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letter from the editor

Dear *CPER* Readers:

I have often remarked that the public sector community in California is a close, well-defined group of lawyers, labor leaders, human resource professionals, and other seasoned practitioners. We meet up with each other at conferences, across the bargaining table, and at arbitration hearings. Our heads are filled with scores of acronyms — MMBA, PERB, EERA, SPB, HEERA — that mean nothing to most folks, but are quite familiar to us.

It also is true that there are some among us who have made a tremendous contribution to the field and are part of the public sector “lore.” While their names are familiar to many, it is important that their legacy be known to some of our newer colleagues.

To that end, this issue of *CPER* includes what I hope will be the first in a series of interviews with individuals who have played a pivotal role in public sector labor relations. Our first interviewee, arbitrator Phil Tamoush, has been involved in the public sector for over 30 years — from the very beginning. His is a name I’ve heard for decades, especially since I began my stint at *CPER* in 1988. By then, he’d already made important contributions to the field, starting before all the legal structures were put in place. Hopefully, my conversation with Phil will familiarize you with his many achievements.

In future issues, I would like to introduce you to others who have played a prominent role in the development of the public sector. If you would like to suggest a future interviewee, don’t hesitate to give me a call or send an email (cvendrill@berkeley.edu).

With that, it’s vacation time. Enjoy the summer. I’ll be back in September.

Sincerely,



Carol Vendrillo
CPER Director and Editor

Bargaining in a Parallel Universe: A Rebuttal Concerning L.A. County

John Rees

John Rees has been on the professional staff of the Association for Los Angeles Deputy Sheriffs since 1984 and has served as its executive director since 2003. He has a Masters of Public Administration degree from San Diego State University.

With agonizing bemusement I read the contribution from Rhonda Albey of the Los Angeles County Chief Administrative Office entitled “*Interesting Times — Los Angeles County and Fringe Benefit Negotiations.*” (CPER No. 172, pp. 6-10.) Unless we are living in a parallel universe, where there are two public jurisdictions known as Los Angeles County — one benevolent to working people and the other hostile — then Albey’s contribution at best tortures the facts. Unfortunately, Albey did not limit the scope of her comments to chest thumping about the county’s heavy-handed achievements at the bargaining table at the expense of thousands of union members. Albey overreaches when she suggests that the county’s experience can “*provide a bargaining blueprint for other agencies.*” Thus her thesis cannot go unchallenged.

Albey, whose background ostensibly includes a doctoral degree and 15 years of employee relations experience, writes about the concept of bargaining simultaneously for salary and fringe benefits, which is apparently terra incognita to her. “*Los Angeles County needed a ‘paradigm shift,’*” opines Albey. She credits the county’s new chief of employee relations, James “Jim” Adams, as the Paradigm Shifter who was most ably aided and abetted by Cathy O’Brien. Somehow, Albey neglected to point out that this dynamic duo are, in reality, none other than her new boss and his charming wife.

Perhaps it is mere coincidence, but some have observed that the steep decline in the relationship between the county and many in the labor community began near the time of the Paradigm Shifter’s arrival. Shortly after his appointment, the county plunged headlong into a lamentable episode of neo-bureaucratic brinkmanship with many unions. During these negotiations, the county did not employ a “business as usual” approach. It was definitely anti-union.

As a result of the Paradigm Shifter's handywork, one union agreed to modest, across-the-board percentage pay increases on the condition that the board of supervisors can, if it desires, unilaterally declare that a financial crisis exists. Regrettably, in talking up the alleged value of this union concession to impacted employees, Albey forgot to mention that there is no meaningful standard or definition as to what constitutes a "financial crisis," or that there is no requirement that any other financial cost-cutting measures be implemented elsewhere in the county before, during, or after the negotiated pay increase(s) are rescinded.

To make matters worse, if the board of supervisors declares that a financial crisis exists, that determination is not subject to any form of appeal. And just to prove that a bad deal can be made worse, once a financial crisis is declared, the union is required to return to the bargaining table where *"the parties shall reopen negotiations on all economic issues."*

In other words, if the board of supervisors evokes the words "financial crisis," the negotiated pay increase evaporates, the union is forced to go back to the table where it can potentially make other economic concessions, and the supervisors can (if they so desire) continue to fund their pet projects unabated — all at the expense of union members.

Unfortunately, the settlement with this one union, which many still believe created an unforgivably dangerous precedent, cast a long and ominous shadow that was to eclipse the bargaining processes of other unions representing tens of thousands of members. Flushed with the success of the "financial crisis" concession from the one union, the curtain then rose on the next act. The county and the Paradigm Shifter, employing a clearly non-visionary, "one-size-fits-all" boilerplate to bargaining, demanded the same concession from the other unions. Relying initially on his cupidity, the Paradigm Shifter attempted to romance the other unions to follow suit. But for a number of the other unions, the Paradigm Shifter's entreaties were as unwelcome as a snake-

oil salesman at a convention of the American Medical Association. Not surprisingly, these union leaders were unwilling to make the leap of faith demanded by the Paradigm Shifter and consign the welfare of their members to the tender mercies of the board of supervisors — a body with whom trust was already in precious short supply. Hence, the stage was set for a brutal, long-term war of attrition between the county and thousands of union members.

Albey also writes, *"How agreement was reached in a relatively painless manner may provide lessons for other agencies."* Unquestionably, many union leaders recall an entirely different environment in which the county opened the floodgates to an unprecedented orgy of management abuse including, but not limited to:

- Forcing multiple unions (including all of the public safety unions representing more than 10,000 employees) to wait over two years before the county put a meaningful proposal on the table.
- Having numerous union leaders and their members prosecuted during negotiations.
- Forcing union leaders to spend

weeks before superior court judges to resolve various legal disputes at a cost of tens of thousands of taxpayer and union member dollars.

- Suspending hundreds of union members for having the temerity to use their negotiated sick-leave benefits in keeping with county policy.
- Forcing hundreds of frustrated union members to file grievances due to the county's failure to abide by its own rules.

Inevitably, this naked abuse of power by management generated a whirlwind of animosity towards the county in general and several members of the board of supervisors in particular. Massive employee demonstrations were staged at a variety of public places. Extensive media campaigns were waged, including billboard advertising, large ads in

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newspapers, and airplanes towing banners with slogans chastising the board of supervisors. But perhaps the ultimate sign of declining morale and dissatisfaction with the course being charted by the county was the campaign by the Association for Los Angeles Deputy Sheriffs to run its own candidate against an incumbent supervisor. Yet, amazingly, Albey characterizes the bargaining process between the county and its employees as having been “*relatively painless*.”

Ultimately, a number of the public safety unions negotiated contracts that did not contain the repugnant “financial crisis” language and that were radically different from the Paradigm Shifter’s “one-size-fits-all” boilerplate. Nonetheless, the agreements required more than two years of bitter, acrimonious bargaining to conclude and may have caused what many consider to be a long-term rupture between the parties that could require at least a decade to repair. Sadly, as of this writing, other unions are now in their third year of trying to negotiate a fair deal with the county.

Almost farcically, Albey writes of the need for the parties to develop a relationship of “*trust*” and the need for “*information, information, and information*.” Clearly, these are fundamental truisms. To suggest, however, that the collective union leadership trusts the county and the Paradigm Shifter is to have been asleep for the past three years or sorely misinformed. In either case, it is hardly the type of analysis that one would expect from someone with Albey’s extensive educational and experiential pedigree. As is the case with institutions, trust between individuals requires the continuing investment of time and repetitive risk taking without falling prey to trick or device. That having been said, *trust* was not facilitated during the last round of negotiations when the county provided bargaining-related information that was incomplete, inaccurate, untimely, or otherwise faulty. Nor was trust strengthened when the county repeatedly engaged

in surface bargaining, sent its negotiators to the table without meaningful authority, and was unprepared and/or unwilling to negotiate for weeks and months at a time — all of which constituted unfair labor practices.

Somehow, in spite of the foregoing, Albey writes, “*The success of Los Angeles County and its unions can provide a bargaining blueprint for other agencies*.” The fact that the relationship between the county and union members has deteriorated with disastrous consequences is beyond contestation. At this moment multiple unions are in the process of collectively raising millions of dollars with a common purpose — to unseat at least one incumbent supervisor in 2006.

Make no mistake about it; this is a path down which most, if not all, unions did not want to venture. The fact that this is happening is a clear indication of how little confidence these union leaders and their members have in the board of supervisors as it is presently constituted. Unless major changes in the institutional relationship between the principals of the county and the labor community are made swiftly, there is every reason to believe that the

current sulfuric employee relations atmosphere may become much more toxic in the future — again, something that nobody wants. Perhaps the Paradigm Shifter will have a new vision that ushers in an enlightened era of labor-management peace. But, stating the obvious, union leaders will not idly stand by and permit their members to become serial victims to the circumstances that so tragically characterized the latest round of negotiations with the county.

So, in a nutshell, can the county’s experience serve as the paradigm of a labor-management relationship that other public agency policymakers should strive to emulate? The answer is “yes,” but only if fomenting widescale labor unrest is the principal motivating factor. *

Trust was not facilitated when the county provided bargaining-related information that was incomplete, inaccurate, untimely, or otherwise faulty.

An Interview With Phil Tamoush

Carol Vendrillo, CPER Editor

In an effort to introduce CPER readers to some of the influential personalities in public sector labor relations, CPER Editor Carol Vendrillo talked to arbitrator Philip Tamoush about his lengthy career. Tamoush has been a well-known — and well-respected — mediator and arbitrator for nearly 30 years.

■ ***CV: So, Phil, how did you get started in this field?***

PT: I got interested in labor relations while in graduate school at UCLA when I took a course in dispute resolution that concentrated on arbitration. That class was taught by John van de Water, a management consultant. Then, Paul Prasow lectured on collective bargaining, and I discovered my “love” for the peaceful resolution of conflicts of any kind.

■ ***After grad school, what came next?***

In 1961, I started out as a personnel analyst with Los Angeles County, and fortuitously for me, Social Workers Local 535 decided to conduct one of the first major public sector strikes, in 1967. This led to the establishment of an employee relations division within the Personnel Department. Since I was the only person around with employee relations experience or an educational background in labor relations, I was chosen to be the division’s first staff person. I set up the files, sat in on negotiations — excuse me, “meet and confer” sessions — recruited new staff, and acted as liaison to the committee comprised of Ben Aaron, Howard Block, and Ben Nathanson, who wrote the Los Angeles County Employee Relations Ordinance.

However, after a stint as director of employee services in the County Social

Services Department, it didn't take me long to learn that being a management "skill" was not my cup of tea. And thank goodness, along came an offer from the UCLA Institute of Industrial Relations to develop training programs for public sector managers. This was at a time when a new era of bilateral employer-employee relations was emerging.

■ ***When did the arbitration practice develop?***

While I was working at the UCLA IIR, I developed more rapport with managers and labor representatives, and I found myself moving towards the middle and was asked if I wanted to arbitrate disputes. Being (unofficially) mentored by Ben Aaron, Howard Block, Paul Prasow, Irving Bernstein, and Ed Peters, I decided the time was right in 1976 to try my hand as a self-employed neutral. (Of course, one of my other principal "mentors" for particular cases was and continues to be the most valuable editions of the Elkouri's *How Arbitration Works*. This 'gold standard' in the field has carried me through many difficult cases.)

Fortunately, the Educational Employment Relations Board (later to become the Public Employment Relations Board) was just being established, and I entered the real world of collective bargaining on April 1, 1976, the same date the Educational Employment Relations Act covering school districts took effect. The EERB had to conduct unit determination hearings all over the state, so I was selected to serve as an "ad hoc" hearing officer at the same time that my arbitration and factfinding caseload was building up.

■ ***Your practice as a neutral certainly took off.***

I taught public sector labor relations and dispute resolution at UCLA Extension and Cal State Dominguez, where I learned more and got better known. And I made it through that ugly first five years, when you either "make it or break it" as a neutral. Now that I am entering my 30th year in the

field, I think I have made it — or, if I haven't, I've spent a lot of time fooling an awful lot of people into thinking I am worthy of resolving their disputes!

■ ***So, how has labor relations changed since you started your career 20 or 30 years ago? And what do you see as the turning point?***

First, I think the turning point was the increased public employee activism of the 1970s, and management's

understanding of the importance of having their problems solved. The new attitude is that if the parties can't resolve the problem, then they're ready to get it resolved by an outsider and move on with the business at hand of providing public services or making products, etc.

Second, especially in the public sector, both management and employees (and their unions) now understand that it is better to resolve their own problems rather than rely on any "outsider." These days, my personal caseload is much less public sector and much more private sector discipline cases than ever before. Perhaps the dramatic rise in the cost of dispute resolution — with advocates being lawyers, transcripts becoming routine, and arbitrator fees approaching those

of attorneys — has something to do with it.

■ ***Looking back, what do you see as the most important development in labor relations?***

That has to be the legislation and court decisions establishing and upholding the notion of final and binding grievance arbitration. This first occurred in the 1960s with the trilogy of Supreme Court decisions, and then in the 1970s when arbitration was further established by enactment of various public sector statutes and PERB decisions.

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■ ***What type of work are you doing now? What is most rewarding?***

About 75 percent of my work involves labor arbitration. I have expanded my practice to include some employment, commercial, and securities arbitration (for economic reasons), and automobile “lemon law”-type arbitration (for altruistic reasons). Also, I serve on several non-profit boards, locally and nationally. The most rewarding work involves the small company or public agency with a problem that might never have gotten resolved were it not for the involvement of an arbitrator. It truly is an honor to know that I am entrusted with such important and consequential decisions.

■ ***What are some of the most challenging or far-reaching decisions you have rendered?***

Since I am one of those “run-of-the-mill” arbitrators with no particular expertise, I’ve really just had 30 years of “nuts and bolts” cases. There was an interest arbitration case almost 30 years ago where I essentially helped rewrite all the civil service rules from the typical unilateral document to a bargained-for instrument. The parties adopted most of my award and created a new set of civil service rules that continue to this day.

Another memorable case was that of a fellow who was the first male to dance with another male at one of the summer-evening Disneyland dances. He was a social worker and tried to make his orientation the focus of his probationary discharge. At the time, my decision was hailed in the newspapers as some sort of victory for “traditional” values, when it was really a simple decision about the guy’s employment rights!

Finally, egotistically, it was fun to see in an agency’s contract for several terms, reference to “the Tamoush formula” for setting caseload/workload. I can’t think of anything more far-reaching or memorable than these, although the parties themselves may have a different opinion.

■ ***Have you handled any interest arbitration disputes?***

Yes, but I regret that the parties have reached the point of needing an outsider to actually set the terms and conditions of their employment. Factfinding and interest arbitration, for the most part, really do reflect a failure by the parties. That said, I believe that final-offer package arbitration is the best way to limit the arbitrator’s “innovations.” Again, as

with grievance arbitration, it is the smallest public agencies that get the best use out of interest arbitration to help resolve the last one or two issues that keep the parties apart.

■ ***Where do you think the public sector in California is headed?***

I think there will be a broader application of “interests” resolution techniques to deal with tightening the economic belt, such as binding arbitration of economic issues in police and fire agencies. The parties — and I think the legislature — would rather turn these disputes over to arbitrators since they don’t seem to be able to resolve the money issues themselves.

■ ***What other trends in arbitration have you seen in your career?***

Based not only on my own experience and just reading through the Q&A and comments of arbitrators on various chat lists, it seems to me that we have gone way too far in emphasizing “technical competency,” rather than problem-solving. Sometimes the Internet comments read like a law course! My former boss at the UCLA IIR, Ben Aaron, was quoted recently in an article as agreeing that “...competence is less important than honor, integrity and character” in the makeup of an arbitrator. I agree. When presenting a case to an arbitrator with these qualities, it doesn’t take attorneys representing each side, verbatim transcripts, or lengthy briefs. And the parties will receive a reasoned decision that will be useful to them after one day of hearing, instead of three.

The most rewarding work involves a small company or public agency with a problem that might never have gotten resolved were it not for the involvement of an arbitrator.

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.
- Helpful discussion of the rules of evidence.
- Expanded treatment of the standards arbitrators use to decide cases.
- The latest on the relationship between PERB and arbitration.
- Updated sections on the courts and arbitration — compelling arbitration, vacating awards, and judicial review.

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■ ***You've had a long-standing relationship with CPER. How did you first get involved with the program?***

That's easy. When I first worked for the Los Angeles County Employee Relations Commission, we heard about Dr. B.V.H. Schneider and a new project called California Public Employee Relations. Since we didn't really know what we were doing, we asked Betty Schneider for help in our research. She worked with me for two or three years as we went through the development of the L.A. County Employee Relations Ordinance, the Meyers-Milias-Brown Act, and the special committee chaired by Ben Aaron to draft comprehensive state legislation for all segments of the public sector. Of course, the result was the "political animal" we now have, in terms of the MMBA and EERA, along with the Higher Education Employer-Employee Relations Act, the Dills Act, and the Agricultural Labor Relations Act, and so on.

■ ***Finally, what advice do you have for newcomers to the arbitration field?***

Probably not to go into the field unless they are attorneys first. Then, make sure you have a lot of contacts with advocates who are willing to trust you as a "newby." Make sure you

have at least some other source of income for five years to get through the leaner times. It is my impression that there are far fewer grievances and other disputes being referred to outsiders. Not only is it an economic issue, but employees, unions, and management truly are trying to resolve issues themselves. They want to get along with each other and leave arbitration for major issues, such as terminations and unitwide interpretation cases. Newcomers just aren't as needed as they were in the 60s and 70s.

I'd like to add that I'm thankful to the advocates who, over the years, have chosen me to resolve their difficulties. As one who espouses peaceful resolution of disputes in other forums besides arbitration — from "macro" problems, such as in the Middle East, down to the simplest landlord-tenant dispute — it is hard to believe that I have had the opportunity to be part of the solution, not the problem. Whether I have been selected as the "lesser of the evils" or because of my character and attitude, I have appreciated the opportunity to serve the parties. And, I hope to continue to be of assistance so long as there are advocates who have confidence that I can help them resolve their disputes. *

Entering the Labyrinth of Pregnancy Leave Laws

Nate Kowalski and Adriana Cara

One of the greatest challenges facing employment lawyers and labor relations practitioners is to thoroughly understand those areas of law that are governed by overlapping statutes and regulations. One such area is pregnancy leave, which is situated at the intersection of the family and medical leave acts and disability laws. Even if you have a basic understanding of this area of the law, you may not fully appreciate how the nature of pregnancy leave can vary greatly depending on the particular facts and circumstances.

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California Labor & Employment
Law Section.*

Imagine receiving a call from your client, Acme, Inc., telling you that one of its employees, Mary Smith, has just asked to take the maximum pregnancy leave authorized by law for her upcoming delivery and to bond with her newborn child. Her doctor told her that, because of a pre-existing medical condition, it is likely that she will be required to stop working well in advance of her delivery. Smith also wants to know whether Acme will continue her medical coverage and other benefits while she is on pregnancy leave, and whether her seniority will continue to accrue during her absence. In addition, Smith has asked whether she is eligible for any form of paid leave and whether she will be able to use her accrued vacation and sick leave balances during this period of time.

After giving you this factual background, the questions come fast and furious from Acme. Is it obligated to provide the leave? Is Smith eligible for leave? How much leave must it provide? Is this paid leave? What if she is disabled by the pregnancy? What about her benefits and seniority during the leave?

To provide sound advice to Acme, you must be familiar with the relevant provisions of the federal Family and Medical Leave Act,¹ the California Family Rights Act,² and the California pregnancy disability leave law.³ In addition, you must be attuned to the ways in which these statutes overlap and diverge.⁴

Pregnancy Leave Under the FMLA and CFRA

Acme's first question is whether it is required to provide pregnancy leave to eligible employees. A private employer is covered by the FMLA and CFRA if it employed at least 50 employees within a 75-mile radius for each working day during 20 or more calendar workweeks in the current or preceding calendar year.⁵ The FMLA and CFRA also apply to all state and local agencies, regardless of size.⁶

Assuming Acme meets that threshold, how do the FMLA and CFRA define eligible employees? To be eligible for FMLA and CFRA leave, Smith must have (1) been employed for at least 12 months;⁷ (2) worked 1,250 hours during the 12-month period before leave,⁸ counting back from the first day of leave;⁹ and (3) been employed at a worksite where the employer employs 50 or more employees within 75 miles of that worksite,¹⁰ as of the date the employee gives notice of the need for the leave.¹¹

If Smith meets that test, does she automatically qualify for FMLA and CFRA leave because she is pregnant? This is one critical area where the FMLA and CFRA diverge. The FMLA considers any period of incapacity due to pregnancy or prenatal care to be a "serious health condition" and, therefore, an FMLA-qualifying event.¹² By contrast, the CFRA excludes pregnancy, childbirth, or related medical conditions from its definition of "serious health condition."¹³

While this may seem illogical at first blush, the CFRA was drafted in this manner so that California's pregnancy leave entitlement supplements its federal counterpart. The CFRA provides that, after the birth of the child, an employee is entitled to an additional 12 weeks of bonding leave.¹⁴ Accordingly, while FMLA and CFRA leaves usually run concurrently, this is not the case when an employee's pregnancy-related condition triggers the leave.¹⁵

Consequently, what is the maximum period of pregnancy leave to which Smith would be entitled under the FMLA and CFRA? Both acts provide that eligible employees are entitled to 12 workweeks of leave in a 12-month "leave year."¹⁶

Because these 12-week periods do not run concurrently, Smith could be eligible to take up to 24 consecutive weeks of leave under the FMLA and CFRA, provided she has a 12-week "serious health condition" within the meaning of the FMLA and elects to take the full 12 weeks of bonding leave.

Smith also inquired about her compensation, benefits, and seniority during her leave. FMLA and CFRA leaves are unpaid unless the employee elects to substitute accrued paid leave (e.g., vacation or sick leave) or the employer requires such substitution.¹⁷ Acme must maintain and pay for Smith's participation in its group health plan as though she were still working.¹⁸ If an employee contribution is required by Acme, it still is required while Smith is on leave.

Smith does not accrue seniority credit while she is on leave.¹⁹ However, when she returns, her benefits, including seniority, must be restored to the levels they were at when the leave began.²⁰ In addition, FMLA and CFRA leaves cannot be treated as breaks in service for purposes of vesting and eligibility for retirement plans.²¹

California Pregnancy Disability Leave Law

While the FMLA and CFRA are substantially identical in many respects, both statutes differ greatly from the California law that authorizes pregnancy disability leave. First, pregnancy disability leave is spelled out as a part of the California Fair Employment and Housing Act. Employers are covered by the FEHA, and thus, for purposes of pregnancy leave, if they have five or more full or part-time employees.²² Unlike the FMLA and CFRA, employees need not meet a length of service requirement to be eligible for pregnancy leave.²³ Therefore, regardless of Smith's length of service with Acme, she may be eligible for leave provided she is "disabled" within the meaning of the pregnancy leave law.

Pregnancy leave is available to Smith when she is disabled by pregnancy or a related medical condition.²⁴ Smith is considered disabled for purposes of pregnancy leave if her health care provider opines that she is unable to work, unable

*The FMLA and
CFRA apply to
all state and local
agencies, regardless
of size.*

A resource that covers both the federal FMLA
and the California Family Rights Act

Pocket Guide to the Family and Medical Leave Acts

By Peter J. Brown

The Pocket Guide spells out

- The rights and responsibilities of both employers and employees under each statute
- The differences between the two laws and which provisions to follow
- Who is eligible for leave
- Increments in which leave can be used
- Methods of calculating leave entitlements
- Record keeping and notice requirements
- Enforcement

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to perform one or more of her essential job functions, or unable “to perform these functions without undue risk to herself, the successful completion of her pregnancy, or to other persons.”²⁵ Smith will be considered disabled for purposes of the pregnancy leave law if she is suffering from severe morning sickness or if she needs to take time off for prenatal care.²⁶

If Smith provides documentation to establish that she is disabled under the pregnancy leave law, how much leave potentially is available to her? The law mandates that Acme must provide eligible employees with up to four months of leave.²⁷ Where an employee’s pregnancy-related condition is the basis for leave, leave runs concurrently with the FMLA, but not the CFRA. In other words, a pregnancy-related condition that constitutes a disability under the California pregnancy disability law will necessarily constitute a “serious health condition” under the FMLA. However, because the CFRA’s definition of “serious health condition” excludes pregnancy-related conditions, the CFRA does not run concurrently with the laws governing pregnancy disability leave.

California law regarding pregnancy leave also differs from the FMLA and CFRA in terms of its treatment of benefits while an employee is on leave. It does not require that Acme maintain Smith’s group health benefits while she is on leave. However, Smith is entitled to participate in Acme’s group health plans, employee benefit plans, and retirement plans to the same extent and under the same conditions as would apply to any other unpaid disability leave of absence.²⁸ Similarly, Smith may accrue seniority during a pregnancy disability leave only if the employer permits such accrual during other unpaid disability leaves.²⁹ As with the FMLA and CFRA, Smith’s benefits, including seniority, must be restored at the conclusion of her pregnancy leave to the level they were at when her leave began.³⁰

Smith is not entitled to pay during the use of pregnancy leave but must be permitted to use any accrued personal

leave (e.g., vacation or sick leave).³¹ Unlike the FMLA and CFRA, however, Acme may not require Smith to use this accrued leave during pregnancy leave.³² However, Acme may require Smith to use accrued sick time.³³ In addition, to the extent that Smith is not using her accrued leave balances during her pregnancy disability leave, she will be eligible for disability income benefits from the State Disability Fund.³⁴

Paid Family Leave

In recognition of the financial difficulties that many employees encounter when taking unpaid family medical leaves, the California legislature enacted the California

Family Temporary Disability Insurance Program.³⁵ This statute authorizes the State Disability Fund to provide up to six weeks of “wage replacement benefits” for employees who take leave to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a new child.³⁶ These benefits are financed by employee contributions at specified rates to the State Disability Fund.³⁷ Smith would be eligible to receive them only after her child is born and not for any pregnancy-related disability. If Smith were to use FMLA leave for her own “serious health condition,” FTDI payments would not be available to her during that leave period. She could, however, obtain FTDI “wage replacement benefits” during her CFRA bonding leave.³⁸

*FMLA and CFRA
leaves cannot be
treated as breaks
in service for
purposes of vesting
and eligibility for
retirement plans.*

Conclusion

Acme’s final question is, what is the total amount of pregnancy leave to which Smith could be entitled? Assuming that Smith (1) is disabled within the meaning of California pregnancy disability leave law; (2) has a “serious health condition” under the FMLA (which necessarily follows from her pregnancy disability); (3) elects to take bonding leave under CFRA; and (4) is eligible for, and requests, the

maximum leave periods under each law, the total period of leave to which Smith would be entitled is approximately seven months. In that scenario, Smith would take FMLA and pregnancy leave for 12 weeks, pregnancy leave for roughly one more month, and CFRA bonding leave for 12 weeks after that. If Smith is able to use accrued paid leave balances and is eligible for disability income benefits and FTDI benefits, she may be able to mitigate the financial consequences of an extended pregnancy leave.

The foregoing discussion only partially enters the labyrinth of pregnancy leave law. While we have summarized the key provisions of the FMLA, CFRA, and pregnancy disability leave law pertaining to this topic, public sector practitioners should consider that many other issues — such as reinstatement rights, spousal leave entitlements, notice, certification, and intermittent leave — routinely need to be navigated in this challenging area of employment law. *

1 29 USC Secs. 2601 et seq.
 2 Gov. Code Sec. 12945.2.
 3 CPDL, Gov. Code Sec. 12945(b)(2), is part of the California Fair Employment and Housing Act, Gov. Code Secs. 12900 et seq.
 4 Where one statute provides greater protection in one respect than the others, that statute will govern on that issue. 29 CFR 825.702(a).
 5 29 USC Sec. 2611(4)(A)(i); Gov. Code Sec. 12945.2(b)(2). The regulations interpreting the FMLA also contain a test for “joint employer” status. 29 CFR Secs. 825.106(a)-(d). See *Moreau v. Air France* (9th Cir. 2003) 343 F.3d 1179 (holding that Air France was not a “joint employer” with a baggage handling company).
 6 29 USC Sec. 2611(4)(A)(iii); Gov. Code Sec. 12945.2(c)(2)(B). See also *Nevada Dept. of Human Resources v. Hibbs* (2003) 538 U.S. 721, 161 CPER 5 (rejecting an 11th Amendment challenge and holding that the FMLA applies to states and arms of the state).
 7 29 CFR Sec. 825.110(a)(1); Gov. Code Sec. 12945.2(a). This is based on hire date, not actual time worked. 29 CFR Sec. 825.110(b); 2 Cal. Code Reg. Sec. 7297.0(e).
 8 29 CFR Sec. 825.110(a)(2); Gov. Code Sec. 12945.2(a).
 9 29 CFR Sec. 825.110(d); 2 Cal. Code Reg. Sec. 7297.0(e).
 10 29 CFR Sec. 825.110(a)(3); Gov. Code Sec. 12945.2(b).

11 29 CFR Sec. 825.110(f); 2 Cal. Code Reg. Sec. 7297.0 (adopting definitions of the FMLA to the extent they are not inconsistent with the CFRA).
 12 29 CFR Sec. 825.114(a)(2)(ii).
 13 Gov. Code Sec. 12945.2(c)(3)(C); 2 Cal. Code Reg. Sec. 7297.0(o).
 14 2 Cal. Code Reg. Sec. 7291.13(c).
 15 Gov. Code Sec. 12945.2(s).
 16 29 USC Sec. 2612(a)(1); Gov. Code Sec. 12945.2(a). An employer may calculate a “leave year” using any one of the following four methods: (1) a calendar year; (2) designating any fixed 12-month period as a “leave year” (e.g., an employer’s fiscal year); (3) designating the leave year prospectively from the time FMLA or CFRA leave is first taken; or (4) designating a “rolling” 12-month period measured backward from the date an employee uses FMLA or CFRA leave. 29 CFR Sec. 825.200(b); 2 Cal. Code Reg. Sec. 7297.3(b). The method an employer decides to use to calculate the leave year must be applied “consistently and uniformly to all employees.” 29 CFR Sec. 825.200(d)(1); 2 Cal. Code Reg. Sec. 7297.3(b).
 17 29 USC Sec. 2612(d)(2); Gov. Code Sec. 12945.2(d).
 18 29 CFR Sec. 825.215(d)(3); 2 Cal. Code Reg. Sec. 7297.5(c).
 19 29 CFR Sec. 825.215(d)(2); 2 Cal. Code Reg. Sec. 7297.5(d).
 20 29 CFR Secs. 825.215(d)(1), (5); 2 Cal. Code Reg. Sec. 7297.5(d).
 21 29 CFR Sec. 825.215(d)(4); 2 Cal. Code Reg. Sec. 7297.5(d).
 22 Gov. Code Sec. 12926(d); 2 Cal. Code Reg. Sec. 7291.2(h). The FEHA also applies to all state and local agencies regardless of size. Gov. Code Sec. 12926(d).
 23 2 Cal. Code Reg. Secs. 7291.6(e), 7291.7(c).
 24 Gov. Code Sec. 12945(b)(2); 2 Cal. Code Reg. Sec. 7291.7(a).
 25 2 Cal. Code Reg. Sec. 7291.2(g).
 26 2 Cal. Code Reg. Sec. 7291.2(g).
 27 Gov. Code Sec. 12945(b)(2). “Four months” is defined as the number of days that the employee normally would work within four months. 2 Cal. Code Reg. Sec. 7291.2(l).
 28 2 Cal. Code Reg. Sec. 7291.11(c).
 29 2 Cal. Code Reg. Sec. 7291.11(c).
 30 2 Cal. Code Reg. Sec. 7291.11(d).
 31 2 Cal. Code Reg. Secs. 7291.11(a), (b)(2).
 32 2 Cal. Code Reg. Sec. 7291.11(b)(2).
 33 2 Cal. Code Reg. Sec. 7291.11(b)(1).
 34 See Cal. Unemp. Ins. Code Secs. 1265.5, 1265.7.
 35 Cal. Unemployment Ins. Code Secs. 2601, 3301(a).
 36 Cal. Unemployment Ins. Code Secs. 2601, 3301(a).
 37 Cal. Unemployment Ins. Code Sec. 3301.
 38 Cal. Unemployment Ins. Code Sec. 3303.

Recent Developments

Local Government

Six-Month Statute of Limitations for MMBA Unfair Practice Charges

It's official. The California Supreme Court has spoken. The statute of limitations for unfair practice charges filed under the Meyers-Milias-Brown Act is six months, not three years. In a unanimous decision written by Justice Joyce Kennard, the court rejected the arguments made by the Public Employment Relations Board and found that the MMBA, like the six other public employment labor relations laws enforced

Statutes should not be construed in isolation.

by PERB, will operate with a six-month limitations period. The court was not persuaded that the legislature was aware of existing precedent supporting a three-year statutory period or that the legislature's failure to include an express six-month limitations period, as it has done in the other statutes, was a significant omission.

The court began its analysis with a lengthy review of the history of public sector collective bargaining laws in California, beginning with the George Brown Act in 1961. The decision notes the enactment of the MMBA in 1968,

followed by passage of the Educational Employment Relations Act in 1975, the Dills Act in 1977, the Higher Education Employer-Employee Relations Act in 1978, the Trial Court Employment Protection and Governance Act in 2000, the Trial Court Interpreter Employment and Labor Relations Act in 2002, and the Los Angeles County Metropolitan Transit Authority Transit Employer-Employee Relations Act in 2003. The legislature has given PERB jurisdiction over all of these statutes, noted the court, and each operates under a specified six-month statute of limitations period.

The court rejected PERB's argument that the legislature's failure to include an express six-month limitations period for the MMBA revealed lawmakers' intent to continue the existing three-year statute of limitations which had applied to actions filed in superior court. First, said the court, the presumption of legislative acquiescence is not conclusive where there had been no published decision expressly holding that an MMBA unfair practice was subject to the three-year statute of limitations period set out in Code of Civil Procedure Sec. 338(a). The leading case relied on by PERB, *Giffin v. United Transportation Union* (1987) 190

Cal.App.3d 1359, did not mention the MMBA, much less construe it, said the court. That decision "supports, at best, only a weak inference that the Legislature understood there was an existing three-year limitations period for an action alleging an MMBA unfair practice."

Even assuming that the legislature was aware that a three-year statute of limitations period had applied to traditional mandate actions filed in superior court to enforce the MMBA, the legislature also must have been aware that Sec. 338(a)'s three-year statute was "forum specific," meaning that it applied only to judicial proceedings. The court explained that "by changing the forum — vesting an administrative agency (the PERB) rather than the

The legislature intended a coherent and harmonious system of laws.

courts with initial jurisdiction over MMBA charges — the Legislature abrogated the three-year statute of limitations under section 338(a), and we assume that this abrogation was intentional and not inadvertent."

The court also noted that statutes should not be construed in isolation. Rather, said the court, every statute must be construed "with reference to the whole system of laws of which it is a part, so that all may be harmonized and

The secret to success is to know something nobody else knows.

Aristotle Onassis

Be privy to the guide that gives complete details about the MMBA. Continually updated since 1985, CPER's Pocket Guide provides local government labor relations practitioners with what they need to know about the essential rights and obligations conferred by the most recent legislation.

