.

U.C. was the only publicly acknowledged bidder for the LBL contract. The initial term of the new contract will be five years, but it may be extended for superior performance for up to 20 years.

Two More to Win

The current contracts for both the Los Alamos and Livermore laborato-

ries will expire in September, although it is likely that DOE will extend the Livermore contract at least a year to avoid simultaneous competitions. A draft request for proposal for LANL was issued in December. Although U.C. had not formally decided to bid for the contract at the time *CPER* went to press, staff have been told to prepare for the competition.

After issuance of the draft RFP, several would-be operators announced they were not interested. U.C. itself has faced obstacles in preparing for the competition. The university was unable to reach an agreement with an industrial partner, such as Lockheed Martin, that it believed would strengthen its bid to run the lab. In March, it disclosed plans to enter into a consortium with the University of New Mexico, New Mexico State University, and the New Mexico Institute of Mining and Technology to form the Advanced Studies Institute, if it won the contract.

But in April, DOE amended the draft language to double the contractor's fee and lengthen the duration of the proposed contract. The University of Texas and Lockheed Martin, major contenders that backed out of the competition in January, are now considering a joint bid. Northrup Grumman and other companies have also expressed renewed interest in running LANL. In May, U.C. announced that it will likely submit a joint bid with defense industry partners Bechtel National, BWXT, and Washington Group.

Threats to Pensions

The draft request for proposal worried LANL employees. The December version made no mention of retiree health benefits that currently are offered to lab employees. It required that base salaries remain the same but merely stated that total employee compensation be “comparable” to U.C. compensation, giving the DOE contract-

The final RFP will require that the successful bidder establish a separate pension plan.

ing officer “sole discretion” to determine comparability. Another provision required “correction” of benefits that are more than 5 percent “richer” than entities DOE considers comparator employers. Since the employer-paid value of LANL retirement benefits are about 70 percent higher than those of the average comparator, and 20 percent higher than the highest ranking comparator, compliance with the provision could entail negative changes to those benefits. LANL’s other benefits are within the range of the comparators’ benefits, except for lower-than-average disability benefits, which brings its overall benefits package to about 20 per-

cent above average, and no higher than the highest comparator.

During the comment period on the draft request for proposal, Manuel Trujillo, president of the Los Alamos local of the University Professional and Technical Employees, CWA, pointed out the lack of protection for current pay and benefits. His letter to DOE’s Source Evaluation Board, which will evaluate competitors’ proposals, also expressed concern that language which recognizes the employees’ collective bargaining rights did not preserve UPTE’s relationship with current management. UPTE is not the exclusive representative and does not have a collective bargaining agreement with the lab; but it does have understandings with U.C. about access rights, dues deductions, and representation of employees that it wants protected.

The Source Evaluation Board responded to some of UPTE’s concerns by indicating the final request for proposal will use a standard of “substantially equivalent” compensation and will include express reference to retiree health benefits. The SEB recognized the conflict between requiring compensation substantially equivalent to current U.C. pay and benefits while constraining the richness of retirement benefits. But its response was not favorable to current employees. It has indicated the final RFP will require that the successful bidder establish a separate pension plan for LANL employees, not to be commingled with the plan for the contractor’s other employ-

ees. “Corrective action” plans to bring the benefits package into line with comparators’ benefits still will be required.

Due to the potential changes in retirement plans, the SEB has asked for an extension to the U.C. contract to enable bidders to prepare “a well thought out pension and benefits package for LANL,” and require a transition plan that gives employees time to consider

Employees at LBL have been assured that they will remain in the U.C. retirement plan.

whether or not to retire or become inactive under the UCRP plan. Those who retire or become inactive will be considered new employees if they seek to continue to work at the lab.

Mollification Unsuccessful

“UPTE is incensed,” says Betty Gunther, chief steward for the Los Alamos local. She told *CPER* that the chair of the SEB, Tyler Przybylek, has tried to reassure employees about their retirement benefits. But judging by postings on employee blogs, employees have not been calmed. “When should I retire?” asks one worker. Other postings catalog the differences between U.C.’s pension benefits and the lesser retirement plan offered by nearby

Sandia National Laboratory, which Lockheed Martin operates.

Chris Harrington, a spokesperson for U.C.'s Office of the President, would not answer questions about the university's response to the employee compensation provisions of the draft RFP due to the sensitivity of the high-stakes competition. He told *CPER* that employees at LBL, where the RFP had similar separate pension and "corrective action" language, have been assured that they will remain in the U.C. retirement plan. John Spring, LBL representative to UPTE's systemwide executive board, confirmed that a DOE spokesperson had made vague asser-

tions to employees that pension benefit formulas would not be changed. But no one thinks that LANL benefits are as secure. Employees are convinced that the proposed management fee was doubled because DOE wants to choose a U.C. competitor to run the lab. And they think that, when this happens, pension benefits will be reduced.

[*Ed. note: As CPER went to press, DOE released a final request for proposal that requires two new pension plans, one for transferring employees and a "market-driven" one for new employees. The age and service credit protections of the new provisions may quiet current employees' concerns.*] ❁

student employees should have contractual rights to the same due process guarantees, student fee waivers, and similar compensation as other academic student employees across the country. Despite their backing, CAASE/UAW found itself in April in nearly the same position as in December. The parties still had not reached agreement on wages, benefits, just cause for discipline, a sympathy strike ban, appointment rights, or the union's access to names of academic student employees. The union notified its members that it

The union won a just cause standard for disciplinary terminations.

Late-Night Deal With CSU Averts CAASE/UAW Strike

The California Alliance of Academic Student Employees/UAW reached its first collective bargaining agreement with the California State University just hours before the student employees were set to begin an open-ended strike on May 12. CAASE/UAW represents graduate student teaching associates, graduate assistants, tutors, and graders at all 23 campuses of the university. The three-year tentative agreement averted a workload crunch for professors who rely on academic student employees to teach classes, tutor, conduct reviews before final examinations, proctor exams, and grade them.

Finals-Week Pressure

As soon as the parties agreed on an appropriate unit last August, CAASE/UAW set its sights on an agreement that would boost wages and benefits for student employees in the spring semester. When no agreement appeared possible in December, the union called a one-day strike just before finals began, claiming CSU would not provide information essential to bargaining. (See story in *CPER* No. 170, pp. 61-63.)

In January, the union enlisted the support of 65 legislators, who signed a letter addressed to Chancellor Charles Reed, emphasizing the view that CSU

would call a strike to protest the university's alleged unfair practices, which included surface bargaining, denying union access to employees, and unilaterally increasing student parking fees, among others.

In early May, the parties began to meet daily. The pressure to reach agreement mounted as the end of the semester approached. On some campuses, classes ended May 13. The union was losing its opportunity to withhold its labor during the crucial final weeks or, alternatively, conduct a ratification vote before students left for the summer.

Assistant Vice Chancellor of Human Resources Sam Strafaci told *CPER* in early May that the economic issues appeared very difficult to resolve, as the union was demanding unconditional wage increases that would have cost CSU \$28 million to \$40 million annually.

Late in the evening on May 11, CAASE/UAW called off the strike. CSU, for the most part, prevailed in its offers of wage increases conditional on state funding, but the union won a just cause standard for disciplinary terminations. Other terms of the tentative agreement are:

- Raises of 3.5 percent in 2005-06, 3 percent in 2006-07, and 4 percent in 2007-08, contingent on the university receiving the funding increases promised by Governor Schwarzenegger in his higher education compact last spring;

- Minimum wages for instructional student assistants of \$8 per hour in 2005-06, \$9 per hour in 2006-07, and \$10 per hour in 2007-08;

- Reopener negotiations on fee waivers for unit members in 2006-07, if the university decides to continue charging student fees;

- A guarantee that single-term appointments, or the first term of an annual contract, will not be cancelled for budgetary reasons;

- Language protecting employees against excessive or unreasonable assignments, but no hard cap on hours worked by exempt teaching employees;

- A prohibition on “strikes of any kind” during the term of the agreement.

The parties were unable to resolve a dispute concerning the university’s duty to provide the union with names and assignments of students in the unit in the face of confidentiality requirements of the Family Educational Rights and Privacy Act. CAASE/UAW will pursue a pending unfair practice charge before the Public Employment Relations Board that claims that, despite the privacy requirements, the university must turn over unit members’ names as part of its duty to bargain in good faith.

Spokespersons for both the union and CSU stressed the importance of having come to agreement on the first contract for the new unit. “The agreement brings tangible benefits for our members and lays the foundation for future collective bargaining negotiations with the University,” said Raymond Wight, a union bargaining unit member and instructional student assistant. CSU’s Strafaci called the negotiations a “positive engagement.” “Starting from scratch to craft a collective bargaining agreement is difficult. The successful negotiations are due to working cooperatively and the patience of the UAW.”

CSU’s board of trustees will consider the tentative agreement at its meeting in July. ✱

Discrimination

No Proof of Intentional Bias Required Under ADEA

In a victory for all workers over 40, the United States Supreme Court ruled in *Smith v. City of Jackson* that the Age Discrimination in Employment Act of 1967 authorizes recovery for disparate impact discrimination. However, the court upheld the lower court's dismissal of a claim brought by a group of police officers that the city's plan for an across-the-board pay raise violated the rights of officers over 40.

Factual Background

On October 1, 1998, the city adopted a pay plan granting raises to all of its employees in order to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability." On May 1, 1999, the city gave raises to all police officers, motivated by its desire to bring the starting salaries up to the regional average. Raises received by officers with fewer than five years of seniority were proportionately greater than those received by officers with more seniority. Most officers over 40 had more than five years' seniority.

A group of officers older than 40 brought suit against the city, alleging

that it deliberately had discriminated against them because of their age (disparate treatment) and that they were adversely affected by the plan because of their age (disparate impact).

The trial court dismissed both claims. The Fifth Circuit Court of Appeals found dismissal of the disparate treatment claim was premature, but it upheld dismissal of the disparate impact claim, finding that such claims are categorically unavailable under the ADEA.

Supreme Court's Decision

Justice John Paul Stevens delivered the opinion of the court. Justices Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer all agreed that disparate impact claims are cognizable under the ADEA but that the circuit court's dismissal of the claim in this case should be upheld. Justice Antonin Scalia came to the same conclusions, but through a different analysis. Justice Sandra Day O'Connor, joined by Justices Anthony M. Kennedy and Clarence Thomas, also agreed that the officers' disparate impact claim should be dismissed, but concluded that disparate impact claims are not cognizable under the ADEA.

