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letter from the editor

Dear *CPER* Readers:

Last month, John Duncan, chairperson of the Public Employment Relations Board, convened a meeting of those individuals who, by self-selection, appointed themselves to serve on a PERB advisory committee. Of the dozen or so people in attendance, the collective recollection was that this was the first PERB advisory committee to come together in more than a decade. Participants represented nearly each public sector jurisdiction — on both sides of the table.

PERB staffers included all five board members, Chief Administrative Law Judge Fred D’Orazio, General Counsel Bob Thompson, and other legal advisers.

Bob Thompson reported that his office is handling “more litigation than ever before.” He told the group that there were 1,126 unfair practice charges filed in fiscal year 2004-05, an increase from 838 charges filed in 2003-04. Fred D’Orazio said that in 2004-05, ALJs issued 49 decisions. Of those, 22 have been appealed to the board. At the time of the meeting, Fred reported that there were 57 cases set for hearing.

John Duncan advised the group that the board issued 142 decisions in 2004-05, up by 10 from the prior year.

Aside from case dispositions, participants at the meeting had some other issues on their minds. Maureen Whalen of the California School Employees Association voiced a concern that the regional attorney staff has become too aggressive about dismissing complaints. That comment was echoed by California Teachers Association attorney Diane Ross.

Jeff Sloan of Renne, Sloan, Holtzman, and Sakai questioned board members on the status of cases currently on the docket and about PERB’s ability to respond quickly to injunctive relief requests involving potential threats to public health or safety.

Other topics on the table were the board’s use of settlement conferences to resolve complaints, the ease of using the board’s website, proposed regulatory changes, the requirement that parties travel to the ALJ hearing location, use of PERB factfinders, and possible designation by PERB of “precedential decisions.”

Those in attendance determined that the advisory committee would meet twice a year. The next meeting will be in January. If you would like to participate, look for an announcement on the board’s website, www.perb.ca.gov/.

Sincerely,



Carol Vendrillo
CPER Director and Editor

What Is Due Process?

Emi Uyehara

The right to procedural due process is one of the most significant constitutional guarantees provided to citizens in general and public employees in particular.

To determine whether an employee is entitled to due process, a multi-layered inquiry is involved. Bear in mind that each factor may trigger another level of analysis, as neither the status of the employee nor the nature of the deprivation may be dispositive. Most importantly, there is no fixed definition of what process is due; rather, it is a flexible principle that varies by situation. Its touchstone is fundamental fairness.

Emi Uyehara is a partner in the San Francisco office of Liebert Cassidy Whitmore. The firm, which also maintains an office in Los Angeles, represents public agency management in all aspects of labor and employment law, including labor relations, civil litigation, and education law. This article is an edited portion of CPER's new Pocket Guide to Due Process in Public Employment. Order at <http://cper.berkeley.edu/>.

While the following guidelines set forth the general requirements regarding due process, they establish only the floor, not the ceiling, of rights. The entitlement to due process is created by statute, charter, ordinance, or other local laws or enactments. Local rules, regulations, and practices can and often do enhance the rights of employees in an agency's jurisdiction. Therefore, to understand what rights of due process exist within a given agency, the governing statutes, charter, ordinances, board policies, rules, regulations, memorandums of understanding, and collective bargaining agreements must be consulted.

With these caveats, this article provides a step-by-step guide to due process rights and procedures, including a discussion of who is protected, under what circumstances, what actions are covered, what process is due, and the remedies that are available when the right is violated.

Sources of the Right: The U.S. and California Constitutions

The right to due process emanates from two sources, the federal and state constitutions.

The Fifth Amendment to the U.S. Constitution provides in relevant part: “nor shall any person...be deprived of life, liberty or property, without due process of law...”

Section 1 of the Fourteenth Amendment to the U.S. Constitution extends this protection to actions by the State: “...nor shall any State deprive any person of life, liberty or property, without due process of law...”

Article I, Sec. 7 (a), of the California Constitution provides, “[a] person shall not be deprived of life, liberty, or property without due process of law...”

The right to due process under the state and federal constitutions, while similar in language, is not identical. As is true of many rights, the California Constitution is more inclusive and protects a broader range of interests than the federal Constitution.¹ At its essence, due process requires notice and an opportunity to be heard before the government deprives a citizen of a significant property interest. The purpose of the guarantee is to provide procedural protections against the arbitrary taking of a property interest by the government. In the context of public employment, the right of due process is triggered by the deprivation of a property or liberty interest.

What Is a Property Interest?

Public employees are entitled to due process only if they have a property interest in their continued employment, position, and/or compensation. Not all public employment creates a property interest.

The United States Supreme Court defines a property interest as follows:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their

daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.²

The California Constitution is more inclusive and protects a broader range of interests than the federal Constitution.

Thus, before a public employee can look to the procedural protections offered by the right to due process, the employee must first establish that he or she has a constitutionally recognized property right. In order to have a constitutionally protected interest in continued employment and compensation, the employee’s entitlement to continuing employment cannot be based on his or her subjective opinion or unilateral expectation. It

must be based on a statute, ordinance, policy, rule, or employment agreement that provides that the employee can be discharged or have his or her employment otherwise significantly impacted only “for cause.”³

Who Is Protected?

Not all employees have a property interest in continued employment. Only those who have a legitimate entitlement to continued employment are assured of due process.

‘For cause’ employees. Employees who have acquired tenure or permanency in their position or whose employment can be terminated or otherwise significantly impacted only for good cause as specified in local laws or rules are provided with the full array of due process rights. This is because they have successfully completed a probationary period, during which they were subject to summary release.⁴ By acquiring permanency, through statute, ordinance, policy, rule, or

contract, such employees can be dismissed only for cause as provided by the authorizing procedures.⁵

Who Is Not Protected?

The protections afforded to permanent employees are in stark contrast to the absence of protections provided to the following classifications.

At-will employees. Public employees who are at-will and serve at the pleasure of the appointing agency do not have a legitimate entitlement to continued employment. Labor Code Sec. 2922 defines an at-will position as “[a]n employment, having no specified term, [which] may be terminated at the will of either party on notice to the other.” At-will employees have no property interest in their jobs. Accordingly, they may be released without due process.⁶ If, however, their liberty interest in their reputation is implicated, they are entitled to a liberty interest or name-clearing hearing, as discussed below.

Probationary employees. Probationary employees are similar to at-will employees in that they do not have a legitimate entitlement to or property interest in continued employment. They may be released without cause during their probationary period.⁷ As with at-will employees, they may be released without due process, but under certain circumstances, may be entitled to a “liberty interest” hearing.⁸

Temporary and substitute employees. In general, temporary and substitute employees have no property interest in continued employment when they are hired to fill in for limited-term projects or periods. As with at-will and probationary employees, they are not entitled to due process protections unless their liberty interests are at stake.⁹

What Actions Are Covered?

The right to due process entails a multi-level analysis that depends on the status of the employee who is subject to

a governmental loss of property and the nature of the employer’s conduct towards the employee. Not all adverse actions trigger due process rights.

Generally speaking, permanent employees are afforded the most due process before deprivation of a property interest. Unless otherwise indicated, the actions that are discussed pertain to permanent employees. Non-permanent employees are not entitled to due process unless such rights are locally established through negotiations, policy, rules, or other agency action.

Protections for permanent employees are in stark contrast to the absence of protections for at-will, probationary, temporary, and substitute employees.

Disciplinary actions. Significant deprivations of a permanent employee’s property interest in continued employment trigger the right to due process. This includes dismissal,¹⁰ suspensions without pay,¹¹ and forced retirement.¹² Demotions may trigger due process rights depending on whether the employee is provided with a property interest in his or her position by statute or local agency policy.¹³

Dismissal. No case is more synonymous with due process in California than *Skelly v. State Personnel Board*.¹⁴ The State Supreme Court in *Skelly* held that permanent public employees have a constitutionally protected property interest in their continuing employment which can be defeated only by sufficient cause. Permanent public employees may not be dismissed or subjected to other significant disciplinary actions without cause. Their right to employment by statute or other authority “constitutes ‘a legitimate claim of entitlement’ to a government benefit.... Therefore, the state must comply with procedural due process requirements before it may deprive its permanent employees of this property right by punitive action.”¹⁵

Suspensions without pay. While not permanent, a “[s]uspension of a right or of a temporary right of employment may amount to a ‘taking’ for ‘due process’ purposes.”¹⁶ The due process to which an employee facing short-term suspension is entitled, however, is not the same as that to which an employee facing dismissal is entitled.¹⁷ Account must be taken of the length and finality of the deprivation.¹⁸

The consequences of a suspension and dismissal are vastly different. The former is an interruption of employment, the latter is its termination. An employee facing suspension is entitled to a hearing with notice and an opportunity to respond to the charges during or within a reasonable amount of time after the suspension.¹⁹

An employee placed on compulsory leave or suspension without pay due to criminal misconduct is not entitled to a pre-deprivation hearing.²⁰ The U.S. Supreme Court in *Gilbert v. Homar*²¹ upheld the right of a public employer to suspend a permanent employee without pay after his arrest on drug charges. The Supreme Court concluded that a post-suspension hearing would provide adequate protection of his property interest because he would be entitled to backpay should he prevail.²²

Forced retirement. In *Barberic v. City of Hawthorne*,²³ a federal district court found that the due process rights of a former police officer had been violated when she was placed on involuntary retirement without a hearing.

The court found there was not a significant distinction between a forced disability retirement and discharge. In both instances, the job loss is due to either misconduct or inability to perform. The court awarded the officer backpay less her retirement benefits.

Involuntary leaves of absence. Under some circumstances, an involuntary leave of absence may trigger due process rights. Routinely such leaves are provided in order to permit the employer to investigate charges of employee misconduct. If there is no loss in pay and the employee is entitled to notice and the opportunity to respond before any deprivation of employment, no property interest has been implicated and no due process rights are triggered.

If, however, the employee is placed on involuntary leave without pay, the Court of Appeal has determined that such leave is akin to an unpaid suspension and the employee is entitled to pre-deprivation due process.²⁴

Constructive discharge. Employees subject to a “constructive discharge” rule, calling for automatic resignation for absences without leave (AWOL), are entitled

to pre-termination notice and an opportunity to be heard by a neutral decisionmaker.²⁵

By resigning, or through the manifestation of the intent to resign evidenced by a failure to report to work, the employee is deemed to have voluntarily surrendered his or her property interest in employment. In this situation, the public employer does not act to deprive an employee of employment and therefore has no duty to afford the employee procedural protections either before or after the resignation takes effect. Nor is such an employee entitled

to reinstatement or backpay. Unlike a disciplinary discharge, resignation from employment does not seriously damage an employee’s standing and association in the community nor does it foreclose other employment opportunities.²⁶

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What Actions Are Not Covered?

Reprimands. Although a form of disciplinary action, reprimands do not entail a loss of property. The reprimand,

whether written or oral, involves no loss of employment, suspension of pay, or demotion to a lower position. Accordingly, unless locally established by policy or memorandum of agreement, issuance of a reprimand does not trigger due process rights.²⁷ Many agencies, however, provide the employee subject to the reprimand with the opportunity to respond orally or in writing to reprimands and to include such a response with the reprimand should it be made part of the employee’s personnel file.²⁸

Transfers and reassignments. Transfers and reassignments sometimes may be disciplinary in nature. Generally, such actions do not trigger notice and an opportunity to respond before their occurrence. While an employee has a property interest in continued employment, he or she does not have a property interest in a particular site of employment or department. As is the case with any change in position, however, local agency rules may provide for more due process rights.²⁹

Layoffs. Employees subject to layoff are not entitled to due process protections. Rather, their rights are limited to

notice of the proposed action and agency compliance with the governing layoff procedures.³⁰ This does not include the right to an individual hearing; the classes of employees affected are entitled to the locally established procedures that govern layoffs.³¹

Removal from an administrative post. While a permanent employee has a property interest in continuing employment, there may be no property interest in a particular administrative title or position.

Negative evaluations. A negative evaluation, although derogatory in nature, does not deprive an employee of any property right. Accordingly, negative comments in a performance evaluation do not constitute punitive action triggering any type of appeal or hearing.³²

Placement on reemployment list. As made clear regarding layoffs, not all separations from service constitute actions that trigger the right of due process. For example, an employee's removal from service due to medical reasons under a statute that provides for his or her placement on a 39-month medical reemployment list after the exhaustion of all accrued leaves, does not entitle the employee to any prior hearing or notice before placement on the list.³³

What Process Is Due?

To determine what process is constitutionally due, four factors must be considered: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible governmental official; and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.³⁴

As articulated by the California Supreme Court in *Skelly*, the balancing of interests entails weighing "the Government's interest in expeditious removal of an unsatisfactory employee...against the interest of the affected employee in continued public employment."³⁵

The Supreme Court in *Skelly* agreed that the state's statutory scheme violated the due process guarantees under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 7 and 15, of the California Constitution by failing to provide permanent employees with pre-removal notice and hearing before dismissal. It determined that in order to meet constitutional requirements:

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Due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. *** As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.³⁶

Notice of the proposed action. An essential component of due process is notice of the action the employer intends to take towards the employee. Appropriate notice may vary by circumstance but should generally be in writing. There is no mandatory fixed number of days concerning how much time an employee must be given to exercise his or her right to respond. Rather, the time to respond must be "reasonable" under the circumstances. Often, statutes or local procedures such as the collective bargaining agreement may set forth the number of days prior to the meeting or opportunity to respond to which the employee is entitled.

Due process was found to be violated where an employee received notice of termination only two-and-one-half hours before it was to be effective.³⁷ A general requirement is to permit at least five days notice. Employee requests for extensions should be granted if the request is justifiable.

The employer also should make clear the level of discipline to be imposed. Notice of a five-day suspension cannot support a dismissal. In the event notice of dismissal is provided, a lesser penalty may be imposed since the employee was provided with and could prepare to defend against the greater penalty.

Reasons for the proposed action. Another component of due process is notice of the underlying facts and disciplinary causes on which the employer relies to support the proposed action. The proposed disciplinary notice should set forth the specific statutes, agency rules, or regulations that the employee facing discipline has violated. The employee has the right to be given notice of the grounds and facts that form the basis for the recommended disciplinary action in order to respond to and prepare for his or her defense.

Copy of the charges and materials on which the action is based. An employee facing proposed action is entitled to a personal copy of the charges and the materials on which the charges are based. This does not entitle the employee to every document relied on by the employer in its decision. *Skelly* is a procedural right, not a rule of evidence.³⁸ There is nothing in *Skelly* that requires the employer to produce all evidence on which it relies prior to a hearing.³⁹ Rather, the employee facing disciplinary action is entitled to “the substance of the relevant supporting evidence” for the charges.⁴⁰

The Court of Appeal in *Gilbert v. City of Sunnyvale*⁴¹ analyzed the history of due process under *Skelly*, its origins and progeny, and rejected the claims of a discharged permanent public safety officer to all documents identified in an internal affairs investigation before his pretermination hearing. Prior to termination, Gilbert had been given notice of the charges against him and the internal affairs investigation report that set forth allegations and evidence of misconduct. The investigation report noted that many “source documents” which supported the allegations remained with the Federal Bureau of Investigation in its active case on the issues. Gilbert sought the source documents, which included the contact numbers for individuals identified during the investigation, surveillance

reports, and communications between the police department and the FBI. In upholding the dismissal, the Court of Appeal held:

Constitutional principles of due process do not create general rights of discovery. *** What *Skelly* requires is unambiguous warning that matters have come to a head, coupled with an explicit notice to the employee that he or she now has the opportunity to engage the issue and present the reasons opposing such a disposition. (Citations omitted.)⁴²

Likewise, the Court of Appeal in *Cockburn v. Santa Monica Community College Dist. Personnel Commission*⁴³ determined that a community college district did not violate an instructor’s right to due process by failing to include in the charges the previous complaints against the employee. The instructor admitted that he had sexually assaulted a student, but contended that the district violated Education Code Sec. 87031, which affords employees the right to inspect

materials in their personnel files that may serve as a basis for affecting the status of their employment, and provides that information of a derogatory nature shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon.

The Court of Appeal determined that the district had complied with the Education Code; the instructor had notice within a reasonable time of any prior misconduct. Moreover, his dismissal was based on the sexual assault of which he had prior notice. Significantly, the Court of Appeal also determined that the district could have relied on previous misconduct of a similar nature for which he had received written notice of unsatisfactory conduct. The appellate court clarified that the responsibilities of a school or community college district under the Education Code do not require the employer to give specific written notice detailing prior derogatory remarks or misconduct that may be used in aid of a specific charge.

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property right.*

Thus, while an employee facing disciplinary action is entitled to notice of the charges against him or her, and copies of any supporting documentation, at a subsequent hearing an employer is not precluded from raising incidents referring to information regarding conduct previously provided to the employee.⁴⁴

Due process is satisfied if the employee has had notice of the grounds against him or her and a chance to respond, even if the written notice of charges is not exhaustive or omits supporting evidence. *Skelly* requires a minimum level of due process protection; it does not guarantee the right to review all evidence supporting the charges.

Right to representation. To provide a meaningful opportunity to respond to charges alleging disciplinary conduct, the employee should be given the opportunity to have representation by an individual of the employee's choosing. This may take the form of a union representative, an attorney, or another type of advocate. However, an employee is not entitled to insist on a particular representative where that would impair the agency's ability to go forward with the investigation.⁴⁵

Right to respond, either orally or in writing, to the authority imposing discipline. Due process requires that the employee facing a deprivation of a property interest be given a meaningful opportunity to respond before the deprivation takes place. Depending on the situation, this could be an oral opportunity, a written opportunity, or both. An employee is not entitled to a full evidentiary hearing prior to the effective date of the discipline, but merely the opportunity to respond informally to an individual authorized to impose or effectively recommend discipline, but who was not involved in making the initial decision.