Portable, readable, and affordable, this Guide provides a quick path through the tangle of MMBA cases. It contains the full text of the act; an easy-to-read description of the MMBA and the state's other employment relations statutes; a subject guide and brief summary of all major cases, along with a table of cases, glossary, and index of terms.

Pocket Guide to the Meyers-Milias-Brown Act

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anomalies avoided." The MMBA is part of a larger system of laws regulating public employment relations, the court said, and PERB "suggests no way in which MMBA unfair practice charges differ from unfair practice charges under the other six public employment relations laws within the PERB's jurisdiction — the Dills Act, the EERA, the HEERA, the TCEPGA, the TCIERA, and the TERA — so as to justify a limitations period that is *six times longer* than the six months allowed under each of these other laws."

The court saw no rational ground on which the legislature could have decided to treat MMBA unfair practice charges so differently in terms of the limitations period. "We find it reasonable to infer that the Legislature intended no such anomaly, and that it intended, rather, a coherent and harmonious system of public employment relations laws in which all unfair practice charges filed with the PERB are subject to the same six-month limitations period."

The court also pointed to Government Code Sec. 3509, which vests PERB with jurisdiction over MMBA matters and instructs that violations of that law are to be processed as unfair practice charges by the board. The court read that language as incorporating an existing body of law concerning the manner in which PERB processes unfair practice charges, including the limitations period under the other public employment relations laws.

The MMBA provision in Sec. 3509, which requires PERB to apply

and interpret unfair labor practices consistent with existing judicial interpretations, "is most reasonably construed as incorporating existing judicial interpretations of substantive provisions of the MMBA, including what constitutes an unfair labor practice, but not as incorporating judicial decisions prescribing the procedures that were deemed suitable to judicial enforcement proceedings."

The six-month limitations period will apply retroactively.

The court examined documents judicially noticed by the Court of Appeal relating to the passage of Senate Bill 739 and found nothing to cause it to alter its view that the legislature intended a six-month statute of limitations period for an unfair practice charge filed with PERB under the MMBA.

The six-month limitations period will apply retroactively. For MMBA unfair practices occurring before July 1, 2001, a charge filed with PERB was timely if brought within three years of the occurrence of the unfair practice, or within six months of July 1, 2001, whichever was sooner. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Board; California School Employees Assn., RPI*[6-9-05] Supreme Ct. S122060, ___ Cal. 4th ___, 2005 DJDAR 6736.) *

Last-Minute Deal Averts BART Strike

After three months of negotiations, the Bay Area Rapid Transit District and the unions representing the majority of BART employees reached a tentative agreement that averted what commuters feared would be a disruptive transit strike. The beleaguered bargaining teams faced off for four days of nearly round-the-clock negotiations, running up to and beyond the union-imposed

Public opinion began to play a part in the negotiations.

strike deadline set for 12:01 a.m., Wednesday, July 6. In the end, just before 3 a.m., an agreement was struck on a new four-year contract that guarantees some wage increases but also requires an increase in employees' health care and retirement contributions in future years.

When negotiations got underway, management came to the table with a projected budget deficit for fiscal year 2005-06 exceeding \$50 million. As a result, its opening proposal sought a four-year wage freeze and substantial increases in health benefit contributions. Service Employees International Union, Local 790, and Amalgamated Transit Union, Local 1555, represent-

ing the majority of BART employees, questioned management's budget projections and came to the table seeking salary increases of 17 percent over three years and no changes in health benefit contributions. (For a discussion of early contract developments, see *CPER* No. 172, pp. 51-52.)

At that juncture, it appeared that negotiations would be rancorous and protracted, as has been the case in prior years. In 1997, workers staged a six-day work stoppage. And, during the last round of negotiations, in 2001, a 60-day cooling-off period was imposed at the request of Governor Davis and a deal was not struck until September. (See *CPER* No. 149, pp. 31-33, and No. 150, pp. 17-21, for background on the 2001 bargaining experience.)

As the June 30 contract expiration date drew near, the parties took their positions to the public. Union members picketed BART stations. Editorials in the press called on the district's board of directors to "hold the line," referring to 2001 negotiations when local politicians intervened to bring pressure on the board to concede to the unions' demands. Preparations for a strike proceeded after the unions conducted authorization votes of their members. Members of SEIU, ATU, and AFSCME Local 3993, representing BART's supervisory employees, overwhelmingly voted to authorize a strike.

In the meantime, public opinion began to play a part. Data released to the *Contra Costa Times* revealed that 353 BART employees currently earn more than \$100,000 a year and that 145, or 41 percent, were union members. This represented a 178 percent increase in this high-end salary bracket from 2000. The newspaper also reported a 57 percent salary increase for BART General Manager Thomas Margro, who earned a total of \$309,000 in 2005. Editorials in several Bay Area newspapers reflected

The tentative agreement includes no salary increase in the current fiscal year.

the view that the BART board of directors was guilty of mismanaging the transit district and of leaving BART riders to foot the bill through higher fares and fees for parking.

Labor leaders from Alameda, Contra Costa, San Francisco, and San Mateo counties convened and promised to give the public 72-hour notice of the strike. The group also extended the strike deadline to July 6.

As that day approached, BART management then came forward with a new proposal for a four-year contract that called for a wage freeze during the first two years and a cost-of-living increase capped at 2 percent for the final two years of the agreement. District

negotiators also sought an increase in employees' monthly health benefit contributions from \$25 to \$100 during the first two years of the contract and a second increase to \$150 thereafter.

The unions reacted negatively to the district's offer, charging that BART negotiators had never presented the new proposal at the bargaining table. By unveiling the proposal to employees in a public forum, the unions charged that BART had engaged in bad faith bargaining. Nonetheless, the unions countered with a proposal seeking annual salary increases of 2 to 4 percent. They also agreed to an increase in health benefit contributions from \$25 to \$75.

While negotiations continued over the July 4th holiday weekend, Bay Area commuters girded for major gridlock. Union leaders would not rule out the possibility of a strike. The district sent two members of the board of directors to the table and gave board president Joel Keller the authority to broker a deal.

On Tuesday, July 5, just before midnight, the unions agreed to extend the deadline to 12:30 a.m. to allow BART negotiators time to review the unions' latest proposal. Union leaders extended the deadline a second time, to 1:30 a.m. BART came back with a counterproposal, and just before 3 a.m., the deal was struck.

The tentative agreement, which faces ratification by the unions and approval by the board of directors, is a four-year accord that expires June 30, 2009. It includes no salary increase in the current fiscal year. In the fiscal years

beginning July 1, 2006, and July 1, 2007, employees will receive 2 percent pay increases. A 3 percent increase will take effect July 1, 2008. In addition, employees will receive a \$300 lump-sum payment in January 2006. Employees' payments for health care benefits will increase from \$25 to \$75 a month beginning in January. Thereafter, contributions will go up by 3 percent annually beginning July 1, 2006. The pact also addresses proposed changes to job

descriptions that are part of the district's plans to modernize payroll and inventory systems, and redirects retirement funds to help cover future retiree medical benefits.

As with any labor agreement, both sides came away with some of what they wanted and had to give up on other sought-after objectives. But Bay Area commuters — who breathed a sign of relief when they saw the trains running on Wednesday morning — appear to be the real winners. *

Court Allows Easier Access to Police Officers' Personnel Records

In a 5-2 decision, the California Supreme Court made it easier for criminal defendants to obtain police officers' personnel records that could support allegations of misconduct in the defendant's case. The high court's ruling opened the door to the trial courts' "in chambers" review of the arresting officers' personnel records relating to incidents involving false arrests, planted evidence, fabricated police reports or probable cause, and perjury.

The court's decision expands on the ruling in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, which established that a criminal defendant can compel the discovery of certain information in a police officer's personnel file by demonstrating how it would support a defense to the charge against him.

By filing what is called a *Pitchess* motion, criminal defendants may gain release of material, such as past citizen complaints against an officer or disciplinary records, that may be used to cast doubts on the charges.

In this case, Los Angeles police officers observed an individual in an area known for violent crime and narcotics. When the officers got out of the car, the individual fled, discarding 42 off-white lumps resembling rock cocaine. Charged with possession of narcotics for sale, the defendant's counsel filed a *Pitchess* motion, seeking the release of information pertaining to the arresting officers. Specifically, the defendant's lawyer asked the trial court to review material in the officers' personnel records dealing with complaints of officer misconduct and discipline

relating to a variety of acts, including aggressive behavior, violence, excessive force, racial and gender bias, and false arrests.

The Court of Appeal concluded that the defendant had not shown good cause for the discovery of prior complaints concerning false statements in a police report because the defendant's factual scenario — that he was on the scene buying drugs, not selling them, and that the true seller dropped the co-

Denying the motion elevated the showing of good cause.

caine as the defendant ran past — was not objectively plausible. In denying the motion because of the implausible or unlikely nature of the defendant's version of the facts, the Court of Appeal “elevated the showing of good cause for *Pitchess* discovery beyond that required by law,” said the Supreme Court.

To show good cause, the court said, the defense counsel's declaration in support of a *Pitchess* motion must propose a defense to the pending charges and articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence that would support the proposed defenses. This requirement ensures that the custodian of the officers' records will allow the court to review only information which is potentially relevant to the defense.

The defense counsel's affidavit also must describe a factual scenario supporting the claimed officer misconduct. That might consist of a denial of the facts asserted in the police report. Although a *Pitchess* motion obviously is strengthened by a witness account corroborating the occurrence of officer misconduct, such corroboration is not required, said the Supreme Court. “What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents.”

What degree or quantity of justification must the moving party offer to establish a plausible factual foundation for the claim of officer misconduct?

The Supreme Court explained:

Here, the Court of Appeal concluded that to be plausible a factual foundation must be reasonably probable or apparently credible and not merely possible. In so doing, the Court of Appeal imposed a greater burden on the party seeking *Pitchess* discovery than required by our prior cases or the statutory scheme. To require a criminal defendant to present a *credible* or *believable* factual account of, or a motive for, police misconduct suggests that the trial court's task in assessing a *Pitchess* motion is to weigh or assess the evidence. It is not. A trial court hearing a *Pitchess* motion normally has before it only those documents submitted by the parties, plus whatever factual representations counsel may make in arguing the motion. The trial court does not determine whether a defendant's version of events, with or without corroborating collateral evidence, is persuasive — a task that in many cases would be tantamount to determining

whether the defendant is probably innocent or probably guilty.

So, what standard must the defense counsel meet to show a “plausible” factual foundation for the *Pitchess* discovery?

The Supreme Court concluded that “a plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both in-

A plausible scenario of misconduct is one that might or could have occurred.

ternally consistent and supports the defense proposed to the charges.” Such a showing puts the court on notice that the specified officer misconduct likely will be an issue at trial.

In this case, the defense counsel's declaration asserted that the officers mistook the defendant for the person who actually discarded the cocaine and that they falsely accused him of having done so. Those assertions are in conflict with the police report in denying that the defendant possessed any cocaine and that he was the one who discarded the cocaine on the ground. Those denials form the basis of a defense to the charge of possessing cocaine. Therefore, concluded the court, the defendant has outlined a defense raising the issue

of the arresting officers' practice of making false arrests, planting evidence, committing perjury, and falsifying police reports or probable cause.

In summary, the court explained, the defendant has established good cause for *Pitches* discovery, entitling him to the trial court's in chambers review of the arresting officers' personnel records relating to making false arrests, planting evidence, fabricating police reports or probable cause, and committing perjury.

Justice Janice Brown, recently elevated by President Bush to the Federal District Court of Appeals for the District of Columbia, lodged a sting-

ing dissent that accused the majority of accepting the defense counsel's assertion that "runs counter to experience, nature, logic, and reason." With only \$2.75 in his possession at the time of his arrest, Justice Brown calls the assertion that the defendant was at the scene to buy drugs, not to sell them, "patently absurd." The majority's credulity concerning the defendant's "unlikely assertions" completely shifts the careful balance between the rights of defendants to reasonable discovery and the privacy interests of police officers, she wrote. (*Warrick v. Superior Court* [6-2-05] Supreme Ct. No. S115738, 35 Cal.4th 1011, 2005 DJDAR 6347.) *

S.F. Nurses' Pact Hopes to Recruit, Retain Staff

Nurses employed by the City and County of San Francisco have agreed to a one-year contract that is designed both to recruit new professionals and to discourage those currently on staff from retiring.

Service Employees International Union, Local 790, represents nurses who work at San Francisco General Hospital, Laguna Honda Hospital, and the city's public health department. The city has about 1,650 budgeted nursing positions; however, over 100 of those positions are unfilled. The new memorandum of understanding is an effort to fill those vacancies by offering higher wages and better working conditions.

The city hopes to be competitive with hospitals in the private, for-profit

sector by increasing the signing bonus offered to new nurses from \$2,500 to \$5,000 in exchange for a two-year commitment. In addition, planned wage increases range from 7 percent up to 13

The city hopes to be competitive with hospitals in the private, for-profit sector.

percent over the next year, depending on seniority. Hoping to discourage experienced nurses from retiring, the contract also adds two new steps to the salary

If you're going through hell, keep going.

Winston Churchill

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scale, one after 16 years of service and the other after 21 years on the job.

The parties agreed to add to the number of nurses assigned to each patient. This will ensure a nurse-to-patient ratio that exceeds the state-wide standard.

The negotiated agreement also doubles the tuition reimbursement fund

— from \$100,000 to \$200,000 — and will allow city nurses to recoup the costs associated with advanced training.

The new pact adds about \$20 million to the \$162 million price tag the city now spends on nursing services. Currently, salaries for registered nurses working for the city range from \$73,000 to \$90,000 a year. *

ings for retirement purposes the fees paid to court reporters for preparation of these transcripts.

Government Code provisions define final compensation for purposes of retirement calculations and set out the formula for calculating final compensation. The court focused on Gov. Code Sec. 31554, which expressly applies to court reporters and identifies them as “attaches of the superior court” who are “paid salaries or per diems by the county and whose [retirement] contributions are based upon such salaries or per diems....”

In 1954, an opinion of the Attorney General concluded that only salaries and per diems that reporters receive in their capacity as the official reporter are to be treated as earnable compensation for the purpose of contributions to the county retirement system.

In *McNeil v. Board of Retirement* (1958) 51 Cal.2d 278, the Supreme Court reached the same conclusion. It similarly interpreted the language of Sec. 31554 to mean that income derived

Compensation for Preparing Transcripts Not Part of Retirement Calculation

The compensation that is received by court reporters for preparation of transcripts in felony proceedings may not be considered in the calculation of their retirement benefits. Sticking with a Supreme Court decision rendered nearly 30 years ago, the Second District Court of Appeal concluded that Government Code Sec. 31554 limits court reporters’ compensable earnings to their salary and per diem payments. The suit was brought by three court reporters of

Los Angeles County, along with the Los Angeles County Court Reporters Association, and SEIU Local 660.

In most felony cases, no transcript of court proceedings is prepared unless the court or a party requests one or an appeal is filed. If a transcript is prepared, reporters are paid a fee by the county according to a rate set by statute. This suit filed against the Los Angeles County Retirement Association sought to include in compensable earn-

Supreme Court to Review San Francisco Impasse Case

The California Supreme Court will review a lower court’s ruling handed down earlier this year holding that the San Francisco Civil Service Commission was not free to unilaterally impose a promotional rule which it said was necessary to comply with anti-discrimination laws. Rather, said the First District Court of Appeal, the bargaining impasse between the city and San Francisco Fire Fighters, Local 798, must be referred to the binding impasse procedure outlined in the city charter.

Despite a long history of legal battles concerning the city’s track record of hiring minority firefighters, the Court of Appeal declared that the commission was not permitted to declare an emergency and side-step the local collective bargaining laws. (For a complete summary of the Court of Appeal decision, see *CPER* No. 170, pp. 44-48.) (*San Francisco Fire Fighters, Loc. 798 v. City and County of San Francisco* [4-27-05] Supreme Court S131818, 2005 DJDAR 4859.)

from extra transcription work is not part of the retirement calculation. The court in *McNeil* found “from the plain words of section 31554 that it restricts membership in the retirement association not only to reporters who are paid salaries of per diems by the county but to reporters whose contributions are based upon such salaries or per diems.”

*‘Any change in the law
is in the Legislature’s
province, not ours.’*

The court determined that the statute precluded the reporters from contributing to the retirement system on the basis of fees for transcription services, drawing a distinction between the reporters’ official reporting duties and other duties for which fees were paid.

The Court of Appeal declined the plaintiffs’ request to reconsider the *McNeil* ruling based on the fact that the court reporters’ jobs have changed since that decision was rendered. The legislature is presumed to be cognizant of the legislative construction offered by the court and the Attorney General, said the Court of Appeal. “Any change in the law is in the Legislature’s province, not ours.” (*Cramer v. Superior Court of Los Angeles County* [6-9-05] B176464, ___ Cal.App.4th ___, 2005 DJDAR 6754.) *

Public Schools

Schools Don't Get Promised Money; Compromises Made on Teachers' Pensions

The budget adopted by the legislature and Governor Schwarzenegger last month gives the governor much of what he wanted in the educational sphere. During negotiations, Democratic legislators talked tough about restoring to the public schools the billions of dollars that Schwarzenegger allegedly had

The compromise budget does not restore the funds cut from last year's budget.

promised. Their solution would have been to raise taxes on the wealthiest Californians. But, in the end, funds were not restored and no new taxes were part of the budget deal. The governor and the Democrats reached a compromise on the issue of who pays for teachers' pensions.

During budget negotiations last year, Schwarzenegger persuaded education officials to accept a \$2 billion cut in education funds guaranteed under Proposition 98, the school funding law. Officials say that, in exchange, Schwarzenegger promised to protect

schools against further cuts and to restore the funds in this year's budget, a claim the governor now denies.

When Schwarzenegger refused to restore the funds in his proposed budget earlier this year, Assembly Speaker Fabian Nunez (D-Los Angeles) said that Democratic legislators would not vote for any budget that failed to return the money to the schools. Nunez proposed raising \$1.8 billion by taxing single taxpayers earning more than \$143,000 a year and couples earning more than \$285,000. Senate President Pro Tempore Don Perata (D-Oakland) stated, "I believe there is nothing more important for this budget, our children and our future than, at the least, restoring the \$2 billion cut from education last year." Perata also called for raising taxes by about \$4 billion to bring school funding up to the national average.

However, the compromise budget announced July 5 — and passed overwhelmingly by both houses — does not restore the funds cut from last year's budget or provide for new taxes.

Schwarzenegger's proposed budget issued earlier this year called for the state to stop contributing to active teachers' retirement, cutting the state's annual contribution to CalSTRS by

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Fran Liebowitz

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(6th edition)

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\$469 million. He contemplated that local school districts would either pay the amount themselves or pass it along to teachers. The final budget crafted by Schwarzenegger and the top Democratic lawmakers requires the state to continue to pay one-half the amount. The rest counts against money the schools are slated to receive under Prop. 98. School districts will not have to put up any cash and, presumably, teachers will not have to pick up the tab.

Democratic legislators blamed their collective collapse on the politics of the upcoming special election and the lack of support from the education

lobby. One idea that had been considered was a wide-ranging education package, including tax increases on the wealthy. The strategy was to put their package before the voters in the special election to counter to the governor's call for a statewide spending cap. However, the education lobby reportedly was not interested in taking that measure to the voters, preferring to use its resources defensively to combat the governor's plan. Perata and Nunez say they have not given up and will continue to fight for increased educational funding in other unspecified ways. *

District Must Obtain Agreement of Academic Senate on Faculty Hiring Procedures

Community college districts cannot adopt faculty hiring procedures without first obtaining the agreement of their academic senates, ruled the Fourth District Court of Appeal in *Irvine Valley College Academic Senate v. South Orange County Community College Dist.* The court rejected the district's arguments that the senates lack standing to bring a legal challenge and that Education Code Sec. 87360 does not insist on agreement over the hiring procedures.

Factual Background

The academic senates representing the faculties of Irvine Community College and Saddleback College, both within the district, filed a lawsuit against

the district alleging that it had violated Sec. 87360 by adopting revised hiring policies to which they had not consented. The trial court agreed and stayed implementation of the policies until the senates were given a meaningful opportunity to participate.

Representatives of the senates and the district began work on a new hiring policy, but they were unable to agree on all aspects of the plan and returned to court. The court determined that actual agreement could not be statutorily required. Section 87360 affords the senates a meaningful opportunity to participate in the process, but it does not give them a "veto or the ability to frustrate reform." The senates appealed.

Court of Appeal Decision

Standing. The district argued that the senates did not have standing to sue because they have no legal existence apart from the district. The court disagreed, noting that a body need not be formally organized to have standing. The fact that academic senates are recognized by statute and have been given specific responsibilities by the legislature is "sufficient to create a legal existence separate from the District."

A body need not be formally organized to have standing to sue.

The court also rejected the argument that the senates lack standing because they merely are advisory bodies, said the court. Although their primary function is to make recommendations, it is not their exclusive function. "In addition to consulting and advising, an academic senate may have other rights and responsibilities which are specifically provided in statute."

The district also maintained that senates lack the beneficial interest necessary to sue because they do not exercise "the sovereign function of government," citing *Laidlaw Environmental Services, Inc., Local Assessment Com. v. County of Kern* (1996) 44 Cal.App.4th 346. The court found *Laidlaw* unpersuasive because there the "local assessment committee" was formed by the county board of supervisors on an

ad hoc basis. “Unlike the LAC in *Laidlaw*,” the court said, “academic senates are not appointed by the District. They are independently elected by the faculty of the community colleges they represent. Further, they are not created on an ad hoc basis, but have permanence and continuity. Finally, academic senates have more than the extremely limited advisory role of an LAC.”

In addition, the court commented that Sec. 87360 “explicitly states academic senates have a key role in developing and adopting faculty hiring procedures, and this is a special right sufficient to confer a beneficial interest.” “If academic senates do not have sufficient standing to challenge a district’s failure to comply with section 87360, it is difficult to envision who does.”

Statutory interpretation. Section 87360(b) states, “No later than July 1, 1990, hiring criteria, policies, and procedures for new faculty members shall be developed and agreed upon jointly by representatives of the governing board, and the academic senate, and approved by the governing board.”

Following well-settled rules of statutory construction, the court first looked to the actual language of the statute:

The literal language of the statute requires the faculty hiring policy, which is to be adopted by July 1, 1990, to be “agreed upon jointly.” At a minimum, the plain language contemplates actual, affirmative agreement to the July 1, 1990, policy contemplated by the statute. “Agreed upon jointly” means what it says — joint agree-

ment — not merely the opportunity to recommend or to participate in the process. In the event joint agreement cannot be reached, subdivision(c) states: “Until a joint agreement is reached and approved pursuant to subdivision (b), the existing district process in existence on January 1, 1989, shall remain in effect.”

The court recognized that the literal language, while clearly requiring joint agreement for the initial policy to be adopted by July 1, 1990, does not address what is to happen *after* the initial policy is adopted. It therefore

The legislature granted the senates a role equal to the district.

turned to the legislative history to determine what the legislature intended. It was guided by language in the statement of legislative purpose in the uncodified portion of the statute: “Faculty members derive their authority from their expertise as teachers and subject matter specialists and from their status as professionals. As a result, the faculty has an inherent professional responsibility in the development and implementation of policies and procedures governing the hiring process.” Based on this, the court concluded that “not only did the Legislature intend to

include the faculty in the hiring process itself, it intended they be included in the process of creating the procedures that would direct the hiring process. Nothing in the statement of legislative intent indicates an intent to include the faculty only once, at the time procedures under the statute were to be initially adopted prior to July 1, 1990.”

The district’s interpretation of the statute, the court reasoned, would directly contradict the legislature’s intent:

If academic senates were only to be included in the process once, it would give a district carte blanche to go through the charade of including the academic senate, and then unilaterally change hiring policies at any time thereafter. Such an ability is in clear contrast to the Legislature’s statement that the faculty has “an inherent professional responsibility” to develop and implement hiring policies and procedures.

The court refused to compare draft language with the final adopted language of the statute, as urged by the district. Given the clear statements of legislative intent with regard to faculty participation, said the court, “we need not try to divine intent from changes in draft language that could have occurred for any number of reasons.”

It also rejected the district’s arguments that the court’s interpretation would give the senates a “veto” over the hiring process, putting the district in the position of ignoring state law regarding hiring practices. Calling that assertion “overblown,” the court said,

“The bottom line is that the Legislature granted the Senates a role equal to the District’s in developing and adopting faculty hiring practices.”

Summarizing its findings, the court stated:

Thus, between the plain language of section 87360 and the legislative history of the statutory scheme, we conclude that the Legislature intended the faculty, through the academic senates, to have an ongoing role in developing and consenting to faculty hiring policies and procedures. In the

event specific changes cannot be agreed upon, the existing policy would remain in effect. In our view, this is the only reading of the statute that harmonizes both its plain language (“agreed upon jointly”) and the legislative statement of intent (the faculty’s “inherent professional responsibility” in developing hiring procedures).

*(Irvine Valley College Academic Senate v. Board of Trustees of the South Orange Community College Dist. [6-8-05] No. G033455 [4th Dist.] 129 Cal.App. 4th 1482, 2005 DJDAR 6713.) **

lion this year. In order to address the problem, the staff was cut from 30 to 21. And, to make up for the loss of staff, the commission introduced a new computer system that has caused what the commission calls a “learning curve” problem. Further compounding the situation is the fact that, under state law, applicants are entitled to a refund of the filing fee if their application is not processed within the 75-day period.

*The commission was
\$3 million over
budget last year.*

Credentialing Commission Overwhelmed

Caught in a financial and technological bind, the California Commission on Teacher Credentialing is facing a huge backlog of applications for issuance and renewal of teaching credentials. A recent switch to a new computer, coupled with staffing cuts, has meant that the 21 remaining employees have been ordered to work overtime to act on approximately 63,000 pending applications.

State law requires the commission to process credentials within 75 days, but the current waiting period now averages four months. Some colleges are providing their teacher graduates with letters vouching that they qualify for credentials so that they will be able to get jobs starting in the fall.

The commission sets standards for teacher education and disciplines teachers who violate professional practices. But a major part of its workload is processing 220,000 applications a year. The commission, which is funded by revenues from the credential and teacher-testing fees, has seen a decline in the number of teachers applying for emergency credentials in recent years. In addition, fees were reduced from \$70 to \$55 in 2001 to give a break to teachers with emergency credentials who have to reapply every year. Regular credentials have to be renewed only once every five years.

These factors meant that the commission was \$3 million over budget last year and expects a shortfall of \$4 mil-

The 15 appointed members of the commission tried earlier this year to close the budget gap by returning the fees to the \$70 amount, but Governor Schwarzenegger’s Department of Finance nixed the plan and ordered the commission to make even more operational cuts.

Assembly Member Mervyn Dymally (D-Compton) has introduced A.B. 123, which would seek better oversight of the commission by merging it with the Department of Education. Hearings on the bill are planned for the fall. *

No More CBEST?

The Assembly Education Committee has voted to eliminate the basic competency test for California public school teachers. The 23-year-old California Basic Educational Skills Test essentially would be eliminated if the legislature and the governor ratify the committee's action. The CBEST tests teaching candidates for basic competency in reading, writing, and mathematics.

In 2003, two years after passage of the federal No Child Left Behind Act, state education officials created a new exam, the California Subject Examina-

tions for Teachers, to comply with the act's requirement that all teachers demonstrate competency in the specific subjects they teach. Beginning this year, all elementary school teachers and junior high and high school teachers specializing in academic subjects will be required to pass this test.

Because of the new requirements, Senator Jack Scott (D-Altadena) argued that the CBEST is redundant and should be eliminated. He introduced S.B. 428 to do just that. The bill, however, would allow local school districts to continue to require the exam. *

District Must Accommodate Charter School Students Even if Public School Students Must Be Relocated

Under the Charter Schools Act of 1992, as amended by Proposition 39, school districts must provide charter schools with facilities that are "reasonably equivalent" to other public schools of the district; the facilities are to be "shared fairly among all public school pupils," including those in charter schools; and charter school students must be accommodated at one site or, if that is not possible, at "contiguous sites." These provisions require districts to provide facilities to charter schools, even if it means disruption and dislocation of other students and programs, stated the Fifth District Court

of Appeal in *Ridgecrest Charter School v. Sierra Sands Unified School Dist.*

Ridgecrest Charter School made a Prop. 39 request for district facilities sufficient to accommodate 223 K-8 students for the 2003-04 school year. In response, the district offered a total of eight classrooms at four different K-5 schools, and one-and-one-half classrooms at one of its middle schools. Because the sites were not contiguous, RCS challenged the offer and suggested another site that was then being used primarily for non-academic purposes. The district called that proposal unfeasible and maintained that it had made

"every reasonable effort to locate and create space for RCS at the fewest possible sites."

RCS then took the matter to court. The trial court found that the district had not abused its discretion. RCS appealed.

The Court of Appeal summarized the positions of the parties as follows:

The district called the charter school proposal unfeasible.

RCS maintains, essentially, that the District was obligated under [Ed. Code] section 47614 to provide it with facilities at *one* of several school sites in the District having sufficient space to handle 223 K-8 students. It contends, in other words, that the ability of a school district to "accommodate" a charter school's students at a single school site, for purposes of the contiguity requirement, relates only to the physical capacity of the facilities at that site. Thus, this argument goes, since there are several such sites within the District, the District's discretion was limited to determining which of them to make available to RCS....

The District, on the other hand, contends that it need accommodate RCS students only insofar as it is capable of doing so "without excessive disruption to and interference with the District's students' education." It claims, in effect, to possess virtually unlimited discretion to decide whether an

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accommodation would be “excessive.” “The District,” it asserts, “has been granted discretion under the statute and its implementing regulations to determine *whether* to offer contiguous sites to the charter school.”

The court first addressed what it considered to be a faulty premise underlying the district’s position, i.e., that charter school students are not district students, “with the implication their needs therefore must yield to those of the students in the district-run schools in deciding how to allocate space among them.” A review of the provisions of the Act, as amended by A.B. 544 and Prop. 39, led the court to conclude that “all these changes reflect an intent on the part of the Legislature to reduce, if not eliminate, the practical distinctions between charter schools and district-run schools.” Therefore, the provisions of the Act “seem clearly to require a district, in responding to a Proposition 39 facilities request, to give the same degree of consideration to the needs of charter school students as it does to the students in district-run schools.”

The court found some support for RCS’ argument that the district has no discretion to provide facilities at more than one site if it has at least one site that is physically capable of housing all of the charter school’s students. “However,” stated the court, “we must construe section 47614 so as to harmonize it with the entire statutory scheme affecting charter schools.” It recognized

that there is “some tension” between the “shared fairly” and “reasonably equivalent” requirements on one hand and the “contiguous” requirements on the other. The court concluded that “the answer lies somewhere in between, albeit toward the contiguity end of the scale.”

The process must at least begin with the assumption that all charter school students will be assigned to a single site, and attempt to accommodate all factors to meet that goal. “What

*That charter school
students are not
district students is a
faulty premise.*

all those other factors are, how much weight each ought to be given, and when consideration of them will make the single-site goal unfeasible, are all decisions that can only be made in light of the circumstances in each particular case.”

In this case, however, determined the court, the district only addressed the requirement that it provide RCS with “reasonably equivalent” facilities, while it totally ignored the equally important “contiguous” requirement. The district did not consider placing RCS in one facility. Furthermore, five different sites physically separated from

one another are not “contiguous” facilities, said the court. “The requirement that charter schools be provided with ‘contiguous’ facilities presumably means the facilities must be contiguous *to one another*, i.e., located at or near the same site.”

The court reversed the trial court, stating:

We have little doubt that accommodating RCS’s facilities request will cause some, if not considerable, disruption and dislocation among the District’s students, staff and programs. But section 47614 requires that the facilities “should be shared fairly among all public school pupils, including those in charter schools.” Providing facilities, whether or not they are reasonably equivalent in other respects, at five different school sites does not strike a fair balance between the needs of the charter school and those of the district-run schools. The District failed, in other words, to demonstrate either that it could not accommodate RCS at a single school site, or that it had minimized the number of sites in a manner consistent with the intent of the Act. This was an abuse of discretion.

*(Ridgecrest Charter School v. Sierra Sands Unified School Dist. [6-29-05] No. F045114 [5th Dist.] ___ Cal.App. 4th___, 2005 DJDAR 7926.) **

Higher Education

CUE, UPTE Strikes Fail to Jump-Start Stalled Negotiations

Spring was strike season for the University of California. But while a strike by service workers in April led to a contract one week later, there has been little movement in the university's negotiations with the University Professional and Technical Employees/CWA since researchers and technical employees struck in May. And no progress has been made in talks with the Coalition of University Employees, which represents over 16,000 clerical workers, since their mid-June strike. Even after enactment of a state budget that increases the university's base funding by 3 percent for such items as salary increases, negotiators have not budged.

UPTE PERB Charges

UPTE/CWA, whose members in both the technical and research units have been working without a contract since last September, is embroiled in a battle for step increases in addition to general raises. In 2003, the union was able to bargain for conversion of all 9,000 employees from pay ranges to a step-based salary system. But UPTE did not achieve a guarantee that employees would move up the steps each year. Researchers and technical workers did receive small merit and step increases in 2002-03, but the university has re-

fused to agree to step increases or general raises since then. The parties are in negotiations for a successor to the contract that expired September 30, 2004.

In the face of university pleas that the state has provided no money for staff raises in 2004-05, UPTE argues that the amount U.C. saves from em-

UPTE filed an unfair practice charge claiming that it still had not received the information.

ployee turnover is sufficient to pay for step increases. UPTE estimates that turnover is about 33 percent among researchers and, after reviewing payroll records, believes there is \$2.5 million in turnover savings that the university has not used for wages within the two bargaining units. The university asserts it saves very little when experienced employees leave and are replaced by new employees, and that step increases cost an amount equivalent to a 1.8 percent raise.

In addition, UPTE claims that funding for researchers and technical workers has increased. At least 70 percent of all technical employees and 90 percent of researchers are funded by non-state money such as research grants. The union believes that the grants have escalator clauses which provide annual increases for the salaries of those working on the research. If so, it contends the university can afford 2004-05 raises regardless of whether the state provided increased funding last year. To prepare its wage demands last summer, the union requested copies of contracts containing the escalator clauses. This spring, it filed an unfair practice charge claiming that it still had not received the information. That charge soon was followed by one claiming the university was engaged in surface bargaining and other indicia of bad faith negotiations.

After 84 percent of the two units voted to strike, UPTE called on employees to walk off the job on May 26. Just before the strike, the university made an offer that included no raise for 2004-05, a 3 percent increase this year, a 3.5 percent raise in 2006-07, and a 2.2 percent boost in 2007-08. All of the raises were contingent on state funding conforming to the university's compact with the governor, which calls for funding increases of 3 percent this year, 3.5 percent next year, and 4 percent the year after. U.C. proposed no step increases for employees until January 2008. UPTE was demanding a step increase of at least 4 percent for 2004-05, and a

combination of a half-step increase, a .5 percent range increase, and a general raise of 3 percent for 2005-06.