Disparate impact available under the ADEA. It is unlawful under the ADEA for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age...." In order to discern the meaning of this language, Justice Stevens looked to *Griggs v. Duke Power Co.* (1971) 401 U. S. 424, which interpreted identical language found in Sec. 703(a)(2) of the Civil Rights Act of 1964 (Title VII) (that bars discrimination because of race, color, religion, sex, and national origin):

In determining whether the ADEA authorizes disparate-impact claims, we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.

Pointing to language in *Griggs* holding that good faith "does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability," the court emphasized, "we thus squarely held that Sec. 703(a)(2) of Title VII did not require a showing of discriminatory intent."

Neither Sec. 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the

language prohibits such actions that “deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual’s” race or age.

Accordingly, the court concluded, “*Griggs*, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA.”

The court further relied on the fact that, for 20 years after *Griggs*, the federal courts of appeal uniformly interpreted the ADEA as authorizing recovery on a disparate-impact theory.

Griggs strongly suggests that a disparate-impact theory should be cognizable under the ADEA.

It was not until after the court’s decision in *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 100 CPER 49, that some lower courts decided otherwise. The justices made clear that those courts had misinterpreted *Hazen Paper*: “In sum, there is nothing in our opinion in *Hazen Paper* that precludes an interpretation of the ADEA that parallels our holding in *Griggs*.”

The plurality opinion addressed the issue raised by the Fifth Circuit and

by Justice O’Connor in her dissent — that additional language in the ADEA, which does not appear in Title VII, should be interpreted as precluding disparate impact claims. That language, which appears in Sec. 4(f)(1) of the ADEA, is referred to as the “RFOA provision.” It states: “It shall not be unlawful for an employer...to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section...where the differentiation is based on reasonable factors other than age....” Justice O’Connor, along with Justices Kennedy and Thomas, concluded that this language “expresses Congress’ clear intention that employers *not* be subject to liability absent proof of intentional age-based discrimination.” Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, disagreed:

In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place....In those disparate-treatment cases, such as in *Hazen Paper* itself, the RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place. The RFOA provision is not, as Justice O’Connor suggests, a “safe harbor from liability,”...since there would be no liability under Sec. 4(a)....

In disparate-impact cases, however, the allegedly “otherwise prohibited” activity is not based on age....Claims that stress “disparate impact” [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more

harshly on one group than another. It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was “reasonable.” Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion.

In further support of its holding, the plurality emphasized that both the Department of Labor, which initially drafted the act, and the Equal Employment Opportunity Commission, charged

‘The RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place.’

with implementing it, “have consistently interpreted the ADEA to authorize relief on a disparate-impact theory.”

Justice Scalia, in his concurring opinion, agreed with the court’s reasoning, but “would find it a basis, not for independent determination of the disparate-impact question, but for deferential to the reasonable views of the Equal Employment Opportunity

Commission.” “This is an absolutely classic case for deference to agency interpretation,” he said.

Scope of disparate impact liability narrower under ADEA than under Title VII. Justices Stevens, Souter, Ginsburg, Breyer, and Scalia all cited two textual differences between the ADEA and Title VII to support their view that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under the ADEA is narrower

The scope of disparate-impact liability under the ADEA is narrower than under Title VII.

than under Title VII. Those two differences are the RFOA provision and the amendment to Title VII contained in the Civil Rights Act of 1991, which has no counterpart in the ADEA.

Regarding the first difference, the majority found Congress’ decision to limit the coverage of the ADEA by including the RFOA provision to be consistent with the fact that age, unlike race, commonly has relevance to an individual’s capacity to engage in certain types of employment. Further, “intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII.”

As to the second difference, the majority recognized that the purpose of the 1991 amendment was to expand coverage of Title VII in reaction to *Wards Cove Packing Co. v. Antonio* (1989) 490 U.S. 642, 82 CPER 12, where the court narrowly construed employer liability for disparate impact discrimination. Therefore, “*Wards Cove*’s pre-1991 interpretation of Title VII’s identical language remains applicable to the ADEA.”

In the instant case, the majority found that the complaining officers did “little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers,” and that they did not identify “any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers.” This, the court determined, is not sufficient evidence to sustain the officers’ burden of proof under the ADEA:

As we held in *Wards Cove*, it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities. Petitioners have failed to do so. Their failure to identify the specific practice being challenged is the sort of omission that could result in employers being potentially liable for the myriad of innocent causes that may lead to statistical imbalances.

Further, the majority found from the record that “the City’s plan was

based on reasonable factors other than age.” The justices acknowledged that the evidence established that almost two-thirds of the officers under 40 received raises of more than 10 percent while fewer than half of those over 40 did. However, they concluded that “the basic explanation for the differential was the City’s perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market” and that the city’s “reliance on seniority and rank is un-

‘The City’s plan was based on reasonable factors other than age.’

questionably reasonable given the City’s goal of raising employees’ salaries to match those in surrounding communities.”

“Accordingly,” the majority concluded, “while we do not agree with the Court of Appeals’ holding that the disparate-impact theory of recovery is never available under the ADEA, we affirm its judgment.”

The Dissent

Justice O’Connor based her dissent on three arguments.

She argued that the plain language of Sec. 4(a)(2) requires proof of discriminatory intent in that the phrase “because of...age” appears in both Secs. 4(a)(1) and 4(a)(2), and must be read to

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

William James

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mean the same in both sections. Because there is no question that Sec. 4(a)(1) requires discriminatory intent, the same must apply to the following section, she reasoned. "Section 4(a)(2) uses the phrase 'because of...age' in precisely the same manner as does the preceding paragraph — to make plain that an employer is liable only if its adverse action against an individual is *motivated by an individual's age*."

She declined to read paragraph (a)(2) to prohibit employer actions that adversely affect an individual's status as an employee because of that individual's age. "Under this reading," she said, " 'because of...age' refers to the *cause of the adverse effect* rather than the *motive for the employer's action*." The "because of...age" clause should be read to modify the entire preceding paragraph.

The sole purpose of the RFOA provision, according to Justice O'Connor, "is to afford employers an independent *safe harbor* from liability," i.e., to allow an employer to rebut an employee's prima facie case of employment discrimination by showing that its action was based on a reasonable non-age factor.

Justice O'Connor also found that the act's legislative history supports the conclusion that it does not permit disparate impact claims. The ADEA was the result of a report by Secretary of State Willard Wirtz. The Wirtz Report emphasized that age discrimination is qualitatively different from the types of discrimination prohibited by Title VII and found no evidence that

age discrimination resulted from intolerance or animus toward older workers. Rather, age discrimination primarily was based on assumptions about the relationship between an individual's age and the ability to perform a job. In fact, the report found in some cases that there is such a relationship.

The minority also took note that the Wirtz Report "drew a sharp distinction between 'arbitrary discrimination' (which the report clearly equates with disparate treatment) and circumstances or practices having a disparate impact on older workers." Although the report proposed legislation to prohibit "arbitrary discrimination," it recommended the other type of discrimination be addressed through noncoercive measures, such as programs and education, argued Justice O'Connor.

The dissenters determined that the stated purposes and structure of the ADEA supported the conclusion that it was enacted to prohibit intentional discrimination only. And, finding that the "legislative history is devoid of any discussion of disparate impact claims," Justice O'Connor argued that Congress' decision not to include disparate impact claims is understandable. Further, she said, "there often *is* a correlation between an individual's age and her ability to perform a job." She added:

[T]here is also the fact that many employment benefits, such as salary, vacation time, and so forth, increase as an employee gains experience and seniority....Accordingly, many employer decisions that are intended to cut costs or respond to market forces

will likely have a disproportionate effect on older workers. Given the myriad ways in which legitimate business practices can have a disparate impact on older workers, it is hardly surprising that Congress declined to subject employers to civil liability based solely on such effects.

Finally, although Justice O'Connor would not read the ADEA to authorize disparate impact claims, she agreed with the majority that if they are allowed, they are strictly circumscribed by the RFOA exemption and governed by the standards set forth in *Wards Cove*. In

addition to the majority's holding that "a plaintiff must demonstrate that it is the application of a *specific or particular employment practice* that has created the disparate impact under attack," Justice O'Connor added that *Wards Cove* also requires that "once the employer has produced evidence that its action was based on a reasonable nonage factor, the plaintiff bears the burden of disproving this assertion." (*Smith v. City of Jackson* [3-30-05] Supreme Ct. No. 03-1160, 554 U.S. ____, 2005 DJDAR 3713.) *

crimination against the girls' team. The district court dismissed his case, finding that Title IX's private cause of action does not include claims of retaliation. The Eleventh Circuit Court of Appeals upheld the dismissal on the same grounds and also found that, even if Title IX did cover retaliation, Jackson was not a member of the class of persons protected by the statute.

The statute authorizes private parties to seek monetary damages for intentional violations.

Supreme Court Holds Retaliation Prohibited by Title IX

The United States Supreme Court has determined, in *Jackson v. Birmingham Board of Education*, that a teacher who was removed as coach of a high school girls' basketball team after complaining of discrimination against the team has a right to sue for retaliation under Title IX of the Education Amendments of 1982. Title IX bans discrimination "on the basis of sex" in any school receiving federal funding. The prohibition covers admissions, recruitment, course offerings, counseling, financial aid, student health and housing, and athletics. Because the statute contains no express prohibition on retaliation, lower courts had found that there was no private right of action for retaliation under the act. (See report of the arguments before the Supreme Court in *CPER* No. 170, pp. 71-72.)

Retaliation

Roderick Jackson was hired by the Birmingham Board of Education to teach physical education and serve as the girls' basketball coach. In 1999, he was transferred to Ensley High School, where he discovered that the girls' team was not receiving equal funding and equal access to athletic equipment and facilities. He complained about the unequal treatment, but the school failed to remedy the situation. Instead, Jackson began to receive negative job evaluations and eventually was removed as the girls' coach in May 2001. Jackson remained a teacher but no longer received supplemental pay for coaching.