Due process does require that an employee subject to dismissal be given the opportunity for a full evidentiary hearing before a neutral decisionmaker at some point in time. But this can take place *after* the discipline is imposed, when the employee appeals or grieves the discipline through statutory, civil service, or contractual procedures.

Alternatively, the employee may be provided with an evidentiary hearing before the discipline is imposed. In that case, the evidentiary hearing is the *Skelly* hearing.

Opportunity to Respond

Embedded in the right to due process is the opportunity to personally be present before the decisionmaker, to be represented by counsel or an employee representative, to present favorable evidence, testimonial and documentary, to refute the charges against the employee, as well as to challenge the evidence presented by the employer. This challenge may or may not include the right to cross-examination. The

hearing officer may limit the introduction of evidence to that which is "sufficiently material to affect the outcome of the case."⁴⁶

Due process requires that "'some kind of hearing' [take place] prior to the discharge of an employee who has a constitutionally protected property interest in his employment."⁴⁷ Where the governing procedures provide for the opportunity for a full evidentiary post-termination hearing,

An employee is entitled to a personal copy of the charges and the materials on which the charges are based.

A pretermination hearing need not definitely resolve the propriety of the discharge. It should be an initial check against mistaken decisions — essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

....The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. (Citations omitted.)⁴⁸

Thus, in the case of discharge, an employee is entitled, at a minimum, to notice of the action, the reasons for the action, the materials on which it is based, and the opportunity to respond.

This can take the form of an informal hearing subject to appeal in an evidentiary hearing, or in a predeprivation evidentiary hearing. There is no right to an informal hearing if the evidentiary hearing takes place prior to dismissal.⁴⁹

The employee's right to respond to the charges against him or her does not include the right to make false statements. Public employees who make false statements to agency investigators regarding misconduct charges may face additional grounds for disciplinary action.⁵⁰ In other words, there is no right to falsely deny charged misconduct. The fact that an employee is not under oath is irrelevant because the additional charge concerns making false statements during an agency investigation.

In California, an employee does not have the option of remaining silent in the face of employer questioning, even if answering the agency's investigatory question could expose him or her to criminal prosecution. The employee can be required to truthfully answer any investigatory inquiry from his or her agency if given the "Lybarger" admonition. In *Lybarger v. City of Los Angeles*,⁵¹ the California Supreme Court held that a police officer has no constitutional or statutory right to refuse, free of administrative sanction, to answer any potentially incriminating questions posed by his employer. His self-incrimination rights are deemed adequately protected by precluding the use of his statements in a subsequent criminal proceeding. Therefore, an employee given such an admonition who nonetheless refuses to answer can be disciplined, up to dismissal, for insubordination in refusing to answer. The consequences set forth in *Lybarger* have been extended to all California employees in *TRW, Inc. v. Superior Court*.⁵²

Thus, under *LaChance*, *Lybarger*, and *TRW, Inc.*, a public employee is required to answer truthfully any investigatory questions posed by his employer, and if the conduct at issue could lead to potential criminal proceedings, an employee who is given the *Lybarger* admonition who refuses to answer can be disciplined for insubordination up to and including dismissal.

An employee should be given the opportunity to have representation by an individual of the employee's choosing.

Who can hear the charges. The local governing body does not always hear the charges against an employee. By statute, ordinance, charter, or contract, the hearing may be before a hearing officer, a panel, or a designated management representative. There is only one governing requirement: "When due process requires a hearing, the adjudicator must be impartial."⁵³

Pre-deprivation conference. The purpose of the pre-deprivation hearing, commonly referred to as a "Skelly" conference, is to provide the employee with a meaningful opportunity to tell his or her "side of the story." It is intended to minimize mistakes by affording the employee the opportunity to present facts relevant to the proposed discipline and to persuade the decisionmaker not to proceed.

The employee is entitled to respond "before a reasonable, impartial, uninvolved reviewer."⁵⁴ Thus, the immediate supervisor of the employee facing disciplinary action cannot be the hearing officer, since the supervisor likely is pursuing or supporting the charges against the employee and therefore is not neutral.

Evidentiary hearing — use of outside hearing officers. The standard for impartiality has evolved regarding the use of outside hearing officers. In *Linney v. Turpen*,⁵⁵ the Court of Appeal affirmed the use of hearing officers selected and paid for by the city. The court found no due process violation where the civil service commission certified the list of qualified hearing officers. Only qualified hearing officers who met certain criteria were on the list, and employees and employee organizations could challenge the appointment of a hearing officer.

The Court of Appeal rejected the argument that the hearing officer was not impartial and had a financial interest in deciding the case in favor of the appointing officer because he was selected by the employer, who had sole responsibility for paying him. The court found:

Due process does not require a perfectly impartial hearing officer for, indeed, there is no such thing.

Rather, the principle our Supreme Court has established is that due process in these circumstances requires only a “reasonably impartial, noninvolved reviewer.” (Citations omitted.)⁵⁶

In 2002, however, the California Supreme Court dramatically altered the ability of a public agency to use outside hearing officers. In *Haas v. County of San Bernadino*,⁵⁷ a public agency retained a temporary hearing officer selected and paid by the county. The court concluded that while the “requirements of due process are flexible...they are strict in condemning the risk of bias that arises when an adjudicator’s future income from judging depends on the good will of frequent litigants who pay the adjudicator’s fee.”⁵⁸

The court’s condemnation of paid ad hoc hearing officers does not extend to administrative law judges from the State Office of Administrative Hearings, hearing officers jointly selected and paid for by the parties, or public agency employees made available through a local office of administrative hearings. Rather, the prohibition is limited to hearing officers selected and paid for by the public employer on an ad hoc basis.

To ensure impartiality when using a system of ad hoc appointments of hearing officers, the Supreme Court has suggested that a public agency should: (1) adopt a rule that temporary hearing officers appointed on an ad hoc basis will not be eligible for future appointments until after a predetermined period of time, long enough to eliminate any “temptation to favor the county,” or (2) appoint a panel of attorneys to hear cases on a preestablished system of rotation.⁵⁹

Separation of agency roles. Due process protections include the right not to be prosecuted by the local governing body’s own legal advocate. In *Quintero v. City of Santa Ana*,⁶⁰ a Court of Appeal concluded that an employee facing discipline had the right to a hearing before the local body without the participation of an attorney with whom the local body had an

ongoing relationship. Based on the totality of the circumstances regarding that previous relationship and representation, the city attorney’s office failed to meet its burden of showing that it had properly separated its roles as advocate for the city and as legal advisor for the personnel board.

Waiver of the right to respond. An individual employee may waive his or her right to respond to the charges. This may occur if the employee fails to respond within the time limits provided or if he or she admits to the charges and/or the proposed disciplinary action. Any waiver of the right to respond should be confirmed in writing.

Additionally, a union may waive an employee’s right to respond. In *Jones v. Omnitrans*,⁶¹ where a collectively negotiated grievance procedure provided a multi-step procedure in which only the union could request arbitration, a Court of Appeal found no due process violation. The employee had received notice of the charges and had two meetings with management to discuss his grievance. When the union refused to take the grievance to arbitration, the employee demanded that his employer agree to arbitration without the involvement of the union. The agency refused.

The Court of Appeal rejected the argument that the agency violated his due process rights by failing to provide him with a post-termination hearing to contest his dismissal. Relying on the Ninth Circuit’s decision in *Armstrong v. Meyers*,⁶² the appellate court concluded that “due process is satisfied by a collective bargaining agreement that affords the employee notice, an opportunity to be heard and the opportunity for arbitration of his dismissal, even though the employee’s union has sole authority to request the hearing, as long as the union is acting under a duty of fair representation.”⁶³

Other considerations: language, translator, etc. An employee’s right to due process may include the ability to understand the charges against him or her and, if necessary, to present a defense through the use of a translator. Despite

An employee is not entitled to insist on a particular representative where it would impair the agency’s ability to go forward with the investigation.

Article 3, Sec. 6, of the California Constitution, which established English as the official language of the state, public employers may want to provide language assistance to eliminate language as a barrier to due process protections. Similar steps have been taken by governmental agencies, such as the translation of workplace statutory rights notices.

Remedies for Violation of Due Process

Pre-deprivation violation. Before a public employer deprives an employee of a protected property interest, it must ensure that its local procedures comply with the constitutional requirements discussed above. Failure of the procedures to satisfy constitutional principles will invalidate the taking of the property right and subject the employer to liability for violation of an employee’s state due process rights.⁶⁴

The remedy for a failure to provide predeprivation due process is backpay from the date of deprivation to the date the evidentiary hearing is held.⁶⁵ The California Supreme Court in *Barber v. State Personnel Board*⁶⁶ determined that the imposition of discipline prior to affording the employee with the right to respond is an infirmity that “is not corrected until the employee has been given an opportunity to present his arguments to the authority initially imposing discipline.”⁶⁷ Before the infirmity is corrected by the provision of such a hearing, discipline that was imposed is deemed invalid and the employee is entitled to backpay from the date of discharge until the date of the agency’s final decision. Dismissal can be voided if the due process rights of the employee have been violated and the penalty of discharge is determined to be excessive for the conduct at issue.⁶⁸

Post-deprivation violation. Due process requires a full evidentiary hearing as part of the termination process. A permanent employee who is discharged without benefit of an evidentiary hearing is entitled to have the hearing set aside

and to have an evidentiary hearing before a neutral decisionmaker at which the employer bears the burden of proof. In *Townsel v. San Diego Metropolitan Transit Development Board*,⁶⁹ a permanent employee who was entitled to continued employment unless dismissed for cause was provided with notice of the charges against him and a pretermination hearing that was not evidentiary in nature. The agency denied the employee’s request for an evidentiary hearing at which the agency bore the burden of proof.

While the trial court upheld the public agency’s actions finding that Townsel had received a pretermination *Skelly* hearing, the Court of Appeal directed that his termination be set aside and that the agency reconsider its decision following an evidentiary hearing at which the employer proved its case against the employee. The Court of Appeal concluded that Townsel was entitled to reinstatement and backpay only if his termination was found to be without good cause. *

The remedy for a failure to provide predeprivation due process is backpay from the date of deprivation to the date the evidentiary hearing is held.

1 *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048.

2 *Board of Regents v. Roth* (1972) 408 U.S. 564, 577, 20 CPER 71.

3 *Board of Regents v. Roth, supra*, 408 U.S. 564.

4 *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 27 CPER 37.

5 However, as will be discussed below, permanent employees may not be entitled to due process before removal of interests that do not rise to the level of a property interest, such as a leadership position, an extra-duty assignment or stipend, reprimand, or reassignment.

6 However, public employers are prohibited from terminating at-will employees in violation of public policy, such as for discriminatory or retaliatory reasons. See *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.

7 Under unique circumstances, however, a probationary employee may be entitled to due process before being released if mandated by local rules or procedures. See *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340, 44 CPER 51.

8 *Lubey, supra*, involved the right of probationary employees to a “liberty interest” hearing that permitted reinstatement during the probationary period under the city charter. A liberty interest in employment arises when an allegation seriously damages one’s standing and associations in the community.

9 *Williams v. Los Angeles City Dept. of Water and Power* (1982) 130 Cal.App.3d 677, 53 CPER 38; *Bell v. Duffy* (1980) 111 Cal. App.3d 643, 48 CPER 38.

10 *Skelly v. State Personnel Board, supra*, 15 Cal.3d 194.

11 *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 40 CPER 59.

12 *Barberic v. City of Hawthorne* (C.D. Cal. 1987) 669 F.Supp. 985. (No significant distinction between a forced retirement and discharge.)

13 Compare Ed. Code Sec. 44951 (permitting school districts to demote administrators to the classroom for no cause so long as they are provided with notice of the “reassignment” by March 15) with Ed. Code Secs. 45302 and 45304, which grant classified employees rights to due process before they are demoted, and *Ng v. California State Personnel Bd.* (1977) 68 Cal.App.3d 600. (The right of notice and opportunity to respond applies to demotions. While the demotion was upheld, the employee was entitled to backpay from the time of the demotion until the date the deficiency was corrected by notice and the opportunity to respond.)

14 *Supra*, 15 Cal.3d 194, at 207-208.

15 *Ibid.*

16 (Citations omitted.) *Civil Service Assn. v. City and County of San Francisco, supra*, 22 Cal.3d 552, 560.

17 *Townsel v. San Diego Metropolitan Transit Development Board* (1998) 65 Cal.App.4th 940, 132 CPER 71.

18 *Bostean v. Los Angeles Unified School District* (1998) 63 Cal.App.4th 95, 113. 130 CPER 66.

19 *Civil Service Assn. v. City and County of San Francisco, supra*, 22 Cal.3d at 564.

20 *Gilbert v. Homar* (1997) 520 U.S. 924, 125 CPER 19.

21 *Ibid.*

22 Similarly, employees working for public school and community college districts are subject to pre-deprivation suspensions without pay if charged with a narcotics or sex offense. (See Ed. Code Secs. 44940, 44940.5, 45304, and 87736.) In order to receive pay during their suspension, they must post a suitable bond. If the district pursues dismissal of the employee, he or she is entitled to backpay if acquitted of the charges.

23 (1987) 669 F.Supp. 985.

24 *Bostean v. Los Angeles Unified School Dist., supra*, 63 Cal.App.4th 95.

25 *Coleman v. Dept. of Personnel Administration* (1991) 52 Cal.3d 1102, 88X CPER 6.

26 *Id.* at 1120.

27 See e.g., Gov. Code Sec. 19570. “Disciplinary action does not include a written or oral reprimand.”

28 See, e.g., Ed. Code Secs. 44031, 87031, and 89546 regarding the rights of school district, community college district, and state university employees to review the contents of their personnel files and to respond to any derogatory documents in the file.

29 And see e.g., Public Safety Officers Procedural Bill of Rights Act, Gov. Code Secs. 3300 et seq.

30 *California School Employees Assn. v. Pasadena Unified School Dist.* (1977) 71 Cal.App.3d 318.

31 *Ibid.*

32 See e.g., *Turturici v. City of Redwood City* (1987) 190 Cal.App.3d 1447, 73 CPER 82. (A police officer is not entitled under the Public Safety Officers Procedural Bill of Rights Act to appeal negative comments in his performance evaluation because they did not constitute punitive action warranting an appeal.)

33 *Trotter v. Los Angeles County Board of Education* (1985) 167 Cal.App.3d 891, 66 CPER 4.

34 *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, rev. den. See *Matthews v. Eldridge* (1976) 424 U.S. 319, 335.

35 *Supra*, 15 Cal.3d at 212-213.

36 *Id.* at 215.

37 *Coburn v. California State Personnel Bd.* (1978) 83 Cal.App.3d 801.

38 *Cockburn v. Santa Monica Community College Dist. Personnel Com.* (1984) 161 Cal.App.3d 734.

39 *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264.

40 *Id.* at 1278, quoting *Arnett v. Kennedy* (1974) 416 U.S. 134, at 264-265.

41 *Id.*

42 *Id.* at 1280 (slip op. at 14).

43 *Supra*, 161 Cal.App.3d 734.

44 *Id.* at 745.

45 *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 162 CPER 30.

46 See e.g., *Gilbert v. Superior Court* (1987) 193 Cal.App.3d 161, 175.

47 *Cleveland Board of Education v. Loudermill, supra*, 470 U.S. at 534.

48 *Id.* at 545-546.

49 *Skelly v. State Personnel Board, supra*, 15 Cal.3d 194.

- 50 *La Chance v. Erickson, Jr.* (1998) 522 U.S. 262, 128 CPER 57.
51 (1985) 40 Cal.3d 822, 827, 67X CPER 1.
52 (1994) 25 Cal.App.4th 1834, 1853.
53 *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017.
54 *Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 737, 79 CPER 20.
55 (1996) 42 Cal.App.4th 763, 117 CPER 74.
56 *Id.* at 770-771.
57 *Supra*, 27 Cal.4th 1017.
58 *Id.* at 1037.
59 *Ibid.*
60 (2003) 114 Cal.App.4th 810, 164 CPER 49.
61 (2004) 125 Cal.App.4th 273.
62 (9th Cir. 1992) 964 F.2d 948, 94 CPER 43.
63 *Jones, supra* at 284.
64 This article is limited to a discussion of state law or administrative remedies and does not address remedies that may be available under federal civil rights laws such as under 28 USC Sec. 1983.
65 *Barber v. State Personnel Board* (1976) 18 Cal.3d. 395.
66 *Ibid.*
67 *Id.* at 403.
68 See *Skelly, supra*, 15 Cal.3d 194.
69 (1998) 65 Cal.App.4th 940.

“The right to procedural due process is one of the most significant constitutional guarantees provided to citizens in general and public employees in particular.”

Pocket Guide to Due Process in Public Employment

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Keeping Up With Technology: Legal Protections for ‘Bloggers’

Stacey Leyton

Of the estimated 120 million American Internet users, 1 in 15 have created “blogs,” according to a recent study.¹ More than 1 in 10 have posted on a blog, and as many as 1 in 4 have read them.² For the uninitiated — in step with the 62 percent of Internet users who still are not sure what a blog is — “blog” is short for “web log.” It can be defined as a web page that serves as a publicly accessible personal journal for an individual and that also may be used as a forum for people to post opinions about issues or topics.