U.C. attempted to persuade UPTE to meet with a state mediator before the strike, but UPTE declined. The union claims 3,000 employees participated in the job action; however, the university asserted only 3 percent of the workers struck. Construction workers refused to cross the picket lines set up by UPTE, CUE, academic student employees, and other union members.

Negotiations have continued after the strike. But despite the passage of a state budget, the parties have been unable to reach agreement.

CUE's Economic Strike

CUE members are angered by the university's refusal to agree to the 1 to 2 percent market equity adjustments for most titles in the unit that were recommended by a factfinding panel for 2003-04. Instead, the university implemented raises for only 10 or 15 employees. (See story in *CPER* No. 171, pp. 64-67.) Having proceeded through impasse to imposition of the employer's last offer, CUE asserts that its strike on June 13 through 15 is a legal economic strike.

Not so, claims the university. Because the parties are in negotiations on a successor to the contract that expired last September, the strike is an illegal economic action according to U.C. Prior to the strike, CUE reported widespread threats to discipline employees who did not come to work.

The standoff in successor wage negotiations did not help to calm tensions. The union had not backed down from its demand for 21 percent raises over three years, while U.C. offered unguaranteed increases of 12 percent. A few days before the strike, the university offered raises of 0 percent, 3.5 percent, 3 percent, and 4 percent for 2004-05 through 2007-08, provided they are "consistent with state funding

U.C. raised treasurer David H. Russ' salary by 61 percent to \$450,000 per year.

and systemwide increases for other staff." In addition, the university proposed .5 percent equity increases in the last three years of the contract. It did not offer to freeze or limit parking fees or health care costs for employees. U.C. suggested the parties use a state mediator to reach agreement.

The next day, CUE responded with demands for equity increases and credit for two extra vacation days for 2004-05, along with a total of 4.5 percent raises, 1 percent equity increases, and higher shift differentials in 2005-06. For 2006-07, the union proposed a 3 percent raise plus another boost to shift differentials and a pool of money for

merit increases. U.C. rejected the demand, noting that it would increase the university's costs 12 to 13 percent during a period when U.C. expected only 7.5 percent growth in state funding. In a letter to CUE, the university "reserve[d] the right to change the effective dates of any proposed salary increases [in its wage proposal] to the extent the University incur[red] any costs related to the CUE job action."

The strike coincided with the processing of end-of-semester paperwork on some campuses. The university asserted there was little impact, and that only about 600 employees without previously arranged absences failed to come to work the first day of the strike. CUE claims that 3,500 to 4,500 clerical workers walked the picket lines and that more stayed away from work every strike day. CUE suggested its picketers tell onlookers about the factfinding report, the 22 percent market lag in clerical wages, and millions of dollars in university "profits." The union also emphasized the fact that, in May, U.C. raised regents' treasurer David H. Russ' salary by 61 percent to \$450,000 per year.

After the strike, CUE did reach agreement with the university on wages for clerical employees at Lawrence Berkeley National Laboratory, whose positions are funded by the federal Department of Energy. Despite negotiations on July 11 and 12, after the state budget was signed, the parties have not been able to agree on a successor contract. *

U.C. and Lecturers Reach Agreement Quickly

In contrast to the drawn-out and rancorous negotiations with several other unions, the University of California has reached a tentative agreement after eight weeks of bargaining with the union that represents lecturers, the University Council-American Federation of Teachers. The short time line is a departure from the three-year marathon of negotiations for the 2003-06 agreement between the parties. Reopener bargaining began in April on four articles. Negotiations on the duration article, which the university reopened, resulted in extension of the contract through 2010.

The union reopened the article that governs appointments of lecturers, who have no tenure but previously have bargained limited rights to continuing appointments for those who have taught for over six years. The new pact contains improvements for unit members who have been employed fewer than six years. Those lecturers have no right to reappointment, but the contract does limit the reasons the university can use to deny reappointment. The tentative agreement strengthens those restrictions by requiring that any policies which limit appointment duration must be reviewed through "regular consultative processes." UC-AFT explained that the language will prevent a department chair or dean from limiting an appointment without approval from a higher authority.

The university agreed to notify lecturers of reappointment by June 1. Lecturers reappointed to their fourth year will receive a one-step, rather than a two-step, increase. Those who have taught in several departments, and therefore are accruing credit for sixth-year status in more than one department, will be allowed a one-time opportunity to transfer those credits to their "home" department.

In the merit review article, UC-AFT secured the right to an explanation for any unit member whose merit increase is denied. The tentative agreement contains language that matches the university's practice of granting early or especially large salary boosts in exceptional circumstances.

The university gained flexibility in the layoff article. The recall rights of laid-off continuing appointees were shortened from three years to two. U.C. may also rehire a laid-off lecturer for

one semester or quarter without having to rescind the layoff.

The parties agreed to prepare a joint contract-interpretation manual, which is designed to illuminate their shared understandings of the contract as well as disputed provisions. They hope the manual will minimize grievance processing and maximize uniformity across the U.C. system.

There was no change in the salary provisions of the contract, which give the lecturers the same general increases that non-represented academic employees receive. The university has indicated to the union that it anticipates passing along the 3 percent state funding increase as a 2 percent general range increase in the fall, with 1 percent for merit increases.

The five-year deal calls for two reopeners, in 2006 and 2008. Due to the exodus of lecturers during the summer months, the union is conducting the ratification vote by email and postal mail. Results were expected at the end of July as *CPER* went to press. *

U.C. Nurses Upset Over Salaries, Staffing, and Looming Benefit Changes; Court Halts Strike

Nurses represented by the California Nurses Association voted in early July to reject the University of California's "final" offer and authorize a one-day walkout. In addition to salaries and hospital staffing levels, nurses are concerned about substantial systemwide benefit changes that U.C. is consider-

ing for all staff. But, as *CPER* went to press, the Public Employment Relations Board obtained a temporary restraining order against the strike.

Low Salaries

CNA claims the university's salary offer, which varies by location, will do

little to alleviate below-market pay at each of the nine medical centers and campus health clinics. Although the university acknowledges salaries will continue to lag, U.C. says it has made “market-based” pay offers as well as packages that are designed to attract nurses to vacancies. CNA describes those packages as “massive salary restructuring” that “punishes” the most experienced RNs by offering them the lowest raises. CNA pay demands are 4 to 28 percent higher than university offers.

CNA pay demands are 4 to 28 percent higher than university offers.

No Guaranteed Staffing Ratios

The union has brought its struggle with the governor over hospital nurse-to-patient ratios into negotiations with the university. Former Governor Davis signed legislation that mandated higher staffing requirements beginning this year. The 2002-05 contract required U.C. to comply with those state regulations. Governor Schwarzenegger attempted to delay implementation of the regulations on economic grounds, but a superior court judge found his order illegal. (See story in *CPER* No. 171, pp. 38-40.) CNA wants the language of the contract to include the “safe staffing” ratios the governor tried to override. The university, however, contends that the ratios are not a subject of bargain-

ing and that the union wants to drag the university into its fight with the governor. CNA retorts that U.C. has been lobbying to gut the ratios altogether.

The union also is pushing for language that would guarantee teams of employees would be available around the clock for lifting patients. The governor vetoed legislation last year that would have required these teams. CNA asserts that the use of lift teams at the UCLA medical center reduced nurses’ injuries by 70 percent. U.C. has proposed that each location implement its own lift policies and training for nurses.

Benefit Changes Forecast

Alarming news emanated from a Leadership Institute that the university conducted in May for its managers. Michele French, executive director of Human Resources and Benefits Policy and Program Design, explained that escalating health care costs, the retirement eligibility of large numbers of baby-boomers, and stock market losses have impelled the university to consider changing employee benefits. French revealed that, even before pension reform proposals were put forward by the governor and Assembly Member Keith Richman (R-Granada Hills), the university was considering changes for new hires. It also has been looking at “options” for health and welfare plans and retiree health coverage.

Despite stock market losses in 2001, the U.C. retirement plan currently is overfunded. But, warned

French, as neither the university nor its employees have contributed to the plan since 1990, contributions will need to resume in the next three to five years. U.C. is considering phasing in contributions so that employees and the university eventually will split the annual cost of the plan, which is equivalent to 16 percent of payroll.

CNA demanded information in its next negotiations meeting following the Leadership Institute. The union reported that the university admitted it is

Pension contributions will need to resume in the next three to five years.

considering the creation of a separate retirement and benefit plan for management and faculty, an accusation the university says is a misunderstanding. In addition, it may reduce or eliminate its retiree health insurance contributions, which it has retained the right to do. The union demanded language that would guarantee no changes in pensions, retiree health benefits, or other benefits for the life of the contract.

U.C. sought to calm its nurses in a letter to the union in early June. Chief negotiator Gayle Cieskiewicz assured CNA that no changes to pension contributions or plan design would occur prior to October 2007. The university

asserts the 2002-05 contract bars changes to benefits. That contract states the university's maximum health care contributions will be the same as for other bargaining units. It also mandates coverage in the U.C. retirement system for eligible employees.

PERB Obtains TRO

Over 90 percent of nurses who voted supported the one-day strike, which the union called for July 21. Particularly ironic, charged the union, is the fact that U.C. frequently excuses its low salaries by lauding its rich benefits

programs. The union accused the university of bargaining in bad faith. It also complained that U.C. had illegally suspended several nurses who struck in sympathy with the American Federation of State, County and Municipal Employees last April.

U.C. denounced CNA for calling a "presumptively unlawful" strike during negotiations. At its request, PERB obtained an injunction to stop the job action on the basis that CNA had failed to exhaust the impasse procedure prior to calling the strike. *

Governor Vetoes Labor Studies Funding

The legislature tried to sneak back into the budget funding for labor studies at the University of California, but the governor would have none of it. For the third year in a row, Governor Schwarzenegger has aimed to eliminate \$3,800,000 for research and education in industrial relations. (See stories in *CPER* No. 164, pp. 62-64, and No. 170, p. 66.) He cut \$2 million from the 2003-04 budget soon after taking office. The legislature funded the program in 2004-05 despite the governor's refusal to include it in his budget proposals.

The governor's 2005-06 budget also included no money for labor studies. The legislature, however, added funding to the support budget for U.C. for obscure purposes identifiable only by reference to provisions of the Bud-

get Act of 2003. One of those purposes was multi-campus research in labor studies at U.C Berkeley and UCLA. Explaining that the money was intended only as one-time funding in the 2004 Budget Act, and that reductions were needed to bring ongoing expenditures in line with resources, the governor blue-penciled the labor research funds. Labor studies was the only research funding he eliminated.

There is nothing to prevent the university from using other money to fund the research. The *Los Angeles Times* reported that the governor's office has suggested that labor studies could be supported out of the \$76 million increase in funding U.C. will receive this year. *

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State Employment

Supervisors' Independence Drive Fizzles

A campaign that began as a momentous bid for complete autonomy from the California State Employees Association has ended anticlimactically. The Association of California State Supervisors remains an affiliate of CSEA, but no one knows how many votes were cast against independence. The ballots will never be counted because too few CSEA delegates voted.

Mail Ballot on Bylaws Amendment

CSEA is an umbrella organization of four affiliates — SEIU Local 1000, which represents rank-and-file workers; California State Retirees; ACSS; and California State University Employees Union. A long-festering ACSS desire for independence from CSEA picked up momentum two years ago when a CSEA employee was caught embezzling union funds, about \$660,000 of which ACSS claims CSEA should pay back to the supervisors' organization. (See story in *CPER* No. 169, pp. 47-49.) Late last year, CSEA allowed ACSS to present a bylaws amendment to the CSEA board of directors that would have allowed ACSS to separate from CSEA with its members and assets, including the embezzled amount, after paying CSEA for its share

of unfunded pension and post-retirement health benefits of CSEA staff members.

In January, the CSEA board voted to allow the bylaws amendment to go to CSEA general council delegates. To change the bylaws, two-thirds of the delegates must vote and two-thirds of those voting must support the change.

Ballots will never be counted because too few CSEA delegates voted.

A months-long campaign to persuade the delegates that ACSS independence was best for both CSEA and ACSS was countered by CSEA's calls for unity. ACSS argued that the service costs it was required to pay CSEA were causing ACSS budget deficits, which were affecting member services and threatened the continued existence of ACSS. It also pointed out that its agreement to pay CSEA for unfunded staff pension costs upon separation would benefit CSEA members, who would otherwise be on the hook for the

underfunded pension, particularly if ACSS were to go bankrupt.

CSEA did not issue its own campaign materials, but opposition statements in the ballot materials argued that the power of a 140,000-member union would better serve the supervisors' interests than a 6,000-member independent employee organization. The opposition argued that ACSS was gaining, not losing, members and that its 2006-07 budget showed the affiliate was not going broke.

ACSS responded that, as its members comprise just 6 percent of CSEA, its departure would have little impact on CSEA's strength. It also pledged to become a third-party ally.

All 1,024 delegates from the four CSEA divisions received mail ballots in April and were given a deadline in May to cast their votes. But only 585 ballots were returned. As a result, the ballots were not counted. Even among ACSS delegates, only 69 percent cast their vote in the bylaws election.

Plan B

ACSS President Tim Behrens told *CPER* that the low vote return will not stop the affiliate from pressing forward with its plans for full autonomy. ACSS surveyed its 5,800 members in the spring to determine members' views on the proposed separation from CSEA. Only about 1 percent of the members told ACSS they were against disaffiliation.

Behrens will propose a new independence resolution at the ACSS del-

egate assembly this month. If its board adopts the resolution, ACSS will present another disaffiliation proposal to the delegates at the CSEA general council in October. Behrens hopes that

the setting, in which all delegates will be in attendance rather than responding by mail, will lead to a successful bylaws amendment for separation from CSEA. *

Governor Chipping Away at Compensation

A new tentative agreement with the California Union of Safety Employees shows the governor may be gradually succeeding in reigning in state employee pay and benefits. Although the state did not achieve its goals to reduce holidays and leave accrual or gain authority to implement furloughs, two state employee unions now have acceded to demands for fixed-dollar contributions for health care premiums, delayed coverage for new employees, and elimination of sick leave from calculations for overtime pay entitlement. CAUSE agreed the two-year contract will not insulate employees in bargaining unit 7 from changes such as the right to implement furloughs, which the Department of Personnel Administration may negotiate with other unions or the legislature may enact. Now the battle for concessions has shifted to SEIU Local 1000 (CSEA) and other unions faced with negotiating new contracts.

Arnold's Agenda

Since entering office, the governor has set his sights on reducing state em-

ployee compensation. In 2004, he won agreements from the California Association of Highway Patrolmen and California Correctional Peace Officers Association to delay pay raises in exchange for other rights and benefits. (See stories in *CPER* No. 168, pp. 49-51.)

In January, he renewed a proposal to take away two of the 14 state holidays and demanded caps on the accrual of vacation and annual leave. He continued his drive to eliminate leave hours from counting as hours worked when calculating whether an employee is entitled to overtime compensation. He again called for increased employee contributions to retirement benefits, this time proposing that employees pay half the actuarial cost, including unfunded liability. Also on the table were novel proposals to force new employees into defined contribution plans and allow any employee to opt out of retirement benefits in exchange for a salary stipend.

Initial proposals in bargaining with 14 units included a move to fixed-dollar contributions for health care pre-

miums instead of the "80 percent" formulas negotiated by the Davis administration. DPA also demanded provisions that would delay state contributions to new employees' health care insurance coverage until after the first six months of employment. Other attempts to cut health benefit costs included working with the California Public Employees Retirement System to establish a new tier of premium payments for a single parent with children and paying military retirees an extra stipend if they enroll in a federal health care program.

DPA pushed for the governor's right to implement up to five days of furlough.

DPA made a push for a significant new takeaway — the governor's right to implement up to five days of furlough. The proposal sunshined by DPA in January provides that the governor wishes to furlough state employees in 2005-06 if certain fiscal conditions are met. The furlough would not affect leave accrual, benefits, service credit, or determination of compensation for purposes of retirement.

In the first full contract negotiated by the Schwarzenegger administration, the California Association of Psychiat-

If the shoe doesn't fit, must we change the foot?

Gloria Steinem

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ric Technicians agreed to fixed-dollar premium contributions and a single-parent tier. (See story in CPER No. 170, pp. 57-59.) DPA also got its foot in the overtime-pay door by changing entitlement calculations to exclude sick leave taken as hours worked. That contract now has been ratified by the membership and approved by the legislature.

CAUSE Tentative Agreement

In May, CAUSE, which represents about 6,600 investigators, inspectors, dispatchers, and other safety personnel, reached a tentative agreement with DPA. The union, which is under pressure from a decertification drive by the Teamsters Union (see story in CPER No. 172, pp. 57-59), garnered pay-range increases for many classifications in the unit but agreed to fixed-dollar premium contributions and sick-leave exclusion from overtime. It also agreed to work with CalPERS for a new premium tier for single parents with dependent children.

DPA gained one concession from CAUSE that it was unable to wrest from CAPT. New employees hired into the unit will receive only half of the state's health premium contribution for dependents in the first year of employment and 75 percent in the second year.

Overall, the state's health care contributions for safety employees will increase substantially because the state has been paying only the dollar amounts required by the former contract, which expired in 2003 when the legislature refused to approve CAUSE's tentative

agreement with the Davis administration. DPA agreed to contribute, retroactive to January 1, 2005, the dollar equivalent of the 80 percent formula for health care premiums that other unions won in 2003, and to increase contributions to an amount equivalent to 85 percent of the employee's premium and 80 percent of the dependents' premium on January 1, 2006. Since 2004, employees in 13 other units have received a state contribution of 80 percent of the weighted average premium of the four plans with the highest enrollment. For

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from CAPT.*

six units covered by contracts extending into 2006, that formula will change on January 1 to 85 percent of the employee portion of the premium. Contributions for safety employees in 2007 will be established in reopener negotiations.

The minimum of the pay range for dispatchers and communication operators will increase 10 percent immediately. The maximum of the range will be boosted 5 percent now and another 5 percent next year. Pay ranges for several other classifications will rise 5 per-

cent at various times in 2006, and peace officer/firefighter ranges will increase the same percentage on January 1, 2007. The affected classifications constitute about 65 percent of the employees in the bargaining unit, although only those on the minimum and maximum steps will see jumps in their salaries. In the dispatcher classification, however, where the state has had trouble retaining employees, most paychecks will increase immediately. All but about 60 employees are either new or in the top step of their pay range.

Several provisions would ease the way for the governor's agenda.

Employees will be entitled to eight more hours of bereavement leave (24 hours total), and the Family and Medical Leave Act will be available for domestic partners, but employees will be required to use FMLA leave for on-the-job injuries.

New procedures were established for overtime assignment in the California Highway Patrol department, and for scheduling and transfers in various classifications.

There are improvements in employees' rights to donate leave and use released time for employee organiza-

tion purposes. CAUSE also won the right to be notified of any individual employee's grievance that reaches the third step of the grievance process.

Several provisions of the contract will have no immediate impact but would ease the way for the governor's agenda. CAUSE agreed that holidays could be reduced for unit employees if the reductions are implemented for all bargaining units with defined holidays. It acquiesced to language that would allow employee furloughs if authorized by the legislature, subject to a 30-day period to bargain the impact. And, while recently enhanced retirement formulas for peace officer/firefighter and safety classifications are still in effect, CAUSE agreed the contract will not bar implementation of retirement plan changes by the legislature or initiative, subject to 30 days of effects bargaining.

CAUSE leadership recommended the contract as the best that could be achieved under the current economic and political conditions. It estimated that most of its members would gain \$2,000 in reimbursements and health care savings during the first year. A mailing foul-up occurred during the ratification vote, but 70 percent of the members voting ratified the tentative agreement. If approved by the legislature and signed by the governor, the contract would run from July 1, 2005, to June 30, 2007. As *CPER* went to press, the legislature was set to pass the bill approving the agreement.

CSEA Protests

The state has been bargaining with SEIU Local 1000 (CSEA) for only a few months, but the union already has organized lobbying and protests against the governor's proposals. On June 30, when the contracts of seven Local 1000-represented units expired, union members protested at the capitol.

CSEA already has organized lobbying and protests.

The union estimates that the state's demands would cut compensation by \$5,800, which is 14 percent of the average salary earned by the employees it represents, and 17 percent of the average salary in units of technicians and clerical and service workers. In reaching this figure, the union assumes that the state will freeze its health care contribution at the current amount. But Lynelle Jolley, spokesperson for DPA, says that no specific health benefits proposals have been made beyond the general concept of moving from formula-driven contributions to fixed-dollar amounts.

For new hires, the state employer is proposing that they receive no employer contributions to health care coverage for the first six months of employment. The union estimates this

amounts to an average \$2,575 in state savings, equivalent to 6 percent lower pay for new employees.

Meanwhile, CalPERS has announced that the state's retirement contribution rate will decrease next year. And, although health insurance premiums still are rising, they will average only about 9 percent in 2006, compared to 11 percent and over 20 percent in the previous two years, respectively.

Local 1000 has requested that DPA produce data showing the need for economic takeaways. The union says that DPA has been slow in handing over the information, but DPA claims the union's requests for documents were so numerous that they were obviously trying to stall negotiations. Bargaining could be long and drawn out if the governor insists on his takeaway agenda. *

2004 indicates that 24 percent of the registered nurse positions remain vacant. Other understaffed positions include physicians (7 percent vacant), clinical psychologists (17 percent vacant), psychiatric technicians (15 percent vacant), psychiatrists (25 percent vacant), social workers (25 percent vacant), and medical technical assistant positions (22 percent vacant). In their brief, the unions pointed out that they

Unions Welcome Receivership of State Prison Medical Program

Unions that represent state employees who work in prison medical facilities told the federal district court in friend-of-the-court briefs filed in *Plata v. Schwarzenegger* that receivership of the system may be justified. The Prison Law Office filed the lawsuit four years ago, alleging that the corrections department violated the prohibition against cruel and unusual punishment by not serving prisoners' serious medical needs. A settlement agreement in 2002 subjected the department to periodic audits of inmate medical care. In a hearing in May, the judge cited the continuing horrifying conditions that he estimated led to about one preventable death each week, and he indicated he was considering taking over the health care system. The state was ordered to file briefs explaining why the court should not place the system into receivership.

The court granted the Union of American Physicians and Dentists, Service Employees International Union, Local 1000 (CSEA), and Local 2620 of the American Federation of State, County and Municipal Employees the opportunity to weigh in on the decision as organizations representing the doctors and dentists, registered nurses, medical technical employees, pharmacists, and social workers who staff the prisons. The employee organizations blamed the prison problems on inept management that, they contend, scapegoats employees and their unions.

A common theme voiced by the three unions was that many problems stem from the persistent failure of the corrections department to hire sufficient medical personnel, instead relying on expensive contracts with outside doctors, nurses, and pharmacists. Information submitted to the legislature in

*Twenty-four percent
of registered
nurse positions
remain vacant.*

have lobbied for higher pay and better working conditions to attract the personnel the system needs.

The unions tried to dispel the impression that they have hindered improvement of the system. SEIU Local 1000 has filed a grievance objecting to the corrections department's use of registry nurses. While the department contends this has been an obstacle, the unions emphasized experts' testimony that outside nurses are not a good substitute for permanent staff nurses. Despite union arguments that state nurses' salaries are at least 20 percent below market rate, the state has agreed to only a 5 percent general salary increase, with another 5 percent for a small number of nurses in certain locations.

The UAPD has challenged the department's unilateral decision to subject all physicians to competency testing. (See story in *CPER* No. 170, pp. 55-57.) The UAPD emphasized that it supports efforts to determine whether physicians are fit to work in the prisons' medical facilities, and agrees that negligent physicians should be disciplined. It agrees with court experts that serious complaints about physician

The union asserts that the testing program has caused many competent physicians to resign.

negligence should be investigated by a management physician, not an internal affairs investigator, who normally investigates correctional officers.

However, UAPD insists that the corrections department implemented the competency review of physicians in a "fundamentally counterproductive" manner by requiring all the doctors, regardless of credentials or work history, to submit to a standardized examination with little notice or chance to study and with the risk that they will be reported to the California Medical Board if they fail the test. The union asserts that the testing program has caused many competent physicians to

resign, exacerbating the shortage of qualified doctors. The UAPD agrees that competency testing might be appropriate for individually identified physicians.

At the end of June, the court decided to appoint a receiver, who will likely be given authority to hire and fire employees. However, the judge assured the unions in a May hearing that he would "not empower a receiver to interfere with [the unions'] contractual rights."

The unions requested appointment of a receiver who will recognize the

importance of a stable workforce and who will work with them and the department toward reform. The three unions recommended John Hagar, who served as a special master in a case involving Pelican Bay State Prison, as a temporary receiver for the medical system. In their words, Hagar "has demonstrated his ability to improve the provision of medical care at Pelican Bay" and "has earned the trust of unions representing medical personnel at that facility." *

SPB Review of Contract Is Not Inadequate Where Challenge Is Untimely

In an unpublished opinion, the California Court of Appeal stressed the advantage of challenging a public contract before the State Personnel Board prior to its approval by the Department of General Services. It found no basis for the contention of the California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment that SPB review was inadequate to challenge the state's contract with an outside entity for administrative hearings and mediations. It therefore upheld the trial court's ruling that CASE had failed to exhaust its administrative remedies when it challenged a contract in court rather than under SPB procedures. The Court of Appeal also rejected the contention that CASE could

"end-run" the doctrine of exhaustion of administrative remedies by suing in its capacity as taxpayer. In addition, the court held that the section of the Education Code providing for administrative hearings and mediation in special education cases is not unconstitutional on its face.

State employee organizations can demand that the SPB review a contract for services to determine whether it falls within an exception to the general rule that the state cannot contract out work that civil service employees normally perform. If an employee organization challenges the contract before the Department of General Services approves it, the contract does not become effective until approved by the

SPB. (See related story in *CPER* No. 172, p. 59.) CASE has repeatedly challenged the state's contracts to hire outside hearing officers and mediators for hearings required by federal law in cases regarding education and services for children with disabilities.

If challenged, the contract does not become effective until approved by the SPB.

The Department of Education cannot conduct the proceedings because federal law requires that hearing officers and mediators not have a conflict of interest. In September 2000, the state contracted with McGeorge School of Law to perform the hearing and mediation services. In June 2002, CASE requested that the SPB review the three-year contract, contending that the work could be performed by the administrative law judges in the Office of Administrative Hearings. The SPB's executive officer disapproved the contract on April 30, 2003, just before the contract expired on May 31, 2003. The state then entered into a one-year contract with McGeorge for the period from June 1, 2003, to May 31, 2004.

Rather than request SPB review of the one-year contract, CASE filed a petition for writ of mandate and com-

plaint for injunctive relief, asking the court to bar the Department of Education from contracting out the work. The trial court ruled that CASE had failed to exhaust the administrative remedies provided by the SPB.

In the Court of Appeal, CASE argued that it should not be required to exhaust administrative remedies because the SPB remedy was inadequate. First, it contended that the SPB did not have the authority to determine whether the hearing officer and mediator work was civil service work under the California Constitution. But the court pointed out that the Public Contract Code authorizes the SPB to determine whether a contract complies with the statute that implements the constitutional rule against contracting out state services.

The court also rejected the contention that the SPB remedy was inadequate because the SPB has no authority to terminate a contract or curtail expenditures on the contract. The court criticized the union for "miss[ing] the point." "Had CASE made a timely request to the SPB, no issue of termination or curtailment would arise because the contract would not have become effective until approved by the SPB."

The court also turned aside CASE's argument that the SPB process resulted in an untimely remedy. The SPB's action on the prior three-year contract was not a good example for showing inadequacy of the remedy, the court said, since CASE waited nearly two years to file the challenge. *

Discrimination

Firing Pregnant Employee Not Sexual Discrimination

The Second District Court of Appeal has determined that a woman who was terminated while pregnant could not establish sexual discrimination because her employer did not know of her pregnancy at the time of the firing. In *Trop v. Sony Pictures Entertainment*, the majority found that, even if the woman had been able to present a prima facie case of discrimination, her claim would have failed as the record established she was terminated for poor work performance, not because of her pregnancy.

Factual Background

Anne Trop was hired as an assistant to producer/director Betty Thomas in May 2001. A year later, she told another Sony producer she was attempting to get pregnant and asked her not to tell anyone else. She also confided in two friends of Thomas, and asked them not to tell anyone. At a meeting with the two friends, another producer, Jenno Topping, a friend of Thomas', intimated that she knew and "made this belly thing."

By mid-October 2002, Thomas began to notice deficiencies in Trop's performance, and by November, had decided to fire her. At the end of October, Trop told Thomas she wanted to take time off to have a fibroid removed.

According to Trop, Thomas asked her if she was trying to get pregnant and she replied, "Trying," to which Thomas responded sarcastically, "Good luck." By mid-December, Trop suspected she was pregnant. At a Christmas party at Thomas' house, she began playing with a baby. In front of Thomas, she said, "It looks like I get to have one of my own," to which Thomas responded, "Not while you are working for me." Trop took a vacation in December from which she returned late.

On January 28, 2003, Thomas met with Trop and fired her. Thomas listed work-related reasons for the firing, including that she needed "somebody here who wants to be here and who doesn't have a life," referring to the vacation, and mishandled phone messages. According to Trop, she started crying and said, "You knew I was pregnant," or "You know I am pregnant." Thomas went "crazy," asking, "What were you thinking? How could you possibly be my assistant and be pregnant? How did you think it was ever going to work?" Trop said, "Women get pregnant every day." Thomas responded, "Well, that was never going to happen here."

Thomas recalled the exchange differently. She testified that, after she told

Trop she was fired, Trop said there was something she wanted to say, but added "I don't want to tell you, because you are going to think I'm saying this because you fired me." She finally said to Thomas, "I'm pregnant." Thomas maintained that, prior to that meeting, she knew nothing of Trop's pregnancy or the fact that Trop was trying to get pregnant.

Trop filed suit alleging sexual discrimination based on pregnancy and wrongful termination in violation of public policy. The trial court dismissed

The record established she was terminated for poor work performance.

the case, finding that Thomas fired Trop because she was dissatisfied with her work performance and that Thomas did not know Trop was pregnant before the firing. Trop appealed.

Court of Appeal Decision

The majority of the court rejected Trop's contention that the statements allegedly made by Thomas constituted direct evidence of discrimination. Quoting from *Kennedy v. Schoenberg, Fisher & Newman, Ltd.* (7th Cir. 1998) 140 F.3d 716, the court explained, "to rise to the level of direct evidence of discrimination, this Court has stated that isolated comments must be con-

temporaneous with the discharge or causally related to the discharge decision making process.” Here, the court found that Thomas’ comment at the Christmas party was ambiguous, was made in casual conversation, and occurred a month prior to the firing. “This conversation was unrelated to Trop’s work performance and there was no evidence of a causal relationship between Thomas’ statement and the decision to terminate Trop’s employment.” All of the other statements were made after Trop was fired and so could not be evidence of prior knowledge, reasoned the court.

*‘Defendant’s reasons
for terminating
Trop’s employment
were creditable
on their face.’*

The court also found that Trop failed to meet the test set out by the Supreme Court in *McDonnell Douglas v. Green* (1973) 411 U.S. 792, for proving disparate treatment. “The *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be *inferred* from facts that create a reasonable likelihood of bias and are not satisfactorily explained.”

Trop failed to meet the first prong of this test, concluded the court, because “she failed to raise a triable issue of fact that Thomas knew that Trop was pregnant before Trop was fired.”

The court quoted from *Geraci v. Moody-Töttrup International, Inc.* (3rd Cir 1966) 82 F.3d 578, a case in which “the facts are remarkably similar to the instant case.”

When the pregnancy is apparent, or where plaintiff alleges that she has disclosed it to the employer, then a question of the employer’s knowledge would likely preclude summary judgment. If the pregnancy is not apparent and the employee has not disclosed it to her employer, she must allege knowledge and present, as part of her prima facie case, evidence from which a rational jury could infer that the employer knew that she was pregnant.

In this case, the majority determined that none of the employees in whom Trop had confided told Thomas of her pregnancy. The court found that her comments about having a fibroid removed and hoping to become pregnant “fall far short of establishing that Thomas was aware of Trop’s pregnancy.” And, said the court, her statement to Thomas at the Christmas party “is so ambiguous as to be insufficient, as a matter of law, to establish that Thomas knew that Trop was pregnant.”

Furthermore, the defendants satisfied the second prong of the *McDonnell Douglas* test “by presenting competent, credible, and admissible evidence of non-discriminatory reasons for terminating Trop’s employment,” stated the

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you free. But first, it
will piss you off.**

Gloria Steinem

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court. “Defendant’s reasons for terminating Trop’s employment were creditable on their face — her job performance did not meet Thomas’s demanding standards.” Trop herself admitted that she had mishandled phone messages, took an extended vacation during a busy work period, and returned late from vacation.

Trop did not refute the defendants’ showing, found the court. “Plaintiff produced no evidence to rebut defendant’s showing that: (1) Thomas made the decision to fire Trop before Trop learned she was pregnant; (2) Trop’s job performance was unsatisfactory for Thomas’s needs; and (3) Thomas did not know of Trop’s pregnancy until after the firing.”

Justice Richard Mosk dissented, finding that Thomas’ statements at the time of Trop’s termination “satisfied the direct evidence standard for statements disclosing a discriminatory bias against pregnant employees” and that the statements were contemporaneous with her termination. In Mosk’s opinion, Trop submitted sufficient evidence to raise a triable issue of fact as to whether Thomas knew that Trop was pregnant at the time she terminated her. He pointed out that Thomas maintained that she decided to terminate Trop in November, *prior* to Trop returning late from vacation, which was given as one reason for the termination. “Thus, the evidence of when Thomas decided to fire Trop is equivocal.” Justice Mosk concluded by stating, “Trop’s case may not appear strong. Nevertheless, I believe she has

submitted enough evidence to have her case tried by a finder of fact — judge or jury.” (*Trop v. Sony Pictures Entertainment, Inc.* [5-31-05] No. B174101 [2d Dist.], 129 Cal.App.4th 1133, 2005 DJDAR 6257.) *

State Supreme Court to Decide Test for Retaliation

The California Supreme Court is expected to issue a decision that will determine the test to be used in evaluating claims of retaliation for protected activity under the state’s Fair Employment and Housing Act. The case, *Yanowitz v. L’Oreal*, involves a supervisor who alleges that she was harassed for refusing to fire a female employee whom her boss said was not attractive enough.

Yanowitz claims that in 1997, when she was a regional sales manager for the cosmetics firm L’Oreal, a male boss ordered her to fire a dark-skinned female sales associate. He allegedly instructed her to “get me somebody hot.” Later, after a “young, sexy blond” passed by, he allegedly stated, “God damn it, get me one who looks like that.” Yanowitz refused to fire her employee, telling her boss that he needed to give her a better reason to do so.