Jackson filed a lawsuit alleging that the board violated Title IX by retaliating against him for protesting the dis-

Supreme Court's Decision

Justice Sandra Day O'Connor wrote the majority opinion. She was joined by Justices Ruth Bader Ginsburg, David Souter, John Paul Stevens, and Stephen Breyer. Reviewing the court's prior decisions under Title IX, Justice O'Connor took note that more than 25 years ago, in *Cannon v. University of Chicago* (1979) 441 U.S. 667, the court held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination. In *Franklin v. Gwinnett County Public Schools* (1992) 502 U.S. 60, the court held that the statute authorizes private parties to seek monetary damages for intentional violations. The court found the private right of action encompasses intentional sex

discrimination where a school was deliberately indifferent to sexual harassment of a student by a teacher in *Gebser v. Lago Vista Independent School Dist.* (1998) 524 U.S. 274, 131 CPER 38, and of a student by a student in *Davis v. Monroe County Board of Education* (1999) 526 U.S. 629, 136 CPER 28. In all of those cases, the court relied on the text of Title IX that “broadly prohibits a funding recipient from subjecting any person to ‘discrimination’ ‘on the basis of sex,’” concluded O’Connor. She summarized the court’s rationale in this case in clear and unambiguous terms:

Retaliation is, by definition, an intentional act.

Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX’s private cause of action. Retaliation is, by definition, an intentional act. It is a form of “discrimination” because the complainant is being subjected to differential treatment...Moreover, retaliation is discrimination “on the basis of sex” because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional “discrimination” “on the basis of sex,” in violation of Title IX.

The majority rejected the Eleventh Circuit’s finding that Title IX does not

prohibit retaliation because the “statute makes no mention of retaliation.” In reaching this conclusion, the Court of Appeals “ignores the import of our repeated holdings construing ‘discrimination’ under Title IX broadly,” chastised the court. As an example, it pointed to the decision in *Franklin*, where “though the statute does not mention sexual harassment, we...held that sexual harassment is intentional discrimination encompassed by Title IX’s private right of action.” The majority emphasized that Congress intended Title IX’s prohibitions to be read expansively, stating, “‘discrimination’ is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach.”

The majority was not persuaded by the school board’s argument that if Congress had meant to include retaliation in Title IX’s prohibitions, it specifically would have said so, as it did in Title VII of the Civil Rights Act of 1964. The justices distinguished the two statutes:

Title IX is a broadly written general prohibition on discrimination, followed by specific narrow exceptions to that broad prohibition....By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute....Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.

Congressional intent can be determined also from the context in which

the statute is enacted, instructed the majority. It noted that Title IX was passed only three years after the court decided *Sullivan v. Hunting Park, Inc.* (1969) 396 U.S. 229. In that case, the court prohibited retaliation against a white man who spoke out against discrimination towards one of his tenants, a black man. “*Sullivan* made clear that retaliation claims extend to those who oppose discrimination of others.”

The majority also rejected the board’s argument that, even if Title IX included a private right of action for retaliation, Jackson could not bring

‘Discrimination’ is a term that covers a wide range of intentional unequal treatment.

such an action because he was only an “indirect victim” of discrimination. “The statute is broadly worded,” replied the court. “It does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint.” “Where the retaliation occurs because the complainant speaks out about sex discrimination, the ‘on the basis of sex’ requirement is satisfied. The complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint.”

In a footnote, the court repeated a hypothetical posed by Jackson at oral argument to clarify this point: “If the male captain of the boys’ basketball team and the female captain of the girls’ basketball team together approach the school principal to complain about discrimination against the girls’ team, and the principal retaliates by expelling them both from the honor society, then both the female and the male captains have been ‘discriminated’ against ‘on the basis of sex.’”

It is in response to this argument by the board that the majority explained the concerns that it sought to address by its ruling:

Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also “to provide individual citizens effective protection against those practices.” ... This objective would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation.... If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result....

Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX’s enforcement scheme would unravel.

As an additional reason for encouraging individual reporting, Justice O’Connor cited the fact that an ac-

tion cannot be brought under the statute unless the recipient has received “actual notice” of the discrimination. “Moreover,” she wrote, “teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators.”

The board’s final argument was that the court “should not interpret Title IX to prohibit retaliation because it was not on notice that it could be held

Institutions covered by Title IX cannot cover up violations of that law by means of discriminatory retaliation.

liable for retaliating against those who complain of Title IX violations.” The board relied on *Pennhurst State School and Hospital v. Halderman* (1981) 451 U.S. 1, where the court said that legislation enacted by Congress, under its spending power, “is in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.” Therefore, reasoned the *Pennhurst* court, “there can be no knowing acceptance of the terms of the contract if a State is unaware of

the conditions imposed by the legislation on its receipt of the funds.”

The majority had no trouble countering this argument. “Simply put,” said the court, “*Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute.”

Thus, the Board should have been put on notice by the fact that our cases since *Cannon*, such as *Gebser* and *Davis*, have consistently interpreted Title IX’s private cause of action broadly to encompass diverse forms of intentional sex discrimination. Indeed, retaliation presents an even easier case than deliberate indifference. It is easily attributable to the funding recipient and it is always — by definition — intentional.

As further support for its position, the majority noted that “the regulations implementing Title IX clearly prohibit retaliation and have been on the books for nearly 30 years,” and “more importantly, the Courts of Appeals that had considered the question at the time of the conduct at issue in this case all had already interpreted Title IX to cover retaliation.” In a pointed rebuke to the board, the majority concluded: “A reasonable school board would realize that institutions covered by Title IX cannot cover up violations of that law by means of discriminatory retaliation.”

The Dissent

Justice Clarence Thomas authored the dissent in which he was joined by Chief Justice William H. Renquist and

Justices Antonin Scalia and Anthony M. Kennedy.

Justice Thomas summarized his position succinctly:

[The majority's] holding is contrary to the plain terms of Title IX, because retaliatory conduct is not discrimination on the basis of sex. Moreover, we require Congress to speak unambiguously in imposing conditions on funding recipients through its spending power. And, in cases in which a party asserts that a cause of action should be implied, we require that the statute itself evince a plain intent to provide such a cause of action.... Title IX meets none of these requirements.

To the dissenters, “the natural meaning of the phrase ‘on the basis of sex’ is on the basis of the plaintiff’s sex, not the sex of some other person.” Justice Thomas recited the following example to illustrate this point:

Suppose a sexist air traffic controller withheld landing permission for a plane because the pilot was a woman. While the sex discrimination against the female pilot no doubt adversely impacted male passengers aboard the plane, one would never say that they were discriminated against “on the basis of sex” by the controller’s action.

Justice Thomas argued that the phrase “on the basis of sex” is shorthand for “discrimination on the basis of such individual’s sex,” referring to language in Title VII and in other Supreme Court decisions. He concluded that, “because Jackson’s claim for retaliation is not a claim that his sex

played a role in his adverse treatment, the statute’s plain terms do not encompass it.”

Thomas also asserted that a claim of retaliation, by its very nature, cannot be said to be discrimination on the basis of anyone’s sex, “because a retaliation claim may succeed where no sex discrimination ever took place.” All that is required is that the complainant have a reasonable good faith belief that discrimination occurred. Further, “re-

In conclusion, Thomas railed against the majority for its judicial activism.

taliation is a claim that aids in enforcing a separate and distinct right,” and “to describe retaliation as discrimination on the basis of sex is to conflate the enforcement mechanism with the right itself.”

The dissenters also found it significant that Title IX does not mention retaliation. They argued that because Congress *did* expressly prohibit retaliation in other statutes, like Title VII, the Americans With Disabilities Act, and the Age Discrimination in Employment Act, the fact that it did not do so in Title IX meant that Congress did not intend for it to be included. To find otherwise would render the language

prohibiting retaliation in the other statutes “superfluous.”

The minority agreed with the board’s argument that it cannot be held liable because it was not on notice that retaliation was prohibited by Title IX. In interpreting language in spending legislation, “we insist that Congress speak with a clear voice,” wrote Thomas, quoting from *Pennhurst*. Because the statute’s “plain terms do not authorize claims of retaliation,” there was no notice, he deduced.

In conclusion, Thomas railed against the majority for what he saw as judicial activism:

The Court establishes a prophylactic enforcement mechanism designed to encourage whistleblowing about sex discrimination.... Under the majority’s reasoning, courts may expand liability as they, rather than Congress, see fit....

By crafting its own additional enforcement mechanism, the majority returns this Court to the days in which it crafted remedies out of whole cloth to effectuate its vision of congressional purpose. In doing so, the majority substitutes its policy judgments for the bargains struck by Congress, as reflected in the statute’s text. The question before us is only whether Title IX prohibits retaliation, not whether prohibiting it is good policy.

(Jackson v. Birmingham Board of Education [3-29-05] Supreme Ct. 02-1672, ___ U.S. ___, 2005 DJDAR 3602.) *

Detrimental and Substantial Effect on Job Required to Find Retaliation Under the FEHA

It is not enough for an employee claiming retaliation in violation of California's Fair Employment and Housing Act to show that she has been subjected to some form of adverse treatment. In *McRae v. Department of Corrections*, the First District Court of Appeal found that the employee must show the employer's retaliatory actions had

Retaliatory action must have a detrimental and substantial effect on employment.

a detrimental and substantial effect on her employment. And, the court held, an aggrieved employee can seek the assistance of the courts only for "final employment actions," not those subject to reversal or modification through an internal review process.

Factual Background

Dr. Margie McRae, a surgeon, worked for the California Department of Corrections at the California Medical Facility in Vacaville. In 1995, when she was not selected for a position at the state prison in Solano, McRae filed

a complaint with the Department of Fair Employment and Housing alleging that she was denied the job because of her race, African-American.

In 1997, McRae was issued a letter of instruction following a report that she had left her position in the emergency room unattended. McRae again filed a complaint with the DFEH alleging that the letter of instruction was issued in retaliation for having filed the first DFEH complaint.

McRae filed a second retaliation complaint with the DFEH, concerning an internal investigation into reports that she had refused to provide medical information that would have facilitated a patient's transfer to hospice and had incorrectly delayed the administration of antibiotics to another patient.

In 1998, while McRae was on non-industrial disability leave following a confrontation with two nurses, she was informed that when her disability leave expired, she should report to the Solano prison rather than CMF. She did not report to Solano as directed, and filed another complaint with the DFEH alleging that her transfer to Solano was retaliatory.

McRae resigned from her job and filed a lawsuit alleging discrimination and retaliation. After a trial, the jury returned a verdict against McRae for discrimination but awarded her

\$75,000 on her claim of retaliation. Both sides appealed.

Court of Appeal Decision

The FEHA makes it unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." In determining whether an individual has been discriminated or retaliated against under

McRae failed to meet the last two prongs of the prima facie test.

the FEHA, California courts apply the test set out in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, and require the employee to show that he or she engaged in protected activity, that the employer subjected the employee to an adverse employment action, and that there was a causal link between the protected activity and the employer's action. Here, there was no question that McRae engaged in protected activity by filing complaints with the DFEH. It was the last two prongs of the prima facie test that she failed to meet.