Stacey Leyton is an attorney at Altshuler, Berzon, Nussbaum, Rubin and Demain, a San Francisco litigation firm that specializes in labor and employment, environmental, constitutional, campaign and election, and civil rights law.

As can be expected, the increased accessibility of this technology has led to workplace conflicts. A 2005 survey found that one in five employers had policies governing operation of personal blogs on company time and personal postings on corporate blogs.³ Recent articles have reported claims that a flight attendant was fired because she appeared in her uniform in “inappropriate photographs” featured on her personal blog; a Washington staffer was terminated for revealing sexual exploits with powerful men in a blog she says was designed for her three friends; a university fired an individual who was teaching a journalism class for blogging about his attraction to a female student; and employees of banks and even web-based companies have been terminated for blogging about work-related gripes.⁴ Some were fired for the content of their blogs, others simply for using employers’ computers for personal blogging.

The impact of blogging on the workplace is still far less than that of other forms of electronic communications. A recent study indicates that just 3 percent of companies have disciplined employees for blogging activity as compared to the 50 percent that have disciplined employees for personal use of the Internet.⁵ Reports of bloggers being disciplined by public employers are rare. Nonetheless, this method of communication is growing rapidly. Rates of blog readership shot up 58 percent in 2004. Blog posting tripled from early 2003 to late 2004. And blog

creation more than doubled between 2002 and 2004.⁶ The coming of age of those most comfortable with the medium — today's youth — guarantees that the frequency of employee blogging, employer concerns, and the resulting conflicts will continue to rise.

This article outlines some of the legal issues surrounding employee blogging. In particular, it sets forth the legal limits on employers' freedom to monitor employees' blogging activities and to restrict such activities by imposing discipline.

Employer Monitoring

In most workplaces, under current law, a public employee would have a difficult time establishing a reasonable expectation of privacy in his or her employer-provided computer. Therefore, an employer probably would not violate the law by monitoring the use of the computer for blogging. Public employees' privacy rights are protected by the Fourth Amendment to the U.S. Constitution.⁷ While this Fourth Amendment right mainly has been applied to searches of physical spaces like offices and desks, it should apply equally to searches of an employee's computer. However, this protection attaches only if the employee has a reasonable expectation of privacy, and that expectation "may be reduced by virtue of actual office practices and procedures."⁸ Thus, among other factors, in evaluating whether an employee's Fourth Amendment rights were violated, courts will consider the extent to which an employer has put an employee on notice of the potential for monitoring.⁹

Employer monitoring also may intrude on the right of privacy established in the state Constitution.¹⁰ In evaluating whether an employer has violated this right by monitoring an employee's communications, courts would require the employee to show a legally protected privacy interest, a reasonable expectation of privacy, and a serious invasion of privacy by the employer. The court then would weigh the strength of the privacy interest against the employer's countervailing interest.¹¹ As in the Fourth Amendment

context, notice of the potential for monitoring will weigh against an employee's privacy claim.¹²

Even where blog monitoring does not involve the search of a workplace computer, reading an employee's restricted-access blog may violate an employee's privacy rights. Restricting access to a blog (for example by requiring a password) would aid an employee's argument that his or her expectation of privacy was reasonable. In extreme cases, an

employee whose employer has read something deeply personal on the employee's restricted-access blog may be able to claim that the employer has violated his or her right to privacy by unreasonably intruding on the employee's seclusion.¹³ And the employer's disclosure of such personal facts to even a few individuals will heighten the potential for liability for invasion of privacy.¹⁴

Furthermore, an employer who reads an employee's restricted-access blog may violate federal and state statutory prohibitions on the unauthorized interception of communications.¹⁵ However, some of these laws have been interpreted in a manner that limits the protections they convey against unauthorized viewing. For example, they have been read as banning only the interception of communications during transmission and not the interception of any stored communications (posts are "stored" on a server).¹⁶ Further, many of these laws contain exemptions that would apply to most employer-monitoring.¹⁷

Finally, employer surveillance of public employee communications about unionizing or other employment-related issues may violate state labor law by having a "chilling effect" on employees' rights to engage in protected, concerted activities.¹⁸

Employer Restrictions on Blogging and Discipline

No law gives employees an inherent right to blog that would protect them from employer discipline. Some have interpreted two relatively new provisions of the California

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Labor Code — which address “lawful conduct during nonworking hours away from the employer’s premises”¹⁹ — as prohibiting employers from disciplining employees for *anything* that goes on outside of work so long as it is legal (including, presumably, blogging). So far, however, the law has not been construed so broadly. Rather, a number of courts and the Attorney General have concluded that these provisions merely help enforce existing rights — such as the right to privacy — rather than giving employees any additional rights.²⁰ While the issue is not settled, these rulings suggest that the new Labor Code protections apply only if, in the course of disciplining an employee, the employer violated some right conveyed by other laws (for example, by interfering with an employee’s political activities, or libeling the employee).

State and federal law grant statutory protection to, among other things, political speech, speech about unionization or working conditions, speech about discrimination or related to membership in a protected class, and speech that reveals unlawful actions by an employer. When an employee blogs about one of these subjects, an employer must carefully consider the lawfulness of restricting such blogging and/or taking adverse action against an employee based on the blog.

First, California public employees enjoy First Amendment and parallel state constitutional protections against termination or other discipline for certain blogging activity, particularly if the blogging addresses a matter of public concern. If an employee challenges a termination on First Amendment grounds, courts will balance the employer’s legitimate interest in delivering efficient government services against the employee’s interest as a citizen in commenting on a matter of public concern.²¹ So, employee blogs that discuss something important to the public will enjoy greater protection. Conversely, blog content with the potential to disrupt the workplace will diminish that protection. California employees are protected further by provisions of the state Labor Code that prohibit employers from interfering with employees’ political activities.²²

Second, public employee labor law conveys certain protections for employees. California public employees have the right to engage in activities “for the purpose of representation on all matters of employer-employee relations,”²³ the right of self representation,²⁴ and the right to complain about working conditions.²⁵ And employee organizations have rights including the right to represent their members, to have access at reasonable times to work areas, and to use institutional means of communication.²⁶

Employers who interfere with these rights or discriminate against employees for exercising such rights, for example through an adverse employment action, commit unfair practices.²⁷ Unlawful motivation may be established by circumstantial evidence such as an employer’s failure to follow usual procedures, other differential treatment, or the timing of an action.²⁸ Interference may be shown even when proof that the employer acted with unlawful motivation is

lacking.²⁹ Thus, an employer that disciplines an employee who has blogged about union-related matters or other complaints about working conditions runs the risk of violating state labor law. Even if the employee has violated a generally applicable policy, such as a rule prohibiting personal use of the employer’s computer equipment or engaging in personal blogging on work time, the discipline may be unlawful if the policy is being administered in a way that discriminates against protected activities (for example, if the employer has tolerated blogging about other subjects during work time but takes action against an employee who blogs about low wages).³⁰ In addition, while the issue is unsettled, “no personal use” computer policies may violate labor law, even if applied in an even-handed manner, if they serve to restrict solicitation-type speech about protected, concerted activities or restrict reasonable access to other employees.³¹

Third, some topics are protected by statute. For example, California law specifically prevents employers from maintaining or enforcing rules prohibiting employees from

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disclosing their wages.³² It may also violate the law for an employer to take action against an employee for blogging about workplace discrimination. State and federal laws prohibit discrimination based on race, national origin, sex, pregnancy, religion, disability, age, serious health condition, and, under state law, sexual orientation or family/marital status.³³ These laws also prohibit retaliation for complaining about discrimination or harassment based on these characteristics.³⁴

Additionally, employer retaliation against an employee who complains in a blog about workplace safety issues may be unlawful, especially if that employee has complained to his or her employer or to the Division of Occupational Safety and Health about the problem.³⁵ And, an employer who takes adverse action against an employee for exposing its violation of the law, waste of government resources, misconduct, or incompetence may run afoul of statutory whistleblower protections, especially if the employee has reported the violation to the appropriate government authorities before blogging about it.³⁶

Fourth, a union contract or other employment agreement may protect an employee by requiring “just cause” for termination and/or by addressing electronic privacy or computer use issues. Whether blogging activities constitute “just cause” would depend on whether they violate the employer’s work rules, whether the union contract places limitations on those work rules, the specific conduct involved, and the employee’s personnel record. In some very limited circumstances, an employee without a written employment agreement may enjoy some quasi-contractual protections based on personnel policies or representations made to the employee over the course of his or her time on the job that give rise to an “implied contract.”³⁷

In addition, more and more unions are negotiating specific protections for workers’ use of electronic means of communications. For example, some union contracts contain provisions that allow reasonable personal use of an employer’s computer equipment, or that prohibit terminating an employee for off-duty conduct. And even if the union contract does not contain any specific protection, an employer will be required to bargain with the union before making a unilateral change in a workplace computer or Internet policy.³⁸

Finally, in addition to the substantive protections previously discussed, the procedural protections against discipline enjoyed by government employees extend to discipline based on blogging activity. Thus, for example, an employee’s *Skelly* right to a pre-disciplinary hearing and *Weingarten* right to representation in a disciplinary meeting must be respected.³⁹

Conclusion

While no provision of state law prohibits public employers from adopting restrictions on employee blogging activities, such restrictions may run afoul of other substantive protections for public employees. As the frequency of blogging at or about work continues to rise, employers should be aware that the freedom to monitor employee blogging and to place restrictions on such communication is constrained by state and federal law. *

1 Data Memo, PEW/Internet, PEW Internet & American Life Project, Jan. 2005, found at http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf (checked Sep. 14, 2005), at 1.

2 *Id.* at 1.

3 American Management Association, *2005 Electronic Monitoring & Surveillance Survey: Many Companies Monitoring, Recording, Videotaping – and Firing – Employees*, found at www.amanet.org/press/amanews/ems05.htm (accessed Sep. 13, 2005). This is far fewer than the number of employers with policies governing personal e-mail use (84 percent), Internet use (81 percent), instant messenger use (42 percent), and operation of personal websites on company time (34 percent). *Id.*

4 Krysten Crawford, *Have a blog, lose your job?*, CNN, accessed at <http://money.cnn.com/2005/02/14/news/economy/bloggling/> (Sep. 14, 2005); Mike Tierney, *Ex-flight attendant sues Delta over blog*, Atlanta J.-Const., Sep. 8, 2005; Joe Strupp, *Former “Herald” Sports Scribe Loses Teaching Gig After Web Posting*, Editor & Publisher, Jul. 15, 2005; Todd Wallack, *Blogs: Beware if your blog is related to work*, S.F. Chron., Jan. 24, 2005; April Witt, *Blog Interrupted*, Wash. Post, Aug. 14, 2004, W12.

5 Wallack, *supra* note 4 (reporting January 2005 survey by Society for Human Resource Management).

6 Data Memo, PEW/Internet, *supra* note 1, at 2-3.

7 See *O’Connor v. Ortega* (1987) 480 U.S. 709 (plurality op.), 73 CPER 73.

8 *Id.* at 722.

9 Federal and state legislative proposals to require employers to notify employees before engaging in electronic monitoring (for example, the federal Privacy for Consumers and Workers Act of 1993) have not been enacted or signed into law. Most recently, the California legislature passed S.B. 1822 in the 1999-2000 session, but it was vetoed by then-Governor Davis.

10 Cal. Const., Art. I, Sec. 1.

11 *Hill v. NCAA* (1994) 7 Cal.4th 1, 39-40, 106 CPER 61.

12 See *TBG Insurance Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443 (analyzing whether state constitutional protection for privacy provided defense against discovery, and holding employee who had signed consent to employer monitoring lacked any reasonable expectation of privacy in employer-provided home computer).

13 See Restatement (2d) of Torts Sec. 652B. For example, in *Johnson v. K-Mart Corp.* (Ill.App.Ct. 2000) 723 N.E.2d 1192, 1196-97, it was held that an employer's use of undercover investigators who posed as fellow employees to discover sensitive information about its employees' personal lives, without any business justification, may have violated this privacy right.

14 See Restatement (2d) of Torts Sec. 652D; *Johnson*, 723 N.E.2d at 1197; *Karch v. BayBank FSB* (N.H. 2002) 794 A.2d 763, 773-74.

15 See, e.g., 18 USC Secs. 2510 et seq. (Electronic Communications Privacy Act), Secs. 2701 et seq. (Stored Communications Act); Cal. Penal Code Secs. 631-32.

16 See, e.g., *Konop v. Hawaiian Airlines, Inc.* (9th Cir. 2002) 302 F.2d 868.

17 See, e.g., 18 USC Secs. 2510(5)(a)(1), 2511(2)(a)(i).

18 See *Lake Tahoe Unified School Dist.* (1999) PERB Dec. No. 1361, 24 PERC par. 31017, 140 CPER 57 (applying NLRB surveillance doctrine); *NLRB v. Unbelievable, Inc.* (9th Cir. 1975) 71 F.3d 1434 (holding employer committed unfair labor practice by eavesdropping on conversation in employee break room).

19 Cal. Labor Code Secs. 96(k), 98.6.

20 See *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 86-88; *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4th 525, 534-36; 83 Ops. Cal. Atty. Gen. 226 (2000).

21 See *Pickering v. Board of Ed. of Township High School Dist. 205* (1968) 391 U.S. 563, 568; *Gray v. City of Tulare* (1995) 32 Cal.App.4th 1079, 111 CPER 22.

22 Cal. Labor Code Secs. 1101-02.

23 Gov. Code Secs. 3502, 3515, 3543(a), 3565.

24 See, e.g., Gov. Code Sec. 3502.

25 See, e.g., *Marin County Law Library* (2004) PERB Dec. No. 1655-M, 285 PERC par. 195, 168 CPER 112; *Oakdale Union Elementary School Dist.* (1998) PERB Dec. No. 1246E, 22 PERC par. 29047, 129 CPER 60.

26 Gov. Code Secs. 3503, 3515.5, 3543.1, 3568.

27 *Moreland Elementary School Dist.* (1982) PERB Dec. No. 227, 6 PERC par. 13171, 55 CPER 65; *Novato Unified School Dist.* (1982) PERB Dec. No. 210, 6 PERC par. 13114, 54 CPER 43.

28 *Santa Clara Unified School Dist.* (1979) PERB Dec. No. 104, 3 PERC par. 10124, 43 CPER 91; *State of Cal. (Dept. of Transportation)* (1984) PERB Dec. No. 459-S, 9 PERC par. 16027, 64 CPER 40; *North Sacramento School Dist.* (1982) PERB Dec. No. 264, 7 PERC par. 14017, 52 CPER 67.

29 *Regents of the University of California* (1983) PERB Dec. No. 305-H, 7 PERC par. 14139, 57 CPER 71.

30 See *State of California [Dept. of Personnel Administration]* (1998) PERB Dec. No. 1279-S, 22 PERC par. 29148, 132 CPER 84 (prohibiting use of electronic mail pertaining to employee organizations, while permitting other personal use, violates Dills Act).

31 See *Long Beach Unified School Dist.* (1980) PERB Dec. No. 1300, 4 PERC par. 11098, 46 CPER 69 (employer access regulations must be reasonable). The General Counsel of the National Labor Relations Board has determined that "no personal use" policies in workplaces that regularly use email violate federal labor law. See, e.g., NLRB Office of General Counsel Advice Memorandum (Pratt & Whitney), No. 12-CA-18446, 12-CA-18722, 12-CA-18745, 12-CA-18863, 1998 WL 1112978 (Feb. 23, 1998).

32 Cal. Labor Code Sec. 232.

33 See 42 USC Secs. 2000e et seq. (Title VII; race, color, religion, sex or national origin); 42 USC Secs. 12101 et seq. (Americans with Disabilities Act); 42 USC Secs. 621 et seq. (Age Discrimination in Employment Act); Gov. Code Secs. 12900 et seq. (California Fair Employment and Housing Act).

34 See, e.g., 42 USC Sec. 20003-3(a); Gov. Code Sec. 12940(h).

35 The California Occupational Safety and Health Act can be found at Labor Code Secs. 6300 et seq. Labor Code Sec. 6310 prohibits retaliation against workers for filing Cal/OSHA complaints.

36 See Gov. Code Secs. 8547 et seq.

37 See *Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743.

38 See *Trustees of the California State University* (2003) PERB Dec. No. 1507-H, 27 PERC par. 26, 158 CPER 85 (public employer required to bargain over change in computer use policy); *State of California (Water Resources Control Board)* (1999) PERB Dec. No. 1337S, 23 PERC par. 30136, 138 CPER 66 (same regarding Internet policy).

39 See *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194; *NLRB v. Weingarten* (1975) 420 U.S. 251, 27 CPER 37; *Rio Hondo Community College Dist.* (1982) PERB Dec. No. 260, 7 PERC par. 14010.

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Workers Fighting Discrimination Get Help From State Supreme Court

Rebecca McKee, CPER Associate Editor

***Wiswall instructed
Yanowitz to fire a dark-
skinned female sales associate.
He said he preferred fair-
skinned blondes and directed
Yanowitz to replace the
associate with someone "hot."***

Employees who refuse to follow discriminatory directives now have expanded protections under the Fair Employment and Housing Act. In a wide-reaching decision, *Yanowitz v. L'Oreal* (8-11-05) Supreme Ct. S115154, 36 Cal.4th 1028, 2005 DJDAR 9664, the California Supreme Court ruled that an employee who refused to obey her male supervisor's order to fire a female employee because he did not find her sufficiently attractive has the right to be free from retaliation, even where the employee did not inform her boss of the reason for her refusal to comply. The court also announced that an adverse employment action will exist based on consideration of the totality of the circumstances, that each action need not be evaluated separately, and that the continuing violation theory is applicable to FEHA retaliation claims. These holdings are consistent with the intent of the anti-discrimination statute and will further its goals, reasoned the court.