Yanowitz was subjected to a campaign of retaliation, as alleged in her court papers. As a result of the stress, she left work on disability leave and never returned to her job. She sued L’Oreal for sex discrimination and retaliation.

ment, Inc. [5-31-05] No. B174101 [2d Dist.], 129 Cal.App.4th 1133, 2005 DJDAR 6257.) *

The trial court dismissed her case, but the Court of Appeal ruled in her favor, applying the general “deterrence test” for the first time in California. Under that test, retaliation is defined as conduct that would deter an employee

The Court of Appeal applied the general ‘deterrence test’ for the first time in California.

from engaging in protected activity. The appellate court, in its now unpublished decision, also set a precedent by ruling that plaintiffs can bring sex discrimination claims on behalf of other people. The Supreme Court heard argument on the case on May 25, 2005. (*Yanowitz v. L’Oreal, Inc.* [2003] previously published at 106 Cal.App.4th 1036.) *

'Nitpicking' Is Not Retaliation

Nitpicking does not constitute the requisite adverse employment action needed to maintain a claim for retaliation under California's Fair Employment and Housing Act, held the Second District Court of Appeal. In *Pinero v. Specialty Restaurants Corp.*, the court avoided choosing between two different court-developed tests for retaliation, finding that "nitpicking" did not qualify under either test.

Factual Background

Specialty Restaurant Corp. hired Alberto Pinero as the manager of a restaurant in Monterey Park. After 14 months in that position, Pinero was promoted to general manager of Castaways, SRC's flagship restaurant. Several months later, Pinero's supervisors learned that Pinero was the plaintiff in a pending age discrimination action against a former employer who was also a member of the Monterey Park City Council. Pinero had not disclosed this fact prior to being hired by SRC. At a meeting held May 18, 1999, an SRC attorney told Pinero that he should dismiss his lawsuit and that he would be fired for having concealed the lawsuit from SRC.

Pinero claimed that after the meeting, Hoss Babaie, his immediate supervisor, began to criticize him repeatedly about work-related matters. By mid-August 1999, Pinero concluded he

could no longer handle the situation and resigned. In spite of the threat of termination and the work-related criticisms, Pinero was not fired, demoted, or transferred; nor did he lose any benefits, suffer a reduction in pay, or experience a change of job duties or responsibilities.

Pinero sued SRC, claiming that it had retaliated against him in violation of the FEHC for filing an age discrimination suit. The trial court dismissed the case, and Pinero appealed.

Court of Appeal Decision

In order to prove retaliation, "a plaintiff must show he engaged in a protected activity, his employer subjected him to an adverse employment action, and a causal link exists between his protected activity and the employer's action," explained the court. There was no question that the filing of an age-discrimination action qualifies as a protected activity.

The court identified the main issue as whether SRC's treatment of Pinero rose to the level of retaliation. The court noted that the FEHA does not define "adverse employment action" and only three published California cases have addressed the meaning of the phrase: *McRae v. Department of Corrections* (2005) 127 Cal.App.4th 779, 172 CPER 79; *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441; and

Thomas v. Department of Corrections (2002) 77 Cal.App.4th 507, 141 CPER 47. However, a number of federal cases have considered the issue under analogous federal statutes, which the court divided into three groups. The first group holds that an adverse employment action is limited to ultimate employment decisions, such as firing, demotion, or reduction in pay. The sec-

*Pinero was not
fired, demoted, or
transferred.*

ond group takes a broader view and includes a wide range of employment decisions, "so long as the decision or action materially and detrimentally affected the terms and conditions of a plaintiff's employment." The third group has adopted the Equal Employment Opportunity Commission's "deterrence test," which defines an adverse employment action as "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."

The court agreed with the other California courts and rejected as too restrictive the view that adverse employment actions were limited to ultimate employment decisions. All published state decisions "have uniformly held an intermediate retaliatory employment action may suffice," but only

if the decision or action “had a substantial and material adverse effect on the terms and conditions of the plaintiff’s employment.”

But in analyzing the case before it, the court found it did not need to choose between this test and the EEOC’s deterrence test because Pinero’s complaints did not qualify under either. Under the deterrence test,

The court found it did not need to choose between this test and the EEOC’s deterrence test.

“only non-trivial employment actions that would deter reasonable employees from complaining about discrimination will constitute actionable retaliation.” “In short,” stated the court, “neither the materiality nor the deterrence test grants an employee license to litigate his displeasure or trivial grievances with an employer’s work-related criticisms. That is precisely what occurred here.”

Applying the materiality test, the court found that “by Pinero’s own admission, his job responsibilities and title did not change, he was not demoted, and his salary, bonus structure, benefits and all other forms of compensation suffered no impact as a result of his

employer’s knowledge of his lawsuit.”

Pinero’s case did no better under the deterrence test, determined the court. Pinero himself admitted that his immediate supervisor’s criticisms “never rose above the level of ‘nitpicking.’” Although the other supervisor’s criticisms were harsher, they were leveled only once, and that occurred more than a week before the supervisor learned of Pinero’s lawsuit. SRC’s criticisms of Pinero’s job performance also failed to satisfy the test as Pinero could not show that either of the supervisors acted from a retaliatory motive. Said the court:

From an objective standard, the evidence does not reveal any employer decision or action which a jury could conclude would be reasonably likely to deter a reasonable employee from engaging in protected activity. Before his promotion, Pinero was a model employee who apparently had never been criticized by his employer. While it is understandable Pinero was angered, displeased or even insulted by the criticisms he received when he took over Castaways, such displeasure is simply not actionable. The trial court correctly concluded, as a matter of law, that the “nitpicking” about which Pinero complained was at most a “minimal inconvenience, not material, not substantial.” No basis exists on which to conclude Pinero was subjected to adverse employment action by SRC.

(Pinero v. Specialty Restaurants Corp. [6-22-05] No. B177111 [2d Dist.] ___ Cal.App.4th ___, 2005 DJDAR 7535.) *

General

Governor Fills PERB Vacancy

On June 16, Governor Schwarzenegger appointed Karen Neuwald to the Public Employment Relations Board. Neuwald had been chief of the Office of Governmental Affairs for the California Public Employees Retirement System. She previously served as assistant director for legislation at the Department of General Services, and legislative coordinator and staff services manager for the Department of Personnel Administration. She also was an analyst with the Legislative Analyst's Office of the California legislature.

With Neuwald's appointment, PERB now is fully staffed with five board

members. In addition to Neuwald, the board is comprised of Chairperson John Duncan and Members Al Whitehead, Lilian Shek, and Sally McKeag.

The governor also appointed Gregory Lyall as legal advisor to PERB Member McKeag. Lyall previously served as staff counsel for the Department of Personnel Administration and as an associate in the firm of Kronick, Moskovitz, Tiedemann & Girard, where he represented cities and local agencies. Lyall also worked as an attorney with Pinnell and Kingsley, representing school districts, fire protection agencies, and local governments. *

PERB's standard unfair practice and proof of service forms. These forms are currently available on PERB's website at www.perb.ca.gov.

To include attachments to the unfair practice charge, the application would allow the charging party to upload digital copies of documents. These then would be attached to the completed unfair practice charge.

PERB will require the online filer to submit an original, signed version of the submitted forms to the board through U.S. mail. This is now required when unfair practice charges are submitted using a fax machine.

PERB seeks input on online filing of unfair practice charges.

Once the unfair practice form, the uploads, and the proof of service documents are completed, an email confirmation will be sent to the charging party's email address.

Before the board proceeds with the design and implementation of this online system, it is soliciting input from its constitutions. Test screens have been set up to allow use of the upload documents feature at www.perb.ca.gov/onlinefiling/login.aspx. Provide your comments via email to epotter@perb.ca.gov.

PERB Wants Your Input

The Public Employment Relations Board is seeking input from all interested parties concerning the possibility of allowing online filing of unfair practice charges. It also hopes to convene an ongoing advisory committee to help the agency better serve its constituents.

In order to use the proposed electronic filing program, a charging party

will have to have access to a computer with a Windows or Mac operating system; an Internet browser such as Microsoft Internet Explorer, Netscape Navigator, or Mozilla Firefox; an Internet connection; and digital copies of any attachments.

Initially, the online filing program would prompt the user to answer questions that correspond to the blanks on

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

William James

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

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Pocket Guide to Unfair Practices: California Public Sector

See back cover for price and order information

Encouraged by the showing of support last year at the public hearings conducted to address the California Performance Review, PERB is hoping to establish an ongoing advisory committee comprised of constituents and agency staff. The board envisions that the committee will discuss new projects and initiatives, like the electronic filing plan, website improvements, regulatory review, budgetary issues, factfinding costs, and any other subjects related to its role as administrator of the collective bargaining statutes under its jurisdiction.

The board will convene a meeting to discuss the proposed advisory committee and is looking for input concerning committee membership, frequency of meetings, and topics for future consideration. The meeting is scheduled for September 8, beginning at 10 a.m., at PERB's headquarters, 1031 18th Street, Board Room 103, in Sacramento. *

Public Sector Arbitration

No Reemployment Rights After Transfer From Public Agency to Private Employer

While it is not unusual for public agencies to merge, it is extremely rare for a California public utility to literally get out of the business. That is what happened in Stockton. The city decided to outsource the majority of its water services and, as a result, several hundred employees, many of long tenure, lost the many amenities that go with public employment these days. While the union and the city worked out agreements on most issues involved in this divestiture, they disagreed about what rehire rights the now private sector employees had.

In early 2001, the City of Stockton first embarked on its plan to contract out the water and wastewater services that traditionally had been provided by the municipal utilities district. The city initially declined a request from Operating Engineers Local Union No. 3, the union representing the MUD employees, to negotiate the terms of the transfer, and the union filed several unfair practice charges with the Public Employment Relations Board. After a change of heart, which coincided with a change of legal counsel, the city initiated negotiations with the union on both the decision and the effects of the plan to contract out bargaining unit work.

PERB charges were placed in abeyance pending arbitration.

Negotiations occurred in two phases, both of which were lengthy and contentious. The union membership opposed the plan and wanted the union to stop it. But the city was determined, and plans moved ahead.

The special agreement appeared to resolve all the substantive issues.

The first phase, which was completed in February 2002, covered the terms of the request for proposals. The RFP included the names and positions of MUD employees to be transferred to the private employer. The city selected the employees designated for transfer based on the employees' program or division at MUD. Employees working in water and wastewater were to be transferred to the private employer, while employees associated with the storm-water program, acquiring new resources, and managing the private employer contract were to remain with MUD. The union agreed to all the terms, and the RFP went out to bid.

During the second phase of negotiations, the parties reached agreement on the terms and conditions of the transfer of the employees to a private employer. The special agreement appeared to resolve all the substantive issues regarding the transfer and settled the PERB unfair practice charges and a civil lawsuit filed by the union.

The agreement included a unique provision, at least in the public sector, for "transfer pay." Transferred employees were to receive a lump sum on the day they were moved from the city to the private employer. During bargaining, the union described those payments as a "severance" to compensate the transferred employees for "losing the dream" of being employed and retiring from the city.

As for rehire rights, the agreement provided that "all designated employees employed by the provider at the time of cancellation or replacement will have a right to return to the city employment or the successor provider upon the cancellation of the agreement between the city and the provider, or upon the replacement of the provider with another operating entity or with the city itself. The terms and conditions of employment will be equal or better wages and benefits and comparable retirement benefits."

OMI/Thames Water was the successful bidder for the contract.

On July 30, 2003, one day before the transfer was to take effect, the union filed a grievance on behalf of Frank Tucker, an environmental control of-

ficer, who was among the employees slated to be transferred to OMI. Tucker and the union asserted that this transfer of employees was a layoff under the parties' MOU, which stated that layoffs shall be by job classification according to reverse order of seniority. The union contended that the city had violated the agreement because Tucker was more senior than another ECO who was designated to remain with MUD.

The city moved forward with the transfer of work and employees on August 1, 2003, and Tucker promptly ap-

The more recent contract must be given deference.

plied to the Public Employees' Retirement System for his service retirement. His retirement was granted.

On September 15, 2003, after the transferred MUD employees, including Tucker, had collected their "severance" payments, the union filed a generic grievance claiming that the transfer of work and employees was a "layoff." The union also charged that the transferred former employees should have reemployment rights under the MOU.

The city contended that the special agreement applied, not the MOU, which expired the day the employees

were transferred. According to the city, the special agreement was negotiated specifically to cover the transfer and included a generous severance payment in exchange for the employees' complete separation from the city. In exchange for the payment, the employees waived their rights to the vestiges of city employment. The city asserted that the union leadership clearly understood this and that the agreement was very specific. The union disagreed, stating it did not waive the reemployment rights under the MOU or civil service rules.

The two grievances were processed and joined for hearing before arbitrator Chris Burdick because they involved the same contention, that the transfer constituted a "layoff" governed by the provision of the MOU or the civil service rules, or both.

The first issue for Burdick was to determine which agreement applied to the grievances: the MOU and the civil service rules, as the union argued, or the special agreement covering the transfer, as the city urged.

Burdick began his analysis with the premise that where two agreements arguably cover the same subject matter, the more recent contract must be given deference. In this case, he found, because the special agreement was the most recent labor contract negotiated by the parties, it should be given deference. This conclusion was further supported by the agreement itself, which expressly declared that the MOU no longer applied after the date of transfer. Besides, Burdick noted, the MOU

The first rule of holes: when you're in one, stop digging.

Molly Ivans

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Pocket Guide to Public Sector Arbitration: California
(3rd edition)

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clearly stated that only employees in the bargaining unit can be grievants. Tucker and the other grievants were no longer unit members because the positions they formerly occupied no longer existed in the unit represented by the union

Burdick also noted that the special agreement directly addressed the recall and reemployment rights of transferred employees, the very subject of the second grievance. No other reemployment rights were expressly provided or referenced. The contract did not refer to the civil service rules in any regard. Therefore, according to the agreement, reemployment rights were provided to the transferred employees only if the OMI contract is cancelled or replaced. This favored the view that the parties agreed the negotiated transfer involved a full divestiture of employment rights, not just a temporary layoff from employment. Burdick also found that the unprecedented severance payments supported this position. Also pertinent was the fact that the union had not made any proposals about layoffs during negotiations.

Burdick concluded that the MOU had expired at the time of the transfer and the transferred employees' rights as they related to the city were addressed by the special agreement, which granted them only limited recall and reemployment rights that did not apply to this situation. (*Operating Engineers Local Union No. 3 and the City of Stockton* [12-9-04] 19 pp. *Representatives*: Matthew Gauger, Esq. [Weinberg,

Roger & Rosenfeld] for the union; William Kay, Esq. and Alison Moller, Esq. [Kay & Stevens] for the district. *Arbitrator*: Christopher D Burdick.) ❁

Arbitration Log

• Discipline

International Union of Operating Engineers, Stationary Engineers, Loc. 39, and Dublin San Ramon Services Dist. (9-10-04; 25 pp.) *Representatives:* Antonio Ruiz, Esq., (Weinberg, Roger & Rosenfeld) for the union; Jack W. Hughes, Esq. (Liebert, Cassidy & Whitmore), for the district. *Arbitrator:* William E. Riker, CSMCS Case No. ARB-03-1857.

Issue: Was the grievant terminated for just cause?

District's position: (1) The grievant, a licensed water system operator with approximately 20 years experience, was employed by the district for five years. A critical task is to monitor and manage the level of fluoride put into the water, as heightened levels pose a significant health hazard. On April 24, 2003, the grievant did not bring a pump online correctly, failed to follow proper procedure in responding to an alarm, and failed to follow proper sampling procedure. During the investigation, the grievant lied about his actions, and was terminated for violating the personnel rules concerning incompetence and/or inefficiency and dishonesty.

(2) Maintenance was completed on the pump and a mechanic gave the grievant instructions regarding the proper settings. The grievant declined the mechanic's offer of assistance. When the grievant brought the pump

online himself, he failed to set it to the appropriate speed or put it in automatic mode.

(3) Noticing a problem with the fluoride level, the grievant requested that maintenance personnel check the pump, but he did not wait for them at the pump per district procedure.

(4) High fluoride levels set off the alarm, which caused the grievant to be paged. The grievant tried to turn off the alarm instead of responding to the pages.

(5) After the pump was reset, the grievant did not follow the collection procedure.

(6) This was not an isolated incident. In June 2002, the grievant allowed excessive amounts of fluoride to be added to the water system and failed to take proper action. This resulted in multiple customers becoming ill, with some requiring hospitalization. The grievant was given an 80-hour suspension and was required to attend and then deliver training to all water system personnel. This should have effectively

provided the grievant with the knowledge and skills to understand and perform the necessary procedures, and should have impressed upon him the importance of his job.

Union's position: (1) There was no direct evidence that the grievant did anything improper. He brought the pump online at the appropriate speed and in the appropriate mode, and then monitored the pump to ensure it was working properly. His request that maintenance check the pump was purely precautionary, not because anything was wrong.

(2) The grievant never received any pages from the system. The system did not work consistently and was replaced after the grievant's termination.

(3) Evidence from the monitoring system contradicts the mechanic's testimony and supports the grievant's testimony.

(4) There was no evidence of intentional misconduct.

(5) The grievant's role as a shop steward influenced the district's decision to terminate, rather than invoking a lesser step of discipline.

Arbitrator's decision: The grievance was denied.

Attention Attorneys and Union Reps

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Arbitrator's reasoning: (1) In weighing the grievant's word against the mechanic's, there was substantial evidence in support of the district's position, including testimony of witnesses gathered through independent investigations, reports generated by the monitoring equipment, and the maintenance request fax from the grievant.

(2) The grievant's misinterpretation of data demonstrated his failure to master a fundamental job duty. Despite the district's good faith effort to reinforce his technical and procedural skills by affording training, the grievant failed to understand basic operational facts that he should have been aware of based on his journey-level status. While perhaps not the direct cause of the fluoride misfeed, he impaired the district's ability to respond appropriately and might have worsened the situation but for the mechanic's quick intervention.

(3) The grievant's claim that he never received any pages was undermined by evidence that showed receipt and acknowledgment of the alarms as well as an attempt to clear them. The grievant likely received the pages or authorized someone else to respond for him.

(4) In some industries, mitigating factors would allow management the flexibility to follow progressive corrective action. That is not an option for the district because a system failure results in serious consequences. While there are some checks and balances in the system, the organization relies on

individual performance and initiative, undertaken without close supervision.

(5) The contention that the grievant's union activity influenced the district's decision was undermined by the credibility of the witnesses and the fact that the district had to replace the grievant, thus burdening other staff members. While a coordinated cover-up is a possibility, the spontaneity, linking, and sequencing of events made that unlikely.

(6) Based on the preponderance of the evidence, there was just cause to discipline the grievant.

(Advisory Arbitration)

- **Out-of-Class Pay**
- **Civil Service Rules**
- **Reclassification**

City and County of San Francisco (Dept. of Public Health) and Service Employees International Union, Loc. 250 (11-18-04; 18 pp.)
Representatives: Thornton C. Bunch (deputy city attorney) for the union; Jack W. Hughes, Esq. (Weinberg, Roger & Rosenfeld), for the city. *Arbitrator:* Frank Silver.

Issue: Did the city violate the collective bargaining agreement by denying the grievants acting assignment pay?

Pertinent contract provisions: Paragraph 284: "An employee assigned in writing by the Department Head to perform a substantial portion of the duties and responsibilities of a higher classification shall be entitled to out-of-class pay after the tenth work day (within a sixty working day period) of such an assignment, retroactive to the first day of the assignment."

Union's position: (1) Medical evaluation assistants in the emergency department performed a substantial portion of the duties of certified nursing assistants, a higher-paid classification, and were entitled to acting assignment pay. The medical assistants were to clean and transport patients, handle their property and clothing, and administer medical tests. This occurred because the hospital transferred nursing assistants out of the emergency department in 2001. The medical assistant job description indicates that they assist in administering medical tests but does not refer to maintaining patient personal hygiene, which is part of the nursing assistant job description.

Employer's position: (1) Medical assistants were performing a permanent, not temporary, assignment within their own job descriptions and had been since the nursing assistants were transferred in 2001.

(2) This is a critical distinction of an acting assignment under the parties' agreement. The fact that the medical assistants' duties overlapped with nursing assistants does not warrant the "out of class/acting assignment pay." The similarities of the work militates against the conclusion that the assignment was to a higher classification.

(3) The union's recourse was to either negotiate higher wages for medical assistants or seek a civil service commission review of the class. The agreement mandates that disputes concerning related duties are not subject to the grievance procedure and must be submitted to the commission.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) The civil service medical assistant job description does not list any duties with regard to caring for the hygiene of patients, taking inventory of their clothing and possessions, or transporting them between departments. The nursing assistant job description did list those duties. Therefore, those duties were outside the medical assistants' job description. The hospital had, in the emergency department, combined the two jobs into one, having the medical assistants perform a substantial portion of the nursing assistant duties.

(2) Employment opportunity announcements issued by the Department of Human Resources do not support the city's argument that the medical assistants were performing duties within their classification. Class specifications, not job announcements, are the primary source for determining whether employees are performing out-of-class duties.

(3) The agreement provides that denials of out-of-class claims are appealable through the grievance proce-

dure. The fact that the hospital does not consider the duty assignments to be temporary does not foreclose the conclusion that the medical assistants have a valid out-of-class claim.

(4) Medical assistants continue to perform the core duties of their class as well as a substantial portion of the duties of nursing assistants, a higher classification. This is not the assignment of a minor portion of work duties as authorized by civil service rules.

(5) The civil service definition of temporary out-of-class assignments sets a different standard than the contractual definition for out-of-class pay. The dispute is an out-of-class pay claim arbitrable under the contract, not a request for classification or reclassification subject to determination by only the civil service commission.

(6) The medical assistants are entitled to out-of-class pay retroactive from 2001 with interest, until they are no longer required to perform a substantial portion of the duties of the nursing classification or until the parties mutually agree on the duties and compensation of the medical assistants.

(Binding Grievance Arbitration)

• Contract Interpretation

International Federation of Professional and Technical Employees, Loc. 21, AFL-CIO, and City of Richmond (12-22-04; 25 pp.) *Representatives:* Robert J. A. Bezemek, Esq., for the union; Bruce Souble, Esq. (City Attorney's Office, City of Richmond), for the city. *Arbitrator:* Matthew Goldberg, CSMCS Case No. ARB-03-2013.

Issue: Did the grievant retain her status as a permanent employee of the city with bumping rights when she was laid off from her term position?

Pertinent contract provisions: Sec. 4.6: "Designation of Types of Appointment and Service (g) Term: Term appointments shall be used to select management employees for identified special budgeted projects and additional workload that required more than 180 days for completion....Such projects or temporary additional workload should be specific, citing what actually needs to be done. This work plan shall be submitted as an attachment to the Personnel Requisition Form."

Rule XIV. General Provisions Sec. 5: "Waiver of Rights: No officer or employee shall require a candidate for employment, or any temporary or probationary or permanent employee to sign any document whereby such person waives any rights accruing to him/her under the provisions of Article XIII of the Charter or of these Rules."

City's position: (1) The grievant was hired by the city in November 1994 as an employment program specialist and

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achieved permanent status on March 1, 1995. The grievant actively pursued other employment opportunities within the city and, as a result of her efforts, a term employment program manager position was created for her in the housing authority. She started the new assignment in February 2002. On March 19, 2003, the grievant was notified that the city was eliminating positions in her classification and, effective April 7, her employment was terminated.

(2) The grievant's job change was not a transfer. When the grievant took the term assignment in the housing authority, she gave up her status as a permanent employee of the city. Employees on term assignments maintain their permanent status and rights only when they are in a position in the same department, unless a special agreement is negotiated.

(3) The grievant was informed by human resources that in order to take the assignment, she would have to resign her position with the city and relinquish her seniority rights. The personnel action form documenting the change provided clear notice to the grievant both that she would have to tender her resignation with the city and that the only permanent status she had was as an employee of the city.

(4) The employee may have a position in a particular department or division, but it is the city that is the ultimate employer. When an employee is hired by the city and successfully completes probation, he or she becomes a permanent employee of the city and not of the individual department. Maintaining

dual employment status would make managing the city's labor force extremely difficult.

(5) The grievant did not have bumping rights when she was laid off from the housing authority.

Union's position: (1) The agreement protects bargaining unit employees from layoff by providing that an employee designated to be laid off may exercise bumping rights to any previously held classification provided their seniority date is greater than at least one employee in the classification. The agreement defines seniority by classification and not department.

(2) The grievant would not have been laid off if she were permitted to exercise her bumping rights to employment program specialist as she had greater seniority than at least a dozen employees in that classification.

(3) Nothing in the agreement states that permanent employees lose their status by assuming term appointments. Other employees who accepted term positions were able to return to their permanent positions.

(4) The city does not have a right to negotiate private deals with employees to enhance or diminish seniority or bumping rights. Rule XIV prohibits the city from conditioning a transfer on a waiver of seniority.

(5) Even assuming the city could require an employee's resignation in order to transfer to a term appointment, the grievant never actually resigned. The grievant was not asked for a written resignation and she never submitted one, nor did she sign anything that

said she was resigning. The personnel action form did not indicate that the grievant was relinquishing her permanent status with the city or from her classification, just from the department. There is nothing to indicate that the grievant knowingly waived her rights.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) The grievant's position in the housing authority did not meet the definition of a term appointment under the rules because there was no work plan or project that the grievant was hired to work on. The work she was assigned may have been for a limited period of time, but it was more similar to a transfer or reassignment than a term appointment or resignation followed by a temporary appointment.

(2) The grievant never was formally advised that she would have to resign from the city to accept the new job. At most, she was informed during an informal conversation with human resources that she would have to give up her job with the E&T department.

(3) Permanent employment status is a valuable property right and cannot be denied or eliminated absent due process. The city failed to provide adequate proof that the grievant knowingly surrendered her rights. The personnel action forms were the only evidence that the grievant gave up her job, but she never received a copy of them. More importantly, the grievant never submitted or signed a resignation form that would indicate she knew she was relinquishing her rights.

(4) The grievant retained her status as a permanent employee with the city and had bumping rights when laid off. The grievant is to be reinstated immediately, without loss of seniority, and made whole for all wages and benefits lost since the layoff.

(Binding Grievance Arbitration)

• **Contract — Consolidation**

United Educators of San Francisco and San Francisco Unified School Dist. (1-7-05; 11 pp.) *Representatives:* Stewart Weinberg, Esq. (Weinberg, Roger & Rosenfeld) for the union; Namita S. Brown, Esq. (Lozano Smith) for the city. *Arbitrator:* Paul D. Staudohar, AAA Case No. 74-390-00042-04.

Issue: Did the district violate the collective bargaining agreement by failing to return the grievant to his previous assignment following his return from leave?

Pertinent contract provisions: Sec. 15.5.4: “No teacher shall be involuntarily transferred two consecutive years without the existence of special circumstances equivalent to school closure or elimination of program.”

Sec. 15.5.6. “A teacher to be consolidated shall be given reasons in writing. These reasons shall include the names of all less-senior teachers being retained whose programs the teacher being consolidated is credentialed to teach and a description of the program need the retained teacher meets, and/or how the retained teacher maintains or improves the racial and ethnic balance of the staff.”

Sec. 10.2.11.4: “Return from sabbatical – A teacher returning from sabbatical leave shall return to the school to which the teacher was assigned, or would have been assigned had the teacher not been on sabbatical leave.”

Union’s position: (1) The district consolidated the grievant for the second time in two years in violation of Sec. 15.5.4. In 2001, the grievant had been involuntarily transferred to the district’s school health programs department as a teacher on special assignment. The grievant was on sabbatical leave for the 2002-03 school year, which did not interrupt the counting of years for consolidation protection. When he returned from the sabbatical, the grievant was consolidated again, this time as a language arts teacher at a middle school.

(2) The district hired two additional TSAs after the grievant went on sabbatical and retained them when the grievant returned, claiming they had skills that fulfilled particular department needs. The grievant’s skills also met those department needs. The district argued that one of two retained TSAs spoke Spanish and possessed a bilingual cross-cultural language arts development credential (BCLAD). The grievant is fluent in more languages than that TSA.

District’s position: (1) The district had to consolidate positions due to a \$3 million budget shortfall in the school health program. The district complied with the agreement by seeking volunteers, notifying the grievant when none had been found, and explaining to him

the rationale for retaining the two junior employees.

(2) The retained TSAs met specific program needs. One had the necessary nutritional expertise to run the school health programs; the other possessed a BCLAD that allowed her to modify the curriculum and provide instruction in another language. The grievant’s nutritional experience was minimal and, while he could speak other languages, he did not have a BCLAD.

(3) The grievant was not consolidated in the 2001-02 school year, as supported by the fact that he never received a notice of consolidation from the district.

(4) The agreement refers to returning a teacher from sabbatical to his or her original school. The grievant was not assigned to a school, but on special assignment in the school health department. Therefore, there was no obligation to return the grievant to his previous assignment.

Arbitrator’s decision: The grievance was upheld.

Arbitrator’s reasoning: (1) There is no question that the grievant was qualified for the job. He was placed in the assignment, even though the TSA job posting listed BCLAD as a minimum requirement. He fulfilled the job duties for a year, and the executive director of school health stated that she would have kept him in the TSA position if there had been volunteers.

(2) The district followed the consolidation procedures as proscribed by the contract. However, they did not meet the burden of justifying what pro-

gram needs the more-junior retained employees met. While the TSA with the nutritional background was highly qualified and met a particular need within the school health department, the reasoning behind retaining the BCLAD TSA over the grievant is not as clear. The grievant reads, writes, and speaks Spanish and is fluent in three Chinese dialects; this would be an asset to the district with its large Spanish-speaking and Chinese-speaking populations. In addition, he possesses 30 years of education experience and therefore would be knowledgeable about learning needs and curriculum. He would be highly qualified to meet the program needs filled by the BCLAD TSA.

(3) The definition of consolidation in Sec. 15.1.4 refers to “teachers assigned to a site or program.” Thus, taking this language into account, an assignment to school health would be protected in the event of a consolidation.

(4) The grievant did not request the transfer to school health and, while he did not receive a consolidation letter, he received written direction to report to the new school. Because the reassignment was not voluntary, it was involuntary and tantamount to a consolidation. There is no dispute that the sabbatical year would not count as interrupting the counting of years for consolidation protection. Therefore, the grievant was consolidated in two consecutive years.

(5) The grievant had a contractual right as a consolidated teacher to be given prior consideration for the next

open position for which he was qualified. Therefore, under the agreement, he had the right to use his seniority to return to the TSA position. By not allowing him to do so, the district violated the agreement.

(Binding Grievance Arbitration)

• Contract Interpretation

El Camino Community College Dist. and El Camino College Federation of Teachers, Loc. 1388, AFT (1-14-05; 12 pp.) *Representatives:* Lance Widman (AFT dispute resolution officer), for the union; Spencer E. Covert, Jr., Esq. (Parker and Covert LLP), for the district. *Arbitrator:* Joseph F. Gentile.

Issue: Does the agreement between the district and the federation prohibit a retired employee from being appointed to a benefits committee by management?

Union's position: (1) In 2003, the college president appointed Phil Knypstra, a retiree of the district, to the insurance benefits committee. The agreement does not allow for a non-employee to become a committee member.

(2) Art. XVII, Sec. 12(a), of the agreement states: “The District has established an Insurance Benefits Committee comprised of representatives of all union-represented employee groups on campus as well as employees representing other non-represented groups.” The person “representing other non-represented groups” is an “employee.” The contract list of employee categories does not include retirees.

(3) Since its inception in 1990, all committee members have been employees.

City's position: (1) Appendix L of the agreement gives the college president authority to designate six committee members as well as two alternative members. The college president appointed Knypstra because of his wealth of knowledge, experience, and understanding in the area of benefits and the operation of the committee.

(2) Retirees currently account for 20 percent of the individuals affected by the committee's decisions and as such should have a voice in the committee. Art. XVII, Sec. 12(a), of the agreement allows for the appointment of non-represented groups. Retirees qualify as a non-represented group.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) When there is substantial compliance with contract grievance procedure, lack of timeliness should not preclude a decision on the merits, especially where the issue is one of first impression.

(2) The parties did not discuss committee membership during negotiations, and Appendix L, which provided guidelines for the committee and its composition, did not specify who could be a member. However other provisions of the agreement clarify what the parties intended.

(3) According to Art. XVII, Sec. 12(a), the person “representing other non-represented groups” is an “employee.” The agreement also lists employee categories, and “retired” is not included in the list.

(4) While not controlling on the party's application of the term, California Education Code Sec. 87467 states that "the retirement of any employee of a community college district under the provisions of any retirement law shall automatically effect the dismissal of the employee from the employ of the district." This section further supports the federation's interpretation.

(5) Past practice established that only employees have been appointed to the committee. This further supports the federation's position.

(6) The president was precluded from appointing the retiree to a position on the committee because he was not an employee at the time of the appointment. The parties did not intend to include retirees when they negotiated the language. While the argument that retirees should be represented on the committee has merit, the arbitrator may not alter, amend, or add to the terms of the parties' agreement.

(Binding Grievance Arbitration)

Public Employment Relations Board

Orders & Decisions

Summarized below are all decisions issued by PERB in cases appealed from proposed decisions of administrative law judges and other board agents. ALJ decisions that become final because no exceptions are filed are not included, as they have no precedent value. Cases are arranged by statute – the Dills Act, EERA, HEERA, and MMBA – and subdivided by type of case. In-depth reports on significant board rulings and ALJ decisions appear in news sections above.

Dills Act Cases

Unfair Practice Rulings

Department's discipline of supervisor not based on protected testimony on behalf of other employees: Dept. of Consumer Affairs.

(California State Employees Assn., Loc. 1000, SEIU v. State of California [Dept. of Consumer Affairs], No. 1711-S, 11-23-04; 35 pp. dec. by Chairperson Duncan, with Member Neima; Member Whitehead dissenting.)

Holding: Discipline of employees' supervisor did not interfere with employees' rights because it was not based on her testimony at their arbitration hearing. CSEA's interest in reports of an investigation concerning customer threats is outweighed by the privacy interests of the customer.

Case summary: Sheila Hawkins supervised a unit of education specialists whose responsibility it was to review applications for licenses of private postsecondary schools. In compiling a report on backlogged cases, Hawkins told her subordinates to define backlogged cases differently than her manager instructed. Her definition underreported the backlog in her unit.

Hawkins also did not assign work according to the directions of her manager. As a result, two of her subordinates, Marcia Trott and Latanya Johnson, filed a grievance for out-of-class pay. Before the arbitration, her managers told her how important it was for the department to win the

grievance. After Hawkins testified that she assigned work without regard to class, her manager told her she had "cost [the department] the hearing."

A few months later, Hawkins' manager questioned her about the backlog report. Hawkins reacted angrily. She was placed on administrative leave during an investigation of the incident and the backlog report. Her subordinates were interviewed but informed they were not the subjects of the investigation.

The investigators concluded that Hawkins' threatening language had violated the workplace violence prevention policy. They also found that she had not trained or supervised her staff efficiently and had given instructions inconsistent with her manager's directions.

The department demoted Hawkins for failure to manage her unit and its workload and for eight instances of rude and unprofessional conduct. The notice of adverse action mentioned her testimony at the arbitration that the employees were working out of class. But the allegations regarding her management and the hearing were withdrawn during the State Personnel Board hearing. The SPB reduced her demotion to a six-month reduction in salary based on her rude and unprofessional conduct.

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The administrative law judge found that the department interfered with the rights of bargaining unit employees when it disciplined the supervisor for testifying in support of their grievance. The department argued that Hawkins would have been disciplined regardless of her arbitration testimony for her antagonistic behavior and improper management of unit assignments. The board reversed.