Because the FEHA does not define "adverse employment action," the court was guided by other California cases

and concluded that a plaintiff must show more than adverse treatment to establish a claim of retaliation. The employer's actions must have a "detrimental and substantial" effect on the plaintiff's employment. Quoting from *Akers v. County of San Diego* (2002) 95 Cal.App. 4th 144, the court reasoned:

A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient. The reasoning is that requiring an employee to prove a substantial adverse job effect guards against both judicial micromanagement of business practices and frivolous suits over insignificant slights. Absent this threshold showing, courts will be thrust into the role of personnel officers, becoming entangled in every conceivable form of employee job dissatisfaction. While the Legislature was understandably concerned with the chilling effect of employer retaliatory actions and mandated that FEHA provisions be interpreted broadly to prevent unlawful discrimination, it could not have intended to provide employees a remedy for any possible slight resulting from the filing of a discrimination complaint.

The Ninth Circuit Court of Appeals and other federal courts have taken a different approach, holding that an adverse employment action is "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." Under this standard, adverse employment actions can include demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and

toleration of harassment by other employees. The Court of Appeal found the Ninth Circuit's deterrence test "overbroad" in that it could support a finding of adverse employment action in nearly any employment action or decision. An employee might want to avoid the move of an office or a desk, the addition or subtraction of other employees or responsibilities, a change in opening or closing times, or the introduction of a dress code. None of these things, said the court, in and of themselves, should provide the basis for a retaliation claim.

In line with existing California decisions, the court held that an adverse employment action is one that causes "substantial and tangible harm, such as, but not limited to, a material change in the terms and conditions." In fact, the court raised the threshold for plaintiffs beyond that of the other California courts and incorporated an internal administrative exhaustion requirement into the definition of adverse employment action. While something less than an ultimate employment action (such as firing, demotion or reduction in pay) may be actionable, the court announced a plaintiff can seek redress through the courts "only for final employment actions, i.e., those that are not subject to reversal or modification through internal review processes."

Applying its holdings to the actions taken against McRae, the court found the letter of instruction was not an adverse employment action because there was no evidence that it resulted in any loss of pay, status, or job responsibili-

Life is a very imperfect arrangement.

Robert Maddock

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

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Pocket Guide to the Family and Medical Leave Acts

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ties to McRae, noting it was not a performance evaluation. And, the court said, “we do not believe that a negative employment evaluation, even if unwarranted, can trigger an FEHA claim.” “The interest in allowing employers to take corrective action as needed, or to warn employees that their conduct may lead to an adverse employment action, requires an interpretation that tolerates the risk that an employee may be unable to seek redress through the FEHA for such criticism, even when that criticism in fact may be retaliatory.”

The court held that “a negative evaluation is not an adverse employment action when the plaintiff has the power to appeal.” “To rule otherwise, would be to encourage litigation before the employer has an opportunity to correct thorough internal grievance procedures any wrong he may have committed,” explained the court.

Referring to the transfer to Solano prison, the court said that a transfer can be an adverse employment action when it results in “substantial and tangible harm.” But, the court said:

A plaintiff who is...denied a lateral transfer — that is, one in which she suffers no diminution in pay or benefits — does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm. Mere idiosyncrasies of personal preference are not sufficient to state an injury.

McRae contended the transfer was an adverse employment action because the work environment at Solano was worse than at CMF and that Solano was a dangerous place to work. “For Dr. McRae to prevail on this point,” the court said, “the record must contain substantial evidence that Solano Prison in fact presented a less desirable work environment than CMF, and, further, that the change was not just somewhat less pleasant, but had materially adverse consequences comparable in significance to a demotion, a decrease in wages or salary, a less distinguished title, a material loss of benefits, or significantly diminished responsibilities.”

Although there was evidence that McRae was not given a lab coat and did not have her own desk at Solano, these matters “do not amount to a tangible injury supporting a claim of adverse employment action,” said the court.

The court also was not persuaded by McRae’s contention that even if no single action of the department was an adverse employment action, taken together they established a pattern of conduct that would qualify as one. It found her complaints reflected “isolated incidents of unpleasantness,” rather than the “kind of severe and pervasive harassment that permits recovery” on a hostile work environment theory. (*McRae v. Department of Corrections* [3-18-05] Nos. A098073, A100745, A104701 [1st Dist.] 127 Cal.App.4th 779, 2005 DJDAR 3222.) *

Public Sector Arbitration

Termination for Alleged Drug Use Overturned

A university employee terminated for alleged on-site drug use was reinstated to his position by Arbitrator Paul Staudohar based on a lack of corroborating evidence. The grievant had been employed as a senior building maintenance worker with the Physical Plant-Campus Services division of the University of California, Berkeley, and had been well-regarded throughout his three years of employment.

The case arose when an unnamed physical plant employee reported to an Assistant Vice Chancellor that he had observed widespread on-site drug and alcohol use, theft of university property, and department timesheet irregularities. Following the advice of the university police department, an outside firm was hired to undertake an investigation. Two employees provided investigators with written statements identifying the grievant as someone who sold and used methamphetamine drugs with them on university time and property. The grievant also met with investigators and repeatedly denied the charges. However, he signed a written statement proclaiming that he neither confirmed nor denied selling, using, purchasing, or distributing drugs on university property and time. As a result of the investigation, eight employees were ter-

minated, including the grievant and the two employees who had identified him.

The university's code of conduct prohibits employees from using, distributing, or possessing illegal drugs, and authorizes termination for a single violation. The grievant's termination was based solely on the statements of the two employees who implicated him.

The grievant claimed the written statement was coerced.

At his *Skelly* hearing, the grievant provided no evidence of his innocence but claimed the written statement he provided in connection with his interview was coerced. He further claimed that both employees retracted their statements by the time he was terminated. At the arbitration hearing, one of the employees formally retracted his statement, but the university argued that this claim was waived because it had not been raised in the grievance. The university also asserted that the length of time between the issuance of the employee's initial statement and its

retraction was suspect, and if reinstatement were ordered, the grievant's backpay should be limited to the date of the employee's retraction.

The university also emphasized the impact of drug use on the grievant's ability to perform his job. The grievant's position required him to operate power tools and drive a truck around campus. Any substance that impaired his ability to perform his job safely posed a risk of injury or death to himself, other campus employees, and over 30,000 students.

The union charged that the university had failed to conduct an adequate investigation before terminating the grievant. Neither the university nor the outside investigators followed up on the allegations of drug use. The university never identified any specific instances in which the alleged misconduct took place, and no evidence of the grievant having drugs in his possession was provided. The statements on which the university relied contained no information regarding the grievant's conduct.

Moreover, the union argued that the employees' statements were given to the investigators with the understanding that their cooperation would help them retain their own jobs and avoid criminal charges. Thus, the two men had an incentive to shift the focus of the investigation away from them. And because one of the statements was retracted, the termination was based on uncorroborated hearsay testimony.

Arbitrator Staudohar found that the initial written statements identifying the grievant formed a strong prima fa-

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.
- Expanded discussion of how to put on a better case, including what to do and what to expect in a hearing.
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cie case and indicated that termination was justified. However, one statement eventually was retracted and not corroborated by later developments. The employee's signed retraction declared that his original statement was made under duress after enduring a lengthy investigatory interview. Both he and his wife suffered from health problems, and he was extremely worried about losing his medical benefits. The employee tes-

mination was the second employee's statement that could not be confirmed due to his unavailability. Arbitrator Staudohar restored the grievant to his former position with backpay and benefits. (*University of California, Berkeley, and American Federation of State, County and Municipal Employees, Loc. 3299* [12-8-04] 11 pp. *Representatives*: Kenneth T. Phillippi, labor relations advocate, for the university; Jose Martinez, lead organizer for AFSCME, Local 3299, for the union. *Arbitrator*: Paul D. Staudohar.)*

*None of the witnesses
could confirm any of
the alleged misconduct.*

tified about these issues at the arbitration hearing, and said that he had never personally witnessed the grievant using or selling drugs on university property.

The other employee's statement claimed that he had used drugs with the grievant and other employees on university property and time, but it provided no specific information about the incidents. Since this employee did not appear to testify at the hearing about the alleged drug use, this further lowered the credibility of his statements.

None of the witnesses who did testify could confirm any of the alleged misconduct. The whistleblower whose original statements prompted the investigation had never named the grievant as one of the drug users. The only evidence supporting the grievant's ter-

Arbitration Log

• Discipline

County of San Joaquin and Service Employees International Union, Loc. 790 (11-29-04; 26 pp.)

Representatives: Anne Yen, Esq., (Weinberg, Roger & Rosenfeld), for the union; Kimberly D. Johnson, deputy county counsel, for the county. *Arbitrator:* Bonnie G. Bogue.

Issue: Was the grievant discharged for just cause?

County's position: (1) The grievant, a county employee with 12 years of service, appeared intoxicated to several coworkers while at her work station. The grievant was called into a meeting with her supervisor, a union representative, and the county risk manager. She was told the purpose of the meeting was to determine whether she was under the influence of drugs or alcohol, and told that if she did not agree to take an alcohol test, she could be disciplined. The grievant denied being under the influence.

(2) The grievant insisted on having another union representative. When she was unable to reach the union, she left the meeting room and returned to her work station, where she resumed her duties by answering the phone. Her supervisor told her not to work and placed her on administrative leave. The supervisor told her that she would be driven to the hospital for the test. She also instructed the grievant not to leave the building or to drive. Ignoring these

orders, the grievant left without permission and without undergoing the alcohol test.

(3) The department director determined that discharge was appropriate because of the grievant's refusal to take the alcohol test. That, coupled with her clear insubordination, were sufficient to justify termination.

(4) The grievant rejected the county's offer to participate in a residential alcohol treatment program at the county's expense and with full salary and benefits.

Union's position: (1) The county drug and alcohol policy does not authorize discharge for intoxication while on the job. Referral to a treatment program is the appropriate response to a first offense, but the grievant was not offered this option the day she was placed on administrative leave.

(2) The policy does not mandate discharge for refusal to take the alcohol test. Discharge was not appropriate for a first offender with a long and positive employment history. The

grievant never formally refused to take the test. She simply desired proper union representation before doing so.

(3) The grievant was confused during the incident because she was taking a prescription anti-depressant drug, which her doctor confirmed could impair her behavior. Given instructions that she stop working, and that security would be called to escort her out of the building, it was reasonable for the grievant to leave immediately to avoid further humiliation.