Background

Elysa Yanowitz began working with L'Oreal in 1982. By 1997, she was a regional sales manager under the direct supervision of Richard Roderick; Roderick reported to Jack Wiswall. In the fall of that year, after touring a store selling the company's products, Wiswall instructed Yanowitz to fire a dark-skinned female sales associate. He said he preferred fair-skinned blondes and directed Yanowitz to replace the associate with someone "hot." On a return trip to the store, Wiswall discovered Yanowitz had not fired the employee, and he reiterated that she do so. As he passed a young, attractive blond girl on his way out, he turned to Yanowitz and said, "God damn it, get me one like that."

On several subsequent occasions, Wiswall asked Yanowitz if she had fired the associate. Each time, Yanowitz asked Wiswall to provide adequate justification

for the firing, but she was never given one. Yanowitz refused to carry out the order. However, she never told Roderick or human resources personnel that Wiswall was pressuring her to fire the associate. Nor did she explicitly tell Wiswall she believed his directive was discriminatory.

In April 1998, Roderick began to solicit negative information about Yanowitz from her subordinates. He told one individual it was urgent that she persuade others to come forward with their problems concerning Yanowitz. Roderick criticized Yanowitz's work at several meetings and in memoranda. He and Wiswall audited Yanowitz's travel and expense reports. In July 1998, Roderick wrote a memo criticizing Yanowitz's work and citing her failure to respond to earlier criticisms. Yanowitz viewed this memo as an attempt to develop pretextual grounds to terminate her. When Yanowitz met with Roderick to review the contents of his July memo, he refused to read her response and changed her travel schedule. Two days later, Yanowitz left the company on disability leave due to stress and did not return to work.

Yanowitz filed suit alleging that L'Oreal had retaliated against her in violation of the FEHA. The trial court dismissed this claim on the grounds that Yanowitz had not engaged in protected activity. The Court of Appeal reversed, finding that Yanowitz had engaged in protected activity and that she was not required to give L'Oreal notice that she believed Wiswall's order to be discriminatory.

In the California Supreme Court ruling, Chief Justice Ronald George wrote for the majority, joined by Justices Joyce Kennard, Kathryn Werdegar, and Carlos Moreno. Justice Marvin Baxter joined in Justice Ming Chin's dissenting opinion.

Protected Activity

“It is well established that a retaliation claim may be brought by an employee who has complained of or opposed conduct that the employee reasonably believes to be

discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA,” began the majority opinion. Strong policy considerations support this rule. “A rule that permits an employer to retaliate against an employee with impunity whenever the employee's reasonable belief turns out to be incorrect would significantly deter employees from opposing conduct they believe to be discriminatory.”

Wiswall said he preferred fair-skinned blondes, and he directed Yanowitz to replace the associate with someone 'hot.'

Yanowitz reasonably believed Wiswall's order constituted unlawful sex discrimination, found the court, “because she thought the order represented the application of a different standard for female sales associates than for male sales associates.” To support her claim, the court cited Wiswall's demands that Yanowitz fire the associate and find someone “hot” to replace her and, referring to a blond, sexy woman, that she “get me one that looks like that.” The court also noted Yanowitz's assertion that she had never been asked to fire a male associate because he was not attractive enough.

The majority rejected L'Oreal's argument that Yanowitz had not engaged in protected activity because she did not inform the company that her refusal to terminate the associate was a protest against unlawful discrimination. Chief Justice George wrote:

We agree with Yanowitz that when the circumstances surrounding an employee's conduct are sufficient to establish that an employer knew that an employee's refusal to comply with an order was based on the employee's reasonable belief that the order is discriminatory, an employer may not avoid the reach of the FEHA's anti-retaliation provision by relying on the circumstance that the employee did not *explicitly* inform the employer that she believed the order was discriminatory. The relevant portion of section 12940(h) states simply that an employer may not discriminate against an employee “because the person has opposed any practices forbidden under this part.” When an employer knows that the employee's actions rest on

such a basis, the purpose of the anti-retaliation provision is applicable, whether or not the employee has told her employer explicitly and directly that she believes an order is discriminatory.

The court clarified that an employee's "unarticulated belief" that the employer is discriminating is not enough to establish protected conduct absent evidence the employer knew this belief was the reason for the employee's actions. "The relevant question," said the court, "is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner." In this instance, the court concluded, by repeatedly refusing to fire the associate unless Wiswall provided "adequate justification," the trier of fact properly could find that Yanowitz put him on notice that she considered his directive to be discriminatory.

Adverse Employment Action

The court next considered whether Yanowitz had suffered an "adverse employment action" for purposes of a retaliation claim under the FEHA, and which standard to use in making that determination.

Section 12940(h) makes it an unlawful employment practice for an employer "to discharge, expel, *or otherwise discriminate*" against any person because that person opposes a discriminatory practice. In contrast, Sec. 12940(a), the basic anti-discrimination section, makes it unlawful for an employer, because of race, sex, or any other protected status "to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, *or to discriminate against the person in compensation or in terms, conditions or privileges of employment.*"

L'Oreal argued that the words "otherwise discriminate" in Sec. 12940(h) should be interpreted to refer to the same category of offences set out in Sec. 12940(a), i.e., discrimination in the "terms, conditions or privileges of employment." Under that reading, there is no difference between the protections for those claiming retaliation and those claiming discrimination.

Yanowitz, on the other hand, agreed with the reasoning of the Court of Appeal, arguing that because the language of Sec. 12940(h) is not as limiting as Sec. 12940(a), an employee may prevail in a retaliation action not only when he or she has been subjected to discrimination in the "terms, conditions or privileges of employment" that would support a cause of action under Sec. 12940(a), but also when he or she has been subjected to any other action "that is reasonably likely to deter employees from engaging in protected activities."

The Supreme Court refused to make this distinction.

The standard adopted by the Court of Appeal — the "deterrence standard" — does not appear unreasonable when one focuses on the purpose or objective of section 12940(h) viewed in isolation. When the provisions of section 12940 are viewed as a whole, however, we believe it is more reasonable to conclude that the Legislature intended to extend a comparable degree of protection both to employees who are subject to the types of basic forms of discrimination at which the FEHA is directed — that is, for example, discrimination on the basis of race or sex — and to employees who are discriminated against in retaliation for opposing such discrimination, rather than to interpret the statutory scheme as affording a greater degree of protection against improper retaliation than is afforded against direct discrimination.

Rather than adopt the Court of Appeal's "deterrence standard, the court opted for the "materiality standard." It noted that the "overwhelming majority of federal courts that have addressed the issue similarly have concluded that in

*Yanowitz had never
been asked to fire
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because he was not
attractive enough.*

order to maintain an action under the anti-retaliation provision of Title VII, an employee must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment, rather than simply that the employee has been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity.”

Yanowitz argued that the court’s interpretation of Sec. 12940(h) would leave those employees vulnerable to a broad range of retaliatory measures. But the court countered that Yanowitz had too narrow a view of the type of adverse employment actions forbidden by Sec. 12940(a). “Retaliation claims are inherently fact specific,” said the court, “and the impact of an employer’s action in a particular case must be evaluated in context.” Referring to the United States Supreme Court case of *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 103 CPER 10, the court explained that the phrase “terms, conditions or privileges of employment” is not limited to economic or tangible discrimination.

As the high court concluded in *Harris* with respect to the comparable language embodied in Title VII, we believe that the language in section 12940(a) making it an unlawful employment practice for an employer to discriminate against an employee on the basis of race, sex, or the other enumerated characteristics “in compensation or in the terms, conditions, and privileges of employment” properly must be interpreted broadly to further the fundamental anti-discrimination purposes of the FEHA. Appropriately viewed, this provision protects an employee against unlawful discrimination with respect not only to so-called “ultimate employment actions” such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career. Although a mere

offensive utterance or even a pattern of social slights by either the employer or co-employees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase “terms, conditions, or privileges” of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide.

*Rather than adopt the
Court of Appeal’s
‘deterrence standard,’
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‘materiality standard.’*

The court further instructed that there is no “mathematically precise test” for determining whether the adverse action complained of constitutes discrimination in the terms, conditions or privileges of employment and that the action must be “evaluated by taking into account the legitimate interests of both the employer and the employee.”

“Minor or relatively trivial adverse actions” that are likely to only anger or upset an employee could not be said to materially affect the terms, conditions or privileges of employment, clarified the court. However, “adverse treatment that is reasonably likely to impair a reasonable employee’s job performance or prospects for advancement or promotion” does meet that standard and is prohibited under both Secs. 12940(a) and 12940(h).

Turning to the specific evidence of retaliation submitted by Yanowitz, the court stated, “as a threshold matter, we need not and do not decide whether each alleged retaliatory act constituted an adverse employment action in and of itself.” The court rebuffed L’Oreal’s contention that it is improper to consider the acts collectively, finding “no requirement that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries.” “Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute.”

Because some of the retaliatory actions complained of occurred more than a year prior to the date Yanowitz filed her claim with the administrative agency, the statute of limitations under the FEHA, Yanowitz urged the court to apply the continuing violation doctrine. That principle renders an employer liable for actions outside of the statute of limitations if they are linked to unlawful conduct that occurred within the limitations period. L'Oreal argued that the court should not consider the earlier acts, pointing to *National Railroad Passenger Corp. v. Morgan* (2002) 536 U.S. 101, where the United States Supreme Court limited the continuing violation doctrine to Title VII harassment claims, excluding discrimination and retaliation claims.

The court refused to apply the *Morgan* limitations to the FEHA. Instead it relied on its own decisions in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 150 CPER 70 and *Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479, 122 CPER 82, two cases that broadened the reach of a FEHA claim.

A rule categorically barring application of the continuing violation doctrine in retaliation cases would mark a significant departure from the reasoning and underlying policy rationale of our previous cases interpreting the FEHA statute of limitations. In *Richards*, we recognized that such a strict approach to the statute of limitations could encourage early litigation, and that in order to minimize the filing of unripe lawsuits and to promote the conciliatory resolution of claims, the FEHA statute of limitations should be interpreted liberally to allow employers and employees an opportunity to resolve disputes informally. In our earlier decision in *Romano*, these same policy concerns critically informed our decision that a FEHA action for discriminatory discharge does not commence until the actual discharge, not the time the employee was notified that he or she would be discharged.

Where the plaintiff has alleged a retaliatory course of conduct, as in this case, some of the component acts might not be individually actionable, reasoned the court. Barring the continuing violation doctrine in retaliation cases would “undermine the fundamental purpose of the FEHA by encouraging early litigation and the adjudication of unripe claims.” “Thus,” said the court, “we reiterate that in a retaliation case, as in a disability accommodation or harassment case, the FEHA statute of limitations begins to run when an alleged adverse employment action acquires some degree of permanence or finality.”

Upon a review of Yanowitz's evidence, the court concluded that the trial court erred in summarily dismissing her retaliation claims. “Months of unwarranted and public criticism of a previously honored employee, an implied threat of termination, contacts with subordinates that only could have the effect of undermining a manager's effectiveness, and new regulation of the manner in which the manager oversaw her territory did more than inconvenience Yanowitz.” “Such actions...placed her career in jeopardy,” and were “objectively adverse,” said the court.

The court also was not persuaded by L'Oreal's contention that Yanowitz had failed to show that its stated nondiscriminatory reasons for its actions were pretextual. It noted that “Roderick's active solicitation of negative information concerning Yanowitz in the spring of 1998 strongly suggests the possibility that her employer was engaged in a search for a pretextual basis for discipline, which in turn suggests that the subsequent discipline imposed was for purposes of retaliation.”

The phrase ‘terms, conditions, or privileges’ of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace....

The Dissent

Justice Chin took the position that Yanowitz did not engage in protected activity because she did not complain to anyone at L'Oreal about what she considered to be a

discriminatory directive. “The whole point behind giving whistleblowers special protection is to encourage them to speak out to try to prevent employment discrimination before it takes place or to expose it after it occurs. It makes no sense to give this special protection to someone, like plaintiff here, who did nothing (until after she filed a lawsuit) to communicate to her employer that she opposed what she believed to be a discriminatory act,” he wrote.

Justice Chin argued that one of the purposes of providing protection for whistleblowers is “to encourage open communication between employees and employers so that employers can take voluntary steps to remedy FEHA violations.” The only way to do this, he said, is to require employees to “overtly oppose” unlawful discrimination. “Placing the onus on employers to try to find out whether an employee believes an action is discriminatory and for some reason has chosen not to speak out, does not further this purpose,” he explained.

Impact of the Decision

“The court’s decision in this case is a significant weapon in the fight against discrimination in the workplace,” said Patricia Shiu of the Legal Aid Society of San Francisco-Employment Law Center, one of the organizations that contributed a “friend of the court” brief on behalf of Yanowitz. “Those employees who are brave enough to stand up against their employer with others who are being discriminated against now know that they have the right to be protected from all sorts of retaliatory acts and can expect to receive that protection from the courts.” “The court exhibited great sensitivity to the difficulties encountered in real life by workers who try to do the right thing. It recognized that it is not always easy to go

to your supervisor and tell him that you think he is unlawfully discriminating. The reality is if you do that, you are likely to suffer some consequences. And, as the court recognized, the retaliation can take many forms and can take place through a whole series of acts,” she said.

Employers have a mixed reaction to the decision, according to Lawrence A. Michaels, one of the attorneys who filed an amicus brief supporting L’Oreal. “Employers are not disappointed in the standards adopted by the court,” said Michaels, “but there is some concern regarding the way those standards were applied in this case.” Employers are

pleased that the court adopted the materiality standard for determining whether an employee can challenge an adverse employment action under the FEHA and rejected the Ninth Circuit’s “deterrence” standard. And, “no one is surprised that employers can be held liable for retaliation if they know that an employee is protesting an action the employee believes to be discriminatory, whether or not the action is in fact unlawful,” he said.

However, Michaels explained that employers are concerned the court seemed to imply that simply counseling an employee could be held to be an adverse employment action. “Employers

must be able to discuss issues regarding performance with an employee without fear that the discussion itself will be considered a retaliatory act,” he said.

Michaels believes the impact of the decision will not be fully understood for some time. “We will have to see how the standards set out by the Supreme Court in this case will be applied by the lower courts before we can understand which employment actions will be considered to be material and what kind of facts will be held to imply knowledge.” *

*‘The court’s decision
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the workplace.’*

Recent Developments

Public Schools

PERB Slams Oakland USD for Contracting Out Police Services

In a long-awaited decision, California's Public Employment Relations Board found that the Oakland Unified School District violated the Educational Employment Relations Act and failed to bargain with the California School Employees Association when it unilat-

Rumors circulated that the district was considering the elimination of the independent police force.

erally subcontracted police work from the district police force to the Oakland Police Department. The district has appealed the decision.

Factual Background

The district had its own police force since 1957. Most law enforcement authority remained with the Oakland Police Department until 1983, when the district's security division was certified as a full-service police depart-

ment. In 1990, district police officers were placed under OPD's supervision. For 10 years, the district was policed by both district officers and law enforcement personnel from the city's force.

In 1999, the district created an independent police force. But the following year, the union began to hear rumors that the district superintendent was considering the elimination of the independent police force in favor of OPD providing all police services. During negotiations for a successor agreement in the fall of 2000, Mike Helms, the district's chief negotiator, when asked about the rumors on several occasions, said he had no knowledge of an OPD takeover and that it was not going to happen. On January 31, 2001, CSEA and the district reached a tentative agreement for a three-year period that was ratified by the board on March 14, 2001.

In the meantime, on March 5, 2001, the school board received a report addressing public safety issues. It recommended that the district enter into discussions with the city to determine how responsibility for policing the schools could be returned to OPD. The report stated, "the District's cost

savings would allow up to \$1.1 million dollars to be transferred to the City to help cover the City's cost." On that same date, the union wrote to the district superintendent reminding him that CSEA and the district had reached a binding agreement which did not permit the district to contract out any work done by district police officers. On March 7, the superintendent responded, stating he had no intention of breaching the agreement.

However, on May 4, 2001, the district and OPD reached a tentative agreement eliminating the district's in-

The union demanded that the district retract the agreement.

dependent police department and giving OPD the responsibility for police services. In exchange, the district agreed to contribute \$1 million annually to the city.

When the union was informed of the tentative agreement on May 8, 2001, it demanded that the district retract it because the decision to contract out police services violated the collective bargaining agreement. The district refused. The MOU was adopted by the district and ratified by the city council in mid-June, 2001.

On November 15, 2001, the district's police officers received layoff notices. The union and the district then

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began to engage in “effects” bargaining without success. The union declared impasse on January 11, 2002, but failed to pursue EERA impasse procedures.

CSEA filed an unfair practice charge against the district, alleging that it violated EERA when it contracted out police services without affording the union notice and the opportunity to negotiate the decision and its effects, and that it avoided negotiating with CSEA by denying any intent to take such action during negotiations for a collective bargaining agreement. A formal hearing was held before Administrative Law Judge Fred D’Orazio. The ALJ, in his proposed decision, found that the district’s decision to subcontract bargaining work to the OPD was a negotiable subject under EERA and that by failing to negotiate over the decision, the district violated its duty to bargain in good faith.

The district filed numerous exceptions to the ALJ’s proposed decision.