The board noted that it had no jurisdiction to remedy a supervisor's unfair practice claims. However, based on National Labor Relations Board precedent, it held that discipline of a supervisor could be unlawful if it interfered with employees' collective bargaining rights. The board found that CSEA had raised an inference that the discipline of Hawkins was motivated by her arbitration testimony. The board then shifted the burden to the state to show that it would have disciplined her regardless of her testimony. It found ample evidence that the department's decision was based on her admission that she did not assign work as directed, that she gave her staff inappropriate instructions on compiling the backlog report, and that she had violated the workplace violence policy. Because the department had legitimate reasons for disciplining Hawkins, the board found it had not interfered with employees' rights.

The board rejected the department's argument that collateral estoppel should apply because the SPB had held discipline was appropriate. The board noted that the issues before the SPB were different than the interference and protected activity issues considered by PERB.

The ALJ also had found that the department failed to bargain in good faith by refusing to respond to two CSEA requests for information. The board found that the association's request for information about the investigation of Hawkins was not presumptively relevant to the representation of her subordinates. When the department told CSEA that bargaining unit employees were not the subject of the investigation, CSEA did not meet its obligation to renew or explain its request. Therefore, the board found that the department did not violate its duty to bargain in good faith by refusing to provide the information.

CSEA also had requested information concerning another investigation relating to employee Trott. An applicant seeking to establish a university repeatedly had sent Trott communications complaining about the slow pace of the approval process. Based on Trott's fear that the applicant could become violent, the department initiated an investigation, which determined that the applicant's conduct was not criminal and that he did not pose an immediate threat. CSEA requested information concerning the investigation, claiming it was necessary to determine whether the department had conducted a thorough investigation. The department refused.

The board found that the request was related to workplace safety and, therefore, presumptively relevant. However, relying on NLRB law, it held that CSEA's need for the information should be balanced against the privacy interests of the applicant. Because CSEA was aware that the department had directed the applicant to send communications only to managers, had reassigned another employee to review his application, and had eventually approved his application, CSEA's need for the information was not significant. Therefore, it was outweighed by the applicant's privacy interests, and the department did not violate the duty to bargain by its failure to produce information.

The ALJ's decision was reversed, and the charge and complaint were dismissed. In his dissent, Member Whitehead relied on facts not mentioned by the majority and found a "classic case" that the department had disciplined Hawkins to chill her employees' protected activities. He also concluded the state should have provided the information CSEA requested regarding the investigations of both Hawkins and the applicant.

Steward disciplined for telling employees to violate management directives, not for protected activity: Dept. of Corrections.

(Lucketta v. State of California [Dept. of Corrections], No. 1723-S, 12-13-04; 4 pp.+ 7 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Neima.)

Holding: A union steward did not present a prima facie case that the employer took adverse action against him for protected activity when he instructed unit members not to follow management directives.

Case Summary: Aldo Lucketta is a steward and vice president of the California Association of Psychiatric Technicians. A supervisor issued a memorandum that instructed all psychiatric technicians to read and sign a memo concerning medicine management. Lucketta's memorandum in response stated that the psych techs would not sign the posted memo until they had been advised how to operate their clinics and "all disciplines" had been fully notified.

A few weeks later, Lucketta stated to a supervisor that he had told psych techs to call him rather than the supervisor when they were sick because the supervisor was busy.

Lucketta received a letter of instruction. The letter reprimanded him for telling employees not to initial the supervisor's memo and to call in sick to him rather than to a supervisor as instructed by management.

The regional attorney dismissed the charge because it did not demonstrate the department had issued the reprimand based on an improper motive. The board adopted the R.A.'s decision as its own in an opinion stressing that telling employees to violate management directives is not protected activity.

Exceptions to ALJ proposed decision timely filed five days after extended deadline: State Personnel Board.

(International Union of Operating Engineers v. State of California [State Personnel Board; Dept. of Personnel Administration, Interested Party], No. Ad-343-S, 12-21-04; 6 pp. dec. By Member Whitehead, with Chairman Duncan; Member Neima dissenting.)

Holding: A five-day extension of the deadline applies when the board's letter granting an extension of time to file exceptions to an administrative law judge's proposed decision is served by mail within California.

Case summary: The ALJ's proposed decision was served on the parties on December 5, 2003. The board granted the SPB's request for an extension of time to file

exceptions to the proposed decision, but only until January 15, 2004. The letter granting the extension was served by mail. After obtaining confirmation from the appeals office that a five-day extension of the deadline applied, the SPB filed the exceptions on January 20, 2004. The Department of Personnel Administration argued that the SPB did not have good cause for a late filing.

PERB Reg. 32130(c) provides that a five-day extension of time applies to any filing made in response to documents served by mail if the place of address is in California. There have been no board cases on the issue, but the board observed that its practice has been to interpret the regulation to add five days to deadlines extended pursuant to PERB Reg. 32132. Because Reg. 32130(c) was based on the "mailbox rule" of the California Code of Civil Procedure, the board considered court decisions regarding the rule. However, there were none regarding whether the rule applies when a court or administrative body grants an extension of time to file a response. Therefore, the board found the SPB's exceptions timely and denied the motion to reject them. Member Neima dissented because he did not believe the mailbox rule applies to a document that specifies a date to file a response.

Unfair practice charge dismissed for failure to state a prima facie case: Dept. of Transportation.

(Chen v. State of California [Dept. of Transportation], No. 1735-S, 1-19-05; 2 pp. + 7 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The charge was dismissed because it failed to state a prima facie case.

Case summary: Karin Chen appealed a regional attorney's dismissal of her unfair practice charge against the Department of Transportation. Chen's charge alleged that DOT violated the Dills Act by issuing her a warning letter and an "expectations" memorandum.

The R.A. dismissed the allegation regarding the warning letter as untimely because it was filed more than six months after the alleged violation. The R.A. dismissed the allegation regarding the expectations memorandum for failure to

state a prima facie case. Although Chen demonstrated that she was engaged in protected activity and that her supervisor was aware of it, she did not demonstrate that there was any adverse action. The R.A. noted that even if the memo were to be considered an adverse action, the charge did not demonstrate the required nexus between the adverse action and the protected conduct.

The board adopted the R.A.'s dismissal as the decision of the board itself. Noting that Chen had alleged violations of the U.S. and California Constitutions and of various sections of the Government Code, the board commented that unless the violations of these provisions also allege an independent violation of the Dills Act, the board lacks jurisdiction.

Charge dismissed for lack of evidence: Board of Prison Terms.

(California Attorneys, Administrative Law Judges & Hearing Officers in State Employment v. State of California [Board of Prison Terms], No. 1758-S, 3-24-05; 15 pp. + 10 pp. R.A. dec. By Chairperson Duncan, with Member Shek; Whitehead concurring and dissenting.)

Holding: Insufficient evidence was presented to support the charge.

Case summary: The charging party appealed the regional attorney's dismissal of its unfair practice charge against the Board of Prison Terms.

Although it was not made part of the parties' MOU, the state's practice had been to compensate the deputy commissioners for travel from headquarters (deemed to be their residences) to work locations and between work locations.

During negotiations for a successor agreement, CASE submitted a proposal to include this portal-to-portal practice in the contract. The state later notified CASE that it planned to discontinue the portal-to-portal allowance, but was willing to meet and confer over the impact of the proposed changes. CASE contended there were no provisions in the parties' ground rules for side-table bargaining, and they would await a response from the state as to the proposal they had on the table. The state disagreed and asserted that

negotiations did not preclude discussing the portal-to-portal issue away from the table. CASE continued the dispute but agreed to participate in the impact bargaining.

CASE filed an unfair practice charge alleging that the state unilaterally changed the portal-to-portal-policy, refused to bargain over the issue during successor negotiations, and retaliated against the union for protected activity.

The R.A. held the parties' agreement clause gave the state the right to change the portal-to-portal policy, even though it had expired. The R.A. referred to Dills Act Sec. 3517.8, which provides that provisions of an expired contract remain operative until a successor agreement is in place. As the parties had not finalized a new agreement, the provisions of the expired MOU remained valid and the state's actions did not constitute a unilateral change. As for the refusal to bargain, the R.A. stated that CASE did not offer any proof the state absolutely refused to negotiate the matter at the bargaining table. Accordingly, the R.A. dismissed the charge for failure to state a prima facie case.

On appeal, the board examined CASE's allegations of retaliation and failure to bargain in good faith. The board reiterated that CASE failed to provide the required evidence of nexus to set forth a prima facie case of retaliation. The board stated that the test of whether there has been bad faith in bargaining is one of the totality of the circumstances and agreed with the R.A. that CASE did not provide enough evidence regarding the proposals for a determination to be made. Furthermore, the board held that CASE did not provide any information indicating that the negotiations for the successor agreement were not ongoing or that impasse had been reached. Accordingly, the board upheld the R.A.'s decision and dismissed the charge without leave to amend.

Member Whitehead concurred with the finding that the state did not unilaterally change the portal-to-portal policy, but dissented from the remaining portion of the opinion. Whitehead observed that refusal to bargain and retaliation allegations were dismissed because there was insufficient evidence. Whitehead contended that the evidence was inconclusive and that the allegation should be remanded to the Office of the General Counsel for further investigation.

Employee not entitled to have attorney present when meeting with employer: Dept. of Consumer Affairs.

(*Wilson-Combs v. State of California [Dept. of Consumer Affairs]*, No. 1762-S, 4-15-05; 10 pp. + 9 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: Neither the Dills Act nor *Weingarten* rule entitle an employee to have legal representation during a meeting with an employer.

Case summary: Lana Wilson-Combs appealed the regional attorney's dismissal of her unfair practice charge against the Department of Consumer of Affairs for refusing to meet with her and her private attorney, and for issuing a counseling memorandum to her.

Shortly after Wilson-Combs filed a whistleblower complaint with the California State Auditor, she was transferred to a different office. Wilson-Combs believed the transfer to be in retaliation for her actions and obtained legal representation. Management notified Wilson-Combs in writing that she was required to attend a meeting with her supervisor without counsel and that if she did not follow the directive she would be found insubordinate. Wilson-Combs showed up at the meeting with her attorney, and the meeting was cancelled. She then was issued a counseling memorandum. Wilson-Combs filed unfair practice charges alleging that the relocation and counseling memo were actions taken in retaliation for participating in training to become a union steward and discrimination based on her race and gender. She also alleged that the memorandum was issued in retaliation for exercising her right to representation. Lastly, she alleged that the state refused to meet and confer with her in violation of Dills Act Sec. 3519(c).

The R.A. found no evidence that Wilson-Combs was required to attend an investigatory meeting or was denied a request for union representation. The R.A. explained that there was no right to representation by private counsel under the Dills Act for a meeting requested by the employer or for the discussion of topics requested by the employee. The R.A. thus concluded that Wilson-Combs failed to state a prima facie violation of the *Weingarten* rule. The R.A. also found

that Wilson-Combs did not state a prima facie charge of retaliation for protected activity because whistleblower statutes are not protected under the board's purview. She also failed to provide sufficient evidence to demonstrate the nature of her union activity, that the employer was aware of it, or that the adverse action was motivated by the protected conduct. Accordingly, the R.A. dismissed the charge.

In her appeal, Wilson-Combs alleged that the R.A. did not properly investigate her charge, used ex parte communications with the department in rendering his decision, and failed to determine whether the charge should be deferred to arbitration. She also argued that the department's refusal to meet and confer with her attorney violated her protected right to self-representation under Dills Act Sec. 3515.5 and *Weingarten*. And finally, she contended that even though she did not specify the dates of her union activity, the board should have presumed unlawful motivation for purposes of finding a prima facie case.

The board first found that Wilson-Combs had not provided any facts to support her allegations regarding the R.A.'s actions, and it concluded that the R.A. fulfilled the requirements for processing a charge under PERB Reg. 32620.

Referring to its decision in *Oxnard School Dist. (Gorcey and Tripp)* (1988) No. 667, 78 CPER 49, 74, where it held that individual employees did not have standing to allege the employer failed or refused to meet and confer in good faith, the board concluded that the right to self-representation under the Dills Act did not include the right to be represented by private counsel and to meet and confer with the department.

The board also noted that, in *Rio Hondo CCD* (1982) No. 226, 55 CPER 65, it held that the right to representation under *Weingarten* was grounded in the employee's right to participate in the activities of employee organizations, and in the corresponding right of employee organizations to represent their members in their employment relations with employers. Accordingly, the board concluded that under the Dills Act, *Weingarten* did not confer a right to representation by private counsel, and therefore Wilson-Combs did not state a prima facie case for interference.

Lastly, the board held that mere legal conclusions were insufficient to state a prima facie case. Therefore, without specific information, Wilson-Combs failed to state a prima facie case of retaliation.

The board also noted that race and gender discrimination claims are not within its jurisdiction.

The board dismissed the charge without leave to amend.

Duty of Fair Representation Rulings

Unfair practice charge dismissed as untimely: CSEA.

(*Chen v. California State Employees Assn.*, No. 1736-S, 1-19-05; 2 pp. + 5 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The unfair practice charge was dismissed as untimely because it was filed more than six months after the employee knew or should have known the union failed to file a grievance on her behalf.

Case summary: Karin Chen appealed a regional attorney's dismissal of her unfair practice charge against the California State Employees Association. Chen's charge alleged that the association had violated its duty of fair representation by failing to file a grievance.

On December 23, 2003, an association representative agreed to file a grievance on Chen's behalf and told her the process would take approximately one month. The contract between the parties gives the employer 21 days to respond to a grievance once it has been received. Chen contacted the representative in December and January to check on the status of the grievance but did not receive a reply. On August 10, 2004, Chen filed the unfair practice charge.

"In a duty of fair representation charge, the statute of limitation begins to run when the Charging Party knew or reasonably should have known that further assistance from the union was unlikely." The R.A. determined that based on the contract provisions, Chen would have received a response in mid-January had the representative filed the grievance, thus her charge was filed more than six months after she should have known the association had not filed a grievance on her behalf. The R.A. dismissed the charge for failure to

state a prima facie case. The board adopted the R.A.'s dismissal as the decision of the board itself.

Representation duty limited to contractual remedies under union's exclusive control: CSEA.

(*Chen v. California State Employees Assn.*, No. 1749-S, 2-7-05; 2 pp. + 6 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The union's duty of fair representation does not encompass an obligation to provide reasonable accommodation under the ADA.

Case summary: Karin Chen appealed the regional attorney's dismissal of her unfair practice charge against the California State Employees Association for its failure to respond to her request for reasonable accommodation.

Chen submitted a reasonable accommodation request form to her employer but did not receive a response. Six months later, she sent by fax a copy of the request to a CSEA representative. The fax report indicated that the transmission failed. A month later, when Chen had not heard from the CSEA representative, she contacted her by email.

Chen's charge alleged the union failed to respond to her request for accommodation under the Americans With Disabilities Act. The R.A. noted that ADA accommodation is not a matter within CSEA's exclusive control. The R.A. referred to *California School Employees Assn. (De Lauer)* (2003) No. 1523, 161 CPER 92, in which the board held that the duty of representation is limited to contractually based remedies under the union's exclusive control. Accordingly, the R.A. found that CSEA did not owe Chen a duty of fair representation with regard to the ADA claim. The R.A. dismissed the charge.

On appeal, Chen asserted that the fax transmission was successful and that she also had sent an accommodation request to the union by certified mail. The board refused to consider this information because it was known to Chen at the time the initial charge was filed and she failed to show good cause why she had not raised it before the R.A. The board held that her appeal did not respond to the issues raised in the R.A.'s warning letter.

The board adopted the R.A.'s decision and dismissed the charge without leave to amend.

Union was responsive to employee's request: CSEA.

(*Chen v. California State Employees Assn.*, No. 1750-S, 2-7-05; 2 pp. + 6 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The charge was dismissed for failure to state a prima facie case.

Case summary: Karin Chen appealed the regional attorney's dismissal of her unfair practice charge against the California State Employees Association for breaching its duty of fair representation by failing to respond to her requests.

On August 15, 2004, Chen signed a grievance form alleging her employer violated various contract provisions. She submitted the form to the association's Sacramento office. On August 25, CSEA representative Alexandra Tieu contacted Chen by phone and email, and notified her that the grievance should have been filed at the local level in Los Angeles. On September 3, Tieu followed up with a certified letter and email requesting that Chen fill out the grievance with her local steward. Chen then emailed CSEA manager John Delloro to complain that CSEA was being unresponsive. Tieu responded to the email on the same day, and she and Chen exchanged a number of emails. Thereafter, Tieu sent Chen an email to schedule a meeting, to which Chen responded the following day with complaints about CSEA's service. She again faxed the union a copy of the grievance, this time to Tieu and Delloro. Then Tieu scheduled a meeting with Chen.

Based on these facts, the R.A. found no support for Chen's conclusion that CSEA did not follow up on her concerns. Chen failed to demonstrate that CSEA acted in an arbitrary, discriminatory, or bad faith manner. Accordingly, the R.A. dismissed the charge for failure to demonstrate a prima facie case of a breach of the duty of fair representation.

On appeal, Chen asserted Tieu never scheduled to meet with her. The board refused to consider this information because it was known to Chen at the time the initial charge

was filed and she failed to show good cause why she had not raised it before the R.A.

The board adopted the R.A.'s decision and dismissed the charge without leave to amend.

EERA Cases

Unfair Practice Rulings

Contracting out during negotiations violates EERA: Folsom-Cordova USD.

(*California School Employees Assn. v. Folsom-Cordova Unified School Dist.*, No. 1712, 11-23-04; 5 pp. + 35 pp. ALJ dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

Holding: The district violated EERA by unilaterally contracting out prior to exhausting negotiations; the union did not engage in surface bargaining.

Case summary: Each party accused the other of failing to negotiate in good faith during bargaining about the subcontracting of transportation services to a private company. The union, representing school bus drivers, alleged that the district made a unilateral decision to contract out transportation services to Laidlaw Transportation Services prior to the completion of bargaining, in order to beat an impending change in the law. The district alleged that the union engaged in surface bargaining and attempted to stall the negotiations, thereby waiving its rights to bargain over the contracting out issue.

The board adopted the administrative law judge's proposed decision finding that the district violated EERA and dismissing the charges against the union. Applying the test set out in *Grant JUHSD* (1982) No. 196, 53 CPER 43, and *State of California (Department of Forestry and Fire Protection)* (1993) No. 999-S, 101 CPER 62, the ALJ found that the district had made a pre-impasse unilateral change in an established, negotiable practice, violating its duty to meet and negotiate in good faith. Under *Lucia Mar USD* (2001) No. 1440, 149 CPER 67, contracting out is negotiable where the

decision was motivated substantially by potential savings in labor costs, as it was in this case. The ALJ rejected the district's argument that there was no unilateral change because the contract with Laidlaw had not been implemented. He found that the contract was not a "proposed contract" but a legally binding document. He also cited *Anaheim UHSD* (1982) No. 201, 53 CPER 44, where the board rejected the argument that a unilateral change does not occur until it is implemented.

The district argued that the union delayed and rebuffed its efforts to promptly complete negotiations, and therefore waived its right to complain about the change. The board has never held that a union, once having made a timely demand to bargain, waives its right to bargain if it thereafter causes delays in negotiations. Therefore, the ALJ considered NLRB cases and concluded that the union's conduct did not "even approach" those in which the NLRB found waiver. The union here never refused to bargain; it participated in six negotiating sessions and made numerous proposals. The district waited six weeks to respond to the union's request to bargain and proposed no negotiation dates for another six weeks.

The ALJ rejected the district's argument that its actions were justified by operational necessity because it had to enter into the contract before S.B. 1419 took effect. That bill mandated that the district satisfy certain conditions before entering into a personal services contract. The ALJ found that the district was not faced with a true emergency; it could have completed negotiations with the union and, if no agreement was reached, seek to contract out under the new law.

"It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement." Reviewing board precedent regarding the indicia of surface bargaining allegations, the ALJ found no evidence of surface bargaining in the conduct of the union.

Deferral under EERA must be raised as affirmative defense: East Side UHSD.

(*East Side Teachers Assn., CTA/NEA v. East Side Union High School Dist.*, No. 1713, 11-23-04; 6 pp. + 18 pp. ALJ dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

Holding: Deferral to arbitration under EERA is not jurisdictional and must be raised as an affirmative defense. Unilaterally changing the form for submission of public complaints against employees violates the act.

Case summary: An administrative law judge issued a proposed decision finding that the district violated EERA when it unilaterally changed the form used by the public to lodge harassment and discrimination complaints against employees. The district filed exceptions to the decision, asserting for the first time that the matter should be referred to arbitration. The board determined that deferral to arbitration will no longer be considered a jurisdictional defense in light of *State of California (Dept. of Food and Agriculture)* (2002) No. 1473-S, 153 CPER 74, and *Long Beach CCD* (2003) No. 1564, 164 CPER 110. In doing so, the board rejected that portion of *Lake Elsinore S.D.* (1987) No. 646, 75X CPER 13, which held that PERB lacked jurisdiction to hear cases subject to deferral. Here, PERB held that "treatment of deferral as an affirmative defense is necessary to preserve the scarce resources of PERB and the parties."

On the merits the ALJ applied the test for unilateral change set out in *Grant JUHSD* (1982) No. 196, 53 CPER 43, and found that the district had a "historic and accepted practice" of using a formal complaint form in all cases involving public complaints against employees, including complaints of harassment and discrimination, and of providing the employee with a copy of the complaint. The fact that the parties had not negotiated over the use of the form was irrelevant since the union was aware of its use and had acquiesced to it. He found that the district altered its policy when it began using a different form in harassment and discrimination cases, and that it failed to give any prior notice of the change to the union. Further, the change in

policy had a generalized effect and continuing impact on the terms and conditions of employment because the district intended to continue using the form. The ALJ also found that utilization of a form for documenting public complaints is a matter within the scope of representation as a procedure for disciplinary action.

The board affirmed the ALJ's conclusion that the district had unilaterally changed a policy in violation of EERA.

Request for representation is protected conduct: Simi Valley USD.

(Simi Valley Educators Assn. v. Simi Valley Unified School Dist., No. 1714, 11-29-04; 24 pp. By Member Whitehead, with Member Neima; Chairperson Duncan dissenting.)

Holding: The district violated EERA when it committed an adverse action in retaliation for engaging in the protected conduct of requesting union representation at a meeting.

Case summary: Mike Bishop was a teacher and an association site representative. His complaints about a proposed program led to deterioration of his relationship with his supervisor. The supervisor mistakenly believed that Bishop had filed a grievance. The supervisor subsequently visited his classroom 40 times in two months without speaking to him. When she asked to meet with him about student concerns, he replied that he would not meet without union representation. The supervisor cancelled the meeting and wrote him that she planned to visit his classroom 26 more times in the next two months. Bishop took a medical leave of absence and resigned his position as department chair. The association alleged interference and retaliation against Bishop for exercise of his protected rights.

The board reversed an administrative law judge's proposed decision dismissing the charge, finding that Bishop's request for representation was protected conduct under *Novato USD* (1982) No. 210, 54 CPER 63, even though the subject of the meeting was not one for which there is a right to representation. Regarding the second prong of the *Novato* test, and applying the objective test to establish adverse action set out in *Newark USD* (1991) No. 864, 55 CPER 54, the board found that a reasonable person would consider the

supervisor's classroom visits to have an adverse impact on Bishop's employment. The board also concluded that the association had met the third prong of *Novato* by demonstrating a nexus between Bishop's protected activity and the adverse action, in that the supervisor had given Bishop glowing recommendations and had a friendly relationship with him until she mistakenly believed that he had filed a grievance. At that time, she stopped speaking to him and began her numerous silent observation visits to the classroom; this culminated in the request for a meeting. Although she testified that she had a number of concerns about his teaching for years, she never discussed them with him and treated him differently from other teachers after she mistakenly believed he had filed a grievance. The board held that "an employer acts unlawfully if it retaliates against an employee in the mistaken belief that the employee has engaged in protected activity." It found that the facts evidenced timing, disparate treatment, and departure from established procedures and standards, "sufficient to show nexus."

Chairman Duncan dissented and would have adopted the ALJ's decision, finding that the request for representation was not protected activity as the subject of the meeting, "to discuss some student concerns," did not contain a threat of discipline or involve unusual circumstances. He agreed with the ALJ's conclusion that there was an insufficient nexus between other protected activity and any adverse action, and that there was no adverse action in any event.

No unilateral change where contract interpretation advanced by association was prohibited by statute when negotiated: Parlier USD.

(California School Employees Assn. and its Chap. 396 v. Parlier Unified School Dist., No. 1717, 11-30-04; 3 pp. + 10 pp. R.D. dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

Holding: Because the law did not permit the district to delegate its authority over disciplinary decisions at the time the contract language was negotiated, the district's insistence that a hearing officer's decision was not final did not constitute a unilateral change.

Case summary: An employee represented by the association was served with notice of dismissal for physically assaulting another employee. A hearing officer found just cause for the discipline, but deemed that dismissal was too harsh and recommended a suspension without pay and the imposition of a “last chance agreement.” The district board of trustees rejected the hearing officer’s recommendation and upheld the dismissal.

The association alleged that the district unilaterally changed the provisions of the parties’ agreement by asserting that the hearing officer’s position was not final and binding. The language of the contract provides that the hearing officer’s decision is final.

In assessing the unilateral change claim, the regional director first noted that the terms of the parties’ agreement are ambiguous and do not unequivocally characterize the hearing officer’s decision as final and binding. He noted that the contract permits the board to determine whether sufficient cause exists for the discipline and conveys the authority to impose discipline.

More importantly, the R.D. said, was the fact that at the time the contract language was drafted, Education Code Sec. 45113 required that decisions of a governing body be conclusive in matters of discipline of classified employees. On this point, the R.D. also cited *United Steelworkers v. Board of Education* (1984) 162 Cal.App.3d 823, which held that the Education Code prohibited the governing board from delegating its exclusive authority to discipline classified employees to binding arbitration. Thus, he reasoned, the contract interpretation advanced by the association as evidence of a unilateral change was an interpretation that was not permitted by law at the time it was negotiated.

Expressing agreement with the R.D., the board said that, regardless of the ambiguity in contract language, the hearing officer’s decision was not final because, as the law existed when the contract was negotiated, it did not permit the district to delegate its authority over disciplinary decisions. “Thus,” said the board, “even if the contract had clearly attempted such a delegation, it would be unenforceable.” The board found no merit to the association’s assertion that

the board impermissibly imposed a penalty greater than recommended by the hearing officer. The contract provision that permits the imposition of a lesser penalty was inapplicable because it applies only where the employee does not request a hearing.

Involuntary transfer for interpersonal conflicts not unfair practice: Madera USD.

(*Freeman v. Madera Unified School Dist.*, No. 1718, 11-30-04; 5 pp. + 7 pp. R.A. dec. By Chairperson Duncan, with Member Neima; Member Whitehead concurring.)

Holding: The district did not violate EERA when it involuntarily transferred the charging party and two other teachers because of interpersonal conflicts.

Case summary: Laurel Freeman alleged that the district treated her disparately in violation of EERA when it involuntarily transferred her from her school along with two other teachers. The district’s position was that the three teachers were transferred because of interpersonal conflicts which impacted the instructional goals of the school. The teachers previously had signed a memo entitled “Commitment to Work Together or Transfer”; however Freeman refused to attend a meeting because the other two teachers were there, and as a consequence received a summary “conference memo.” Freeman filed a grievance, later withdrawn, alleging that she had been verbally abused. Next, she alleged that the transfer was in retaliation for filing the grievance and that she was treated in a disparate manner since she had done nothing to cause the trouble.

The board adopted the regional attorney’s finding that Freeman did not meet her burden under *Novato USD* (1982) No. 210, 54 CPER 63, of showing a nexus between the protected conduct and the adverse action. It noted that there must be more evidence of the employer’s unlawful motive than a close temporal proximity between the adverse action and the protected conduct. The board found none here. Although the charging party was transferred a few months after the grievance was filed, “the problem existed long before that occurred.”

The board also found that Freeman failed to show disparate treatment because all of the teachers signed the letter agreeing to work together or be transferred. Freeman failed to show that the other two teachers had disciplinary problems. And, most importantly, Freeman failed to show that she had been treated differently from other teachers with conflicts or interpersonal problems, or even from with other teachers without fault.

Accordingly, the board dismissed the unfair practice charge.

Member Whitehead wrote separately to note that the charge alleged that the district had violated Freeman's *Weingarten* rights when the principal told her that union representation would not be necessary at a meeting where he told her he was "writing her up." However, since Freeman did not raise this issue on appeal, Whitehead agreed that the charge should be dismissed.

Request for reconsideration of remedy granted: Desert Sands USD.

(*California School Employees Assn. v. Desert Sands Unified School Dist.*, No. 1682a, 11-30-04, 7 pp. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The union's request for reconsideration to restore the status quo ante was granted and the employer was ordered to rescind its unilateral act.

Case summary: The union requested that the board reconsider the remedy it ordered in *Desert Sands USD* (2004) No. 1682, 170 CPER 97. In that case, the board found that the district violated EERA by unilaterally transferring covert camera installation work from the electronic repair technicians to security agents. Although the board ordered the district to negotiate the issue with the union, it failed to include in its remedy an order requiring the district to transfer the work back to the ERT classification.

Citing *Corning UHSD* (1984) No. 399, 63 CPER 65, the union argued that the board has recognized that an order to negotiate is meaningless in the absence of an order that requires the employer to rescind its unilateral act. It also argued that the board previously has ordered restoration of

the status quo ante in cases involving an illegal unilateral transfer of work, pointing to *Alum Rock UESD* (1983) No. 322, 58 CPER 64, and *Calistoga JUSD* (1989) No. 744, 82 CPER 69.

The district argued that the motion for reconsideration was untimely and that the remedy issued by the board was appropriate given its finding of no economic damage.

The board acknowledged that the union "can only negotiate from a fair position if it is placed where it would have been but for the District's unlawful acts." Granting the union's motion, the board found that, under PERB Reg. 32410(a), its error in not ordering the district to transfer the work back to the ERTs was a basis for reconsideration and that the motion was timely.

Right to self-representation no longer protected by EERA: Woodland JUSD.

(*Woodland Education Assn. v. Woodland Joint Unified School Dist.*, No. 1722, 12-13-04; 5 pp. + 35 pp. ALJ dec. By Member Neima, with Chairperson Duncan and Member Whitehead.)

Holding: The right of self-representation is not protected activity under EERA.

Case summary: An administrative law judge dismissed the allegation that a school teacher had been terminated because she engaged in protected activity. The ALJ concluded that the teacher had engaged in protected activity when she attended a union meeting and sent a note to the principal indicating that she would bring a union representative with her to a subsequent meeting. However, that conduct occurred after the principal had decided to dismiss the teacher and had hired her replacement.

Her prior self-representation — representing herself in an earlier meeting with the principal — was not protected conduct because the legislature amended Sec. 3543 in 2000, deleting language that expressly conveyed to public school employees the right to represent themselves individually in their employment relations with the public school employer. Thus, PERB case law, such as *Pleasant Valley School Dist.* (1988)

No. 708, 79X CPER 12, no longer supports the conclusion that self-representation is a protected right under the act.

The employee's right to present grievances to his or her employer without intervention of the exclusive representative cannot form the basis of a separate protected right because it has been a part of EERA Sec. 3543(b) since the statute was enacted.

The ALJ also rejected the union's assertion that the teacher had engaged in protected conduct when she complained to the principal about the lack of supplies. This contention was not alleged in the initial charge or complaint and the district had no notice that this assertion would be litigated.

Citing *Rio Hondo CCD* (1980) No. 128, 46 CPER 68, the ALJ found that the school principal interfered with employee rights by conveying a threat of reprisal. When the principal spoke during an assembly of taking the district's dispute with the union "up a notch," he threatened teachers in violation of the act not to engage in protected activity by going to the union with their complaints.

The board adopted the ALJ's proposed decision, affirming that self-representation is no longer activity protected by EERA because the right to self-representation was deleted from the statute.

Charge concerning application of city's interest arbitration law to classified school district employees will proceed to hearing under EERA: San Francisco USD.

(*International Federation of Professional and Technical Engineers, Loc. 21, AFL-CIO v. San Francisco Unified School Dist. and City and County of San Francisco*, No. 1721, 12-13-04; 12 pp. By Member Neima, with Chairperson Duncan and Member Whitehead.)

Holding: A school district, whether or not it has a merit system, is excluded from coverage under the MMBA.

Case summary: Classified employees of the San Francisco Unified School District are covered by Education Code Sec. 45318, which establishes a merit system under civil service provisions, and by the charter provision enacted as

Proposition B that provides for binding arbitration of bargaining impasses. During negotiations in 1993, when bargaining reached an impasse, the city refused to grant a wage increase set under the arbitration provisions of the charter to district employees represented by Local 21. In *International Federation of Professional and Technical Engineers v. Bunch* (1995) 40 Cal.App.4th 670, 116 CPER 44, the Court of Appeal held that PERB had initial jurisdiction to resolve the dispute and to determine whether the local regulations were subordinate to EERA.

The parties subsequently resumed negotiations and agreed to several contracts following the court's decision.

In the instant case, Local 21 asserted that the school district is a separate legal entity from the city with regard to educational issues, but a department of the city with regard to classified employees and, therefore, the city is bound by an arbitration award rendered between the parties and by the MMBA. A board agent dismissed the charge, reasoning that the MMBA had no application to the employees and that the charge was untimely.

In reversing the dismissal, the board read Sec. 3501(c) of the MMBA to exclude from the definition of a "public agency" a personnel commission in a school district with a merit system. A school district, whether or not it has a merit system, is excluded from coverage under the MMBA. The board concluded that the charge was not related to the bargaining that occurred prior to the court decision, but to the latest round of bargaining undertaken in 2002.

On the merits, the board concluded that Local 21 established "some ambiguity as to the intent and meaning of Proposition B with respect to the role of the District in contract negotiations." Because nothing in EERA prevents an employer and an employee organization from agreeing to interest arbitration, the board said "there is a plausible argument that the District must submit disputes involving its classified employees to procedures provided by Proposition B." The board remanded this matter to an administrative law judge and directed the general counsel to issue a complaint under EERA since the city is "presumptively" not a public school employer within the meaning of that act.

Directing the association not to directly contact the health care administrator during negotiations that included talks on new benefits was unlawful: Hilmar USD.

(*Hilmar Unified Teachers Assn. v. Hilmar Unified School Dist.*, No. 1725, 12-15-04; 18 pp. + 24 pp. ALJ dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The district interfered with the association's rights when it directed the association not to contact the health benefits administrator directly to obtain information concerning benefits about which the parties were negotiating. The association waived its right to engage in informational picketing during a mediation session scheduled during graduation festivities.

Case summary: While the parties were engaged in the statutory impasse procedures, the district superintendent advised the association that the district would participate in a mediation session scheduled during graduation week only if the association agreed not to engage in concerted activity. An administrative law judge found that, in doing so, the district had interfered with the association's right to engage in protected concerted activities.

In agreement with the ALJ, the board noted that non-disruptive informational picketing is protected under EERA, citing *San Marcos USD* (2003) No. 1508, 158 CPER 83. And, it observed that in *Rio Hondo CCD* (1983) No. 292, 56 CPER 84, the board held that it is unlawful interference for an employer to threaten to suspend protected statutory rights if the employee organization encourages its members to engage in a work stoppage. In this case, however, the board found that the association representative had agreed to cancel the informational picketing scheduled to take place after the mediation session. In so doing, the board held, the association waived its right to engage in concerted activity.