(4) The supervisor's instruction not to drive herself home was not clear and cannot form the basis for insubordination.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) The threshold issue is whether the grievant's conduct constituted a formal refusal to take the test. The evidence does not support the county's claim that she intentionally refused to do so. Rather, the grievant's actions constituted a serious mistake in judgment prompted by circumstances she found upsetting and confusing. The grievant left work and went home to escape an extremely upsetting situation. This was a serious error in judgment that was compounded

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by her failure to take the test later in the day or to locate an acceptable union representative.

(2) The grievant's decision to leave without a guard to escort her cannot reasonably be deemed "absence without leave." She did not understand her supervisor's directive not to drive herself home as a basis for insubordination. The supervisor's testimony confirmed that she did not tell the grievant she would face discipline if she drove herself home or refused to take the test.

(3) The grievant's actions justify discipline, but not discharge. Her record of satisfactory performance without any prior discipline was given no consideration. The county's policy does not mandate discharge for refusal to take an alcohol test; nor did the county present evidence that that was the actual practice. The policy gives employees "three strikes" before discharge for violation of the drug and alcohol rules. Discharge of the grievant put her in the same place as someone who had tested positive for intoxication three times.

(4) The appropriate disciplinary action is a 30-day unpaid suspension, coupled with the opportunity to undergo a treatment program under the same conditions had she tested positive.

(Binding Grievance Arbitration)

• **Contract Interpretation — Salary Los Angeles County Metropolitan Transportation Authority and United Transportation Union** (12-19-04; 9 pp.) *Representatives:* Lawrence Drasin, Esq. (Drasin & Associates), for the union; Denise C. Findlay, labor re-

lations specialist, for MTA. *Arbitrator:* Joseph F. Gentile.

Issue: Did MTA violate the parties' agreement by reducing the grievant's pay rate when she transferred to a position in another bargaining unit?

Union's position: (1) The grievant was employed as a photocopy machine operator in a position represented by the Transportation Communications Union. The grievant applied and was selected for a schedule-maker position. The grievant believed this to be a promotional opportunity and a chance to make a higher salary.

(2) The schedule-maker position is in a bargaining unit represented by United Transportation Union. The grievant understood that, as a result of her transfer, she would establish a new seniority date, leaving behind seven years of MTA work experience.

(3) When the grievant received her first paycheck, she learned that her pay rate was 95 cents an hour lower than what she had made in her previous position. The grievant was aware of the position's starting wage, but she believed she would make more than that rate because she had earned more in her previous classification.

(4) In similar situations, MTA always has increased the rate above the starting wage because it is inequitable to pay employees less than what they made before the transfer. Thus, a valid past practice existed to justify a higher pay rate.

MTA's position: (1) The grievant was well aware that the transfer to the new position would reset her seniority date

and pay rate as though she were a new employee. Two other employees who made a transfer similar to the grievant's began at the new starting rate in their positions.

(2) Although the union presented examples of successful grievances where a cut in the pay rate was not upheld, this practice changed in 1999, and is no longer the guiding rule.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) The parties' agreement provided no guidance for this dispute, and no bargaining history was presented to demonstrate what, if anything, was contemplated by the parties' contract. Past practice was the only guide to resolve the grievance.

(2) Testimony of the union representative who described similar transfers was more credible than the weight of MTA's evidence. Specifically, the unconditional settlement of these cases established a past practice. The union also established that it was unaware of any change in past practice.

(Binding Grievance Arbitration)

• **Contract Interpretation — Seniority California Teachers Assn. and Parlier Unified School Dist.** (1-27-05; 14 pp.) *Representatives:* Richard Ornelas, Esq., for the union; Richard B. Galtman, Esq. (Lozano Smith), for the district. *Arbitrator:* William E. Riker (CSMCS Case No. ARB-03-2424).

Issue: Did the district violate the parties' contract by failing to weigh the

grievant's seniority when selecting a candidate for a resource teacher position?

Union's position: (1) Elizabeth Hernandez has been a teacher for 24 years and has taught in Parlier since 1987. She consistently has received excellent evaluations. When she applied for a resource teacher position at another school, she believed her background made her a competitive candidate.

(2) A new principal reviewed the applicants for the resource teacher position and for a learning director position. The candidate who was selected for the resource teacher position previously had interviewed with the principal for the learning director position. Hernandez was not interviewed and did not know that a selection had been made until her current principal informed her. The new principal had become familiar with the chosen candidate, which gave that candidate an unfair advantage in the selection process.

(3) Section 9.4.5 of the parties' agreement details the criteria to be used when two or more current unit members apply and are qualified for a vacant position. The criteria are listed as seniority, experience, credentials, train-

ing, and performance evaluations. Seniority is the most important factor because it is listed first. Bargaining history demonstrates that seniority intentionally was moved to the top of the list, which gave it more weight in hiring decisions.

(4) Based on her seniority, Hernandez should have been rated as sufficiently competitive to warrant an interview for the position. Instead, the district completely ignored Hernandez's seniority in making its decision.

(5) The successful candidate was interviewed and chosen before all other applicants were ranked. This disadvantaged Hernandez. If her seniority had been properly weighted, she could have competed with the chosen candidate.

District's position: (1) The contract is silent regarding any preference or priority for seniority as a hiring criterion. The five criteria listed in Sec. 9.4.5 simply are categories the parties agreed would be consulted for the purposes of assessing job candidates. Seniority was shuffled to the head of the list without any direction about the weight to be afforded. Seniority serves as a tie-breaker after the interview stage if candidates otherwise are equally qualified.

(2) The contract does not require the district to interview all prospective candidates for a position. Which candidates are interviewed always has been the prerogative of the district. Hernandez's application was considered, but another candidate was determined to be more qualified for the position. Thus, there was no need to advance to the interview step where seniority might have played a role in distinguishing candidates.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) Section 9.4.5 lists five criteria the district must consider in the hiring process but contains no language that ranks or weights those factors. As long as these criteria are addressed in the evaluation of applications, the requirements of the section have been satisfied. This gives the district flexibility in applying the criteria for the purpose of selecting the best-qualified applicant.

(2) In the past, the union attempted to persuade the district to revise the contract language and designate seniority as the dominant criterion. In 1998, the parties agreed to shuffle the order, placing seniority at the top. However, the union's attempt to further influence the hiring process failed; no language was inserted to give precedence to seniority. The district's interpretation of the language was proper.

(3) While the hiring process for the resource teacher position was in accordance with the contract, the district should have notified the other applicants, including Hernandez, of the

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candidate's selection. Also, hiring for each vacant position should proceed discreetly.

(Advisory Arbitration)

• **Contract Interpretation — Salary Foothill-DeAnza Faculty Assn. and Foothill-DeAnza Community College Dist.** (3-7-05; 27 pp.) *Representatives:* Robert J. Bezemek, for the union; Charles D. Sakai (Curiale, Dellaverson, et al.), for the district. *Arbitrator:* Kenneth N. Silbert (CSMCS Case No. ARB-01-0554).

Issue: Did the district violate the collective bargaining agreement when it denied the grievant his third professional achievement award in 2001?

Union's position: (1) The grievant has been employed by the district since 1986. He was granted tenure in 1987. In 1993, he received his first professional achievement award, a monetary award for excellence that, in practice, functions as a step increase. In 1997, he received his second PAA. In 2001, the district denied his application for a third PAA. Approximately 98 percent of applicants receive their third PAA. The district did not base its decision to deny the PAA on the grievant's "principal duties" or those related solely to his functions as a faculty member. Instead, the district improperly relied on the grievant's expressive communications outside the classroom, which officials characterized as hostile, threatening, or inappropriate.

(2) The grievant expresses his opinions and is active outside the classroom. Consequently, he had a number of con-

flicts outside the classroom with district administration between receipt of his second PAA and application for his third PAA. District officials described their interactions with the grievant as "threatening." However, having a tendency to be confrontational, without acting inappropriately, is not grounds for denying a third PAA.

(3) The grievant's third PAA application included a self-evaluation, student evaluations, a peer evaluation, and an administrative evaluation. While the student and peer evaluations ranged from positive to excellent, the administrative evaluation rated the grievant poorly in the areas of professionalism and collegiality. He also received a poor rating for allegedly failing to maintain student-faculty relationships that were conducive to learning. The college president said she denied the application because of the grievant's hostile relationship with college administrators.

(4) The parties' agreement specifies that a PAA application should be granted or denied based on the applicant's performance of "principal duties." This terminology refers to instructional and classroom duties, as well as attendance at certain meetings. The grievant's communications during these meetings are not a part of his principal duties, and should not have been considered.

District's position: (1) The PAA application was denied because the grievant did not meet the contractual standard of excellence. All evaluations submitted with the application must verify excellence; his administrative evalua-

tion was lacking. Professionalism is a part of a faculty member's principal duties, and the grievant's actions in the interim between his second PAA and his application were deficient.

(2) The district has broad discretion to determine excellence in a faculty member's performance of his principal duties, provided it is not exercised in an arbitrary, capricious, or discriminatory manner. Evaluations are highly subjective and should not be disturbed in arbitration absent evidence of improper motive. The evidence overwhelmingly supported denial of the grievant's PAA application because he did not demonstrate excellence in the performance of his principal duties.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) The PAA was denied because of the grievant's apparent lack of professionalism. The term "principal duties" is not limited to the grievant's classroom-related functions. The agreement clearly contemplates consideration of all factors in the evaluation form submitted in support of a PAA application.

(2) The grievant's demeanor revealed him to be unusually forceful and direct; and this behavior could cause others to be uncomfortable. It was clear that district officials reacted negatively to the grievant's directness. But the grievant never used inappropriate language or acted inappropriately in raising issues that were of concern to him, and thus did not act unprofessionally. In two incidents, the grievant arguably

was rude when dealing directly with district officials, but his behavior was not threatening as the official later characterized it. Thus, his conduct and communication with the administration should not have been relied on as a basis for denying his PAA application.

(3) While granting a third PAA is not automatic, and each application should be judged on its merits, only a noticeable decline in performance after a second PAA would appear to justify denial of a third award. Some negative ratings attributed to the grievant in his administrative evaluation were not justified, and thus should not have been relied on in evaluating his application.

(4) The union met its burden of demonstrating that the district's denial of the third PAA application was arbitrary and capricious. The district was ordered to impose the award retroactively with appropriate compensation.

(Binding Grievance Arbitration)

• Contract Interpretation

Operating Engineers Loc. 3 and City of Fremont (4-2-05; 6 pp.) *Representatives:* Alan Crowley, Esq. (Weinberg, Roger, and Rosenfeld), for the union; Kathy E. Mount, Esq. (Meyers Nave Riback Silver & Wilson), for the city. *Arbitrator:* Alan R. Rothstein (CSMCS Case No. ARB-04-2521).