The Decision

The board affirmed the administrative law judge’s decision in an opinion written by Chairperson John Duncan. Members Lillian Shek and Al Whitehead agreed with Duncan’s conclusions but criticized their colleague for unnecessarily addressing the same issues that were covered in the ALJ’s proposed decision.

Scope of representation. The board agreed with the ALJ that the district’s decision to enter into the MOU was a matter within the scope of

representation under EERA Sec. 3543.2. As the ALJ explained, an item like subcontracting, which is not enumerated in that section, is negotiable “if (1) it is logically and reasonably related to wages, hours, or an enumerated term or condition of employment; (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict; and (3) the employer’s obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of its mission.” Measured against this test, the ALJ said, PERB has long held that a decision to subcontract is within the scope of representation and an employer must negotiate about such decisions.

The district argued that its decision to eliminate its police force was a managerial decision essential to the achievement of its mission and not subject to collective bargaining. The ALJ acknowledged that managerial decisions which lie at the core of entrepreneurial control or change the nature and direction of an operation may be excluded from collective bargaining. As an example he cited “a decision to entirely eliminate bargaining unit work.” But that did not occur in this case, said the ALJ:

If the District had decided merely to eliminate police services, this arguably would have been a different case. However,

the District did not merely eliminate the services performed by its independent police force. It eliminated its police force and contemporaneously entered into an MOU under which it paid OPD to provide the same police services previously performed by unit employees and laid off the entire bargaining unit. Contrary to the District's position, the evidence in this matter makes it difficult to distinguish the decision to enter into the MOU from a decision to subcontract police work.

By entering into the MOU with OPD, the district did subcontract services.

Referring to *Redwoods CCD* (1997) PERB No. 1242, 128 CPER 64, and *Lucia Mar USD* (2001) No. 1440, 149 CPER. 67, the ALJ noted, "the Board has held that the decision to subcontract bargaining unit work is negotiable when it results in an outside entity performing the duties of bargaining unit employees in a similar manner under similar circumstances." The ALJ was not persuaded by the district's attempt to distinguish the duties of the district's officers from those of OPD's officers. He found the core duties to be "fundamentally similar" and determined that the capacity to provide coverage was not significantly different.

The district argued that its police officers were ineffective and, therefore, its decision to cease providing police services and contracting with OPD was justified. The ALJ disagreed. Addressing these issues through the bargaining process "would erode no managerial prerogative essential to the achievement of the District's mission," he said.

The district also contended that its decision to enter into the MOU with the city did not meet the definition of subcontracting under *Fibreboard Corp. v. NLRB* (1964) 379 U.S. 203 and PERB law because it did not retain ultimate control over police services. The ALJ was not convinced. First, he noted, the control test relied on by the district does not appear in the majority opinion in *Fibreboard*, but in a concurring opinion. And, although the board did apply the control test in *Fremont UHSD* (1987) PERB No. 651, 76 CPER 85, it is not clear the board intended that definition of subcontracting to be applied in all cases. The ALJ referred to other PERB cases decided after *Fremont* that have not placed great weight on the control test. Citing *Redwoods CCD* and *Lucia Mar USD*, the ALJ rejected the district's assertion that an employer must maintain ultimate control over terms and conditions of employment before an action may be characterized as subcontracting. Finding that the district and OPD participated in a "closely integrated arrangement," the ALJ concluded that the relationship between the district and OPD closely resembled that of employer and subcontractor.

The board agreed with the ALJ that by entering into the MOU with OPD, the district did subcontract services. "If this were just the layoff of the bargaining unit then it would not be subject to bargaining," explained Duncan. However, the district did not just let go of the unit and allow OPD to fill the void. "It entered a contract with the City and paid \$1 million to have OPD do the work previously done by the unit. Although the transfer of money

'The District says it got out of the police business but the MOU says otherwise....'

to the new entity might not have been enough to find conclusively that this is a subcontracting case, the language of the MOU in combination with the money lock in the District as having hired a subcontractor," said Duncan. "The District says it got out of the police business but the MOU says otherwise.... The MOU memorializes a close working relationship between the two entities in providing police services."

The board, like the ALJ, rejected the district's argument that it had no obligation to negotiate about the decision to subcontract because it was not

based on labor costs. “The ALJ correctly noted that there is not always a need to apply any labor cost-savings test in determining whether a decision to subcontract is negotiable. This is based on the *Lucia Mar* case where the Board found that there is no need to apply any further test about labor costs when an employer ‘replaces its employees with those of a contractor to perform the same services under similar circumstances,’” wrote Duncan. Both the ALJ and the board found no actual support for the district’s claim that saving labor costs was not part of its motivation. The ALJ found the district was motivated at least in part by potential savings in labor costs, and Duncan noted reports by the superintendent and assistant superintendent indicating labor costs as a factor in the recommendation to have the city take over the delivery of police services.

Waiver and other issues. The district also took the position that, even if the decision to adopt the MOU is negotiable, its only obligation was to provide CSEA with notice and an opportunity to bargain prior to arriving at a firm decision to enter into the agreement. It contended that it did provide the requisite notice immediately after it reached a tentative decision with the city, and that CSEA waived its right to negotiate because it did not make a request to negotiate and made no proposals prior to the date the MOU was adopted. It also argued that the zipper clause in the collective bargaining agreement with CSEA did not preclude

it from entering into the MOU with the city.

CSEA contended that the district already had reached a firm decision to subcontract police services when it provided notice of a tentative agreement on May 4 and any attempt to bargain at that point would have been futile. CSEA claimed that it did make a demand to bargain shortly before adoption of the MOU on June 13, 2001, but the district refused.

The zipper clause precluded the district from entering into the MOU.

The ALJ determined that the district had no duty to provide notice until May 4, 2001, when it reached a firm decision in the form of a tentative MOU with the city. Because it did provide the requisite notice on May 8, CSEA was given an opportunity to present proposals before the MOU was adopted and fully implemented.

However the ALJ also concluded that the zipper clause precluded the district from entering into the MOU. The clause provided, in part, that “neither party shall during the term of this Agreement demand any change therein, nor shall either party be required to bargain with respect to any

matter.” The ALJ found the language to be clear and unambiguous and that “CSEA had no duty to bargain with respect to any matter, and the District had waived its right to demand any change.” Further, he found, because CSEA repeatedly told the district it considered the MOU to be a violation of the collective bargaining agreement, CSEA never “consciously yielded or clearly and unmistakably waived its right to negotiate about the subcontracting decision.”

Nor did CSEA waive its right to negotiate by agreeing to inclusion of the management rights clause in the contract, which reads:

Except as limited by the specified and express terms of this Agreement, the District retains the exclusive right to manage the school district including, but not limiting, its right to determine the methods, means and personnel by which the District operations are to be conducted; and to determine the missions and functions of each of its departments, sites, facilities and operating units, set standards of service to be offered to the public; and to administer the personnel system, classify positions, and or delete positions or classes to or from the salary plan, establish standards for employment, take disciplinary action for just cause, to schedule work and relieve its employees from duty because of lack of work or other legitimate reasons. The district further reserves the right to take whatever action may be necessary in an emergency situation.

The board agreed with the ALJ on these points, finding that the management rights clause did not apply because a waiver of a right to bargain must be “clear and unmistakable,” citing *Amador Valley Joint Union HSD* (1978) PERB No. 74, 39 CPER 59, and *San Jacinto USD* (1994) PERB No. 1078, 111 CPER 67. The clause in the contract with CSEA did not specifically address subcontracting or police services, and there was no emergency situation, Duncan concluded.

The district gave a reasonable amount of time for meaningful negotiations.

The board also agreed with the ALJ’s dismissal of the allegation of bad faith bargaining while negotiating the successor agreement because “during the course of the successor agreement bargaining, all aspects of the potential change in the provision of police services were in a preliminary state.”

The board had only one obvious difference with the ALJ’s holdings. The ALJ found that in the face of the district’s position that it would not negotiate the decision to subcontract, any attempt by CSEA to submit proposals “would have been futile.” Although all the board members agreed that the ALJ need not have reached the issue of fu-

tility because of the presence of the zipper clause, Duncan felt the need to clarify the ruling on this issue.

In his proposed decision, the ALJ concluded that “CSEA’s decision not to present proposals regarding the decision to adopt the MOU cannot serve as a waiver of its right to bargain. A union has no duty to present proposals when doing so would be futile.” ALJ D’Orazio cited *Arcohe USD* (1983) No. 360, 60 CPER 54, and *Fall River USD* (1998) No. 1259, 130 CPER 72, in support of that assertion. Duncan found *Arcohe* inapplicable to the facts of this case. “*Arcohe* is a case where there was no actual notice to the union. Here, the notice was timely.” Duncan did find the ALJ’s reliance on *Fall River* was appropriate. In *Fall River*, the board ruled that even if the union had been notified of the decision, any failure to request bargaining would not constitute waiver because the district clearly had made a firm decision and any request would have been futile. The facts of this case are even stronger, said Duncan. “Here we know it was futile for the union to ask to bargain the decision because they did ask,” referring to requests made by the union in June 2001.

Members Shek and Whitehead simply declined to adopt that portion of the proposed decision regarding the futility of the demand to bargain, finding no need for further clarification.

The final issue addressed by the ALJ, and by Duncan in his opinion, was whether the district satisfied its duty to bargain the effects of the decision to

enter into the MOU if the decision itself were determined to be nonnegotiable. “Assuming that the decision to adopt the MOU is not negotiable,” ALJ D’Orazio wrote, “I would find the District had satisfied its duty to negotiate effects” under *Compton CCD* (1989) PERB No. 720, 80X CPER 14. *Compton* held that under some circumstances, an employer, prior to agreement or exhaustion of impasse procedures, may implement a nonnegotiable decision after providing reasonable notice and a meaningful opportunity to bargain over effects of the decision. The ALJ found those circumstances existed here. The district provided adequate notice to CSEA and gave the union a reasonable amount of time to allow for meaningful negotiations. Although those negotiations did not begin until just prior to implementation of the agreement, the district was not at fault for any delays, he said. “Accordingly, I find that the District did not fail or refuse to negotiate in good faith regarding the effects of the decision to implement the MOU providing for OPD takeover of the District’s police force,” said the ALJ. Duncan agreed. (*CSEA v. Oakland USD* [6-21-05] PERB No. 1770.) *

Pocket Guide to K-12 Certificated Employee Classification and Dismissal

By Dale Brodsky

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CTA Sued Over Fee Hike for Political Campaign

An anti-union legal foundation has filed a federal suit against the California Teachers Association, seeking to block the organization from assessing its more than 300,000 members \$60 each over the next three years to fight ballot measures introduced by Governor Schwarzenegger and to strengthen the union's ability to impact state politics.

The National Right to Work Legal Defense Foundation of Springfield, Virginia, which describes itself as

The \$60 increase may generate more than \$50 million in campaign funds.

a charitable organization "dedicated to the protection of all employees from abuses of compulsory unionism," filed suit on behalf of six plaintiffs but is asking the court to give it class-action status.

"We looked at the facts of this situation and we believe that the First Amendment rights of these teachers have been violated," said Stefan Gleason, vice president of the foundation. "They should have been given notice of their right to object and an opportunity to object, and to reclaim

and get back any dues that were collected from them to be used for these political activities," he said.

CTA raised the fees earlier this year to fight Proposition 74, which would extend a new teacher's probationary period from two to five years; Proposition 75, which would require unions to get annual written consent from members to use dues for political purposes; and Proposition 76, which would grant the governor greater authority over the state budget and allow him to make across-the-board spending cuts. The \$60 increase is expected to generate more than \$50 million in campaign funds.

CTA president Barbara Kerr issued a statement saying that the suit is baseless. "CTA has a long record of compliance with all legal requirements in regard to the collection of dues and

their use for political purposes," she said. "We are scrupulous in our recordkeeping, and we bend over backwards to observe the rights of members and fee payers."

About 30,000 California public school teachers have chosen not to join CTA and are listed as "agency fee payers." Fee payers still must support the union for its contract bargaining function because they also receive the benefits negotiated by the union, but they are not assessed any charges for financing CTA's political goals. The foundation claims that this system is unfair because fee payers initially have the political money taken out of their paychecks. It later is refunded in rebates that, the foundation alleges, can take up to two years. "We don't think the appropriate remedy is a later refund," said Franklin Lowenthal, a professor at Cal State East Bay and one of the plaintiffs, "because in the meantime they will have spent our money on a political action that we oppose." *

Disparity in Teachers' Salaries at Rich and Poor Schools Exposed

Teachers at schools with a higher percentage of students who are poor and members of racial minorities make thousands of dollars less than those at white, rich schools within the same district, according to the results of a recent study. Education Trust-West, an Oakland-based policy and research or-

ganization, spent two years analyzing teachers' salaries throughout the state, finally issuing its findings in a report entitled, "A Tale of Two Schools."

The study, funded by the Broad Foundation and the Bill and Melinda Gates Foundation, showed the average teacher salary in each school in each of

the state's 12 largest school districts. In San Jose USD, for example, the average teacher's salary at one high-poverty, mostly minority school was \$52,000 a year, \$10,000 less than at a wealthier and whiter elementary school in the same district. A comparison of two high schools in Los Angeles USD revealed a discrepancy of approximately \$8,000 in average salary. The results of the study, including a comparison of teachers' salaries in each district, can be found at <http://www.hiddengap.org>.

*The results of
the study can be
found at
www.hiddengap.org.*

These huge differences have been masked by the way in which teachers' salaries are reported. Districts are required to give the state Department of Education only the average of all teachers' salaries in the district. This system has worked a tremendous hardship on poorer districts. Under the system, though each school gets its own budget, teachers' salaries are taken out of each school's pot before it actually receives the money; each school is charged for the number of teachers times the salary of the average teacher *in the district*. This means that poorer schools with lower teachers' salaries are overcharged, leaving less money for

supplies and programs, while those with higher teacher salaries are undercharged.

Because teacher salaries are closely tied to experience and level of education, the data shows that, in general, less-experienced teachers are instructing the children who have the greatest needs. Experienced teachers who have greater seniority often elect to teach at schools in wealthy neighborhoods, where kids have fewer problems, parents raise more money for the schools, and the facilities are nicer. The study found that students in schools with the highest percentage of minority students were five times more likely to have an underprepared teacher than those in schools with lower percentages.

State Superintendent of Public Instruction Jack O'Connell said he found the findings "disturbing but not surprising." "People will tend to gravitate toward newer schools and less-challenging environments — it's human nature," he said. "We need to help change the culture. This is one more indication that the pernicious achievement gap needs to be addressed."

The authors of the study made several recommendations to rectify the situation, including giving stipends to teachers at low-performing schools, developing a statewide training program for new teachers in urban schools, and giving school districts the authority to add senior teachers to needy schools. Some researchers and organizations, including the California

Teachers Association, have suggested that the neediest campuses should be given better materials, more assistants, and smaller class sizes, which could improve education and attract more experienced teachers.

*S.B. 687 will make
the salary disparity
more obvious.*

A bill now sitting on the governor's desk may prod the state into taking some action. Though S.B. 687, introduced by Senator Joe Simitian (D-San Mateo), does not provide a solution to the problem, it will make the salary disparity more obvious and will allow parents to compare schools more easily. The bill requires school districts to report the average salaries at each school as part of its annual School Accountability Report Card. *

Local Government

L.A. City Council Approves Deal With IBEW

The International Brotherhood of Electrical Workers, Local 18, and the City of Los Angeles reached agreement on a generous five-year contract that covers nearly 8,000 employees who work for the Los Angeles Department of Water and Power. Negotiators signed off on the pact months ago, but the deal nearly unraveled last month.

IBEW warned the city could face a strike if the deal were not finalized.

The problem was that the terms of the new contract were negotiated while James Hahn was the mayor. City voters turned out Hahn and replaced him with Antonio Villaraigosa, who took the helm just as the chief administrative officer warned that the city faced a potential budget deficit of \$225 million for fiscal year 2006-07.

The newly elected mayor spoke of the need to scale back city spending and curtail labor costs. In that climate, the potential IBEW contract looked like a hard sell. The tentative pact promised

annual wage increases linked to the consumer price index for urban wage earners. It guaranteed annual salary boosts of at least 3.25 percent, with a ceiling of 6 percent. During the life of the contract, salary increases ranged from 17 to 34 percent. Complicating the matter politically for Villaraigosa was the fact that IBEW was one of only a few unions to have supported him in his run to unseat Hahn.

In August, after union members had ratified the agreement, the proposed pact headed to the five-member DWP board, where approval was expected. But, in a surprising move, the commissioners — who had been appointed by Hahn — failed to give their needed stamp of approval to the tentative agreement. Publicly, the board said it wanted to give the commissioners appointed by Villaraigosa the opportunity to take a look at the deal.

IBEW leader Brian D'Arcy accused the board of acting childishly, and warned city officials and the public that the city could face a strike if the deal were not finalized by October 1, the date the new contract was to take effect.

Pressure on the commissioners, the city council members, and Villaraigosa continued to mount. Julie Butcher,

general manager of SEIU Local 347, charged that the IBEW contract was unfair since lower-paid city workers represented by SEIU had agreed to accept a pay freeze last year in response to claims by the city that it could not afford any increases. Others within city government also pointed to significant wage disparities between DWP employees and other city workers in the same job classifications.

While lawmakers were sympathetic to these arguments, some also had concerns that the city could be accused of committing an unfair labor practice if it reneged on the bargain it

The final agreement gave DWP employees a hedge against inflation.

struck in June, when the city's Executive Employee Relations Committee gave its approval to the bargain that had been inked at the table. This prompted city council member Tony Cardenas to ask city attorney Rocky Delgadillo for a legal opinion on this point.