The association also alleged that the superintendent interfered with its protected rights by instructing the association president not to directly contact the health insurance administrator to obtain health insurance information. Recognizing that the exclusive representative is entitled to in-

formation to discharge its bargaining rights and that it has a duty to keep unit members informed about the new health plans under consideration, the board found that the superintendent's statements interfered with the association president's right to represent employees and the right of employees to the association's representation. Applying the balancing test set forth in *Carlsbad USD* (1979) No. 89, 41 CPER 58, the board found only uncorroborated hearsay to support the district's claim that it instructed the association not to contact the health benefits administrator directly because of complaints about numerous calls from the association.

Charge concerning same issues raised in grievance is deferred to arbitration: Oxnard ESD.

(*Ybarra-Grosfield v. Oxnard Elementary School Dist.*, No. 1728, 12-21-04; 10 pp. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The charge was deferred to arbitration under *Collyer* standards because the district is willing to proceed to arbitration and the issues raised in the grievance are the same as the allegations asserted in the unfair practice charge.

Case summary: The charging party raised a number of objections to her salary calculations. One dispute concerned her claim that the district had overpaid a substitute teacher and that, as a result, the difference between the substitute's pay and her pay was reduced. Another contention concerned the calculation of "summer pay," the amount the district pays teachers in July as a final installment of their compensation.

The charging party filed a grievance regarding the calculation of summer pay and the payment of substitutes. The charging party raised similar complaints in her unfair practice charge.

A board agent determined the charge was untimely and declined to toll the statute of limitations period for the time expended using the grievance procedure because the issues presented in the grievance and the unfair practice were not the same.

On appeal, the board directed that the charge be deferred to the contractual grievance procedure. Relying on *Dry Creek Jt. Elementary School Dist.* (1980) No. Ad-81a, 47 CPER 82, and *Collyer Insulated Wire* (1971) 192 NLRB 837, the board noted that deferral is appropriate where the dispute arises within a stable collective bargaining relationship, the respondent is ready and willing to proceed to arbitration and to waive contract-based procedural defenses, and the contract and its meaning lie at the center of the dispute. The board found that these standards were met in this case.

The parties were operating within a stable collective bargaining relationship, and the district expressed its willingness to proceed to arbitration and did not raise any procedural defects. Contrary to the findings of the B.A., the board found the issues raised in the grievance were the same as the allegations in the unfair practice charge. Both alleged that the district wrongly calculated the charging party's summer pay, and at her expense, overpaid the substitute teacher.

The board noted that the charging party could seek a repugnancy review by the board following issuance of the arbitrator's decision.

The board refused to entertain new issues raised by the charging party in her appeal.

Union waived right to demand negotiations over health premium increases: Berkeley USD.

(*IUOE Loc. 39 v. Berkeley Unified School Dist.*, No. 1729, 12-22-04; 5 pp. + 6 pp. R.A. dec. By Chairperson Duncan, with Members Neima and Shek.)

Holding: Through language in the management rights clause, the union waived its right to negotiate over increases to health and welfare benefit payments that occurred after expiration of the agreement.

Case summary: Terms of a collective bargaining agreement between the parties obligated the district to cover the cost of health plan premiums up to a maximum cost of Kaiser coverage for a subscriber and two or more dependents. The contract also stated, "The District shall not automatically assume responsibility for the increase in employee

health and welfare premiums after the expiration of this Agreement."

Before the agreement was set to expire on June 30, 2004, the parties engaged in negotiations. During that time, the district learned that health insurance premiums would increase for the next fiscal year, and it advised employees that their premiums would increase if the parties did not reach agreement prior to July 1, 2004. The district sent a second letter to employees notifying them of the increase in health care costs under the terms of the existing agreement.

On July 6, 2004, the union declared impasse and subsequently filed an unfair practice charge asserting the district had violated EERA by unilaterally charging employees for increased health care premiums after expiration of the contract.

The regional attorney determined that, while health care benefits are a matter within the scope of representation, the union had waived its right to bargain over the issue. The basis for her conclusion was the language of the contract expressing the fact that the district would not automatically assume responsibility for premium increases past the contract expiration date. The R.A. also cited the language stating that the district would pay the premiums until the expiration of the agreement. Based on these provisions, the R.A. reasoned the parties did not contemplate that the district would continue to pay for health premium increases post-contract expiration.

On appeal, the board affirmed the dismissal of the charge. "It is very clear from the clauses that once the contract expired, the District would no longer cover increases in health and welfare benefit payments," the board said. By agreeing to the language that excused the district from assuming responsibility for premium increases after expiration of the agreement, the board found that the union had waived its right to bargain over the subsequent increases passed on to employees.

The board refused to consider the union's assertion that the district had unilaterally imposed increases in copayments. That claim was not accompanied by sufficient factual allegations to state a prima facie case, said the board.

Unfair practice charge is untimely because union was aware of employee's transfer when it filed grievance: San Francisco USD.

(*United Educators of San Francisco v. San Francisco Unified School Dist.*, No. 1730, 12-27-04; 7 pp. + 7 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The union was aware of the district's transfer of the employee when it filed a grievance and failed to file the unfair practice charge within six months of acquiring that knowledge.

Case summary: The union is the exclusive representative of the district's certificated employees, including teachers on special assignment. The parties' contract addresses the consolidation of positions and the transfer of employees. It also provides for binding arbitration of grievances.

On March 11, 2003, the district eliminated the positions of 12 teachers on special assignment. One teacher, Robert Fisher, was notified on March 21, 2003, that his position had been eliminated and that he would be returned to the classroom. One month later, Fisher learned that his position had not been consolidated but had been transferred to an employee in the administrators' bargaining unit.

The union filed a grievance on July 1, 2003, asserting that Fisher's position had not been consolidated but transferred to another employee. The union also filed an unfair practice charge with PERB on February 25, 2004, claiming that the district had unlawfully transferred Fisher's position to another bargaining unit.

The regional attorney determined that the charge was untimely, reasoning that the union was aware of the facts giving rise to the charge when it filed the grievance on July 1, 2003. Even if timely, the R.A. said, the charge must be deferred to arbitration under the standards articulated in *Dry Creek Joint Elementary School Dist.* (1980) No. Ad-81a, 47 CPER 82, and *Collyer Insulated Wire* (1971) 192 NLRB 837.

On appeal, the board first found good cause to accept the district's late-filed response to the union's appeal, determining that the appeal was sent to the wrong address through no fault of the district.

On the issue of timeliness, the union asserted that it was not aware that Fisher's job had been transferred to another bargaining unit until the district submitted its response to the grievance on December 30, 2003. Using this date, the unfair practice charge was timely filed. The union argued that at the time it filed the grievance, it did not know the nature of the transfer and believed that Fisher's position had been moved to another individual.

Citing PERB Reg. 32635(b), the board said that a charging party may not present new allegations or evidence on appeal absent good cause. The assertion that the union was unaware of the district's unlawful conduct until December 30, 2003, was known at the time it filed the unfair practice charge. The union failed to provide this information to the board prior to its appeal and offered no good cause for failing to do so. Thus, the board sustained the R.A.'s finding that the charge was untimely.

The board determined that deferral to arbitration was not appropriate because, according to the union's claim raised for the first time on appeal, the grievance and the charge cover different issues. Moreover, the board noted that it was not provided with a copy of the pertinent provisions of the collective bargaining agreement and it therefore was unable to determine if the *Collyer* standards were met.

Unilateral change allegation remanded: Fairfield-Suisun S.D.

(*California School Employees Assn. and its Chap. 302 v. Fairfield-Suisun School Dist.*, No. 1734, 1-12-05; 4 pp. + 6 pp. B.A. dec. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: The charging party failed to establish a prima facie case of discrimination, but the unilateral change portion of the charge was remanded for further investigation.

Case summary: The association filed an unfair practice charge alleging that the district discriminated against Mildred Salgadoe for her protected activities, and unilaterally changed its policy and practice with regard to layoffs.

Salgadoe is an instructional assistant in special education. She submitted a request for reclassification from level

II to level III. The reclassification committee recommended her promotion to level III as soon as she completed the necessary requirements. Salgadoe's supervisor was unhappy with the reclassification and attempted to have it modified. CSEA and the district eventually reached agreement over a new job description.

The district met with Salgadoe and her CSEA representative to discuss her position. The district asserted the purpose of the meeting was to discuss her future options, given the impending graduation of the sole student to whom Salgadoe was assigned. CSEA claimed that Salgadoe was admonished at this meeting, warned of potential discipline, and told that she ought to be returned to her previous position.

Meanwhile, the district placed a less-senior employee in the level III class. Shortly thereafter, Salgadoe received an evaluation that accused her of being difficult to locate at work. Next, the district notified Salgadoe that she would be laid off from her reclassified position due to lack of funds. The district contended that her layoff was prompted by the graduation of her student.

The board agent found that the union had not demonstrated a prima facie case of discrimination. Salgadoe's request for, and subsequent reclassification to, her new position was not protected activity under Gov. Code Sec. 3543. The B.A. determined that requesting and receiving a reclassification does not qualify as a protected activity. Moreover, she found no evidence of a nexus between her reclassification request and her eventual layoff.

On appeal, CSEA asserted for the first time that Salgadoe had participated in protected activity when she requested union representation during her meeting with the district and for dealing with her supervisor's attempt to modify her job description. However, the board sustained the dismissal of this portion of the charge, finding the evidence still failed to demonstrate a connection between the request, which was granted, and her layoff.

Regarding the allegation of an unlawful unilateral change, the board held that the record was insufficient to determine whether CSEA had stated a prima facie case. The parties' memorandum of understanding provides that lay-

offs are to occur in the reverse order of seniority. When two employees in the same classification have equal seniority, the MOU provides that selection is to be determined by lot. Salgadoe had been employed with the district for 22 years; the employee who was placed at level III had been with the district for only 12 years. Thus, CSEA asserted that Salgadoe should not have been laid off.

The district countered that seniority for purposes of layoffs is seniority within the targeted classification, not overall seniority. The level III employee had been in the classification longer than Salgadoe, even though both had been reclassified at approximately the same time. The district asserted that the successful candidate's prior classification was the predecessor to her current classification, and thus must be considered in calculating seniority. CSEA disputed this argument, arguing that the prior classification never existed.

The board found it unclear whether the prior classification existed and, if so, whether a past practice existed for determining that the classification should be considered in determining seniority for layoffs. As the B.A.'s decision did not address the allegation, the board remanded this portion of the charge for further investigation.

Contract allows for transfer of employees to other work locations: Colton JUSD.

(California School Employees Assn. and its Chap. 244 v. Colton Joint Unified School Dist., No. 1737, 1-20-05; 2 pp. + 6 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The charge was dismissed because it failed to state a prima facie case.

Case summary: The California School Employees Association and its Chap. 244 appealed the regional attorney's dismissal of its unfair practice charge against Colton Joint Unified School District for unilaterally transferring two employees two days a week from their regular district assignments to a separate public school employer.

The contract between the parties allows the district to transfer bargaining unit employees if it is in the best interest of the district, unless it is for disciplinary purposes. The

contract language does not place a limit on where employees can be transferred. The transferred employees were performing their usual duties at the new work location.

“In order to prevail on a theory of a change in job responsibilities, the charging party must demonstrate actual changes in the employee’s job duties.” The R.A. held that the association failed to demonstrate any actual changes in duties. While health and safety concerns raised by the association might be subjects for effects bargaining, there was no evidence that the association requested to negotiate those changes in working conditions.

The R.A. dismissed the charges for failure to state a prima facie case. The board adopted the R.A.’s dismissal as the decision of the board itself.

Timely appeal under ‘mailbox rule’ failed to state claim: Los Angeles County Office of Education.

(*Cummings v. Los Angeles County Office of Education*, No. 1743, 1-26-05; 4 pp. + 7 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The charge was dismissed for failure to state a prima facie case.

Case summary: Rodney Cummings appealed the regional attorney’s dismissal of his unfair practice charge against the Los Angeles County Office of Education for discriminating against him. Cummings alleged that the Office of Education disciplined him in retaliation for a grievance he had filed for its failure to support his student suspension recommendations, provide adequate teaching materials, and take appropriate action when his classroom was inundated with toxic fumes. The R.A. dismissed his charge for failure to state a prima facie case after finding that Cummings failed to demonstrate a nexus between the protected activity and the employer’s actions.

In his appeal, Cummings provided additional allegations and evidence. However, the board refused to consider this information because it was known to Cummings at the time he filed the initial charge and he failed to show good cause why he had not raised these items before the R.A. The board also noted that Cummings’ only alleged violations

that pertained to state and federal statutory provisions, personnel commission rules, and sections of the collective bargaining agreement, all matters beyond the board’s jurisdiction.

The board adopted the R.A.’s decision as that of the board itself.

The board found that Cummings’ appeal was timely even though the date stamp on his perfected filing was two days after the deadline set by the appeals office. In *State of California (State Personnel Board)* (2004) No. Ad-343-S, 173 CPER 65, the board held that its version of the mailbox rule, PERB Reg. 32130(c), also applied to board-granted extensions of time to file documents. Based on that decision, which allowed Cummings five days after the deadline set by the appeals office to perfect his filing, the board found his appeal to be timely.

Unfair practice procedure may not be used to circumvent the unit modification process: Berkeley USD.

(*International Federation of Professional and Technical Engineers, Loc. 21, AFL-CIO v. Berkeley Unified School Dist.*, No. 1744, 1-26-05; 7 pp. + 6 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The parties must petition the board to modify unit placement of employees and may not challenge the confidential status of employees using the unfair practice procedure.

Case summary: The International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, appealed the regional attorney’s dismissal of its unfair practice charge against the Berkeley Unified School District. The union alleged that the district had violated EERA by refusing to deduct dues from six formerly confidential employees, who were now in the unit, unless the union agreed to negotiate different longevity and vacation schedules for those employees.

On August 3, 2003, EERA Sec. 3540.1 was amended to change the definition of “confidential employee.” Local 21 determined that based on the change in law, six employ-

ees who formerly were excluded from representation now were eligible to be in the unit. The union submitted to the district signed membership/dues deduction authorization cards for those employees, with the expectation that the employees would be enrolled in Local 21 and that dues would be deducted from their paychecks. Although the district did not deny their eligibility, the dues deduction cards were not processed. In response to an inquiry from the union in late-March 2004, the district stated it would not deduct dues for these employees unless the union agreed to negotiate different vacation and longevity schedules for them.

The union filed this charge alleging the district's conduct in linking the non-mandatory unit modification issue with mandatory subjects of bargaining was a refusal to bargain in good faith and a violation of EERA. The district then informed the union that EERA did not permit the inclusion of confidential employees into the unit. In an amended charge, the union alleged that the district had refused to bargain by repudiating the previous agreement to deduct dues for the six employees. In response, the district asserted that it never agreed the employees were no longer confidential.

Citing *Burlingame Elementary School Dist.* (2003) No. 1510, 159 CPER 72, the R.A. observed that parties may not use the unfair practice procedure to circumvent the unit modification process. The board concurred that the appropriate forum for addressing a dispute over a change to the composition of a bargaining unit is to petition for unit modification before the board, as provided for in PERB Reg. 32781. Therefore, the union's attempt to include those employees in the unit without petitioning the board was invalid, and the district did not commit an unfair practice when it withdrew its agreement to include the employees in the unit. The R.A. held that the union's allegation failed to state a prima facie case.

In *Lake Elsinore School Dist.* (1986) No. 603, 69X CPER 21, and *Travis Unified School Dist.* (1992) No. 917, 92 CPER 45, the board held that a party may not negotiate to impasse on a proposal that conditions agreement to a non-mandatory subject on acceptance of mandatory subjects. Accordingly, the district could not lawfully negotiate to impasse the

non-mandatory unit modification proposal conditioned on the union's acceptance of the mandatory proposal addressing vacation schedules. Here, however, the board found that the union had not alleged facts demonstrating that the district bargained to impasse over the proposal. In addition, the district withdrew the proposal after Local 21 filed its unfair practice charge. Therefore, since the district did not negotiate to impasse, its action was appropriate.

The board affirmed the R.A.'s dismissal.

Request for withdrawal of charge granted: Barstow CCD.

(*California School Employees Assn. and its Chap. 176 v. Barstow Community College Dist.*, No. 1745, 1-28-05; 2 pp. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The request for withdrawal of the charge was granted.

Case summary: California School Employees Association and its Chap. 176 petitioned to withdraw with prejudice its appeal of the board's agent's dismissal of its unfair practice charge. The B.A. had dismissed CSEA's unfair practice charge alleging that the district had violated EERA by unilaterally changing policies regarding a declaration of an emergency for purposes of overtime. The parties later reached a settlement, and CSEA petitioned for withdrawal of the charge.

The board found the withdrawal to be consistent with the purposes of EERA and in the best interest of the parties. Accordingly, the board granted the withdrawal.

Audit is investigative tool, not adverse action: LAUSD.

(*Fykes v. Los Angeles Unified School Dist.*, No. 1746, 2-1-05; 2 pp. + 7 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The charge was dismissed for failure to state a prima facie case. The complainant failed to demonstrate a nexus between the adverse action and exercising his protected rights. The audit was not an adverse action.

Case summary: Forrest Fykes appealed the regional attorney's dismissal of his unfair practice charge against the Los Angeles Unified School District.

In 2003, the Laborers International Union of North America, Local 200, filed two unfair practice charges against the district on behalf of Fykes. The parties proceeded to discuss the issues and eventually reached a settlement where the charges were withdrawn with prejudice and the complaints were dismissed. During the discussions, Fykes complained that he was being held to a higher standard than other fire extinguisher servicer technicians. The district offered to perform an independent audit of all fire extinguisher servicer technicians, and Fykes agreed. Following completion of the audit, the district issued notification recommending Fykes' dismissal. Fykes alleged that the district authorized the audit and termination in retaliation for the unfair practice charges he had filed.

The R.A. noted that while Fykes did exercise his rights under EERA, and the district was aware that he had exercised those rights, it was not clear that the district authorized the audit or termination because of his exercise of those rights. In addition, based on the subjective test used by the board, the audit did not appear to be an adverse action, merely another method used to investigate misconduct. The R.A. found that Fykes failed to demonstrate the necessary nexus between the adverse action and the protected conduct.

The board adopted the R.A.'s decision and dismissed the charge without leave to amend.

Individual does not have standing to bring a unilateral change claim: Alum Rock Union ESD.

(*Aguilera v. Alum Rock Union Elementary School Dist.*, No. 1748, 2-7-05; 2 pp. + 6 pp. R.A. dec. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: The charge was dismissed because the charging party did not have standing to bring the claim.

Case summary: Victoria Aguilera appealed the regional attorney's dismissal of her unfair practice charge against Alum Rock Union Elementary School District. The district

had transferred Aguilera due to a school closure. In her charge, Aguilera alleged the transfer violated the collective bargaining agreement.

The R.A. noted that Aguilera was alleging a unilateral change under EERA. In *Oxnard School Dist.* (1988) No. 667, 78 CPER 49, 74, the board held that individual employees do not have standing to allege unilateral change violations. Accordingly, the R.A. dismissed Aguilera's charge.

The R.A. also noted that even if Aguilera did have standing to file the charge, she had failed to state a prima facie case. In order to have presented a prima facie case, she would have had to demonstrate that the district had transferred a less-senior employee into a position for which she was qualified.

In her appeal, Aguilera shifted the focus of her charge to allege that the involuntary transfer was based on her race, age, and/or disability. The board rejected the argument because Aguilera failed to show good cause for asserting the new allegations on appeal and noted that even if her new allegations were considered, they still would have been rejected because they were outside PERB's jurisdiction.

The board dismissed the charge without leave to amend.

Late filing excused because of clerical error: Lodi USD.

(*California School Employees Assn. and its Chap. 77 v. Lodi USD*, No. Ad-346, 2-11-05; 3 pp. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The late-filed response to exceptions was accepted because the party had good cause and doing so would not prejudice the opposing party.

Case summary: Lodi Unified School District requested that the board excuse its late-filed response to exceptions filed by the California School Employees Association and its Chap. 77 to an administrative law judge's proposed decision.

The attorney for the district was ill on the date the filing was due and left her clerk to serve and file the completed paperwork. Despite her directions, the clerk served

the response but did not file it with PERB either by fax or personal service. As a result of the clerical error, the response was filed one day late. The record shows that CSEA was served appropriately and was made aware of an error in its exceptions because of the district's service.

PERB Reg. 32136 allows the board to excuse a late filing for good cause. In prior decisions, the board had deemed "honest mistakes," such as mailing or clerical errors, as good cause. The board referred to *Regents of the University of California (Davis, Los Angeles, Santa Barbara, and San Diego)* (1989) No. Ad-202-H, 84 CPER 75, as being very similar to this situation. In *Regents*, the board excused a late filing because the clerical employee inadvertently sent the document by regular mail instead of certified mail on the last day for filing. Here, the board found that the attorney's justification for the late filing was reasonable and credible.

Having found the justification reasonable, the board evaluated whether it would prejudice the opposing party if the late filing were excused. The board noted that CSEA was properly and timely served, and given the opportunity to note an error in its exceptions as a result of the service. Further, CSEA did not claim prejudice from the district's late filing.

The board found the district had demonstrated good cause to excuse its late-filed response to exceptions and granted its request that the response be accepted.

Statute of limitations runs from date of termination: LAUSD.

(*Dorfman v. Los Angeles Unified School Dist.*, No. 1754, 2-17-05; 7 pp. + 6 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The charge was dismissed because it was untimely and failed to state a claim under the board's jurisdiction.

Case summary: Mitchell Dorfman appealed the regional attorney's dismissal of his unfair practice charge against the district for violating EERA by not granting him tenure and terminating him.

Dorfman was fired from his position at the North Hollywood Community Adult School in September 2002. In June 2004, Dorfman learned from a colleague that the principal and assistant principal of the school had allegedly altered his evaluation and directed staff not to enroll students in his class.

Dorfman filed an unfair practice claim against the district alleging that his constitutional rights had been violated and that the district retaliated against him by terminating his employment.

The R.A. determined the charge was untimely, referring to *Regents of the University of California* (2004) No. 1585-H, 165 CPER 77, in which the board ruled that in retaliation cases the actual date of the termination triggers the running of the statutory limitations period. In addition, the R.A. stated that the board did not have jurisdiction over constitutional claims. Accordingly, the R.A. dismissed the charge.

In his appeal, Dorfman alleged that the underlying acts which resulted in his dismissal were the unfair practice and, because he did not become aware of them until June 2004, the charge should be considered timely. In addition, Dorfman argued, for the first time in his appeal, that if the board ruled that the statute of limitations had run, his charge should be accepted as a late filing under EERA Sec. 3541.5.

The board affirmed the R.A.'s holding that the statute of limitations had run and remarked that Dorfman should have investigated the reasons at the time of his termination. In response to Dorfman's new claim that the board should accept the late filing, it cited PERB Reg. 32635(b), which provides that a charging party may not present new charge allegations or new supporting evidence on appeal, unless it has shown good cause. The board found that Dorfman had not provided any information that showed good cause. Therefore the charge was untimely.

The board adopted the R.A.'s decision and dismissed the charge without leave to amend.

Request for withdrawal of charge granted: Vacaville USD.

(*Vacaville Teachers Assn. v. Vacaville Unified School Dist.*, No. 1767, 3-1-05; 2 pp. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: The request for withdrawal of the unfair practice charge was granted.

Case summary: The Vacaville Teachers Association filed an exception to an administrative law judge's proposed decision regarding its unfair practice charge against the Vacaville Unified School District for unilaterally changing its policy on the calculation of employee monthly salary deductions. The association notified the board that the parties had settled their dispute and requested to withdraw the charge with prejudice.

The board found the withdrawal to be consistent with the purposes of EERA and in the best interest of the parties. Accordingly, the board granted the withdrawal.

Request for reconsideration of decision to issue complaint denied: San Francisco USD.

(*International Federation of Professional and Technical Engineers, Loc. 21, AFL-CIO v. San Francisco Unified School Dist. and City and County of San Francisco*, No. 1721a, 3-2-05; 3 pp. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: Request for reconsideration was denied because it failed to state appropriate grounds for reconsideration.

Case summary: San Francisco Unified School District and City and County of San Francisco requested reconsideration of the board's decision in *San Francisco Unified School Dist. and City and County of San Francisco* (2004) No. 1721, 173 CPER 74. In that case, the board reversed a board agent's dismissal of an unfair practice charge filed by International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, alleging the district violated EERA and the MMBA by refusing to implement salary increases pursuant to a city charter arbitration process.

In support of its request for reconsideration, the district argued that the board's decision contained a prejudicial error of fact because it failed to consider Local 21's actions as evidence of bad faith and that Local 21 failed to correctly capture the size of the bargaining unit. The board rejected these two arguments as not relevant to its determination that Local 21 had stated a prima facie case.

The district also argued that laches should be invoked because it would impose a financial hardship on the district to bind it to the arbitration award between Local 21 and the city. The board rejected this argument as inappropriate to this stage of the unfair practice process since there has been no factual finding of prejudice.

The board denied the request for reconsideration and noted that the district's arguments were more appropriately raised during the evidentiary hearing.

Bad faith bargaining determination requires consideration of totality of party's actions: Contra Costa CCD.

(*United Faculty Contra Costa v. Contra Costa Community College Dist.*, No. 1756, 3-8-05; 4 pp. + 9 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The charge was dismissed because the union failed to provide enough evidence for the board to determine whether the district bargained in bad faith.

Case summary: United Faculty Contra Costa appealed the regional attorney's dismissal of its unfair practice charge against the Contra Costa Community College District for bargaining in bad faith.

The parties' collective bargaining agreement expired June 30, 2003. In early February 2004, the parties held their first bargaining session and the district presented its first comprehensive bargaining proposal, which included a call for a 5 percent salary reduction. The parties continued to meet and exchange proposals. On May 28, the district presented its last, best, and final offer, which included a 7 percent salary reduction. A week later, the district filed a request for impasse determination with the board.

UFCC filed an unfair practice charge alleging the district failed to provide the requested information and engaged in bad faith bargaining by making regressive proposals, requesting an impasse determination, and requesting that the parties bargain on weekends, holidays, and in the evenings.

The R.A. found the evidence showed that the district provided the union with all the requested information in a reasonable amount of time. As to the allegation of regressive bargaining, she found insufficient evidence to determine whether or not that was the case. The R.A. contended the board needed copies of the proposals in their entirety in order to determine if they were regressive. The union provided information regarding only the salary proposals. The R.A. also noted that the district had complied with the parties' agreement when it requested an impasse determination. Lastly, the R.A. found no case law indicating that a request to bargain at inconvenient times is an indicia of bad faith. Accordingly, the R.A. dismissed the charge.

In its appeal, the union argued that it was not required to provide all bargaining information, as it was only alleging that the salary portion was regressive.

The board found that the union had ignored the legal test for determining if a party has engaged in regressive bargaining. The board reiterated that bad faith is established by reviewing the totality of the conduct to determine whether it indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained. The board noted that in *Regents of the University of California* (1985) No. 520, 66X CPER 5, it found that a single act of bad faith bargaining was insufficient to support a prima facie case of unlawful conduct, unless those actions were so egregious that they would constitute a per se violation of the duty to bargain in good faith.

Here, the board found no examples of egregious unilateral activities that would constitute a per se violation and agreed with the R.A. that the union failed to provide enough information for the board to make a determination as to bad faith.

The board adopted the decision of the R.A. and dismissed the charge without leave to amend.

Employer may enforce written policy regardless of past practice: Stockton USD.

(*California School Employees Assn. and its Chap. 318 v. Stockton Unified School Dist.*, No. 1759, 3-28-05; 5 pp. + 11 pp. R.A. dec. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: The charge was dismissed because the charging party failed to provide evidence to support a claim of unilateral change of policy and discrimination.

Case summary: The association appealed the regional attorney's dismissal of its unfair practice charge against the Stockton Unified School District for unilaterally changing the time-off policy for job stewards and for discriminating against Marilyn Brown for her protected activity.

In 2002, the new principal sent a memo setting forth her expectations regarding Brown's use of released time. Brown was an instructional assistant, chief job steward, and chair of the union's bargaining team. The association replied to the memo stating that pursuant to the contract, requests for released time must be made in writing and prior to the time away from work. On April 29 and May 8, 2003, the principal denied verbal requests from Brown for released time. In July, Brown was notified that the school site council had eliminated her instructional assistant position and she was being involuntarily transferred to another school. On November 5, the association filed an unfair practice charge alleging that the district had unilaterally changed the released time policy for job stewards by denying verbal requests contrary to past practice. It also alleged that the district discriminated against Brown when it denied her released time and involuntarily transferred her.

The R.A. found that when the principal denied Brown's request on May 8, there was not a past practice of granting verbal requests for released time. The charge included the allegation that a verbal request for time off was denied on April 29. And the R.A. noted that if the April 29 denial was the first time the practice had been changed, then the allegation was untimely filed. The R.A. also found that the association failed to establish a nexus between the protected activity and the adverse actions. Accordingly, the R.A. dismissed the charge.

On appeal, the board first rejected the district's contention that the appeal was untimely. PERB Reg. 32130(c) provides that a five-day extension of time applies to any filing made in response to documents served by mail. This rule applies regardless of whether the documents are filed by mail or some other method.

The board held that the association's appeal failed to provide any additional information supporting its allegation that the district had unilaterally changed the released time policy or showing a nexus between Brown's protected activity and the adverse action. The board rejected the association's assertion that, in practice, involuntary transfers have been used to avoid layoffs or disciplinary action. The parties' contract permitted the district to implement involuntary transfers based on the work-related needs of the district. This language did not limit the use of involuntary transfers. And the board said, even if the past practice had been to limit involuntary transfers to certain situations, the district maintains the right to adhere to and enforce the contract language.

The board also affirmed the dismissal of the discrimination charge, finding nothing to demonstrate that Brown's position was selected for elimination because of her union activities.

Accordingly, the board dismissed the charge without leave to amend.

Arbitration award not repugnant to purposes of EERA: LAUSD.

(*United Teachers of Los Angeles v. Los Angeles Unified School Dist.*, No. 1765, 5-3-05; 6 pp. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: The charge was dismissed because the party seeking to have the arbitration award deferred failed to show the deferral standard had been met.

Case summary: United Teachers of Los Angeles appealed the board agent's dismissal of its charge alleging that the arbitration award arising from a grievance against the Los Angeles Unified School District was repugnant to the purposes of EERA.

In 2002, the district announced its intention to increase class sizes. The parties' collective bargaining agreement placed restrictions on the terms of achieving class-size reductions. The union filed a charge alleging that the district had committed an unfair practice by unilaterally changing class size without providing notice and an opportunity to bargain. PERB deferred the charge to the parties' grievance and arbitration procedures.

The union then filed a grievance alleging the district had violated the class-size provisions in the agreement and EERA. An arbitration panel heard the case and found that while the district had exceeded the contractual class-size limits in some cases, it had not violated the agreement because the increases were based on state funding limitations. The panel determined that it did not have jurisdiction to rule on an EERA violation.

The union filed an unfair practice charge alleging the arbitration award was repugnant to the purposes of EERA, the panel erroneously concluded that the union waived its right to bargain class size, and the panel failed to consider the unfair practice allegation.

In its analysis, the board followed the arbitration deferral standard set out in *Dry Creek Joint Elementary School Dist.* (1980) No. Ad-81(a), 47 CPER 82. The board found the issues raised in the unfair practice charge had been considered by the arbitration panel, that the union had not made a claim that the arbitration proceedings were unfair and irregular, that the parties agreed to be bound by the arbitration award, and lastly, that the union failed to establish that the award was "repugnant" or palpably wrong.

Accordingly, the board deferred to the arbitration award and dismissed the charge.

Representation Rulings

Election stay granted only for unfair practice charge: Turlock USD.

(*Turlock Unified School Dist. v. California School Employees Assn. and its Chap. 56*, No. Ad-345, 1-26-05; 5 pp. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The appeal was denied and the decision to proceed with the election was upheld.

Case summary: The California School Employees Association and its Chap. 56 appealed the board agent's administrative determination that the representation election for a bargaining unit at the Turlock Unified School District should proceed.

Turlock consolidated its two school districts into one and reduced the number of bargaining units from five to three. The two unions, CSEA and Turlock Classified AFT, which each had represented a portion of those five units, petitioned to be placed on the ballot for the scheduled consent elections.

The AFL-CIO requested PERB stay the election to allow time for resort to the internal AFL-CIO process related to a violation of Article XX of the AFL-CIO constitution. The B.A. notified the parties that neither EERA nor PERB regulations provided for an election to be held in abeyance in deferral to the internal dispute resolution procedures of unions or their affiliates. A stay would be granted only if all parties agreed to it. Because AFT and the district would not agree to the stay, the AFL-CIO's request was denied.

CSEA then appealed the determination to proceed with the election and requested a stay. As PERB Reg. Sec. 32752 provides for a stay only when there is an unfair practice charge pending, the appeal was denied.

CSEA then sent a second appeal to PERB appealing the previous denial. It argued that the board could grant a stay on the basis of EERA Sec. 3541.3(n), which allows the board to "take any other action...necessary to discharge its powers and duties."

Referring to *Robert L. Mueller Charter School* (2003) No. Ad-320, 160 CPER 74, and other prior decisions, the board affirmed that, absent an unfair practice charge, an election should occur and any representation issues will be decided after the election. Therefore, it was not appropriate to grant a stay based on deferral to an outside entity's internal procedure.

The board upheld the B.A.'s and appeals assistant's determinations and denied the appeal without leave to amend.

Judicial Review Rulings

Board denies to join in request for judicial review: Options for Youth-Victor Valley, Inc.

(*Options for Youth-Victor Valley, Inc., and Victor Valley Options for Youth Teachers Assn.*, JR Order No. JR-22, 12-27-04; 4 pp. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The employer failed to demonstrate a sufficient basis for the board to join in the request for judicial review of its decision regarding the appropriateness of a bargaining unit.

Case summary: In *Options for Youth-Victor Valley, Inc.* (2004) No. 1701, 172 CPER 93, the board granted the association's request for recognition of a certificated bargaining unit. The employer opposed the request on the basis that it was an employer under the National Labor Relations Act, which pre-empts the board of jurisdiction under EERA. The board found the certificated unit to be an appropriate unit under EERA and noted that, under California Constitution Art. 3, Sec. 3.5, the board lacks jurisdiction to determine whether the NLRA pre-empts EERA. In that decision, the board said that whether the NLRA pre-empts PERB of its jurisdiction under EERA "must be left to the appellate courts for determination." Based on that language, the employer asked the board to join in its request for judicial review.

EERA Sec. 3542(a) provides that neither the employer nor the employee organization have the right to judicial review of a unit determination except when the board, in response to a petition from an employer or an employee organization, agrees that the case is one of special importance and joins in the request for judicial review or when the issue is raised as a defense to an unfair practice complaint. PERB Reg. 32500(c) confers on the board the sole discretion to determine whether a case is one of special importance.