Issue: Did the city violate the collective bargaining agreement and past practice when it eliminated the grievant's 5 percent acting pay differential?

Union's position: (1) The grievant, a park field supervisor, assumed the du-

ties of a fellow supervisor when that employee left his position. Both positions were paid at the same rate, but the grievant expected to receive a 5 percent differential known as "recognition pay." When the differential was not forthcoming, he filed a grievance, and the parties agreed that he would be paid the differential until his position was "restructured." He received the differential for 17 months, but it was terminated without notice.

(2) Traditionally, the pay differential has operated when one field supervisor assumes the duties of a second supervisor who has left the position. The differential is paid until a new person is hired for the open position. In the grievant's case, his graffiti removal subordinate was moved to another department in the last month he received the differential. No one was hired to fill the open position. Thus, he still is entitled to recognition pay for continuing to perform the duties of both positions.

City's position: (1) The earlier grievance resulted in an agreement that the grievant would be paid the differential until a departmental reorganization occurred. Two departments later were separated into three, and some employees who reported to the grievant were laid off or shifted out of his unit. After the reorganization was finalized, the grievant had the same set of duties as the other field supervisors, which ended justification for extra compensation.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The union presented evidence of several instances where a field supervisor assumed the duties of one of his peers and was paid a differential until a replacement was hired. In all cases, this occurred for approximately four to six months. In the present case, however, the city chose not to replace the field supervisor whose duties the grievant assumed. The parties never met and conferred over the decision, thereby creating a gap in communication that contributed to this grievance.

(2) Pursuant to the parties' agreement that resolved the earlier grievance, the pay differential was to end when the grievant's position was restructured, not when a replacement supervisor was hired. The grievant's situation differs from the past practice, where it was clear that a replacement would be hired. Although the grievant's extra duties were terminated without formal notice, it was not a contract violation for the city to do so.

(3) The union contended that the city's reorganization did not constitute the "restructuring" anticipated by the parties' settlement agreement in the earlier grievance. But it did not assert what other changes would suffice to eliminate the pay differential. The reorganization removed some of the grievant's responsibilities so that his workload again resembled that of other supervisors. Accordingly, by the terms of the pay differential agreement, the city underwent appropriate restructuring to justify eliminating the differential.

(Binding Grievance Arbitration)

Resources

PERB Expands Web Features

The Public Employment Relations Board recently unveiled several new features on its website. Decisions now are posted at <http://www.perb.ca.gov/> within 48 hours after they are issued. Practitioners can request to be added to an email notification system that provides instant notification of newly released decisions.

PERB also is in the process of providing the public with full access to its “decision search engine.” This tool lets anyone search PERB decisions using words, phrases, and other variables. The search engine contains a topical index of all decisions along with short summaries. Currently, the full text is available for decisions from 1992 to the present, and older decisions are being added daily. PERB expects all decisions to be available by July. Advanced electronic search features will be available later this year. In addition to the new web features, PERB has updated its section on “frequently asked questions.”

As part of this innovation drive initiated by Chairperson John Duncan, PERB hopes to fully automate the charge-filing process.

Furthering a Work and Family Agenda

This comprehensive new manual from the Labor Project for Working Families is for union leaders and activists, negotiating teams, and organizers. It provides all the information needed to successfully move forward a work and family agenda.

“This guide provides unions with the tools they need for negotiating for critical policies like paid family leave, flexible hours and child care,” notes AFL-CIO President John Sweeney. “It also helps unions advocate in state and national arenas for good public policies that benefit all working families, as the union movement did with paid family leave in California.”

The guide includes information on getting started by forming a work and family committee, creating a child care fund, and adopting the work and family “bill of rights”;

negotiating family-friendly contract language on child care, family leave, flexible hours, and elder care; understanding current state family leave laws; and creating a work and family member survey.

A Job and a Life: Organizing and Bargaining for Work and Family Issues, by the Labor Project for Working Families (2005) 100 pp. Send check to: LPWF, 2521 Channing Way, Berkeley, CA 94720-5555; or order at <http://www.laborproject.org/>. Softcover, \$10 (free shipping). For bulk prices, call (510) 643-7088.

Building Better Relationships

James W. Tamm and Ronald J. Luyet have written a “how-to” manual for those who want to develop the collaborative skills to build relationships, both professional and personal. *Radical Collaboration: Five Essential Skills to Overcome Defensiveness and Build Successful Relationships* focuses on four introspective skills — collaborative intention, truthfulness, self-accountability, and self-awareness and awareness of others — and on a fifth skill, problem solving and negotiating.

At the heart of the book is a theory of human relationships called Fundamental Interpersonal Relations Orientation, or FIRO. It explains how unmet emotional needs can sabotage efforts to collaborate. To foster self-discovery, the book works in tandem with a personal online profile. Each copy of the book contains a unique code number that readers use to gain access to an online relationship profile test at <http://www.radicalcollaboration.com/>. An analysis of participants’ answers increases their awareness of how they behave in relationships and gives information about behavior in three areas that strongly influence the ability to collaborate: control, inclusion, and openness.

Radical Collaboration: Five Essential Skills to Overcome Defensiveness and Build Successful Relationships, by James W. Tamm and Ronald J. Luyet (2004) 336 pp. Harper Business, <http://www.harpercollins.com/>. Hardcover, \$24.95.

History of Public Sector Unions

From the dawn of the 20th century to the early 1960s, public sector workers generally had no legal right to strike, to bargain, or to arbitrate their disputes, and they could be fired simply for joining a union. *Public Workers* is the first book to analyze why public sector labor law evolved as it did, separate from and much more restrictive than private sector labor law. Also explored is what effect this law had on public sector unions, organized labor as a whole, and, by extension, all of American politics. Joseph E. Slater explains how public sector unions survived, represented their members, and set the stage for the most remarkable growth of worker organization in American history.

Slater examines the battles of public sector unions in the workplace, courts, and political arena, from the infamous Boston police strike of 1919, to teachers in Seattle fighting a yellow-dog contract, to the fate of the powerful Transit Workers Union after New York City purchased the subways, to the long struggle by AFSCME that produced the nation's first public sector labor law in Wisconsin in 1959. Slater introduces readers to a determined and often-ignored segment of the union movement and expands readers' knowledge of working men and women, the institutions they formed, and the organizational obstacles they faced.

Public Workers: Government Employee Unions, the Law, and the State, 1900–1962, by Joseph E. Slater (2004) 272 pp. Cornell University Press. Hardcover, \$39.95.

Updated Labor Directory

BNA's directory of private and public sector unions and union leaders is now in its 2004 edition. Published annually, and gleaned from extensive research and information the unions themselves have reported to the U.S. government, the *Directory of U.S. Labor Organizations* helps find personal contacts, union locations, and other vital details on labor organizations in the United States.

This directory is the most widely used collection of union contacts and key data. The data include entries for nearly 150 national and international union entries with

proper names, addresses, telephone and fax numbers, websites, and email addresses; membership figures; and the names of nearly 2,500 elected officers and key staff. Publications and convention years are given. The directory also explains federal reporting requirements for unions and summarizes the rights of union members guaranteed by law.

Directory of U.S. Labor Organizations, 2004 edition, 268 pp. BNA Books, <http://www.bna.com/bnabooks>. Softcover, \$115.

Public Employment Relations Board

Orders & Decisions

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

EERA Cases

Unfair Practice Rulings

Protected activity must occur prior to termination for prima facie case: Berkeley USD.

(Lavan v. Berkeley Unified School Dist., No. 1702, 11-5-04; 2 pp. + 8 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The charging party's failure to engage in protected activity prior to her notice of reprimand or termination did not state a claim of discriminatory termination.

Case summary: Elaine Lavan filed an unfair practice charge alleging that the Berkeley Unified School District discriminatorily terminated her. Lavan was employed as a teacher at Inter City Services, an adult school. The charge arose out of an argument Lavan had with a community member who was visiting her classroom. Lavan used profanity and directed racial remarks to the community member during the argument, which was witnessed by several students and district employees. The community member filed a complaint with the district regarding the incident.

Lavan was placed on administrative leave and received a letter of reprimand. The letter confirmed the community member's version of the incident and charged Lavan with unprofessional conduct. The letter further instructed her to attend anger-management classes, and gave her 30 days to respond. However, two days after the reprimand was issued,

Lavan was terminated for failure to comply with the reprimand, which she believed was for her failure to attend the prescribed classes. In her response to the reprimand, she offered her version of the incident, although she conceded to the use of profanity and racial statements.

The regional attorney found the charge failed to state a prima facie case of discrimination because Lavan did not engage in any protected activity prior to her termination. Her response to the reprimand might be considered protected activity, but it did not occur until more than two weeks after she was notified of her termination. Even assuming that Lavan had engaged in protected activity prior to her termination, the charge also failed to demonstrate the nexus between that activity and her termination. Lavan also claimed that she could not be required to attend anger-management classes; however, that requirement was not inconsistent with the parties' memorandum of understanding.

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

Teachers have right to wear bargaining-related buttons: East Whittier S.D.

(East Whittier Education Assn. v. East Whittier School Dist., No. 1727, 12-21-04, 37 pp. dec. By Member Neima, with Member Whitehead; Chairperson Duncan dissenting.)

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

Holding: The board affirmed its earlier ruling that teachers have the right to wear bargaining-related buttons in the presence of their students absent special circumstances and that the wearing of union buttons is not “political activity” within the meaning of Ed. Code Sec. 7055. (See the Public Schools section of this issue of *CPER*, pp. 33-38, for complete coverage of the story.)

Representation Rulings

Charter school ordered to hold representation election: Options For Youth.

(*Options For Youth-Victor Valley, Inc., and Victor Valley Options For Youth Teachers Assn.*, No. 1701, 11-5-04; 10 pp. + 22 pp. R.D. dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: OFY was found to be a political subdivision and therefore subject to PERB jurisdiction.

Case summary: The Victor Valley Options for Youth Teachers Association filed a request for recognition with Options for Youth-Victor Valley, Inc., and PERB, seeking exclusive representation for approximately 20 full-time teachers employed by OFY. PERB found that the association had demonstrated proof of at least majority support in the petitioned-for unit, that no interventions had been filed, and that OFY could lawfully grant voluntary recognition. OFY declined to grant recognition, however, and argued that the association’s petition should be dismissed because OFY is a private, non-profit corporation. Following this reasoning, OFY argued that it was not a public employer, and thus is subject to the National Labor Relations Act, not EERA. Because OFY is a registered charter school, the board requested that the parties submit additional information on OFY’s status as a public school employer under EERA and Education Code Sec. 47611.5(b).