The proposed contract went back to the DWP board, and on August 16, it won approval from a majority of the commissioners. Villaraigosa had called on the board to move the contract along to the city council, saying that he wanted

the decision on the labor agreement to be made by elected city officials. Publicly, he said he would support the council's decision, whatever it was.

As the October 1 strike deadline approached, IBEW members kept up their pressure. Over the Labor Day holiday, union members marched with their supporters holding signs reading, "A deal is a deal."

On September 21, with the chamber packed with DWP workers, the city council gave its approval to the contract by a vote of 10 to 3. The majority felt the final agreement was reasonable and gave DWP employees a hedge against inflation.

Council president Alex Padilla underscored the fact that the council already had consented to the general parameters of the labor agreement several months earlier, and that the tentative agreement had been ratified by the union members. Notwithstanding the city attorney's internal advice memo, which reportedly instructed that the council could renegotiate the deal, Padilla said that approach would not be in the spirit of good faith bargaining.

After the council's action, Villaraigosa was supportive of its decision but has vowed to initiate a comprehensive review — and possible reform of — the city's collective bargaining process. *

Commission's Reversal of Termination Was Abuse of Discretion

The San Diego County Civil Service Commission abused its discretion when it reduced a deputy's termination to a 90-day suspension. In stern language, the Fourth District Court of Appeal admonished the commission for its indifference to the public safety and welfare where the deputy had been complicit in covering up the abuse of an inmate to protect a fellow officer.

The case involved the conduct of deputy sheriff Timothy Berry, who recently had joined the San Diego County Sheriff's Department. While on duty at a detention center, one of the inmates became disorderly and belligerent to-

wards deputy sheriff Alfonso Padilla. Berry witnessed Padilla yell provocative words and use force on the inmate. Padilla repeatedly bumped the inmate's head against the wall and caused him to suffer injuries that required medical care.

When the inmate filed a grievance, Berry was questioned about the incident by his sergeant. At the request of Padilla, Berry said that Padilla simply had taken the inmate to the medical holding area. One week later, when the investigation continued, the truth of Barry's account was questioned. During a taped interview, Berry admitted

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

Aristotle Onassis

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that he had lied to protect Padilla. He then provided investigators with the truth.

Sheriff William Kolender terminated Berry for his lack of truthfulness and acts incompatible with the mission of a public law enforcement agency. Berry appealed his termination to the civil service commission and stipulated to the facts underlying the lack of truthfulness charge. Among the findings cited by the commission were the facts that a “code of silence” existed in the department and that Berry was a member of an “angry team” of “rogue” deputies who told him to forget everything he had learned at the academy and “to go along to get along.”

Following a hearing, the commission ruled that, while the sheriff’s department had proved all of the charges, Berry’s termination was excessive. Instead, it imposed a 90-day suspension. Sheriff Kolender filed suit challenging the commission’s action. When the trial court found no abuse of discretion, Kolender took the matter up to the Court of Appeal.

“An agency’s discretion is not unfettered,” began the appellate court, “and reversal is warranted when the administrative agency abuses its discretion, or exceeds the bounds of reason.” Relying on *Hankla v. Long Beach Civil Service Commission* (1995) 34 Cal.App.4th 1216, 112 CPER 33, the court recognized that an abuse of discretion occurs where the administrative decision “manifests an indifference to public safety and welfare.” “The public is entitled to protec-

tion from unprofessional employees whose conduct places people at risk of injury and the government at risk of incurring liability.”

“A deputy sheriff’s job is a position of trust and the public has a right to the highest standard of behavior from those they invest with the power and authority of a law enforcement officer,” said the court, quoting *Talmo v. Civil Service Commission* (1991) 231 Cal.App.3d 210. “Honesty, credibility and temperament are crucial to the proper performance of an officer’s duties,” the court continued. “Dishonesty is incompatible with the public trust.”

Still focused on the harm to public safety, the court said: “Berry’s wrongdoing implicated important values essential to the orderly operation of the office. He lied regarding a grave matter, and thereby forfeited the trust of his office and the public.”

The court underscored that Berry was complicit in covering up abuse of an inmate. “The safety and physical integrity of inmates is one of the office’s paramount responsibilities. No requirement exists that San Diego’s Office must retain officers who lie and protect deputies who harm inmates; rather, the Sheriff was entitled to discharge Berry in the first instance, especially in light of the Commission’s findings regarding the existence of the ‘code of silence,’ the physical abuse of inmates, and the ‘rogue team’ within the office.”

The court discounted the commission’s assertion that its modified penalty was justified by the fact that Berry told the truth at the recorded formal hearing and that his testimony before the commission led to Padilla’s termination. Berry did nothing special by testifying truthfully against Padilla, said the court. In fact, it added, “the dishonesty and truthfulness charges against Padilla would have been easier and more quickly proved if Berry had simply responded honestly to the investigators when he first was asked.”

Equally unpersuasive was Berry’s argument that the sheriff did not have an established policy requiring termination of deputies who were untruthful and that investigators typically did not terminate those who eventually told the truth. Again quoting *Talmo*, the court said: “While at common law, every dog was entitled to one bite, we know of no rule of law holding every deputy sheriff is entitled to tell one lie before he or she can be discharged. When it comes to a public agency’s imposition of punishment, there is no requirement that charges similar in nature must result in identical penalties.” By sending the message that Berry only need to have *ultimately* told the truth, the commission “encourages sheriff’s deputies to play cat-and-mouse games with investigators and only tell the truth when they determine the moment is opportune to do so, or if they are cornered to do so because their lie has been found out.”

Finding that the commission abused its discretion in reducing the

termination to a 90-day suspension, the Court of Appeal granted Sheriff Kolender's petition and vacated the commission's order. (*Kolender v. San*

Diego County Civil Service Commission [9-12-05] D045268 [4th Dist.] ___Cal.App.4th___, 2005 DJDAR 11262.) *

Felony Conviction Will Bring Forfeiture of Retirement Funds

Upset by the fact that San Joaquin County Sheriff Baxter Dunn was able to hold on to his \$140,000 pension despite having pled guilty to mail fraud, Assembly Member Greg Aghazarian (R-Stockton) decided to do something about it. Under new provisions of the Government Code, any elected public officer convicted of a felony arising out of his or her official duties will forfeit all rights and benefits under any public retirement system earned during the period of elected office.

Among the crimes that will result in a forfeiture are felonies that involve accepting a bribe, embezzlement, extortion, theft of public money, and perjury.

Prior to the enactment of A.B. 1044, existing PERS law provided for the suspension of benefits following an indictment for the commission of specified offenses related to the abuse of public funds or perjury. However, a PERS member is not subject to this penalty unless he or she also is a fugitive from justice. Existing law is silent on the issue of a conviction for any of these offenses. Once suspended, public

employees may withdraw all accumulated contributions; the withdrawal is treated as an election to terminate membership in the retirement system.

The system covering the retirement benefit available to judges mandates that a judge who pleads, or is found, guilty of a felony involving

The new law covers elected public officers.

moral turpitude forfeits all benefits under the system. Accumulated contributions are returned. County employees who work under the laws governing 1937 Act counties may have their retirement benefits recalculated but only to recover overpayments caused by fraudulent reports overstating the final compensation on which the retirement benefit is based.

The new law covers elected "public officers," defined to be an officer of the state, county, city and county, district, authority, department, division,

If you're going through hell, keep going.

Winston Churchill

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

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bureau, board, commission, agency, or instrumentality of any of these entities.

It applies to members of PERS, STRS, and the twenty 1937 Act county retirement systems in operation. The public office holder who engages in the prescribed criminal activity forfeits “all rights and benefits” under these retirement systems as of the date of the conviction. There is a provision in the law for the governing body of the officeholder’s employer to authorize the individual to receive his or her benefits despite the conviction.

According to the bill analysis, Pennsylvania, New Jersey, Massachusetts, and Maine have laws like this on the books. New York and Indiana are considering enacting similar laws. Data maintained by the federal Justice Department revealed that between 1993 and 2002, prosecutors convicted nearly 1,000 public or elected officials of various crimes including bribery, embezzlement, conspiracy, mail fraud, and money laundering. *

State Employment

High Court Blocks Post-and-Bid Provisions of CSEA MOUs

Contract terms that require the state employer to make promotions and appointments in the California civil service solely on the basis of seniority violate the merit principle of the state Constitution, the California Supreme Court has ruled. Even though the memorandum of understanding between the state and the California State Employees Association applied the seniority criterion to select from among candidates scoring in the top three ranks after a competitive examination, the court held the legislature's approval of the contract terms was invalid because the program did not allow for "comparative merit evaluations" among the ranked candidates.

The court's frequent reference to the post-and-bid programs' use of seniority as the "sole" criterion indicates that the decision does not rule out some use of seniority as a factor in permanent appointment and promotion decisions. In addition, the decision does not affect seniority preferences that are applied to transfer opportunities which do not involve a civil service examination. The court reversed the judgment of the Court of Appeal in *California State Personnel Board v. California State Employees Assn., Loc. 1000, SEIU*. (For a

summary of that decision, see *CPER* No. 164, pp. 55-58.)

MOUs Challenged

In 2001, the Department of Personnel Administration and CSEA negotiated agreements that established pilot "post-and-bid" programs for bargaining units 1 (professional, administrative, financial, and staff services employees), 4 (office staff), and 11 (engineering and scientific technicians). The collective bargaining agreements were approved by the legislature and signed by the governor.

The contracts required that, in a limited number of classifications, the employer department post notices regarding job openings so that eligible employees could bid on those positions. Although the contracts differed slightly, generally the department was required to select the most-senior eligible bidder. To be considered, an employee had to be a permanent civil service employee on an eligibility list for the position or be eligible for appointment under the civil service rules.

Civil service rules have been established pursuant to Art. VII, Sec. 1, subd. (b), of the California Constitution, which requires that appointment

and promotion within the state civil service be "based on merit ascertained by a competitive examination." The legislature has implemented the merit principle by enacting a requirement that appointments to vacant positions be made from employment lists. The lists are established by competitive examinations of persons who meet minimum qualifications for the classification. The examinations determine the qualifications, fitness, and ability of competitors to perform the duties of the class in which they seek employment.

The CSEA MOUs did not alter the civil service examination procedures or the three-ranks rule.

Candidates who pass the exam are listed in the order of final earned ratings. For the classifications affected by the MOUs, statutory law provides that the department must select from among the three highest ranks of candidates; the employer need not select the candidate with the highest ranked score.

The post-and-bid pilot programs in the CSEA MOUs did not alter the civil service examination procedures or the three-ranks rule. However, in addition to eligibility under the civil service rules, the programs prescribed additional eligibility criteria. An em-

ployee eligible to bid could not be on probation or enrolled in an official training and development assignment. The employee had to meet the minimum qualifications and possess the physical ability to perform the essential job functions. The provisions required an employee have overall satisfactory job performance in the current job and not have had an adverse action relating to job performance within the preceding 12 months. The contract covering unit 11 also provided that the right to bid could be denied “for reasons related to safety, security or for other job related reasons.”

Once it was determined who was eligible to bid, the department had to select the eligible bidder with the most seniority in state service. As the court noted, seniority governed, “regardless of the nature of the positions in which the seniority was earned, the specific duties and responsibilities of the position to be filled, or the relative qualifications of the competing eligible bidders.”

After selection, the MOUs for units 1 and 11 entitled an employee to return to his or her prior position within a 30-day trial period. In unit 1, management also had the right to make the decision to return an employee to his or her former position. The MOUs did not eliminate the probationary period set by civil service rules and statutes.

In addition, the MOUs specified that they were not intended to contravene the merit principle. They provided that “any matters which concern the

application of the merit principle to State employees are exclusively within the purview of those processes provided by Article VII of the State Constitution or bylaws and rules enacted thereto.”

The California State Personnel Board challenged the post-and-bid provisions in court. It argued that they violated the merit principle of the California Constitution, and it sought to prohibit their implementation. Although the superior court ruled in favor of the SPB, CSEA prevailed on appeal. The SPB petitioned for review in the Supreme Court.

Legislative Authority

The court acknowledged the principle announced in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, CPER SRS 16, that the legislature has broad powers to fashion laws relating to personnel administration. As stated in *Alexander v. State Personnel Board* (2000) 80 Cal.App.4th 526, “Nothing in the Constitution requires that all civil service rules apply to all public employees and nothing prohibits the Legislature from experimenting to treat certain employees under different rules, *provided the merit principle is not infringed.*”

Seniority an Insufficient Measure

To analyze whether the post-and-bid provisions infringed on the merit principle, the court conceptually separated the process into three phases — eligibility, selection, and probation. The court noted that there was no judi-

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

Gloria Steinem

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cial precedent addressing whether the merit principle applies to the selection phase of the appointment and promotion process.

The SPB contended that the merit principle governs all three phases of the process. In particular, the SPB argued that the application of an absolute seniority-based preference in the selection phase prevented the employer from evaluating candidates' relative fitness for the needs and duties of specific

The court agreed that 'seniority may be an appropriate factor in evaluating merit.'

positions. CSEA asserted that the post-and-bid programs did not violate the merit principle because the seniority factor entered the selection process only after the administration of competitive examinations and identification of candidates in the top three ranks.

The court found the language in Art. VII, Sec. 1 clearly commands that appointments and promotions be based on merit. The ballot materials on the constitutional amendment that added Article VII also emphasized its purpose was to prohibit hiring "except on the basis of merit, efficiency and fitness." Relying on its findings in *Pacific Legal Foundation*, that Sec. 1 refers to a concept of recruitment, selection, and ad-

vancement under conditions of political neutrality, equal opportunity, and competition on the basis of merit and competence, the court held that "appointment and promotion decisions, not just preappointment eligibility determinations and other screening measures, [must] be based on merit."

The court agreed with CSEA that "seniority may be an appropriate factor in evaluating merit and efficiency." However, the court distinguished the use of seniority to determine advancement within a class of jobs from using seniority as a factor in hiring for potentially unrelated jobs. In addition, the court emphasized, "seniority does not necessarily equate to greater ability, efficiency, or productivity." It reasoned that depriving the hiring authority of the ability to interview candidates and base its decisions on other criteria conflicts with the constitutional merit requirement.

The court acknowledged that competitive examination and the rule of three ranks guard against selection of incompetent political favorites. But it pointed out that examinations test only for general fitness and minimum qualifications for a class of jobs, not the specific knowledge, skills, abilities, and personal attributes that might be needed for a particular position. The court concluded that the legislature could not approve contracts which require the state to hire and promote based solely on the seniority status of employees who meet only threshold eligibility requirements and which do not allow for

"comparative merit evaluations" of those employees. The court buttressed its conclusion by observing that permanent appointments and promotions outside the post-and-bid process are made using an assortment of considerations, citing to a very recent SPB regulation that lists a variety of job-related qualifications in its definition of merit and fitness.

The court disregarded a Legislative Counsel opinion that concluded the

The legislature could not approve contracts that do not allow for 'comparative merit evaluations.'

MOUs did not violate the merit principle as long as the parties agreed to apply post-and-bid procedures only after a competitive examination or transfers that do not require a civil service examination. The court also turned aside CSEA's argument that, because the legislature had left hiring authorities the discretion to choose from those within the top three ranks, it could limit that discretion by adopting the seniority-based preference. Although the legislature has not provided a process for the use of merit-based factors in the hiring phase of the appointment process, it has no authority to validate pro-

grams that contravene the Constitution, the court said.

CSEA relied on a passage in *Alexander* that “the merit principle does not require that the most qualified or best candidate be chosen,” but the court interpreted the phrase “most qualified or best candidate” as referring to ranking resulting from an examination. *Alexander*; the court noted, did not suggest that the merit principle does not apply to the hiring phase once examinations have been held and the three highest ranks determined.

Other eligibility requirements of the post-and-bid programs were not sufficient indicators of merit to satisfy the court. Satisfactory evaluations and a lack of disciplinary actions in the preceding 12 months are threshold requirements, not measures that distinguish between bid-eligible candidates, it reasoned. Moreover, an absolute

seniority-preference requirement rules out consideration of any disciplinary history outside the previous 12 months or of a junior candidate’s superior performance.

Nor did the trial periods of employment set up by the post-and-bid programs appease the court. Trial periods are operative “only after state resources have been needlessly consumed in selecting and training the unfit employee,” it protested. Eliminating the ability to make informed decisions before hiring “tends to frustrate rather than promote the goal of the merit principle and the purpose of the civil service statutes to achieve efficiency and economy in state government.” (*California State Personnel Board v. California State Employees Assn., Loc. 1000, SEIU*[7-28-05] Supreme Ct. S122058, 36 Cal.4th 758, 2005 DJDAR 9051.) *

PECG bargained with former-Governor Davis’ administration did not begin to make up the difference.

Davis vetoed legislation that would have given the engineers a statutory right to pay parity. But his administration agreed to a memorandum of understanding that called for four annual raises beginning July 1, 2005, which would increase engineer pay to the market rate. Under the collective bargaining agreement, market lags are

*Pay was estimated
to be about 25 percent
less than in comparable
local government
positions.*

State Engineers Finally on Road to Pay Parity

After several years of laying the groundwork, 13,000 employees represented by the Professional Engineers in California Government have started the first leg of their journey toward pay parity with similar employees in other large California governmental entities. If the legislature is willing, in four years, their salaries will catch up with the pay of other government engineers. PECG also persuaded the Department of Per-

sonnel Administration to agree to similar raises for supervisors and managers.