Long-standing board precedent applies a strict standard in responding to judicial review requests in order to prevent numerous legal challenges to unit determination

rulings. Cases such as *San Diego CCD* (2002) No. JR-20, 153 CPER 73, have placed a heavy burden on parties seeking to obtain the board's consent to joint in judicial review. To demonstrate "special importance," the employer must show that PERB's order presents a novel issue that primarily involves construction of an issue unique to EERA and that is likely to arise frequently.

The board determined that the employer had not met any of the prongs of the *San Diego* test. The fact that there are 600 charter schools in the state is not a sufficient explanation for granting judicial review. In balance, it does not warrant a delay in affording rights to employees or to the employee organization seeking to serve as their representative.

Duty of Fair Representation Rulings

Refusal to pursue grievance did not breach DFR duty: CSEA.

(*Richards v. California School Employees Assn. and its Chap. 183*, No. 1716, 11-30-04; 2 pp. + 8 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Neima.)

Holding: The association did not breach its duty of fair representation by failing to pursue the charging party's grievance.

Case summary: A dispute arose concerning the maximum number of vacation days that can be carried over by classified employees of the San Bernardino City School District. The charging party believed the district improperly had reduced the maximum cumulative number of days from 30 to 25, and a grievance was filed. This prompted the district to issue a clarifying memo. Thereafter, representatives of the district and the association met regarding the issue. When the association refused to pursue the matter to level III of the grievance procedure, the charging party asserted that it had breached its duty of fair representation.

The regional attorney dismissed the charge, noting that the association quickly responded to the charging party's concerns, participated in informal meetings concerning the dispute, and explained its decision for not appealing the grievance. The refusal to pursue the grievance was not arbitrary,

discriminatory, or bad faith conduct, the R.A. determined, because the collective bargaining agreement limits the number of days that can be accumulated to 25. Reliance on the MOU "cannot be considered arbitrary conduct," said the R.A., even if the language of the personnel manual differs.

Refusal to pursue grievance did not violate duty of fair representation: Madera Unified Teachers Assn.

(*Freeman v. Madera Unified Teachers Assn.*, No. 1719, 11-30-04; 3 pp. + 8 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Neima.)

Holding: The union did not breach its duty of fair representation by failing to pursue the charging party's grievance to arbitration.

Case summary: On facts similar to those in *Freeman v. Madera USD*, No. 1718, 173 CPER 72, the board adopted the proposed decision of the regional attorney finding that the association did not violate its duty of fair representation and dismissed the unfair practice charge. The charging party alleged that the association acted arbitrarily in its handling of her grievance against the district in violation of EERA by failing to represent her appropriately in a dispute over her transfer and that of two other teachers. The charging party asserted that the association collaborated with the district by suggesting the idea of transferring the teachers so it would not have to pursue her grievance against the other two.

The R.A. found that the charging party did not set forth sufficient facts to prove that the association's actions were made for reasons that were "irrational, arbitrary or that demonstrate bad faith." Therefore, it did not meet the test set forth in *United Teachers of Los Angeles (Collins)* (1982) No. 258, 56 CPER 76, to assert a violation of a union's duty to represent a member.

Citing *Castro Valley USD* (1980) No. 149, 48 CPER 65, the board held that "an employee does not have an absolute right to have a grievance taken to arbitration and that an exclusive representative's reasonable refusal to proceed with arbitration is essential to the operation of a grievance and arbitration system." The board found that the association in this case "made a reasonable decision regarding the impact

of its actions on all the teachers and worked through the situation to do what it believed was best in representing all three teachers.”

DFR charge filed more than six years after employee’s termination untimely: United Educators of San Francisco.

(*Coverson v. United Educators of San Francisco*, No. 1726, 12-15-04; 2 pp. + 6 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The unfair practice charge was untimely since the conduct in question occurred more than six years before the charge was filed.

Case summary: The charging party alleged that the association failed to represent him in conjunction with his termination by the San Francisco Unified School District in 1998. In 2004, the charging party sought the assistance of the association and subsequently filed an unfair practice charge asserting that it had breached its duty of fair representation by refusing to assist him in seeking reinstatement with the district.

The regional attorney dismissed the charge as untimely. She also noted that the charging party had failed to demonstrate that the association acted in an arbitrary, discriminatory, or bad faith manner.

The board affirmed the dismissal, noting that the six-month statute of limitations period set out in Sec. 3541.5(a)(1) begins to run once the charging party knows, or should have known, of the conduct underlying the charge. The association raised the statute of limitations as an affirmative defense to the charge. Thus, the charging party was required to demonstrate that the charge was timely filed. The board found the charging party provided no information indicating why the charge should be considered timely filed, noting that more than six years had passed since the conduct in question had occurred.

Refusal to permit charging party to run for union office was internal union affair and did not affect membership rights: CSEA.

(*Peterson v. California School Employees Assn. and its Chap.* 36, No. 1733, 12-28-04; 9 pp. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The charging party failed to demonstrate that the association discriminated against him by preventing him from running for union office.

Case summary: The charging party alleged that the association unlawfully denied him the opportunity to run for union office in retaliation for his protected activities.

Applying the same test for assessing discrimination by an employee organization as it uses for gauging discrimination by an employer, the board found no discrimination by the association because the charging party’s exclusion from running for union office was not an adverse action. Rather, the board said, participation in union elections is an internal affair about which PERB traditionally has refused to interfere unless the activity has an impact on the member’s relationship with his or her employer. Unlike the case in *California Union of Safety Employees (Coelho)* (1994) No. 1032-S, 105 CPER 70, where the union filed a citizen’s complaint against the charging party that prompted an investigation by the employer, here the charging party showed no impact on the employer-employee relationship.

The board also rejected the charging party’s contention that his exclusion from participating in the union election was the same as a suspension or dismissal from membership. EERA Sec. 3543.1(a) permits an employee organization to make reasonable provisions for the dismissal of individuals from membership. In support of its holding, the board cited *California State Employees Assn. (Barker and Osuna)* (2003) No. 1551-S, 164 CPER 101, where the charging parties’ removal from their positions as bargaining unit chairs was not deemed to be a suspension or dismissal from membership. Thus, the board concluded, the association’s conduct in excluding the charging party from running for union election was not a matter subject to PERB review under Sec. 3543.1(a).

The board also dismissed the claim that the charging party enjoyed a right to representation under EERA. Amendments enacted in 2000 deleted provisions of EERA Sec. 3543 that had conveyed to employees a self-representation right. The board has interpreted this legislative action in *Woodland Joint USD* (2004) No. 1722, 173 CPER 73, as eliminating the protected right to self-representation under EERA.

Duty of fair representation does not include enforcement of Ed. Code: CTA.

(*Radford v. California Teachers Assn.*, No. 1763, 4-21-05; 2 pp. + 8 pp. R.A. dec. By Member McKeag, with Chairperson Duncan and Member Shek.)

Holding: The charging party failed to prove that the union's actions were arbitrary or capricious. The union's representation obligation did not extend to enforcement of the Education Code.

Case summary: Sherry Radford appealed the regional attorney's dismissal of her unfair practice charge against the California Teachers Association for failing to meet its duty of fair representation.

Radford is a teacher represented by the association. When the district attempted to transfer her to another school because of inappropriate emails she sent to the principal, the association negotiated an agreement to prevent her transfer. Radford later violated the agreement and was transferred to another school. The association refused to file a grievance on her behalf stating that the transfer did not violate the collective bargaining agreement since the move was not arbitrary or capricious. The association also refused to file a grievance on Radford's behalf for alleged Education Code violations, as they were not within its jurisdiction. Radford filed a charge alleging that the association failed to meet its duty of fair representation when it refused to file the grievances on her behalf.

The R.A. observed that the association met its duty of representation when it negotiated a settlement to prevent Radford's involuntary transfer, granted Radford's request to see an attorney after allegations were raised that she had violated the agreement, provided her with representation

during meetings, and spoke to the board of education on her behalf. The R.A. found that the evidence showed the association's decision not to file a grievance was not arbitrary but based on the language of the collective bargaining agreement and documentation which demonstrated that Radford had violated the agreement. The R.A. found that Radford failed to demonstrate that the association acted in an arbitrary, discriminatory, or bad faith manner. The R.A. also noted that the duty of fair representation did not extend to extra-contractual forums; therefore, the association's duty of fair representation does not extend to enforcement of the Education Code. Accordingly, the R.A. dismissed the charge.

The board adopted the R.A.'s decision and dismissed the charge without leave to amend.

Timely charge failed to support breach of duty of fair representation allegation: UESF.

(*Banos v. United Educators of San Francisco*, No. 1764, 4-21-05; 7 pp. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The charging party failed to provide evidence demonstrating that the union acted arbitrarily or in bad faith.

Case summary: Stanley Banos appealed the board agent's dismissal of his unfair practice charge alleging that United Educators of San Francisco had breached its duty of fair representation.

Banos, a probationary teacher, was notified by the school district in March 2004 that he would not be rehired. The union represented Banos throughout the disciplinary process and pursued the removal of negative documents from his file. Although Banos obtained legal counsel, he continued to work with the union. Approximately one month after his last meeting with the union, Banos left messages with the union that went unreturned. His last phone call to the union was on May 12, the day of his final meeting with the district. Banos was represented by legal counsel at that meeting.

On October 28, Banos filed a charge against the union alleging it had breached its duty of fair representation. The B.A. dismissed the charge for failure to state a prima facie

case and because the charge likely was untimely. Banos appealed.

The board first noted that the board agent's dismissal incorporated facts from the union's position statement that had not been served on Banos or signed. The B.A.'s reliance on the statement was improper because PERB Reg. 32620(c) requires that all written responses must be provided to the charging party and signed under penalty of perjury.

The board also disagreed with the board agent's determination that the charge was untimely. The board noted that in duty of fair representation cases, the six-month statutory limitation period begins to run on the date the charging party knew or should have known that further assistance from the union was unlikely. The board found that Banos would not have understood that the union would not provide further assistance until sometime between April 27 and the first two weeks of May. Under this calculation, the charge was timely. The board also noted that obtaining an attorney does not automatically terminate a union's duty to represent a unit member fairly.

The board stated that a union may exercise its discretion as to how far to pursue a grievance so long as it does not arbitrarily ignore a meritorious grievance. Here, the board noted that the evidence showed the union provided Banos with representation during the disciplinary process. Banos had not provided facts that showed the union had acted in an arbitrary manner or in bad faith. Accordingly, the board held that Banos failed to support his allegation.

The board refused to consider the information Banos introduced on appeal because it was known to him at the time the initial charge was filed and he failed to show good cause why it had not been raised then.

The board dismissed the charge without leave to amend.

HEERA Cases

Unfair Practice Rulings

No violation for failure to follow up on CSU's incomplete response to association's request for information: CSU.

(*California State Employees Assn. v. Trustees of the California State University*, No. 1732-H, 12-27-04; 7 pp. + 13 pp. ALJ dec. By Chairperson Duncan, with Members Whitehead and Neima.)

Holding: The university was not obligated to provide information when the association failed to reassert its request for an item that the university initially did not provide.

Case summary: Deborah Corey was a secretary at the CSU San Marcos College of Business. She also was a steward and had testified in a PERB hearing in August 2002. In July 2002, Corey resigned her job effective September 30 to follow her son to Wisconsin. However, on October 7, her son informed her he was going back to California. Corey requested reinstatement to her position in accordance with a contractual provision that allowed an employee to request rescission of a resignation within 30 days of a termination. The dean and associate dean recommended that she not be reinstated, but, on the last day of the application process, advised her that she could reapply for the position. Corey did not reapply. In his letter denying her request several days later, the college president explained that the recruitment process had been completed. CSEA requested seven categories of documents from CSU relating to the decision not to reinstate Corey.

CSEA contended that CSU's decision not to reinstate Corey was in retaliation for her association activities. The board adopted the ALJ's decision that found no retaliation. The ALJ found credible the administrators' testimony that they did not reinstate her because, after she submitted her resignation, she talked openly about how happy she was to be leaving the department.

Among the seven categories of information CSEA requested were (1) a list of employees who previously had requested reinstatement and the disposition of their requests, and (2) copies of notes or minutes for College of Business staff meetings after Corey left.

CSU generally claimed that CSEA was not entitled to the seven categories of information, but provided some or all of the documents in five of the categories. CSU responded that it did not track reinstatement requests and declined to search for the information, but it did not demonstrate that substantial cost would be required for the search. The university completely failed to respond to the request for notes or minutes of staff meetings. In the post-hearing brief, CSU claimed there were no such documents.

The ALJ found a failure to provide relevant information in violation of the duty to bargain. The board, however, emphasized that CSEA never reasserted its request for the information. Relying on *Oakland USD* (1983) No. 367, 60 CPER 54, the board held that no failure to provide information was established.

Failure to state a prima facie case: CSU (Sacramento).

(*California State Employees Assn., Loc. 1000, CSU Division v. Trustees of the California State University [Sacramento]*, No. 1740-H, 1-26-05; 4 pp. + 9 pp. R.A. dec. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: The charge was dismissed for failure to state a prima facie case.

Case summary: The association appealed the regional attorney's dismissal of its unfair practice charge against CSU for discriminating against Mark Christl because he engaged in protected activity.

In October 2003, Christl, a graphic design specialist, expressed disagreement with work directions from his supervisor, specifically those requesting that he leave his office door open, greet and assist visitors, and post his office hours. Christl informed his supervisor that he had sought the association's assistance in this matter. In December 2003, Christl received a letter from the dean of the College of Education repeating the work directions given by his super-

visor, discussing the need to obtain prior approval for work schedule changes, and discussing an issue regarding Christl's inappropriate behavior in the workplace. The letter expressed concerns about Christl's threatening behavior but did not charge him with violating the workplace violence policy. Christl filed a grievance alleging the actions of his supervisor and the dean had violated the contract. In February 2004, the dean sent Christl another letter documenting additional performance and behavioral issues that had come to his attention.

The association filed a charge alleging that Christl suffered adverse action for his protected activity of filing a grievance. The association argued that the university departed from its own procedure by failing to conduct a full and fair investigation before imposing discipline.

The board found that the association failed to demonstrate that the letters constituted discipline and that even if they were to be considered letters of reprimand, the association had not established that the letters were in violation of any policy. In addition, the association failed to demonstrate any nexus between the protected activity and the adverse action.

The board adopted the decision of the R.A. as its own.

Race discrimination not within PERB's jurisdiction: CSU.

(*Graves v. Trustees of the California State University*, No. 1741-H, 1-26-05; 2 pp. + 15 pp. ALJ dec. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: The unfair practice charge was dismissed for failure to state a prima facie case under PERB's jurisdiction.

Case summary: Orlando Graves appealed the regional attorney's dismissal of his unfair practice charge against the Trustees of the California State University. Graves asserted that after he applied for a position, the university changed the job requirements because of his race. In *CSEA (Waymire)* (2000) No. 1448, 149 CPER 73, the board held PERB has no jurisdiction to enforce statutes regarding discrimination based on sex, race, or religion. The R.A. dis-

missed the charge, stating that the allegations fell outside of PERB's jurisdiction and were more properly considered by the Department of Fair Employment and Housing. The board adopted the R.A.'s decision as its own.

University-implemented student complaint procedure does not constitute a unilateral change for employees: CSU.

(*Academic Professionals of California v. Trustees of the California State University*, No. 1751-H, 2-8-05; 16 pp. + 13 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Shek concurring.)

Holding: The board found that the non-discrimination policy for students implemented by the university did not constitute a change in policy or practice. As the complaint procedure applied only to students, it did not constitute a change for employees. The board also noted that discrimination against students was prohibited by law before enactment of the policy. (See *CPER* No. 171, pp. 61-64, for complete coverage of the story.)

Employee's comments about working conditions are protected activity: CSU (Sonoma).

(*California State Employees Assn. v. Trustees of the California State University [Sonoma]*, No. 1755-H, 3-1-05; 10 pp. By Member Shek, with Member Whitehead; Chairperson Duncan dissenting.)

Holding: Accepting the charging party's allegations as true, the union established a prima facie case of discrimination. The allegation that the university failed to provide information was dismissed for lack of evidence.

Case summary: California State Employees Association appealed a board agent's dismissal of its unfair practice charge against the university for discriminating against VaLinda Kyrias for her protected activities.

Kyrias, an administrative coordinator and CSEA's chief job steward, received a written reprimand for divisive and inappropriate behavior in the workplace. The reprimand noted that she told one coworker not to trust the dean's office or anyone in it and told another that she should not ask the

dean's office staff for assistance because they use it against people in their performance evaluations. Kyrias denied making the comments attributed to her.

CSEA filed the unfair practice charge alleging that the university discriminated against Kyrias for her protected speech and that the university withheld information from the union during the investigation.

The board's analysis centered on whether Kyrias' statement qualified as protected activity under HEERA. Following *Golden Plains USD* (2002) No. 1489, 156 *CPER* 91, the board accepted Kyrias' assertion that she told an employee only "to be cautious about how much help she asked for from the dean's office because it could end up in her probationary evaluation."

Citing *Regents of the University of California* (1984) No. 449-H, 64 *CPER* 58, *Pomona USD* (2000) No. 1375, 141 *CPER* 53, and *State of California (Dept. of Transportation)* (1983) No. 304-S, 56 *CPER* 85, the board instructed that HEERA protects a wide range of employee speech, even when the speech is uncomplimentary to the employer and contains inaccuracies and exaggerations, so long as its purpose is to advance the employees' interests in working conditions. As the board held in *Rancho Santiago CCD* (1986) No. 602, 71X *CPER* 12, employee speech loses protection only when "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption" or "material interference."

Observing that Kyrias' statements involved working conditions, the board found them to be entitled to protection, especially given her role as a union steward. Comparing Kyrias' statements to those in *Rancho Santiago*, the board found them not to be so malicious or defamatory so as to lose their protection. Accordingly, the board held her speech was protected and reversed the B.A.'s dismissal related to the discrimination charge.

The board upheld the B.A.'s dismissal of the charge concerning CSEA's information request. The board found no evidence that the university was lying when it said it had no other documents pertaining to Kyrias. In addition, CSEA did not allege that it believed other documents existed.

The board affirmed the dismissal in part and remanded the remainder of the charge to the general counsel for issuance of a complaint.

Chairperson Duncan dissented. He argued that the board erred in applying *Golden Plains* to the facts of the case. He viewed the assertion that Kyrias' statements involved working conditions and therefore were entitled to protection as an inaccurate legal conclusion and without which there was no prima facie case.

Codified Skelly hearing instructions were not change in past practice: CSU.

(*Academic Professionals of California v. Trustees of the California State University*, No. 1760-H, 3-30-05; 15 pp. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: The charging party failed to provide evidence to support its allegation that the university had made a unilateral change in past practice when it codified its Skelly hearing instructions.

Case summary: Academic Professionals of California filed exceptions to the proposed decision of an administrative law judge, which found that the union failed to establish that the university made a unilateral change in policy or practice regarding Skelly hearings.

In 1997, the university codified its existing policies regarding Skelly hearings. It recommended that Skelly hearing officers limit employees to one representative and have employees speak for themselves to avoid confusion. In 2002, an officer refused to allow an employee to have two representatives and found it unacceptable for the representative to do all the speaking for the employee. At the time, the hearing officer believed the university's policy to be a firm restriction, not a guideline. During the PERB hearing, however, the hearing officer reread the policy and concluded that he did have the authority to allow multiple representatives and to let them speak for the employee. The union filed an unfair practice charge alleging that the university had unilaterally changed the hearing policy in 1997.

The board found the union failed to satisfy its burden of proof in this case by providing any evidence that the university changed its policy in 1997 when it codified the instructions. The union did not present any evidence to contradict the university's testimony that there had not been a change in practice after 1997. While the union presented evidence regarding seven post-1997 hearings, the 2002 hearing was the only one at which the employee was not allowed to have multiple representatives. The board found that the university's policy of preferring to hear directly from the employee was congruent with the Skelly hearing safeguards that protect an employee's right to respond.

As for the single incident in 2002, the board found that the officer's decision to allow only one representative was not authorized by the university and was not representative of the university's policy. The hearing officer never stated that the employee's representative was prohibited from speaking or representing the employee. The board held that his actions constituted a one-time breach of university policy, and it did not have a generalized or continuing impact on the terms and conditions of bargaining unit members.

Accordingly, the board found that the university did not make a unilateral change, and it dismissed the charge without leave to amend.

Representation Rulings

Good cause exists to allow late filing of response to request for judicial review: CSU.

(*Trustees of the California State University and California Faculty Assn.; and California Alliance of Academic Student Employees/UAW, Joined Party*, No. Ad-344-H, 12-28-04; 2 pp. dec. By Chairperson Duncan, with Members Neima and Whitehead.)

Holding: A new staffperson's lack of familiarity with procedures for PERB filings constitutes good cause for late filing.

Case summary: CFA filed a request for judicial review of *Trustees of the California State University* (2004) No. Ad-342-H, 171 CPER 94. Responses to the request were

due in the appeals office on October 29, 2004, a Friday. CSU's response was mailed on October 28, but not received until November 1. CSU explained that it had reorganized job assignments, and the person mailing the response was not familiar with the office practice of mailing and faxing the response to the appeals office. CSU argued there was no prejudice to CFA because a copy of the response was timely received by CFA. The board found good cause to accept the late-filed response.

Judicial Review Rulings

Request for judicial review of unit clarification order: CSU.

(*Trustees of the California State University and California Faculty Assn.; California Alliance of Academic Student Employees/UAW, Joined Party*, No. JR-23-H, 12-29-04; 3 pp. dec. By Chairperson Duncan, with Members Neima and Whitehead.)

Holding: CSU did not establish that a case involving unit clarification was a matter of special importance meriting judicial review.

Case summary: CFA requested judicial review of *Trustees of the California State University* (2004) No. Ad-342-H, 171 CPER 94, in which the board clarified that students employed to perform instruction, but whose employment status is not exclusively dependent on their status as degree-seeking students in the department, are not part of the faculty unit as it was described in a 1991 order. CFA contended that judicial review was necessary because the board's decision was contrary to the principles of statutory construction and made portions of the original order meaningless. The board stated that CFA had not identified the canon of construction the board's order had allegedly violated. The board found CFA had not met its burden of showing the case was one of special importance. It denied the request to join in CFA's request for judicial review.

MMBA Cases

Unfair Practice Rulings

No evidence of surface bargaining: County of Riverside.

(*Riverside Sheriffs Assn. v. County of Riverside*, No. 1715-M, 11-30-04; 8 pp. + 27 pp. ALJ dec. By Chairperson Duncan, with Members Whitehead and Neima.)

Holding: Adamant insistence on a bargaining position is not a refusal to bargain in good faith.

Case summary: The association alleged that the county engaged in unlawful surface bargaining when, during the course of protracted negotiations for a successor agreement, it canceled five previously scheduled meetings, reneged on a tentative agreement to grant a "3 percent at age 50" retirement formula, engaged in regressive bargaining by withdrawing its salary proposals, insisted on resolving non-economic issues before negotiating on economic issues, and conveyed insufficient authority to its chief spokesperson. An administrative law judge found support for some of these allegations but concluded from the totality of conduct that the county had not engaged in surface bargaining by intending to subvert the process with obstructionist conduct.

The ALJ also rejected the association's contention that the county failed to participate in the impasse procedures in good faith by declining to submit the issues in dispute to binding interest arbitration established by S.B. 402. The ALJ concluded that the county's position was based on a good-faith doubt about the constitutionality of that new statutory enactment.

The board adopted the ALJ's proposed decision, reviewing board precedent regarding the various indicia of surface bargaining allegations. It affirmed, however, that while a party may not go through the motions of bargaining without the genuine intent to reach agreement, adamant insistence on a bargaining position is not necessarily a refusal to bargain. Citing *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 29 CPER 43, and *Oakland USD* (1982) No. 275, 52 CPER 68, the board said "the obligation

of the employer to bargain in good faith does not require the yielding of positions fairly maintained.”

Decision to lay off is managerial prerogative under MMBA: City of Richmond.

(*International Association of Firefighters, Loc. 188 v. City of Richmond*, No. 1720-M, 12-13-04; 4 pp. By Member Neima, Chairperson Duncan and Member Whitehead.)

Holding: Under MMBA, the effect of the decision to lay off employees is within the scope of representation, but the decision itself is a matter reserved to the employer.

Case summary: The association argued that under *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 23 CPER 54, the decision to lay off employees is within the scope of representation under the MMBA. The board rejected that assertion, finding support in the language of *Vallejo* to affirm that, while the timing of the layoff and its impact on the workload and safety of remaining employees is within the scope, the decision itself is a matter reserved to the employer.

The board also referred to its decision in *Newman-Crows Landing USD* (1982) No. 223, 55 CPER 62, which recognized that the determination as to whether there is sufficient work or funds to support the workforce is a matter of fundamental managerial concern and a matter of managerial prerogative. The board found no reason to depart from “this well-established rule.”

The board found no support for the association’s claim that it had requested to bargain over the effects of the layoff decision. The decision to bargain over a non-negotiable matter will not be interpreted as a demand to negotiate over the effects of that decision. Any demand to bargain over effects must clearly identify the negotiable areas of impact. “Where the union requests only to bargain over the non-negotiable decision, and gives no notice of its desire to negotiate over effects, PERB has held that the union has waived its right to bargain over effects,” said the board citing *Newman-Crows Landing*.

Alleged past practice of health premium parity does not defeat unambiguous contract language: City of Modesto.

(*Modesto City Employees Assn. v. City of Modesto*, No. 1724-M, 12-15-04; 5 pp. + 7 pp. B.A. dec. By Member Whitehead, with Chairperson Duncan and Member Neima.)

Holding: The express contract provision in the parties’ agreement sets the health care premium payment schedule and supersedes the alleged past practice of premium parity among bargaining units. Thus, no unilateral change in health care premiums was demonstrated.

Case summary: The association alleged that, for a period of 10 years, the city maintained equal health care benefits for all employees. In its unfair practice charge, the association asserted that in 2003, the city unilaterally changed its past practice by failing to maintain parity with other employee organizations in the amount of the employer’s health premium contribution.

Relying on *Marysville Joint USD* (1983) No. 314, 58 CPER 62, the board instructed that an established policy may be embodied in the terms of a collective bargaining agreement or, “where a contract is silent or ambiguous as to a policy, it may be ascertained by examining past practice or bargaining history. However, where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning.”

The parties’ contract provides a schedule of employer health care premiums, noted the board, and includes no provision for health premium parity among bargaining units. The zipper clause also precludes bargaining “with respect to any subject or matter referred to or covered in” the parties’ contract absent mutual agreement by the parties. Thus, the board concluded, the express provision setting a health benefit premium payment schedule supersedes the alleged past practice of premium parity among bargaining units.

The association also asserted that the city was required to invoke the provisions of the zipper clause when the Modesto Police Officers Association and the Modesto Police Management Association sought to negotiate health benefit premiums. The board concluded that the city is not

obligated to negotiate a change to the zipper clause and therefore did not make an unlawful policy change in violation of the MMBA.

PERB vacates prior decision at direction of Court of Appeal: Fresno Irrigation Dist.

(*Fresno Irrigation District Employees Assn. v. Fresno Irrigation Dist.*, No. 1565a-M, 12-21-04; 2 pp. By Chairperson Duncan, with Members Whitehead and Neima.)

Holding: PERB's decision in *Fresno Irrigation Dist.* (2003) No. 1565-M was vacated and the underlying complaint and unfair practice charge dismissed at the direction of the Fifth District Court of Appeal.

Case summary: In *Fresno Irrigation Dist.* (2003) No. 1565-M, 164 CPER 118, PERB found that the district had violated its local rules and the MMBA when it denied the association use of district facilities for a meeting, failed to meet and confer in good faith over a change in policy regarding the use of district facilities, and discriminated against employees for the exercise of protected rights. The district petitioned for review of the board's decision and, in *Fresno Irrigation Dist. v. PERB*, the Court of Appeal for the Fifth Appellate District ruled that the district's isolated denial of the use of the meeting facility did not amount to a change in policy with a generalized effect or continuing impact on bargaining unit employees, relying on *CSEA v. PERB* (1996) 51 Cal.App.4th 923.

Accordingly, at the court's direction, the board vacated its earlier decision, No. 1565-M, and issued a new decision dismissing the complaint and underlying unfair practice charge.

Employer's 'work group' did not bypass exclusive representative: County of Fresno.

(*SEIU Loc. 535 v. County of Fresno*, No. 1731-M, 12-27-04; 2 pp. + 7 pp. B.A. dec. By Chairperson Duncan, with Members Neima and Shek.)

Holding: The work group set up by the employer to plan for a new detention center did not infringe on the rights of the exclusive representative.

Case summary: While the parties were at the bargaining table in 2003, the employer established a work group numbering about 60 persons to design a plan to staff and operate the jails more efficiently. The union provided the names of unit employees to participate, but non-unit members dominated the group. According to the unfair practice charge filed by the union, the work group discussed issues subject to negotiations, such as work shifts and shift selection, changes in days off, vacation usage, and swapping time off. The union asserted that in establishing this group, the county bypassed the exclusive representative and was attempting to gain employee support for changes the employer was not able to obtain from the exclusive representative at the bargaining table.

The board agent dismissed the charge, distinguishing the case from *Oak Grove S.D.* (1986) No. 582, 70 CPER 60. In the present case, the B.A. noted, unlike in *Oak Grove*, the union's chapter president provided the county with a list of potential work group members. And, he noted, the union understood that there would be further discussions with the employer if the county intended to make changes based on the work group's recommendations. Further, the B.A. found, the union had ample opportunity to ask its members on the committee about the scope of the work group's responsibility.

On appeal, the board summarily affirmed the B.A.'s dismissal.

Providing members and fee payers enhanced benefits is unfair practice: San Diego Municipal Assn.

(*DuLaney v. City of San Diego; Dulaney v. San Diego Municipal Assn.*, No. 1738-M, 1-20-05; 11 pp. + 19 pp. ALJ dec. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: Providing different benefits based on union membership constitutes an adverse action and is a violation of the MMBA. It is a violation of the duty of fair representation for a union to negotiate an agreement that discriminates against employees who abstain from participating in the union.

Case summary: The San Diego Municipal Employees Association appealed the administrative law judge's proposed decision upholding the unfair practice charges filed against it and City of San Diego by Tanya DuLaney.

Under the current MOU between the parties, an employee must be either an association member or an agency fee payer to be eligible for the association's dental and vision plans. There is an exception in the MOU that also allows conscientious objectors to participate in the plans. These are the only dental and vision plans available to the employees. DuLaney, an employee in a bargaining unit represented by the association, is not an association member, fee payor, or conscientious objector and as such is not able to participate in the dental and vision plans. DuLaney filed charges against the city and the association, asserting this agreement violated the MMBA by denying her benefits for not being an association member or fee payer.

The ALJ found that DuLaney participated in protected activity when she chose not to be a member of the association, and that being denied the dental and vision benefits available to association members was an adverse action. Basing his conclusion on the holdings in *Campbell Municipal Employee Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 53 CPER 2, and *Palo Verde USD* (1998) No. 689, 75X CPER 13, the ALJ found that the city and association had unlawfully discriminated against DuLaney and had interfered with her rights, and that the association had violated its duty of fair representation. Agreeing with the ALJ, the board found that "[t]here is an adverse action when an employee is denied a benefit based on whether or not he or she is a union member just as in *Campbell* when there was an adverse action by treating members of one union differently than members of others. Here, the benefit is denied to non-union members." The board adopted the ALJ's proposed decision as its own.

Assignment of work to project employees is acceptable based on provisions of agreement and past practice: Oakland Housing Authority.

(*Building Trades Council v. Oakland Housing Authority*, No. 1739-M, 1-26-05; 8 pp. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The charge was dismissed because it failed to state a prima facie case.

Case summary: The Building Trades Council appealed a board agent's dismissal of its unfair practice charge alleging that the Oakland Housing Authority unilaterally changed an existing policy by assigning the work of regular employees to project employees. The council alleged that project employees are limited to working on special project work funded by grant money or are limited to working no more than six months if their work is made possible by regular funds.

The MOU between the parties defines project employees as those whose positions are funded by special grants or temporarily funded by regular funds for a specific duration. The board noted that the MOU did not limit the "specific duration" for project employees and that the six-month limit referenced by the council applied only to temporary employees. The board concluded that, based on the MOU, the only distinction between regular and project employees is that the latter are hired for a specified duration and are required to sign employment papers acknowledging the limited duration of the position.

The board found no evidence that the authority unilaterally departed from the provisions of the MOU or unilaterally changed the past practice when it assigned project employees the work of regular employees or when their term of employment exceeded six months. The board dismissed the unfair practice charge without leave to amend.

Charge dismissed for failure to state a prima facie case: Contra Costa County Health Services Dept.

(*Kromann v. Contra Costa County Health Services Dept.*, No. 1742-M, 1-26-05; 3 pp. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The unfair practice charge was dismissed for failure to state a prima facie case.

Case summary: Dennis Kromann appealed a board agent's dismissal of his unfair practice charge against the county health services department. He alleged that the department terminated him because of his protected activity.

The B.A. dismissed his charge for failure to state a prima facie case. In his appeal, Kromann reiterated the facts alleged in his unfair practice charge. The board held the Kromann failed to state a reason for his appeal and again failed to state a prima facie case. The board adopted the B.A.'s decision and dismissed the charge without leave to amend.

Request denied for reconsideration of termination decision: Alameda County Medical Center.

(*Flenoy v. Alameda County Medical Center*, No. 1707a-M, 2-4-05; 5 pp. By Chairperson Duncan, with Members Whitehead and Neima.)

Holding: The request for reconsideration was denied for failure to provide valid grounds for reconsideration.

Case summary: Delores Flenoy requested reconsideration of the board's decision in *Alameda County Medical Center* (2004) PERB No. 1707-M, 172 CPER 97. In that case, Flenoy alleged that the medical center violated the MMBA by retaliating against her for her protected conduct as a union steward. The board held that Flenoy was terminated for her misconduct, not for her protected activity.

Flenoy submitted five documents with her request for reconsideration. The board reviewed Flenoy's documentation and determined that it failed to meet the requirement for reconsideration as prescribed by PERB Reg. 32410(a). The board stated that Flenoy failed to show that three of the documents were not previously available to her. The remaining two documents failed to show a nexus between her protected activity and termination, and furthermore were not relevant to the issue. The board pointed out that these documents referred to incidents that occurred long after the events at issue in the charge. The request for reconsideration was denied.

Protected activity required to state a prima facie case: Contra Costa County Health Services Dept.

(*Neal v. Contra Costa County Health Services Dept.*, No. 1752-M, 2-11-05; 3 pp. + 7 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The charge was dismissed because the party had not engaged in protected activity and therefore failed to state a prima facie case.

Case summary: Donald Neal appealed the regional attorney's dismissal of his unfair practice charge against the Contra Costa County Health Services Department. Neal alleged that the department terminated him for his protected activity under the MMBA.

Neal, a charge nurse at the county's detention facility in Martinez, was terminated during his probationary period. The department stated that he was being terminated for his excessive absences and failure to secure removal of federal sanctions against him. Neal appealed the department's decision to the merit board, which rejected the appeal.

The R.A. noted that Neal had not engaged in any activity that would be considered protected by the MMBA and dismissed his charge.

In his appeal to the board, Neal reiterated the facts alleged in his charge without addressing why the R.A.'s dismissal should have been reversed. The board ruled that his appeal did not comply with PERB Reg. 32635 and dismissed the charge without leave to amend.