The case was heard by PERB’s regional director. He found OFY to be a public school employer within the meaning of EERA. OFY contended that this fact was not controlling because it is not a “political subdivision” under the NLRA, meaning that the NLRB has no jurisdiction over OFY.

The Supreme Court’s decision in *National Labor Relations Board v. Natural Gas Utility District of Hawkins County, Tenn.* (1971) 402 U.S. 600, sets out the test for determining whether a party is a political subdivision under the NLRA and thus exempt from its jurisdiction. Under *Hawkins*, a political subdivision is either (1) an entity created directly by the state, so as to comprise a department or administrative arm of the government; or (2) an entity administered by individuals who are responsible to public officials or to the general electorate.

From the evidence presented, the R.D. concluded that OFY met the first prong of *Hawkins*. OFY operates a charter school pursuant to the Charter Schools Act. The charter’s renewal or revocation is subject to the CSA, and the school is obliged to comply with the CSA. The district in which OFY operates was required to hold a public hearing before approving the charter. OFY carries out its education functions pursuant to power granted to it by the legislature. Most importantly, the grant of public monies to OFY is lawful only if the charter school is “under the exclusive control of the officers of the public schools.”

Evidence also demonstrated that OFY met the second prong of *Hawkins*. The district is the chartering authority, receives 1 percent of OFY’s funding for oversight, and may insist on representation on OFY’s board. California case law holds that a charter school must remain under the control of the officers of public schools and “must never stray from the control of the chartering authority.” Thus, reasoned the R.D., to find that OFY was not a public school employer or political subdivision of the state would require a finding that OFY was not complying with the CSA.

OFY did not dispute the R.D.’s finding that it is a public school employer. Rather, in the exceptions filed to the R.D.’s decision, it contended that this characterization was irrelevant given its status as an employer under Sec. 2(2) of the NLRA. However, the association argued, and the board agreed, that PERB may not refuse to enforce EERA on the grounds that it is preempted by federal law.

Article 3, Sec. 3.5, of the California Constitution provides that state administrative agencies have no power to declare a statute unenforceable on the basis of federal pre-

emption unless an appellate court has made a determination regarding preemption. In *Regents of the University of California v. Public Employment Relations Board* (1983) 139 Cal.App.3d 1037, 57 CPER 52, the Court of Appeal held that the board had properly refused to decide a conflict between HEERA and federal postal laws and regulations. The board found the issue in the present case to be analogous to that in *U.C. Regents*, and thus any potential conflict first must be decided by the appellate courts. Accordingly, the board ruled that it would conduct an election to determine whether the employees in the proposed unit wished to be represented by the association.

Confidential status granted to one employee, denied to another: Burbank USD.

(*Burbank Unified School Dist. and California School Employees Assn.*, No. 1710, 11-22-04; 9 pp. + 12 pp. ALJ dec. By Member Whitehead, with Member Neima; Chairperson Duncan dissenting.)

Holding: The administrative secretary to the director of personnel is a confidential employee, but the administrative secretary to the assistant superintendent of business services remains within the bargaining unit.

Case summary: The Burbank Unified School District filed a petition requesting modification of a bargaining unit represented by the California School Employees Association. The petition sought to exclude the administrative secretary to the director of personnel and the administrative secretary to the assistant superintendent of business services from the unit as confidential employees, as defined in EERA Sec. 3540.1(c).

The district director of personnel plays an integral role in the negotiating process. She attends nearly all negotiating sessions, has regular meetings with the unions, devises bargaining tactics and strategy, and exchanges confidential communications with the superintendent and the district's attorneys on negotiation issues. She also investigates potential disciplinary actions and grievances, and maintains related confidential files.

The personnel director's administrative secretary assists in a number of ways. Some of the secretary's functions, such as typing and formatting draft bargaining proposals, and gathering data from other school districts, may be performed by any non-confidential secretary. However, the secretary also attends caucuses with the district negotiating team and types documents relating to employee discipline and grievances. She has access to the director's computer password and all of her files, with which the secretary works regularly. She also discusses pending grievances and disciplinary actions with district counsel in the director's absence. She spends a significant portion of her time dealing with confidential negotiation and personnel documents.

Although her access to the director's computer, files, and attorney invoices were not determinative of her status, an administrative law judge found that a regular and substantial part of her duties required her to work with confidential files, memoranda, and attorney-client documents. The secretary has assumed increasingly confidential duties since the creation of the position. The ALJ concluded that the personnel director's secretary was a confidential employee within the meaning of EERA.

The assistant superintendent for business services oversees six departments, including budget and payroll benefits. He plays an active and integral role on the district's bargaining team, though his involvement generally concerns wages, benefits, and other financial matters. He attended at least half the sessions during the most recent round of negotiations. He also acts as the district's risk manager, responsible for overseeing litigation involving district employees and students.

The assistant superintendent's secretary maintains his litigation files, negotiation notes, and data prepared for negotiations. She is part of the communication link between the assistant superintendent and the district's attorneys regarding pending litigation. As the assistant superintendent took on a more active role in negotiations, the secretary's time spent preparing related reports and memoranda has increased, although she did not quantify the portion of her time spent on negotiation matters.

The ALJ did not find the evidence demonstrated that this secretary spent sufficient time on employer-employee relations to be considered confidential, even when the 2004 amendment expanding the definition of “confidential” was considered.

The board affirmed the ALJ’s decision. Chairman Duncan dissented regarding the determination that the assistant superintendent’s secretary is not a confidential position. Duncan emphasized that PERB precedent did not focus on the amount of time spent on employer-employee tasks, a fact on which the ALJ based her opinion. Rather, case law has considered whether engaging in such tasks was part of the employee’s routine duties. Duncan observed that in one case, PERB found confidential status of an employee whose supervisor had not been to any negotiation sessions and thus had not assigned related tasks to the employee. Duncan also noted that the secretary in the present case was an integral part of the stream of confidential communications, and her supervisor was a key player in negotiations, an area within his expertise.

Duty of Fair Representation Rulings

Employee’s failure to follow contract procedure does not constitute DFR breach: College of the Canyons Faculty Assn.

(*Lynn v. College of the Canyons Faculty Assn.*, No. 1706, 11-16-04; 2 pp. + 11 pp. ALJ dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

Holding: There was no breach of the fair duty of representation where the employee was treated fairly and failed to familiarize herself with the grievance procedure.

Case summary: Cindy Lynn filed an unfair practice charge alleging that the College of the Canyons Faculty Association breached its duty of fair representation by failing to pursue her allegations concerning unpaid overtime.

Lynn was employed as a salaried, full-time faculty member at the child development center of the College of the Canyons. Her charge concerns the assertion that, at the time she started in the position, an unidentified person told

her the job required her to work only 35 hours a week. The primary piece of evidence to support her assertion is the collective bargaining agreement, which in Article 11 states that the normal workday for full-time counseling faculty members is seven hours, or 35 hours a week. She argued that all faculty are classified as either instructional or non-instructional, and that she falls within the latter category. Lynn claimed she was entitled to additional compensation because she was required to work more than the 35-hour maximum and the association did nothing to assist her in obtaining that remedy.

Beginning in 1997, Lynn embarked on a quest to clarify the number of hours associated with her position. Her immediate supervisor told her that her position was not limited by the 35-hour contractual limit. Lynn was informed by the college vice superintendent that, while she was considered a full-time counseling faculty member, most faculty worked more than 35 hours and she was not entitled to overload pay. The association president told Lynn that the contract did not establish an hourly maximum for faculty members, and that even for the positions that fall within Article 11, no overtime or compensatory time is available. Moreover, Lynn’s position did not fall within Article 11 because it was instructional in nature. The college human resources director told Lynn to put her complaints in writing. Lynn did so but never received a response.

Lynn contended that the COCFA chapter services consultant did not respond to multiple attempts to contact him. The consultant remembered one voicemail left by Lynn in 2002, to which he replied. When Lynn later met with the consultant, he agreed to have a meeting with her and the vice superintendent to discuss the matter; the meeting never was held and Lynn never filed a grievance.

An administrative law judge found that the association had not breached its duty of fair representation. He found that Lynn was not a counselor, and cited pervasive evidence defeating her claim that she was “non-instructional.” Four individuals, both college and association officials, told her that her position did not fall within Article 11.

Even if her claim had merit, the ALJ found that the association clearly met its statutory obligations. Five people affiliated with the association discussed Lynn's concerns with her and attempted to provide assistance. The parties' contract places the obligation for filing a grievance on the employee, not the union. Furthermore, it requires an employee to file a grievance within 10 days of discussing the problem with a supervisor. While Lynn contended that these procedures were not explained to her until after the deadline had passed, she had a responsibility to read the contract and understand her rights. Her failure to follow procedure was not the fault of the association. Lynn failed to demonstrate that the association acted arbitrarily, discriminatorily, or with bad faith in their assistance.

Accordingly, the board dismissed the charge.

HEERA Cases

Unfair Practice Rulings

Change in policy did not constitute a negotiable rule of conduct: CSU.

(*Academic Professionals of California v. Trustees of the California State University [Stanislaus]*, No. 1705-H, 11-9-04; 18 pp. + 7 pp. R.A. dec. By Chairperson Duncan with Member Neima; Member Whitehead dissenting.)

Holding: A newly promulgated computer-use policy citing Government Code restrictions on employee use of state property was not a unilateral change in disciplinary policy. The policy made discipline subject to the collective bargaining agreement, which incorporated the statutory bases for discipline listed in the Education Code. (See *CPER* No. 171, pp. 61-64, for complete coverage of the story.)

MMBA Cases

Unfair Practice Rulings

Appeal withdrawn: San Joaquin County.

(*County of San Joaquin v. San Joaquin County Correctional Officers Assn.*, No. 1703-M, 11-5-04; 2 pp. + 13 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The county's unfair practice charge and appeal were withdrawn with prejudice.

Case summary: The board granted the county's request to withdraw its unfair practice charge and appeal with prejudice, finding it to be in the best interests of the parties and consistent with the purposes of the MMBA.

Union is entitled to members' contact information absent compelling need for privacy: Golden Empire Transit Dist.

(*Teamsters Loc. 517 v. Golden Empire Transit Dist.*, No. 1704-M, 11-8-04; 11 pp. dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The charging party is entitled to receive the home addresses and phone numbers of unit employees from the district.