Market Lags

After years of stagnant pay in the 1990s, state engineers, architects, and land surveyors found that their salaries severely lagged behind county and city employees in similar jobs. In 1998, their pay was estimated to be about 25 percent less than in comparable local government positions. The raises that

determined by annual salary surveys of selected positions in 18 counties and cities and the University of California.

The legislature, however, refused to approve raises that it could not calculate. Instead, the MOU bill provided that the legislature consider the proposed pay boosts after each salary survey is conducted.

The Department of Personnel Administration conducted the first survey last December. It showed that employees in entry-level positions, such as a transportation civil engineer, were paid nearly 16 percent less than their counterparts in local governments and U.C. Registered journey-level engineers were

underpaid by 22 percent, and senior transportation engineers were paid 30.6 percent less than engineers in similar governmental positions.

Earlier this year, PEECG successfully shepherded its unit's compensation package through the budget process. Because the contract contemplates closing the pay gaps by 25 percent this year, state engineers will receive raises of 4 to 7.7 percent. Monthly paychecks will increase by \$760 for entry-level positions and by nearly \$2,000 for senior engineers.

Managers' Pay Boosted 7.7 Percent

PECG also represents supervisors and managers in engineering-related positions. Last spring, the union proposed salary parity provisions for these employees, who have limited meet-and-confer rights under the Excluded Employees Bill of Rights Act. DPA replied that the administration was not open to

DPA is concerned about salary compaction.

pay parity for supervisors due to limited fiscal resources. However, DPA is concerned about salary compaction, which results when rank-and-file salaries increase, and supervisors and managers earn little more than those they supervise. As a result, supervisory salaries were raised at least 4.8 percent.

Some supervisors and all managers received 7.7 percent pay boosts.

While employees in 12 other bargaining units are resisting DPA's attempts to increase employee pension contributions, implement furloughs, reduce holidays, and cap leave accrual and employer health plan contributions, those in bargaining unit 9 are in the enviable position of having locked in compensation until July 2, 2008. Since July 2003, the state has paid 80 percent of the weighted average of pre-

miums of the state health plans for both the employee and family, and is scheduled to increase its contribution to the employee's portion of the premiums to 85 percent beginning January 1, 2006. While PEECG must obtain legislative approval for pay improvements every year, it need not fight compensation reductions. Under the MOU, only PEECG can reopen the contract. That means the state cannot demand from PEECG the concessions it is seeking from other state employee unions. *

IUOE's Work Preservation Settlement Nets Health Benefits Gains While Bargaining Stalls

The governor signed legislation approving a settlement of several work preservation disputes between the Youth and Adult Correctional Agency and the International Union of Operating Engineers, which represents about 10,000 crafts and maintenance workers in state bargaining unit 12. The Department of Personnel Administration, which negotiated for the agency, agreed to increase employer contributions for health benefits as part of a pact that clarifies bargaining unit work and eliminates liability for a 2002 arbitration award. The agreement enabled IUOE to achieve a better benefits package for its unit 12 members without agreeing to reductions in holidays, furloughs, and employee pension contribution increases that DPA is demanding in negotiations.

Guards Used

Nearly 10 years ago, the union became aware that correctional officers were being used to supervise inmates performing groundskeeping and other maintenance tasks. The union negotiated a new contractual provision that barred the assignment of bargaining unit work to non-bargaining unit employees. In 2002, an arbitrator ruled that the state had violated the work preservation provisions of the contract by using guards to supervise inmate groundskeepers, but the state resisted compliance with the arbitrator's award. Estimates of the state's liability under the award ranged from \$35 million to \$90 million.

After a clarification of the award and several court hearings, the parties

agreed last year that only unit 12 employees could provide active supervision of incarcerated groundskeeping crews in perimeter areas outside the prisons, but that correctional officers could be on hand to ensure security and maintain custody of inmates. The agreement did not address supervision of work crews inside the prisons. In the meantime, the union had filed a grievance over the use of inmates to perform unit work.

The union gave up its claim for monetary relief under the arbitrator's award.

On the bargaining front, DPA had reached an agreement with IUOE on a successor to the contract that expired in July 2004, but the governor refused to approve it. (See story in *CPER* No. 169, at pp. 45-47.) One of the governor's objections was to a new 80 percent formula for calculating employer contributions to health benefits. At that time, employer contributions to unit members' health care premiums had not increased for at least two years.

Monetary Award Waived

In January, the parties wrapped up several disputes at once. The union acquiesced in the state's demand to use incarcerated workers to perform craft

and maintenance work. The state agreed that unit 12 members would direct and instruct inmates doing that work, other than cutting weeds and moving earth without equipment, but that other correctional employees could provide "passive supervision" for security purposes. The union gave up its claim for monetary relief under the arbitrator's award, as well as the right to arbitrate several grievances about correctional officers driving trucks and fixing plumbing. The state agreed to pay fixed dollar amounts for health care equivalent to the amount employees in some other units are receiving under the 80 percent formula — \$284 per month for an employee, \$564 per month for an employee plus one dependent, and \$728 per month for an employee plus two or more dependents.

It took the legislature nearly seven months to pass the bill approving the parties' tentative agreement. The pact required over \$9 million in additional funds for health benefits retroactive to January 1, and is estimated to cost an extra \$11 million in 2005-06.

Bargaining Continuing

The parties still have not settled on a successor agreement, despite a last-minute push to wrap up negotiations before the legislature recessed in September. While DPA offered a 2.5 percent increase to salaries this fiscal year, it is demanding that employees contribute to the pension system an additional 2 percent of salary to remain in the plan that allows retirement at age 55. Under

the state's proposal, employees could avoid the increase in contributions by returning to the age-60 retirement plan they had prior to 2000, or they could opt out of the retirement plan altogether and receive a stipend equal to half the state's normal contribution to the age-55 retirement plan.

DPA is proposing elimination of two holidays. It also is demanding that IUOE agree that its unit members could be furloughed for up to five days. Larry

The state proposes that employees could not take the five 'furlough' days off until the next year.

Dolson, IUOE director, told *CPER* that the state's plan is to reduce salaries by 2.3 percent for 10 months, but that employees could not take the five "furlough" days off until the next fiscal year. The leave would have to be used within 18 months. In a change to overtime rights, all leave would be excluded from the definition of "time worked" in determining eligibility for overtime pay.

Although the state is willing to boost health premium contributions in January 2006, it did not offer further increases for 2007. It also is proposing that new employees not receive the full contribution for dependent health cov-

erage until the third year of employment.

In addition to the 2.5 percent raise for 2005-06, the state offered another 2.5 percent for 2006-07, and 5 percent increases for several classifications in which the state is having trouble retain-

ing staff. But the union asserts the state's proposal would result in a net loss in wages and benefits. According to DPA, the union's counter proposal demanded raises of 5 to 30 percent, which the state rejected. *

compromised its ability to advocate solely for the interests of unit employees, who would have no job if Local 228 were successful.

In the end, the Teamsters withdrew from representing CAUSE staff, rather than give up on its decertification drive. This summer, nine CAUSE employees signed a letter assuring CAUSE unit members that they did not know that Local 228 would attempt decertification when they elected the union to represent them and that they do not support the decertification effort. In response, a former employee has posted a letter on the Teamsters' website claiming that employees were forced to sign the letter on pain of losing their jobs.

CAUSE Decertification Election Coming, Mud Slinging Continues

The California Union of Safety Employees is fighting for its very existence since the Public Employment Relations Board determined that Teamsters Local 228 submitted enough interest cards to hold a decertification election. CAUSE has posted on its website a National Labor Relations Board advice memorandum that analyzes the Teamsters' conflict of interest last year, when it represented CAUSE staff while campaigning to decertify their employer. The Teamsters has denounced CAUSE for using dues money to slander Local 228 at a Campbell's Soup plant where the local union represents employees. When both sides' reputations are fully sullied, PERB will count the ballots on November 21.

Competing with the Employer

Local 228 began representing the CAUSE staff in May 2003, and began negotiations with CAUSE that fall. But in June 2004, Local 228 began a campaign to decertify and replace CAUSE as the exclusive representative of 7,000

safety officers employed by the state. CAUSE refused to continue negotiations with the Teamsters.

The NLRB's region 20 general counsel's office found that the Teamsters had a disabling conflict of interest by seeking to substitute itself for the employer of a unit it represents. Relying on *Bausch & Lomb Optical Co. (1954)* 108 NLRB 1555, NLRB counsel decided that CAUSE was privileged not to bargain with the Teamsters. The memorandum noted that, if CAUSE were decertified, it would likely cease to exist since it represents no other employees. Since there was a danger that the Teamsters would not bargain in good faith, but instead use its special interest as a competitor to harm the employer, CAUSE was not required to negotiate with the union.

NLRB counsel also found that Local 228 had committed an unfair labor practice by placing itself at odds with the employees it represents. By seeking to replace CAUSE and likely run it out of business, Local 228 had

*CAUSE was
privileged not to
bargain with the
Teamsters.*

CAUSE at Campbell's

The Teamsters' latest salvo accuses CAUSE of "character assassination" for passing out a 30-page booklet of materials that accuse various Teamsters entities and officials of mismanagement, greed, and corruption. Twelve elected officials and representatives of CAUSE distributed the materials at a Campbell's Soup plant in Sacramento, while handing out decertification cards to employees represented by Local 228.

Make everything as simple as possible, but not simpler.

Albert Einstein

Demystify the FLSA, understand its impact in the public sector workplace, and decipher the complicated provisions of the law, like the "salary basis" test and deductions from pay and leave for partial-day absences. This Guide is a great training tool and a resource for public sector practitioners who need a working knowledge of the law.

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

Pocket Guide to the Fair Labor Standards Act

See back cover for price and order information

Local 228 trumpets the fact that CAUSE dues were used to print the booklets and reminds readers of complaints that CAUSE officials are not accessible to members.

CAUSE legal counsel Kasey Clark explained to *CPER* that the CAUSE board of directors voted to spend dues on the materials. CAUSE would not represent the employees if decertification is successful, but an affiliated CAUSE Public Works PAC would be-

come the representative. "CAUSE wants to send a message to any union that thinks about trying to decertify us that we will go after their people," Clark warns. He asserted the CAUSE PAC is on the verge of becoming the exclusive representative of employees for the City of Merced, who previously were represented by Local 228. "It's to the benefit of CAUSE to branch out since the politicians at the local level tend to become state legislators." *

Pension Reform Delayed

We admit our prediction was off a little. We thought the governor would have the opportunity to sign a pension reform bill, even if it made only minor changes in an attempt to head off a ban on defined benefit retirement plans. (See story in *CPER* No. 171, pp. 71-73.) But, of all the reform bills introduced by Assembly Members Keith Richman (R-Northridge) and Alberto Torrico (D-Fremont), and Senators Roy Ashburn (R-Bakersfield) and Nell Soto (D-Ontario), only a pension-fraud bill made it through both houses of the legislature.

Torrico introduced A.B. 456 to combat fraud. It would have made it a crime to make false statements to obtain retirement benefits. Potential criminal penalties were reduced in amendments to the legislation. Although the bill was passed unanimously in each house, the bill was made inac-

tive by its author before the Assembly could vote whether to concur in the Senate amendments. The governor will not see it on his desk this year.

However, as promised when the governor dropped a defined benefit pension ban initiative in the spring, pension reform plans are back in the second half of the session. Assembly Member Richman has introduced a proposed constitutional amendment, ACA 23, for consideration next year. It would provide that after July 1, 2007, a public agency could enroll new hires only in defined contribution or hybrid (defined contribution/defined benefit) plans, but not in the defined benefit plans that are currently available to most public employees.

Employer contributions to hybrid plans would have to be matched by employee contributions and could not be higher than 4 percent of the

employee's salary. Local governments could exceed contribution limits if approved by two-thirds of local voters, and the state could make higher contributions if a majority of state voters authorize them. The University of California could exceed the limits in classifications and positions that the U.C. regents find are "competitive and need additional contributions to recruit and retain employees."

The proposed amendment specifically protects disability retirement benefits.

The benefit formula for the defined benefit component of the hybrid plan would be limited to 1 percent of highest average salary for each year of service for all employees except public safety employees and employees who are not eligible for Social Security benefits. Those ineligible for Social Security benefits would be entitled to a 1.75 percent plan. Public safety officers would have a 2 percent plan and could retire at age 55.

The proposed amendment specifically protects disability retirement benefits. It also provides that employer-paid retiree health benefits cannot be paid until normal retirement age, defined as 55 for public safety officers, and 65, or the applicable Social Security retirement age, for all others. *

Official Proceedings Privilege Defeats Whistleblower Claim

A state employer who calls the police and requests a restraining order against a threatening employee is protected from whistleblower claims by the privilege for statements made in official proceedings set out in Civil Code Sec. 47(b), the Court of Appeal has held. The employer claimed the employee had made violent comments while reporting that his superiors assaulted, battered, and harassed him. The court was not persuaded that application of the privilege would render the state whistleblower statute ineffectual.

Correctional Officer's Complaint

An officer employed by the Department of Corrections reported to the Office of the Inspector General, a prison oversight agency, that a lieutenant had assaulted and battered him, and a sergeant had harassed him. The OIG's report indicated that the officer, Kevin Brown, had mentioned that he "could lose it, and if he ever lost it he could kill" the lieutenant. The OIG forwarded the report to the prison's warden, who contacted the city police. Although the police arrested Brown, all charges later were dropped.

The warden also filed an action in court for a temporary restraining order and injunctive relief against the threats of violence. Because the evidence did not present clear and convincing proof

of a credible threat of violence, the trial court ruled against the warden but commented that his legal action had been prudent.

Brown filed a lawsuit under Labor Code Sec. 1102.5 and the whistleblower statute that protects state employee whistleblowers, Government Code Sec. 8547.8. He claimed that the OIG, the Department of Corrections, and the prison officials had retaliated against him for reporting his superiors to the OIG. The trial court reviewed Brown's allegations, which included a denial of ever having conveyed a threat, and took judicial notice of the OIG report. It dismissed the claims on the grounds that the OIG report to the prison, the prison's report to the police, and the application for injunctive relief could not be the basis of a lawsuit under Civil Code Sec. 47(b).

Official Proceedings Privilege

California law grants an absolute privilege for a statement made in a judicial or legislative proceeding, in an "official proceeding authorized by law," or "in the initiation or course of any other proceeding authorized by law" that is reviewable by a writ of mandate. The Court of Appeal reiterated prior case law, which has held that the privilege bars a lawsuit for damages based on a covered communication.

Although the privilege originally pertained only to defamation suits, the courts have applied it to all tort actions except malicious prosecution.

In *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, the Supreme Court extended the statute's bar to a lawsuit filed by a Latino bank customer after the bank called the police, claiming the customer was passing a counterfeit check. The court held that

An absolute privilege applies to communications intended to prompt an official investigation.

the privilege barred claims ranging from false imprisonment to invasion of privacy and declined to consider the customer's argument that the privilege should not be a defense against a claim of discrimination under the Unruh Civil Rights Act. Based on the policy of assuring "freedom of communication between citizens and the public authorities whose responsibility it is to investigate and remedy wrongdoing," the *Hagberg* court held that an absolute privilege applies to communications intended to prompt an official investigation of suspected wrongdoing.

The Court of Appeal applied the *Hagberg* holding to Brown's lawsuit. It

found that the OIG reported the threats of violence to prison officials "pursuant to [their] law enforcement duties," although the court did not identify the source of those duties. Since the OIG's statements and the prison official's report to the police were intended to instigate official investigation into suspected criminal wrongdoing, the court held Brown's claims that the reports were retaliatory were barred. The warden's action for a restraining order also was privileged under Sec. 47(b).

No Exception for Anti-retaliation Claims

Brown contended that applying the privilege to a retaliation claim would decimate the California Whistleblower Protection Act and the anti-employment retaliation provisions of the Labor Code. He argued that an employer could avoid the consequences of these protective statutes by accusing an employee of a crime and hiding behind the privilege. Citing the reasoning in *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 93 CPER 43, Brown asserted that Sec. 47(b) conflicts with the Whistleblower Act and that the act should prevail since it is more specific than the privilege.

In *Shoemaker*, a Department of Health Services investigator claimed he was terminated through administrative proceedings after uncovering wrongdoing that the department tacitly approved. The court held that statutory immunity for "instituting or prosecuting any judicial or administrative

proceeding within the scope of...employment" did not bar the employee's whistleblower claims, even though he alleged the retaliation occurred through administrative proceedings. The *Shoemaker* court found that the broad immunity statute conflicted with the narrower whistleblower statute where a public employee used his official authority to institute an administrative proceeding to discourage or dis-

Brown asserted that Sec. 47(b) conflicts with the Whistleblower Act.

criminate against a whistleblower. Of particular concern was the fact the whistleblower statute was directed against the state employees and employers that could institute administrative proceedings to discipline an employee. Fearing that the immunity statute would render the whistleblower protections illusory, the court in *Shoemaker* held the immunity statute did not bar the whistleblower claim.

The *Brown* court, however, was not persuaded by the analogy to *Shoemaker*. After considering Brown's factual allegations and the OIG report, it found no conflict between the privilege of Sec. 47(b) and the anti-retaliation laws in this case. The court asserted that

Brown had made criminal threats, unlike the whistleblower in *Shoemaker*. The court said it was the threats, not whistleblowing, that led to the defendant's reports through official channels to the police and that led to the prison's request for an injunction.

The court further observed that the OIG's report to prison officials was allowable under an exception to the usual requirement that the identities of informants be kept confidential. The exception applies when disclosure was allowed "to a law enforcement agency in the furtherance of its duties."