Charge dismissed for failure to identify a negotiable effect: Oakland Housing Authority.

(*Service Employees International Union, Loc. 1877 v. Oakland Housing Authority*, No. 1753-M, 2-16-05; 3 pp. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: The charge was dismissed for failure to state a prima facie case.

Case summary: Service Employees International Union, Loc. 1877, appealed a board agent's dismissal of its unfair practice charge alleging that the Oakland Housing Authority refused to meet and confer over the effects of the authority's decision to hire project employees.

The board observed that this case was factually similar to *Oakland Housing Authority* (2005) No. 1739-M, 173 CPER xx, in which the board dismissed the union's charge that the authority violated the collective bargaining agreement by assigning to project employees work that should have been assigned to regular employees. In this case, SEIU alleged that the project employees hired by the authority were de-

priving bargaining unit members of legitimate work opportunities and that the authority refused to negotiate over the effects of its decision.

As to the assertion that the authority had deprived members of job opportunities, the board noted that the project workers are members of the SEIU bargaining unit. In addition, the board found that SEIU failed to identify a negotiable effect of the decision. Accordingly, the charge failed to state a prima facie case.

The board dismissed the charge without leave to amend.

No unfair practice charge if no protected activity: County of Colusa.

(*Womble v. County of Colusa*, No. 1757-M, 3-8-05; 2 pp. + 5 pp. R.A. dec. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The charge was dismissed for failure to demonstrate that the charging party participated in any protected activity.

Case summary: Linda Womble appealed the regional attorney's dismissal of her unfair practice charge against the county.

Womble, a legal administrative assistant in the Office of the County Counsel, alleged that the county required her to perform duties in the public defender's office without compensating her for the work.

The R.A. dismissed the charge because Womble failed to show that she exercised any rights protected by the MMBA and that the county denied her compensation claim in reprisal for such activity.

In her appeal, Womble raised the issue that she requested a reclassification of her duties. The board refused to consider this information because it was known to Womble at the time the initial charge was filed and she failed to show good cause why it had not been raised before the R.A.

The board adopted the R.A.'s decision and dismissed the charge without leave to amend.

Employer may choose method of overtime compensation: City of Whittier.

(*Whittier City Employees Assn. v. City of Whittier*, No. 1761-M, 4-8-05; 8 pp. + 6 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The charge was dismissed because the charging party failed to show there was any change in policy or practice.

Case summary: Whittier City Employees Association appealed the regional attorney's dismissal of its unfair practice charge against the City of Whittier for unilaterally changing its overtime policy.

The city's standard operating procedure stated both that the department head will determine whether compensation or time off will be given when overtime is worked and that employees are given a choice of whether to receive pay or time off. Since 1988, the city had interpreted the procedure as allowing the department head to determine the method of compensation. The MOU, negotiated by the parties and adopted in 1996, provided that overtime pay may be granted in lieu of compensatory time off at the city's discretion.

The board found that the standard operating procedure was inconsistent as to who was to determine the method of overtime compensation. However, it was clear when read together with the MOU, that the department head was the arbiter. The board found the language of the MOU to state conclusively that the city, not the employee, had the authority to determine how overtime compensation was paid.

The board concluded that there was no change in policy and dismissed the charge without leave to amend.

City violated MMBA by denying employee representative at council hearing: City of Monterey.

(*Laborers Loc. No. 270 v. City of Monterey*, No. 1766-M, 5-20-05; 3 pp. + 26 pp. ALJ dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The city violated the MMBA by interfering with the employee's right to designate a representative of his choice at his termination hearing and the union's right to

represent a member in his employment relations with his employer.

Case summary: The City of Monterey filed exceptions to the administrative law judge's proposed decision in an unfair practice charge filed by Laborers Local No. 270.

Marcus Trujillo, a custodian, was terminated by the city for being intoxicated while on the job. Tim McCormick was Trujillo's union representative through both the disciplinary process and grievance process. McCormick was to represent Trujillo at a hearing before the city council, the final step in the grievance process. At the city council hearing, the city moved to exclude McCormick from the proceedings because it intended to call him as a witness. The city argued that it would be a violation of the Ralph M. Brown Act and the Evidence Code if he were allowed to be present for the hearing. The council granted the motion, and McCormick was excluded, although he was never called to testify. Allan Crowley, the attorney representing the union, was forced to act as Trujillo's advocate during the hearing. A supervisor, George Helm, designated as a city representative, remained during the hearing and was called to testify.

The ALJ applied the test established by *Public Employees Association of Tulare County v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 65 CPER 29, to determine whether the city interfered with the rights guaranteed by the MMBA.

First, the ALJ determined there was protected conduct. The ALJ found that Trujillo had participated in protected conduct under Sec. 3502 when he designated McCormick as his representative, and that McCormick engaged in protected conduct under Sec. 3503 when he attempted to act as Trujillo's union representative. Over the city's contention that Crowley was present to serve as an advocate for Trujillo, the ALJ found that Crowley was not Trujillo's designated representative under Sec. 3502 or a designated union representative under Sec. 3503.

Next, the ALJ determined that the city had engaged in conduct that interfered with the exercise of those protected rights. The ALJ found that when the city excluded McCormick, it interfered with the union's right to designate

a representative to represent a member in an employment-related matter. That action also denied Trujillo his right to designate a representative of his choice. The ALJ cited the well-established principle that an employee organization has the right to designate its own representatives in dealing with the employer.

Lastly, the ALJ analyzed whether the city's actions were justified by legitimate business reasons. The ALJ acknowledged that the Brown Act gave the city council the general authority to exclude a witness from a closed session convened to consider an employee's dismissal. However, the ALJ reasoned, that authority is permissive, not mandatory, and may not be exercised in a manner that violates MMBA rights. Further, the MMBA specifically precludes the restriction imposed by the city council by conveying to employees the right to participate in activities of an employee organization unabridged by any grounds not set by the MMBA.

The ALJ was unpersuaded by the city's argument based on the Evidence Code, noting that the city council rules clearly stated that the formal rules of evidence do not apply. The ALJ held that the city exercised its authority in a manner that interfered with MMBA rights by excluding McCormick from the hearing while allowing Helm to remain.

The ALJ distinguished this case from *Uplands Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 162 CPER 30, where the court was concerned that an officer could prevent an interrogation and thwart legislative purpose simply by choosing a representative who would never be available. The ALJ found there was no concern in the case that McCormick's presence at the hearing would thwart any legislative purpose.

Accordingly the ALJ found that the city violated the MMBA by interfering with Trujillo's right to designate a representative of his choice and the union's right to represent a member in his employment relations with his employer.

The board adopted the ALJ's proposed decision as its own.

Duty of Fair Representation Rulings

Manner in which union conducted arbitration hearing did not violate duty of fair representation: IUOE Loc. 39.

(*Kempe v. IUOE Loc. 39*, No. 1747-M, 2-4-05; 10 pp. By Member Neima, with Members Whitehead and Shek.)

Holding: The union's presentation of a grievance in arbitration did not violate its duty of fair representation.

Case summary: Richard Kempe appealed the board agent's dismissal of his unfair practice charge against IUOE Local 39 in which he alleged that the union breached its duty of fair representation by failing to fairly represent him in his grievance against the Contra Costa Water District.

In 2000, Kempe was precluded from performing his job as a canal safety guard for the district because of an injury. He formally resigned from his position and applied for lifetime medical benefits. The district denied the request, asserting that Kempe was not permanently precluded from work.

Local 39 filed a grievance on Kempe's behalf, alleging the district violated the provisions of the MOU when it failed to provide him with lifetime medical benefits. The district denied the grievance, and Local 39 requested it be advanced to the next level. Local 39 then informed Kempe that the district had missed the deadline to respond and it was going to advance the grievance to arbitration. A few days later Kempe received a letter from the district stating the appeal of his grievance had not been timely filed.

Local 39 successfully petitioned the superior court to compel arbitration and a date was scheduled. Kempe was told that a meeting would be scheduled with the union's attorney. He provided the union with documentation in preparation for the arbitration hearing. The meeting with the attorney did not occur. Just prior to the arbitration, Kempe was informed by the attorney that he would not need to meet with him because he had read the union's position statement.

The arbitrator denied the grievance on the merits, finding that the district had not improperly denied lifetime medical benefits because Kempe had not established that he re-

mained permanently disabled at the time of his resignation.

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." In applying this standard, the board has found that while various actions taken by a union would not violate the duty of fair representation when considered separately, they could represent a pattern of conduct demonstrating an arbitrary failure to represent a bargaining unit employee when considered in their totality.

In this vein, Kempe alleged that the union demonstrated arbitrary conduct in violation of the duty of fair representation by losing his file, missing time lines, failing to return phone calls, and failing to schedule time to consult with the attorney. He also cited the attorney's failure to admit a section of the MOU and Kempe's medical records into evidence.

The board observed that the union continued to pursue Kempe's grievance and attempted to correct its mistakes. The board declared that those actions did not suggest efforts by the union to ignore or mislead Kempe concerning the status of his grievance and none of the errors constituted negligence that foreclosed the arbitration of Kempe's grievance.

The board referred to *United Teachers-Los Angeles (Farrar)* (1990) No. 797, 84X CPER 21, in which it concluded that a union's decision to conduct an arbitration hearing contrary to the wishes of an employee, by failing to meet with the employee before the hearing and failing to present certain evidence, did not violate the duty of fair representation. Therefore, Kempe's disagreement with the union's presentation of his case during the arbitration hearing did not demonstrate a breach of the duty of fair representation.

Accordingly, the board dismissed the charge without leave to amend.

Activity Reports

ALJ Proposed Decision (By Region), March 1-June 30, 2005

Sacramento Regional Office — Final Decisions

San Juan Teachers Assn. v. San Juan Unified School Dist., Case SA-CE-2190-E. ALJ Fred D’Orazio. (Issued 3-16-05; final 4-12-05; HO-U-872-E.) In the face of pending layoff hearings, the district unlawfully changed contractual procedures to select substitutes, require medical certificates for absences, and require use of personal necessity leave on days of hearing. However, the district did not unlawfully change a contractual provision covering assignments during preparation periods, where the contract gave the district the right to do so during emergencies.

Organization of SMUD Employees v. Sacramento Municipal Utility Dist., Case SA-CE-137-M. ALJ Allen Link. (Issued 3-30-05; final 4-26-05; HO-U-874-M.) The district did not unlawfully transfer work out of the bargaining unit when it created new classifications, where the work allegedly transferred is not the same work as that performed by unit employees because the work is “proactive” rather than “reactive.”

Butte County Employees Assn., Loc. 1 v. County of Butte, Case SA-CE-187-M. ALJ Fred D’Orazio. (Issued 4-1-05; final 4-27-05; HO-U-875-M.) Employees were unlawfully denied union representation during interviews conducted after the county discovered large amounts of pornographic material at the worksite, where possession or knowledge of such material could result in discipline. The ALJ found that employees reasonably feared discipline under the objective standards and the interviews were conducted in highly unusual circumstances.

Schmiett v. Calaveras County Employees Assn., Case SA-CO-20-M. ALJ Allen Link. (Issued 4-11-05; final 5-10-05; HO-U-877-M.) The union did not breach its duty of fair representation when it did not act as a representative in a termination appeal, where the employee was free to, and did, retain outside counsel, the exclusive representative did not control the exclusive means of representation, and the employee demonstrated no genuine interest in representation by the exclusive representative.

San Francisco Regional Office — Final Decisions

No proposed decisions became final.

Los Angeles Regional Office — Final Decisions

Academic Professionals of California v. Trustees of the California State University, Case LA-CE-792-H. ALJ Thomas Allen. (Issued 3-3-05; final 4-20-05; HO-U-873-H.) The university unlawfully implemented a requirement that employees with access to personal information sign a confidentiality agreement, where the form required employees to ensure that the recipient of the information understands his or her responsibilities as a user, and that violations of the agreement are to be processed under normal university procedures.

Buena Park Teachers Assn. v. Buena Park Elementary School Dist., Case LA-CE-4558-E. ALJ Ann Weinman. (Issued 3-10-05; final 4-5-05; HO-U-871-E.) The district breached its duty to bargain where the superintendent signed a tentative agreement covering health benefits and class-size reduction procedures, and the school board ratified it but, upon later review of the final draft, refused to execute it, and instead, changed language in both areas. The ALJ rejected the district’s defenses that its negotiators lacked authority and there was no meeting of the minds.

Yorba Linda Water Dist. Employees Assn. v. Yorba Linda Water Dist., Case LA-CE-143-M. ALJ Ann Weinman. (Issued 4-6-05; final 5-3-05; HO-U-876-M.) The complaint that the district unilaterally changed job duties was dismissed as untimely, where the duties had not changed since 1983, and the year 2000 job description accurately reflects those duties. The union’s argument that the alleged change is a continuing violation was rejected where evidence showed no new conduct independent of the original violation.

Blume v. ABC Federation of Teachers, Case LA-CO-1173-E. ALJ Ann Weinman. (Issued 5-10-05; final 6-7-05; HO-U-878-E.) The union did not breach its duty of fair representation during the grievance procedure, which permits an employee to file a grievance on her own behalf, where the employee filed a grievance indicating that the union did not represent her and did not ask for union representation. The union did not breach its duty of fair representation in a sepa-

rate proceeding challenging a notice of unprofessional conduct, where the advice of the union attorney as to the timing of filing a response to the notice did not result in adverse consequences to the employee, the union representative's failure to appear at the meeting to address the matter was inadvertent, and the meeting was rescheduled.

Sacramento Regional Office — Decisions Not Final

Health Care Workers Union, Loc. 250 v. Sutter County In-Home Supportive Services Public Authority, Case SA-CE-211-M. ALJ Allen Link. (Issued 5-11-05; exceptions filed 5-20-05.) The Authority had no duty to negotiate about the decision to implement a criminal background check for in-home care providers because it involved a managerial prerogative beyond the scope of representation. However, the employer breached its duty to bargain about the effects of the decision, including but not limited to procedures to handle criminal records, payment of fees for background checks, appeal rights of employees who are incorrectly identified as having a criminal record, and categories of reportable offenses.

Stationary Engineers, Loc. 39 v. County of Placer, Case SA-CE-260-M. ALJ Donn Ginoza. (Issued 6-14-05; exceptions due 7-11-05.) The termination of two county collection agents was not retaliation for assisting in the union's preparation of a sexual harassment complaint against their supervisor, despite prima facie evidence of unlawful animus. One employee had a history of throwing temper tantrums, engaging in disrespectful conduct, and multiple disciplinary actions. Another employee, a probationer, had received an overall improvement-needed evaluation after three months, was slow to adapt to the new job, and read novels on work time.

Maxey v. Sierra Joint Community College Dist., Case SA-CE-2235-E. ALJ Fred D'Orazio. (Issued 6-15-05; exceptions due 7-11-05.) The refusal to renew the appointment of the part-time women's head soccer coach was not retaliation for filing grievances and other protected activity, despite prima facie evidence of unlawful animus and the failure of the district to present competent evidence of many allegations of inappropriate behavior. The ALJ sustained the district's action because the coach refused to participate in a

contractual evaluation procedure, which involved, among other things, observation by the athletic director and an anonymous survey of players as to the coach's performance. Also, the coach refused to sign an employment form establishing terms and conditions of employment such as salary and employment status.

Operating Engineers, Loc. 3 v. City of Porterville, Case SA-CE-164-M. (Issued 6-30-05; exceptions due 7-20-05.) Incorporating the right of access into the MMBA, the ALJ found the city unlawfully denied a union representative reasonable access to premises under a local rule providing union representatives "shall not enter any work location without the consent of the department head." The city did not unlawfully refuse to provide information relating to the drug test and background check required of applicants for employment, where the employee and the union were offered opportunities to secure the information but refused to take advantage of them.

San Francisco Regional Office — Decisions Not Final

AFSCME, Loc. 3299 v. Regents of the University of California, Case SF-CE-708-H. ALJ Donn Ginoza. (Issued 3-16-05; exceptions filed 4-21-05.) The university refused to negotiate in good faith at the campus level about salary increases in certain classifications, and shift differential and shift-leader pay, after the parties agreed to refer the matters from the systemwide bargaining table to the campus level, despite a systemwide contract that permits the university to implement wage increases in "selected classifications," "shift differentials," and "market equity adjustments" under a "meet and discuss" obligation. The ALJ credited the union negotiators' testimony to the effect that the parties agreed the matters would be referred to campus negotiations as "meet and confer" items. The parties reached agreement on some issues (e.g., shift-leader pay). When the parties disagreed at the local level on other items, such as whether the salary increase would be retroactive and whether the proposal was a meet and discuss item or a meet and confer item, talks broke off and the university implemented its last, best offer with respect to the salary increase, thereby breaching its duty to negotiate. The ALJ also found that the university unlaw-

fully bypassed the union when, after agreement on shift-leader pay and other issues, the university made public statements to the effect that the agreement was the result of a management recommendation, as opposed to a negotiated deal with the union.

Newark Teachers Assn. v. Newark Unified School Dist., Cases SF-CE-2377-E; SF-CE-2380-E; SF-CO-640-E. ALJ Donn Ginoza. (Issued 4-18-05; exceptions filed 5-9-05.) The association bargained in bad faith when it insisted to impasse on a proposal that would “disaggregate” Standard Testing and Reporting (STAR) results by teacher for the first time (scores in each class were grouped by teacher), where the proposal involved confidentiality issues, the right of principals to review the results for evaluation purposes, limited district discretion as to how it received scores, and infringed on a managerial prerogative to consider the results. The ALJ also found that contractual waiver language did not bar negotiations about the association’s proposal to select CalPERS as its health insurance carrier. The association did not engage in surface bargaining under the totality of circumstances test in pre-impasse negotiations dealing with preparation time, class-size evaluations, and economic matters. Nor did the association refuse to participate in good faith in the mediation process, renege on a tentative agreement by failing to ratify it, condition agreement in the 2003-04 negotiations on concerns in the 2004-05 successor negotiations, or otherwise engage in surface bargaining during mediation. The ALJ found that the association spokesperson unlawfully bypassed the district when he circulated a proposed elementary school schedule to principals, where the schedule was the subject of settlement discussions in the grievance process. The district bargained in bad faith when it permitted a broker of a pre-paid legal services program, a negotiable matter, to solicit bargaining unit members’ participation in the program via payroll deduction and implemented the program unilaterally.

Los Angeles Regional Office — Decisions Not Final

California School Employees Assn. and its Chaps. 759 and 724 v. San Diego Unified School Dist.; *California School Employees Assn. and its Chap. 788 v. San Diego Unified School Dist.*

Cases LA-CE-4724-E and LA-CE-4725-E. ALJ Ann Weinman. (Issued 3-7-05; exceptions filed 5-18-05.) The district did not breach its duty to bargain in good faith when it refused to implement agreements covering use of new computer software to record sick leave and vacation benefits in operations, support services, and paraeducators bargaining units, and where agreements required school board approval and the board rejected them. The district breached its duty to negotiate in good faith when it refused to implement an agreement covering the new computer system used to record leave and benefits in the office, technical, and business services unit, where the school board previously adopted the agreement.

Long Beach Council of Classified Employees v. Long Beach Community College Dist. ALJ Thomas Allen. Case LA-CE-4373-E. (Issued 3-28-05; exceptions filed 4-20-05.) The district breached its duty to bargain when it unilaterally implemented a 4/10 workweek schedule during an energy crisis, where the collective bargaining agreement authorized a change of shift, not workday, for compelling business necessity and authorized a 4/10 workweek with only the concurrence of employees.

California School Employees Assn. and its Chap. 2001 v. Coachella Valley Mosquito and Vector Control Dist. Cases LA-CE-123-M and LA-CE-178-M. ALJ Ann Weinman. (Issued 4-5-05; exceptions due 9-6-05.) Limiting released time to one employee was found to be unreasonable, where evidence showed negotiations were complex, discussions hostile, and the union’s structure required decisions in negotiations to be made by bargaining unit employees. However, the district did not bargain in bad faith when it refused to incorporate into the agreement a provision that conscientious objectors to agency fees be referred to union legal counsel for verification. The district unlawfully denied bargaining unit employees who work in the field access to email for the purpose of communicating with the union, where the district permits other employees email access. The district requirement that the union request permission to use meeting rooms in advance was not an unlawful unilateral change, where the requirement was a mere ministerial imposition on the union and evidence showed no impact on employees.

However, the district's prohibition against union meetings after hours was found unlawful, where the concerns about vandalism were undercut by the lack of evidence that vandalism was a problem and the district could have negotiated. No violation was found where the district, pursuant to local rule, denied a unit modification petition to add employees hired to control and eradicate red imported fire ants (RIFA) to a unit of vector employees, where the district offered to conduct an election of RIFA employees in a separate bargaining unit and the union won the election. Addressing several incidents of alleged retaliation surrounding the filing of the unit modification petition and the election, the ALJ found (1) the district's assignment of confidential work to two employees to prevent them from voting was not retaliatory, where confidential duties were given to one employee prior to the unit modification petition and the district agreed to remove confidential work from both employees but one chose to remain in a confidential status and the other was laid off; (2) no retaliation when RIFA employees applied for, and were denied, transfer to vacant position in the vector unit, where the person hired had desirable qualifications and the RIFA applicants merely met minimum standards; (3) the manager's comments to the effect that, although employees were free to join the union, difficulties with the union were creating legal expenses, and the money to pay the expenses must come out of salaries and benefits, interfered with protected conduct; the ALJ found the reasonable interpretation was that unless employees rejected the union they would be subject to layoff; and (4) layoff of employees was retaliatory, where evidence showed no compelling financial concerns to support the layoff decision and the timing of layoffs coincided with the election.

Academic Professionals of California v. Trustees of the California State University. Case LA-CE-821-H. ALJ Fred D'Orazio. (Issued 4-19-05; exceptions filed 5-20-05.) The allegation that one campus in the university system unilaterally changed its method for reporting sick leave and vacation credits from one-hour increments to 30-minute increments was rejected, where the university gave the union notice of the change and offered to meet to discuss the change at the campus level; the union made no proposal and instead

insisted that the matter be incorporated into systemwide negotiations in progress at the time.

Zanchi v. State of California (Dept. of Corrections). Case LA-CE-599-S. ALJ Ann Weinman. (Issued 4-21-05; exceptions filed 5-11-05.) The ALJ dismissed allegations that the Department of Corrections retaliated against an employee by initiating criminal and administrative investigations against her, denying her extension of a limited-term assignment as sergeant, and denying her promotion for filing a grievance, where evidence showed that the DOC's actions were not motivated by unlawful animus but rather by the legitimate belief that the employee's grievance fraudulently sought reimbursement for an airline ticket.

Hesperia Education Assn., CTA/NEA v. Hesperia Unified School Dist. Case LA-CE-4666-E. ALJ Ann Weinman. (Issued 4-29-05; exceptions filed 5-19-05.) In the context of contentious negotiations during which the union actively supported two opposition candidates for school board, the ALJ found that the district disciplined a union activist for conduct during a meeting to contest the denial of personal leave by giving him a letter of reprimand, where evidence showed the employee was wrongly accused of misconduct, other teachers were not disciplined for taking personal leave without approval, and an indicia of anti-union animus exists. The ALJ dismissed the allegation that, during an altercation in the street, the incumbent school board member attempted to run down the union activist with her car in retaliation for his protected activity, where evidence showed the incumbent did not attempt to hit the union activist and the school board member was not acting as an agent of the district in any event.

Allegations of retaliation against a second union activist were upheld. The ALJ found: (1) a memo to the employee from the principal citing parental complaints was retaliatory, where the actual complaints were discredited and the district failed to follow complaint procedure; (2) an independent investigation of the employee involving multiple issues, conducted by the district lawyer, was retaliatory, where the investigation damaged the employee's career and evidence showed no valid reason for the investigation; (3) placing the employee on administrative leave and issuing him a

letter of reprimand after a heated post-election argument with the principal over the principal's removal of flyers from teachers' mailboxes and the modification of the flyers, was retaliation, where the flyers were not derogatory, the employee had a general right to distribute the flyers, and, under the totality of evidence, the employee demonstrated the adverse action would not have taken place but for his protected conduct; (4) the employee was issued a notice of unprofessional conduct in retaliation for protected conduct, where the reasons for the notice were tainted by an earlier unlawful investigation and the employee demonstrated that the notice would not have been issued but for his protected conduct; and (5) portions of the evaluation report and improvement plan issued to the employee by the vice principal were retaliatory because they were based on earlier unlawful notice of unprofessional conduct; parts of the evaluation and improvement plan not based on an earlier notice were not unlawful.

Service Employees International Union, Loc. 399 v. Antelope Valley Health Care Dist. Case LA-CE-196-M. Thomas Allen. (Issued 5-26-05; exceptions filed 6-20-05.) The district acted unlawfully when it treated "no union" cards as revoking valid SEIU cards, thus depriving SEIU of a majority showing under the MMBA, where the district previously instructed employees how to revoke a union card and employees did not act in accordance with the district's instructions. The ALJ found under these facts that neither the district nor the employees had a reasonable basis to conclude that the nonconforming attempts to revoke the SEIU cards were valid.

Associated Administrators of Los Angeles v. Los Angeles Unified School Dist. Case LA-CE-4819-E. Bernard McMonigle. (Issued 6-2-05; exceptions filed 6-27-05.) The district unlawfully refused to negotiate about several administrators found to be bargaining unit employees in *Los Angeles Unified School Dist.* (2004) No. 1665, thus creating a technical refusal to bargain.

Report of the Office of the General Counsel

Injunctive Relief Cases

There were six requests for injunctive relief filed between March 1 and June 30, 2005.

Union of American Physicians and Dentists v. State of California, IR No. 478, Case SF-CE-228-S. A renewed request for injunctive relief on an amended charge was filed on 2-23-05. The petitioner withdrew its request on 3-2-05. Issue: Did the state unilaterally change the evaluation procedure of the Department of Correction's doctors?

Abbate, Kimber and Gruszecki v. Santa Clara County Correctional Peace Officer's Assn., IR 480, Case SF-CO-67-M. The request for injunctive relief was filed on 3-24-05. PERB denied the request on 4-6-05. Issue: Did the union defame the charging parties and violate the union's bylaws and California's statutes?

Kit Carson Union School Dist. v. Kit Carson Educators Assn., IR No.481, Case SA-CO-502-E. The request for injunctive relief was filed on 3-28-05 and withdrawn on 4-1-05. Issue: Did the teacher job action violate EERA?

Amalgamated Transit Union Loc. 1704 v. Omnitrans, IR No. 482, Case LA-CE-216-M. The request for injunctive relief was filed on 4-13-05 and withdrawn on 4-15-05. Issue: Did the employer unlawfully deny released time to union representatives?

Amalgamated Transit Union, Loc. 1704 v. Omnitrans, IR No. 483, Case LA-CE-216-M. The request for injunctive relief was filed on 4-21-05. PERB denied the request on 5-4-05. Issue: Did the employer unlawfully deny released time to union representatives?

Kit Carson Union School Dist. v. Kit Carson Educators Assn., IR No. 484, Case SA-CO-502-E. A renewed request for injunctive relief was filed on 4-26-05 and withdrawn on 5-2-05. Issue: Did the teacher job action violate EERA?

Litigation Activity

Five litigation cases opened and three cases closed between March 1 and June 30, 2005.

Ferguson v. PERB, Superior Court of Alameda County, Department 31, Case No. RG 04-186166 (Case SF-CE-2364-E, No. 1645). Issue: Did PERB err in dismissing the unfair practice charge? On 10-7-04, Ferguson requested that PERB provide an administrative record. On 1-10-05, Ferguson served PERB with a petition for writ of administrative mandamus, notice of hearing, and proposed order.

On 1-20-05, PERB filed its preliminary opposition. The court dismissed the petition on 5-15-05.

Siskiyou County Employees Assn., Loc. 3899 of the American Federation of State, County and Municipal Employees v. County of Siskiyou, Superior Court of Siskiyou County, Case No. SV CV PT 05-0050 (Case SA-CE-314-M). Issue: PERB seeks to intervene in the court case because the alleged conduct is arguably protected or prohibited by PERB-enforced statutes. On 3-22-05, PERB filed an amicus brief. On 4-15-05 PERB filed an application for intervention. On 5-18-05, PERB presented oral argument.

Service Employees International Union, Lo. 790, AFL-CIO v. County of San Joaquin. Superior Court San Joaquin County, Case No. CV026530 (Case SA-CE-330-M). Issue: PERB seeks to intervene in the court case because the alleged conduct is arguably protected or prohibited by PERB-enforced statutes. On 6-30-05, PERB filed an application for intervention.

California Assn. of Professional Scientists v. Governor Schwarzenegger, State of California, Sacramento County Superior Court, Case No. 04CS01446 (Case SA-CE-1468-S). Issue: PERB seeks to intervene in the court case because the alleged conduct is arguably protected or prohibited by PERB-enforced statutes. On 10-27-04, PERB filed an application for intervention. On 3-30-05, the court denied PERB's intervention and dismissed the complaint.

Waters v. Thompson and Inan, United States District Court Northern District of California, Case No. 4857 MJJ. Issue: Did the defendant violate the plaintiff's civil rights. On 3-9-05, PERB received a copy of the summons and complaint. On 3-24-05, the Attorney General filed a motion to dismiss. On 4-28-05, the court dismissed the complaint.

California Association of Professional Scientists v. Governor Arnold Schwarzenegger et al. Court of Appeal, Case No. C049928. Issue: There was an appeal of the superior court denial of intervention. On 5-25-05, PERB filed a notice of appeal.

Coachella Valley Mosquito and Vector Control Dist. v. PERB (California School Employees Assn., RPI), Supreme Court of California, Case No. S122060 (Case LA-CE-1-M). Issue: Is the statute of limitations under the Meyers-Milias-Brown

Act three years or six months? On 3-30-04, the court granted PERB's petition. On 6-9-05, the court issued its decision finding the statute of limitations to be six months.

Regulation Adoption and Modification

On April 14, 2005, the board completed its review and approval of the permanent regulation changes adopted in response to the enactment of PERB jurisdiction over the Trial Court Employment Protection and Governance Act and the Trial Court Interpreter Employment and Labor Relations Act. The Office of Administrative Law approved the rulemaking file on May 31, 2005, and the changes took effect that same day upon filing with the Secretary of State.

On May 11 and June 9, 2005, the board considered proposed changes to PERB's conflict-of-interest code (PERB Reg. 3110). The board gave final approval to the proposed amendments on June 9, 2005, and the revised code was submitted to the Fair Political Practice Commission for review.

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 refused to reinstate employee to previous position after pregnancy leave: Wal-Mart.

(DFEH v. Wal-Mart Stores, Inc., Wal-Mart, Inc., No. 05-04-p, 6-07-05; 1 pp. + 20 pp. ALJ dec.)

Holding: The employer violated pregnancy disability leave laws by failing to reinstate the employee to her job or a substantially equivalent position. The FEHC ordered the employer to reinstate the employee, pay her lost wages and damages for emotional distress, and pay an administrative fine to the state fund.

Case summary: This complaint arose from Wal-Mart's failure to reinstate the complainant, Karen Carver, to her position as a manager after her return from pregnancy disability leave.

Carver, who began working at Wal-Mart in August 1996, applied for and was granted six weeks of pregnancy disability leave in April 2001. After returning to work briefly, she took a company approved "personal leave" to spend more time with her child and returned to work in December 2001.

In April 2002, Carver was promoted to a managerial position in Antioch, which had supervisory responsibility, a set schedule, guaranteed overtime compensation, and included a profit sharing allowance.

Carver became pregnant again in early 2002. In May 2002, while Carver was on a one-month leave due to pregnancy-related complications, Wal-Mart filled her position.

When Carver tried to return to work, she was informed that she had exhausted all of her protected leave and that Wal-Mart had relieved her of her position as was its right, but would try to locate another position for her. Approximately two weeks later, Carver was notified that Wal-Mart had found her a sales associate position at a store in Turlock. The position had less responsibility, a variable schedule with significantly reduced hours, no guaranteed overtime, and did not include the profit sharing allowance. Carver declined the position and did not return to work at Wal-Mart.

Carver diligently looked for work, with the exception of two six-week periods when she was disabled by the births of her two younger children, but she remained unemployed. In November 2002, Carver cashed out her 401(k) plan to pay for her family's living expenses. Carver suffered severe depression after her departure from Wal-Mart in June 2002 until May 2003.

On November 12, 2002, Carver filed a complaint with the Department of Fair Employment and Housing alleging Wal-Mart's actions violated the Fair Employment and Housing Act. On November 7, 2003, the DFEH issued an accusation against Wal-Mart alleging that the company failed to reinstate Carver to her previous position after returning from disability leave in violation of Gov. Code Sec. 12945(b)(c), discriminated against Carver on the basis of her sex in violation of Gov. Code Sec. 12940(a), and failed to take reason-

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able steps to prevent the discrimination from occurring, in violation of Gov. Code Sec. 12940(k).

California law provides female employees up to four months of pregnancy disability leave per pregnancy while disabled on account of pregnancy, childbirth, or related medical conditions. The ALJ found that the DFEH established that Carver was disabled due to pregnancy and was entitled to leave.

Under California Code Reg. Title 2 Sec. 72919, the employer has a legal duty to reinstate that employee to the same position she held before her pregnancy disability leave and, unless it can establish an affirmative defense, will be found to have violated Gov. Code Sec. 12945(b)(2). The ALJ found that Wal-Mart did not have a valid affirmative defense for its failure to return Carver to her former position and therefore had unlawfully denied Carver's reinstatement after her pregnancy disability leave.

The ALJ ruled that the DFEH did not prove the allegation of sex discrimination because it failed to show that Wal-Mart treated Carver differently than it treated similarly situated, non-pregnant employees who were also temporarily disabled.

Although the DFEH did not establish the allegation of sex discrimination, the ALJ held it had established that Wal-Mart failed to take the reasonable steps necessary to prevent the discrimination from occurring and that the inaccuracies in Wal-Mart's policy and the inadequate training of its managers led directly to the harm suffered by Carver.

The ALJ ordered Wal-Mart to reinstate Carver and to provide the training necessary to bring her up to date. Carver was awarded backpay, with interest for her lost wages, and benefits up through either her date of reinstatement or the date she declined the reinstatement, and \$75,000 for the emotional distress she suffered as a result of Wal-Mart's actions. The ALJ declined to award Carver the lost bonus or out-of-pocket expenses for the penalties incurred when she cashed in her 401(k) plan because they could not be ascertained with certainty.

Carver's backpay calculation was not impacted by her decision to decline the Turlock job. An employee is required

to accept alternative employment only if it is substantially equivalent to the position that she was denied, which the Turlock position was not.

Finding that the DFEH established by clear and convincing evidence that Wal-Mart willfully and consciously disregarded its obligations as a California employer in denying Carver her rights to reinstatement after the pregnancy disability leave, the ALJ ordered Wal-Mart to pay an administrative fine of \$25,000 to the state's general fund.

Lastly, the ALJ ordered Wal-Mart to disseminate its policy on pregnancy disability leave, develop a complaint procedure for violations of that policy, and provide all current California supervisors with training on the policy and complaint procedure.

The commission adopted the ALJ's opinion in full as a precedential decision.