Case summary: Teamsters Local 517 filed an unfair practice charge alleging that the transit district refused to provide requested information about bargaining unit employees. A Local 517 business agent requested a current list of unit employees' names and contact information, and asked the district to notify the union when new employees were hired. The district said its policy prohibited the release of such information and that union stewards traditionally had collected the information in person.

Several months later, the district posted a memorandum for all bargaining unit employees that informed them of the union's desire for their contact information and of the need for employees' consent to release of information. Copies of the consent form were made available to all unit members. The district asserted this was the first time that the

union had requested this information. All but four unit members consented to the release.

An administrative law judge found that the district violated the MMBA by refusing to provide the employees' contact information. The district is obligated to provide all information that is necessary and relevant to discharge the union's duty of fair representation. Failure to provide such information is a per se violation of the duty to bargain in good faith. The ALJ found that the district had failed to establish that Local 517 had waived its right to obtain the contact information. Failure to request information in the past does not constitute a "clear and unmistakable" waiver of the union's right to the information.

However, the ALJ declined to order the district to release the information. Instead, he ordered the parties to meet and confer regarding the mechanics of providing the information, particularly in terms of respecting employee confidentiality. Information pertaining to the four employees who requested confidentiality was not to be released at all.

In its exceptions to the ALJ's decision, Local 517 argued it was entitled to receive the unit employees' contact information. The board agreed.

PERB precedent requires the board to balance the privacy interests of employees against the union's need for information. Where a union has established the relevance and need for particular information, the burden of proof is on the party holding the information to show that disclosure would compromise the right of privacy. Provisions of the California Public Records Act that exempt disclosure of employees' home addresses and phone numbers do not apply to public employees covered by the MMBA. Local 517 requested information that allows it to communicate with its members and fulfill its duties as the employees' exclusive representative. Evidence demonstrated that other attempts to communicate to employees through the workplace have hindered Local 517's ability to carry out its obligations. The district did not justify the need for privacy other than as to the four employees who did not sign the information release. Moreover, the board found that the ALJ erred in not permitting the disclosure for those four employees.

Accordingly, the board ordered the district to release the relevant information.

Dismissal for just cause not retaliatory: Alameda County Medical Center.

(*Flenoy v. Alameda County Medical Center*, No. 1707-M, 11-16-04; 2 pp. + 12 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The charging party's termination evidence did not state a prima facie case of retaliation.

Case summary: Delores Flenoy filed an unfair practice charge alleging that the Alameda County Medical Center retaliated against her for protected activities. She was employed as a patient financial counselor with the medical center from January 1999 through October 2002.

Flenoy had a history of excessive tardiness throughout the course of her employment. She received verbal counseling, written counseling, seven written reprimands, and a 10-day suspension for tardiness prior to termination. Her problem was cited as one of the primary reasons for the termination.

Flenoy's supervisors also received numerous complaints about her unwillingness to work with Spanish-speaking patients. On occasion, she told Spanish-speaking patients they did not qualify for public assistance when they did. After six such incidents, Flenoy was suspended for 30 days without pay in February 2002. She filed two grievances over this matter, but they were denied.

In the meantime, Flenoy had become a union steward in October 2001 and filed a number of grievances. In July 2002, she received a reprimand from her immediate supervisor over misuse of union time. She filed a grievance over this incident, but it was rejected.

In September 2002, the grievant failed to return to work following a meet and confer session. Her supervisor informed her that she was absent without leave.

Finally, the medical center discovered evidence that Flenoy may have falsified her husband's financial records in order to secure public assistance.

Flenoy was terminated on October 28, 2002, for her excessive tardiness, her previous suspensions, and falsification of records.

The regional attorney found no nexus between her protected activity and her termination. Although the medical center was aware of her role as union steward and some of the disciplinary actions were in close temporal proximity to her union activities, the facts demonstrated that she consistently had been reprimanded for her tardiness well before she assumed the steward position. Continuation of the discipline did not constitute disparate treatment, especially as another employee with a similar tardiness problem was disciplined in the same manner. The medical center consistently followed its progressive discipline policies. No other evidence was presented to support her contention that her termination was not justified.

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

No cause of action for wrongful termination: Alameda County.

(Huntsberry v. County of Alameda, No. 1708-M, 11-16-04; 2 pp. + 6 pp. R.A. dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

Holding: A charge alleging wrongful termination is outside the board's jurisdiction.

Case summary: Dianne Huntsberry filed an unfair practice charge alleging that Alameda County wrongfully terminated her from her group counselor position in the probation department. She is represented by the Alameda County Probation Peace Officers Association.

The charge arose out of a child endangerment incident. On April 10, 2001, Huntsberry witnessed a staged fight between two minors in county custody. The fight was arranged by two employees in the probation department, who then placed bets on the outcome. Huntsberry claimed that she was not present at the fight, but testimony from other witnesses confirmed both her presence and her failure to assist the minors. The county placed her on administrative leave pending the outcome of an investigation, and the dis-

trict attorney's office filed criminal charges against her.

The county terminated Huntsberry in July 2002, and she was convicted of two misdemeanor counts of child endangerment in November 2002. The union did not represent her at trial. Following the verdict, Huntsberry's attorney informed her that her civil service appeal was unlikely to succeed because of her criminal conviction, as the county was likely to present the same evidence at the hearing that it did at the trial. However, at the hearing in June 2003, the county did not present sufficient evidence. The hearing officer ordered Huntsberry reinstated.

The regional attorney found that the charge failed to state a prima facie violation of the MMBA because a claim based on "wrongful termination" is not covered in the MMBA. Such allegations fall within the Labor Code and other anti-discrimination statutes, over which the board lacks jurisdiction.

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

Duty of Fair Representation Rulings

No DFR breach in forum outside contract: Alameda County Probation Peace Officers Assn.

(Huntsberry v. Alameda County Probation Peace Officers Assn., No. 1709-M, 11-16-04; 2 pp. + 9 pp. R.A. dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

Holding: There was no breach of the duty of fair representation because the union owes no duty to its members in a forum over which it does not exclusively control the means to a particular remedy.

Case summary: Dianne Huntsberry filed a DFR charge alleging that the association failed to represent her when Alameda County wrongfully terminated her from her group counselor position in the probation department.

On April 10, 2001, Huntsberry witnessed a staged fight between two minors in county custody. The fight was arranged by two employees in the probation department, who then placed bets on the outcome. Huntsberry claimed she

was not present at the fight, but testimony from witnesses confirmed both her presence and her failure to assist the minors. The county placed her on administrative leave pending the outcome of an investigation, and the district attorney's office filed criminal charges against her.

The county terminated Huntsberry in July 2002, and she was convicted of two misdemeanor counts of child endangerment in November 2002. The union declined to represent her at trial. Following the verdict, Huntsberry's attorney informed her that her civil service appeal was unlikely to succeed because of her criminal conviction, as the county was likely to present the same evidence at the hearing that it did at the trial. The union also failed to represent her in the civil service appeal.

At a hearing in June 2003, a hearing officer found that the county had not presented sufficient evidence and ordered Huntsberry reinstated.

The MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, but the courts have held that unions generally owe such a duty to its members. Huntsberry claimed that the association breached its duty by failing to represent her at trial and at the civil service hearing. However, as the regional attorney noted, an exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the remedy. The duty extends only to alleged contract violations that are subject to the parties' grievance procedure. The contract specifically excludes civil service matters.

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

Fair Employment and Housing Commission

California Code of Regulations Title 2, Sec. 7435, authorizes the Fair Employment and Housing Commission to designate as precedential, any decision, or part of any decision, that contains a significant legal or policy determination of general application that is likely to recur. Once the commission has done so, the agency may rely on it as precedent and the parties may cite to it in their arguments to the commission and the courts.

One of the commission's decisions designated as precedential is summarized below.

Employer created hostile work environment and violated employee's civil rights: Bottoms.

(DFEH v. Kurt D. Bottoms, No. 05-03-p, 4-5-05; 2 pp. + 23 pp. ALJ dec.)

Holding: The employer unlawfully made sex-based threats of violence and engaged in "quid pro quo" sexual harassment.

Case summary: The complainant, Silverlene Bates, alleged that Kurt Bottoms, her former employer, subjected her to physical, verbal, and visual sexual harassment constituting a hostile work environment and constructive discharge. Her complaint further alleged that Bottoms subjected her to an act of violence and threats of violence because of her sex.

The department issued an accusation against Bottoms that echoed Bates' allegations. It also alleged that Bottoms failed to maintain and enforce an effective sexual harassment policy.

Beginning in January 2003, Bates worked in Bottoms' real estate office located in his home in Richmond, California. Bottoms attempted to extract sexual favors from Bates on more than one occasion. He also commented on her figure, told her to break up with her boyfriend, subjected her to surveillance, called her names, made overt demands for sexual relations, and made sexually-based threats of violence against her.

Administrative Law Judge Ann Noel found that Bottoms had sexually harassed Bates in violation of Gov. Code Sec. 12940(j)(1), both by creating a hostile work environment and through quid pro quo harassment. It was clear that unwanted sexual conduct, both verbal and physical, had occurred repeatedly and was confirmed by witnesses other than Bates. Bottoms' demands for Bates to have sex with him as a condition of staying in her job was corroborated by her pastor, and this proved the quid pro quo allegation. Bottoms also created a hostile work environment through his treatment of Bates while on the job and by his behavior toward her outside of work hours. He made countless phone calls and showed up at her home in the middle of the night. ALJ Noel found his actions to be both severe and pervasive.

The department asserted that Bottoms had violated Bates' civil rights in violation of the Ralph Civil Rights Act by threatening her with death if she reported his sexual advances. The Ralph Act provides that all persons within California have the right to be free from any violence or threats of violence against their persons or property because of their sex. ALJ Noel found that Bottoms had made numerous credible threats against Bates and her husband, and that he threatened Bates with death if she report him to the police. This conduct constituted a violation of the Ralph Act.

Finally, Noel found that Bottoms, as an employer, had failed in his affirmative duty to take all reasonable steps to prevent unlawful harassment and discrimination from

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occurring. Bates testified that Bottoms refused to cease his sexual advances, and Bottoms expressed disdain for any need to prevent unlawful harassment.

Noel awarded Bates \$100,000 for emotional distress and \$25,000 for Bottoms' Ralph Act violations. The ALJ ordered an administrative fine of \$30,000 for FEHA violations. Finally, the ALJ ordered Bottoms to cease and desist from further acts of sexual harassment and threats, and to establish an anti-harassment policy for his workplace.

The commission adopted the ALJ's opinion in full as a precedential decision.