The court did not explain how Brown's claim of statutory conflict was different from the statutory conflict found in *Shoemaker* except to distinguish this case on its facts. The reasoning used to decide the privilege applies to whistleblower claims depends heavily on the court's apparent finding that Brown made the alleged threats, despite Brown's allegations that he never conveyed a threat. In light of the fact that the case was appealed from a demurrer — a motion to dismiss claims before there has been an evidentiary hearing to resolve factual disputes — the force of the court's holding is open to question. If the court had not resolved the factual dispute in the department's favor, it might have had to decide whether application of the privilege to bar claims of retaliatory instigation of investigations and lawsuits undermines the goals of the

whistleblower act. (*Brown v. Dept. of Corrections* [8-31-05] 132 Cal.App.4th 520, 2005 DJDAR 10824.) *

Higher Education

PERB Obtains Preliminary Injunction Against U.C. Nurses' Strike; Labor Code Ruled Inapplicable

Seldom does the Public Employment Relations Board use its authority to petition the superior court for an injunction against a party to a labor dispute. But, in July, PERB granted the University of California's request for injunctive relief and obtained a temporary restraining order against a strike the California Nurses Association had called during bargaining. In early September, the court issued a preliminary injunction. The court held that the requirements of Labor Code Sec. 1138.1, which restrict issuance of injunctions in labor disputes, do not apply to PERB requests for injunctions against unfair practices. PERB now has certified that the parties are at impasse in bargaining.

No Exhaustion of Impasse Procedures

U.C. and CNA began bargaining in January. Major issues between the parties include salaries and the prospect of hefty increases in employee contributions to benefits. The parties also are at odds over CNA's proposal to place hospital nurse-patient ratios required by state regulations into contract language. (See *CPER* No. 173, pp. 35-37.) They met 22 times before CNA called for a strike vote.

Before calling a strike, the union filed an unfair practice charge, which it amended twice. CNA charged that U.C. was refusing to bargain over the staffing proposal, misrepresenting its level of compliance with state staffing regulations, and refusing to provide information on its patient classification systems.

Before calling a strike, the union filed an unfair practice charge.

It also accused the university of conditioning its approval of a successor agreement on the union's acceptance of a provision banning sympathy strikes. U.C. has been demanding waivers of sympathy strike rights in its bargaining with the other unions since 2002, when the Ninth Circuit Court of Appeals held in *Children's Hospital Medical Center v. California Nurses Assn.*, 283 F.3d 1188, that a no-strike clause does not prohibit sympathy strikes. CNA also charged that U.C. was retaliating

for the association's refusal to agree to a sympathy strike ban by disciplining nurses who refused to cross picket lines in support of a strike by the American Federation of State, County and Municipal Employees earlier this year.

After CNA gave U.C. notice of the strike, the university filed an unfair practice charge with PERB and requested injunctive relief to prevent the strike. Two days before the threatened strike, PERB issued a complaint on U.C.'s charge and filed an application for a temporary restraining order with the court. The court issued the TRO and an order to show cause why it should not issue a preliminary injunction.

Labor Code Inapplicable

In ruling on the preliminary injunction, the court was required to address a novel issue. CNA argued that Labor Code Sec. 1138.1 bars the court from issuing an injunction in a case arising from a labor dispute prior to hearing testimony and making specific findings, including findings that property would be damaged. It also requires posting of a bond by the party seeking an injunction. The legislative history of A.B. 1268, which was enacted in 1999, indicates that Sec. 1138.1 was designed to conform state law to the federal Norris-La Guardia Act and to overrule cases in which courts held unions liable for the wrongful actions of their officers and other agents. Because Secs. 1138 et seq. exclude only peace officers from coverage, not PERB-requested injunctions, CNA con-

Finally...a resource to the act that governs
collective bargaining at the University of California and
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Pocket Guide to the Higher Education Employer-Employee Relations Act

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

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

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tended that the legislature did not intend to exclude unfair labor practice injunctions. But the court found the Labor Code provisions inconsistent with the section of the Higher Education Employer-Employee Relations Act, Government Code Sec. 3563, which authorizes PERB to petition for an injunction.

The court explained that Sec. 1138.1 was intended to preserve employee rights to engage in lawful concerted activity and to limit injunctive relief to situations in which threatened unlawful conduct during a labor dispute is likely to result in damage to the employer's property. In contrast, injunctive relief under the Government Code "is intended to preserve PERB's exclusive primary jurisdiction and remedial power over unfair practices under HEERA." When used against pre-impasse strikes, injunctive relief also supports HEERA impasse procedures and fosters collective bargaining. The findings a court must make under Sec. 1138.1 — the probability of substantial and irreparable property damage and an inability of public officers to protect the property — rarely are at issue in public employee strikes, the court pointed out. Requiring those findings would defeat PERB's attempts to prevent pre-impasse strikes and thereby nullify impasse procedures. In addition, the court noted, the section says nothing about the role of PERB.

The court concluded that application of Sec. 1138.1 would effectively repeal Gov. Code Sec. 3563(i), an absurd result that the legislature did not

intend. It emphasized that, under rules of statutory construction, it could not find an implied repeal or amendment because the two statutes have distinctly different purposes and functions that allow them to operate without conflict.

The court found that the sole exclusion of peace officers from the application of Sec. 1138.1 did not imply that PERB was bound to meet the statute's requirements. Labor relations between local peace officers and their

*The court concluded
that application of
Sec. 1138.1 would
effectively repeal Gov.
Code Sec. 3563(i).*

public employers are not within PERB's jurisdiction, the court noted. Therefore, requests for injunctions against peace officer actions would have had to meet the restrictive prerequisites of Sec. 1138.1 but for the exclusion, the court stated.

The court's reasoning on this point is not complete. Perhaps the court found it obvious that a person seeking an injunction against peace officers threatening property should not have to go through a hearing to show that public officers likely would not be able to protect the person's property. In the

end the court fell back on its analysis of the absurd effect Sec. 1138.1 would have on PERB's injunctive authority. It found irrelevant the principle of statutory construction which urges that enumeration of one item implies exclusion of others.

PERB Had Reasonable Cause

Having dispensed with the Labor Code argument, the court applied the standard of review established in *Public Employment Relations Board v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, CPER SRS No. 21. The court examined whether PERB had reasonable cause to believe that an unfair practice was being committed and whether injunctive relief was just and proper.

The court found proper PERB's application of the presumption that a pre-impasse strike is unlawful. That presumption survived the Supreme Court ruling in *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, 65 CPER 2, that California common law did not prohibit public employee strikes. Because *County Sanitation* was decided under the Meyers-Milias-Brown Act, which does not contain prescribed impasse procedures, the Supreme Court had had no occasion to address the limitations on public employee strikes imposed by other statutes such as HEERA, the court reasoned.

CNA claimed that its call for a job action was a legal unfair practice strike. But the court found that PERB had presented enough evidence that U.C.

merely had taken firm positions on the staffing ratio and sympathy strikes issues, and had not refused to bargain. The court also determined that U.C.'s discipline of six union members for engaging in sympathy strikes was not sufficient to provoke a strike because the discipline did not affect bargaining and the issue could be resolved through arbitration. The court minimized the harmful effect of an alleged refusal to provide information. The refusal "does

lively of important health care services at the medical facilities, which would create a substantial and imminent threat to the public health, the court issued an injunction to restrain CNA from engaging in a slowdown or work stoppage until impasse procedures have been exhausted. It also ordered U.C. to refrain from retaliating for the threatened strike. The court's order can be viewed at www.universityofcalifornia.edu/news/2005/nurses0905order.pdf.

contained two questions — one concerning whether members wanted to accept the university's last offer, and one regarding whether members supported a strike. Materials issued to members prior to the vote contained references to unfair practices but focused primarily on bargaining issues. Thompson said PERB has filed no complaints on the union's charges concerning discipline of sympathy strikers or bad-faith bargaining. As the strike seemed to be

The court found injunctive relief was justified to protect the integrity of the statutory process.

not require or warrant a strike to ensure the fairness and efficacy of the collective bargaining process when HEERA unfair practice and impasse procedures are available and intended to resolve such a matter without a strike," the court said.

The court found injunctive relief was justified to protect the integrity of the statutory process, which, the court emphasized, was enacted to minimize work stoppages. If not prohibited, the strike would occur before PERB could adjudicate whether it was an unfair practice and order an appropriate remedy. Since the strike would disrupt the de-

Injunctive Powers Rarely Used

PERB's decision to petition for an injunction against CNA marks the first time it has requested injunctive relief in three years, despite receiving 15 to 20 requests annually. In 2002, PERB requested injunctions to prevent governing boards at Victor Valley Community College and College of the Canyons from improperly recognizing or negotiating with the California Teachers Association as the representative of part-time faculty members that were being organized by the American Federation of Teachers (see *CPER* No. 154, pp. 20-22; No. 150, pp. 47-50). The same year, it petitioned for an injunction to prohibit the California State Employees Association from suspending two officers of its civil service division during a bitter battle over the division's attempts to incorporate.

PERB General Counsel Robert Thompson told *CPER* his office believed that CNA called the strike to put pressure on bargaining. The ballot that CNA used to gauge support for a strike

PERB believed that CNA called the strike to put pressure on bargaining.

motivated by bargaining, and the parties had not exhausted impasse procedures, PERB granted U.C.'s injunctive relief request.

Impasse

The day before the injunction was issued, the parties agreed to declare impasse. However, the university offered to implement its proposed 2005-06 salary increases while continuing impasse procedures, and CNA agreed. The raises will begin to address current disparities between market salaries and U.C. nurses' pay, and help U.C.'s hospitals recruit and retain employees. *

CSU Settles With SETC-United, UAPD

Finally, raises are coming to employees at the California State University. The university, which has suffered through reduced state funding for the past three years, is receiving a 3 percent increase for its general operations in 2005-06. CSU has a new three-year contract with the State Employees Trades Council-United, which repre-

The union gained access to a computer and an email account for each steward.

sents about 1,050 skilled tradesworkers at the 23-campus university. It also concluded reopener negotiations on 2005-06 compensation with the Union of American Physicians and Dentists.

SETC-United

The major gain for tradesworkers, who have not seen a raise for two years, is a 3 percent general salary increase effective July 1, 2005. Employees in some supervisory positions will be able to earn just over \$70,000 annually. In addition, eligible employees with 10 or more years of service will receive a 1 percent permanent pay increase in January. Those with at least one year of sat-

isfactory service will pocket a \$254 bonus. The university will continue providing a \$500 annual health-care stipend to employees in rural areas who are not enrolled in a health maintenance organization. However, a long-term disability plan has been discontinued. Compensation in the 2006-07 and 2007-08 years is subject to reopener bargaining.

A new article relating to industrial injuries has been added to the contract. It gathers all contract provisions relating to industrial injury leave and benefits into one article and reiterates certain provisions of state law and campus policy. Employees are entitled to union or other representation for industrial injury issues, but the article is not subject to the grievance and arbitration procedure.

Further changes provide benefits that other university employees already enjoy. For example, tradesworkers will be able to use up to five days for funeral leave rather than the one or two paid days that had been available. Domestic partners now are included in the definition of "immediate family" for leave purposes. And, instead of a 15-day grievance-filing deadline, the filing period will increase to 30 days.

The union won a minor enhancement in protection for probationary employees. While the previous contract did not require a performance evaluation before an employee could be re-

jected from probation during the first year of employment, the new collective bargaining agreement states that probationary employees "normally" should be given at least one evaluation before separation from service.

The union gave up its right to engage in sympathy strikes. However, it gained access to a computer and an email account for each steward. CSU now must provide notice of new human resources policies to the union, even if there is no request, and may provide the notices by email.

UAPD

UAPD represents about 130 physicians who work in student health centers at the university's 23 campuses, as well as a handful of veterinarians at three campuses. Negotiations involved only compensation for 2005-06, since the parties' contract does not expire until June 30, 2007. The union negotiated a 3.5 percent general salary increase, which will boost the salary of each unit member and add to the minimum and maximum salaries in the ranges. Physician salaries range from about \$85,000 to \$168,000, but UAPD Regional Administrator Joe Bader says most of the doctors earn between \$115,000 and \$125,000.

In addition, unit members will continue to receive a \$25,000 life insurance benefit. Bader told *CPER* that CSU agreed not to subtract the cost of the benefit from the unit's compensation pool. *

Public Records Act Exemption Protects Correspondence Between Opposing Counsel

The Court of Appeal advises attorneys involved in pending litigation to mark their correspondence “confidential” to avoid its disclosure to the press under the California Public Records Act. Even without that precaution, however, correspondence between attorneys for the California State University and counsel for two CSU employees was held exempt from disclosure

Any exceptions contained in the act are narrowly construed.

under the pending litigation exception of the act. Deposition transcripts are available to the public under Sec. 2025.570 of the Code of Civil Procedure, the court held.

The *San Diego Union-Tribune*, published by Copley Press, sought documents from the university relating to pending lawsuits filed by two of its employees. The newspaper demanded communications between San Diego State University and the employees or their attorneys, as well as transcripts of all depositions in the case. After the university refused to turn over the documents, the trial court ordered their disclosure.

The purpose of the CPRA is to make available to the public the records of government agencies; therefore, any exceptions contained in the act are narrowly construed. The Court of Appeal reiterated prior law that the pending litigation exception protects only “documents (1) that the agency prepared; (2) for its own use in litigation; and (3) that [the agency] had an interest in not disclosing until after the litigation has finalized.”

The court acknowledged that, under this precedent, correspondence between the parties or their counsel arguably would be subject to disclosure. However, the court distinguished this case from prior cases in which a potential litigant sought documents from a government entity. Here, because a third party made the request in this case, different reasons support withholding the documents, the court explained. If third parties were able to obtain access to correspondence under the act, “it would eviscerate the parties’ ability to vigorously litigate and protect their clients’ interests,” the court warned. Although prior cases protected only documents prepared by the agency, the court extended the exemption to correspondence from the employees’ counsel. Correspondence often makes reference to prior correspondence, the court observed, and disclosure there-

I always wondered why somebody doesn't do something....Then I realized I was somebody.

Lily Tomlin

The federal Family and Medical Leave Act and the California Family Rights Act are for everybody. CPER's clear and concise guide is useful to employees who are eligible for benefits, union officials questioned about employee entitlements, and labor relations managers charged with implementing the act. Use it as a training tool or for resolving practical, day-to-day questions.

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

Pocket Guide to the Family and Medical Leave Acts

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fore would expose the agency's confidential communications.

The court cautioned that the exemption applies only while litigation is pending. In addition, nothing prevents a party from voluntarily disclos-

ing documents. (*Board of Trustees of the California State University v. Superior Court, San Diego County; Copley Press, RPI*[9-14-05] D045929 [4th Dist.] ___ Cal.App.4th___, 2005 DJDAR 11369.) *

testimony in the first trial was improper. The court overturned the verdict. (See story in *CPER* No. 165, pp. 34-38.) Back in the trial court this spring, though, Kotla won another verdict, twice as large as the first. Prior to trial, DOE had reimbursed U.C. over \$1.2 million in legal fees and costs.

U.C. spokesperson Chris Harrington asserts the new law will not affect the university's litigation practices. "The university does not defend cases simply because DOE reimburses the costs. Each case is reviewed on its merits," he told *CPER*.

The reimbursement prohibition may not affect U.C. immediately. The provision makes an exception for re-

U.C. would risk footing the bill if it appeals and loses.

imbursement agreements in contracts that existed prior to its enactment. DOE's contracts with U.C. generally call for reimbursement unless the university's liability was caused by bad faith or willful misconduct of managerial personnel. U.C. entered a new five-year contract to run the Berkeley lab in June. Its contract to manage the Los Alamos lab has been extended through next May, and the Livermore lab contract is expected to be extended through September 2007. *

Law Limits Reimbursement of Legal Fees in Whistleblower Cases at U.C. Labs

The Energy Policy Act of 2005 that President Bush signed in August adds one more factor for the University of California to consider before it appeals a verdict in favor of a lab whistleblower. U.C. operates the Lawrence Berkeley National Laboratory, the Lawrence Livermore National Laboratory, and the Los Alamos National Laboratory under contracts with the federal Department of Energy. In the past, the labs' litigation expenses and legal fees usually have been reimbursed by the federal treasury. But a section of the energy bill now bans DOE reimbursement of a contractor's legal fees or expenses that are incurred after a whistleblower is successful in either an administrative hearing or in court unless the contractor prevails on appeal. The provision applies to claims of retaliation under the DOE Contractor Employee Protection Program, nuclear whistleblower protection laws, general federal law protecting employees from reprisal for disclosing illegal activity, "or any comparable State law."

In 2002, Congressman Ed Markey (D-Massachusetts) was stunned to

learn that DOE had reimbursed U.C. over \$400,000 for legal costs in a case filed by Dee Kotla, a worker at the Lawrence Livermore lab. The university claimed it fired Kotla in 1996 for using her computer to perform some programming work for a friend's business and \$4.30 in local telephone calls, matters it discovered during and after her deposition in another employee's sexual harassment lawsuit. Kotla won a \$1 million judgment when a jury decided the university retaliated against her by terminating her for her testimony in the lawsuit. This case, and information that DOE reimbursed 95 percent of contractors' legal costs between 1995 through 2001, led Markey to seek statutory limits on reimbursements.

Under the new restriction, U.C. would risk footing the bill itself if it appeals an adverse determination and loses again. It is open to interpretation, however, how the law would have operated in the *Kotla* case, where U.C. lost twice. The university successfully argued to the Court of Appeal that expert

New Law Protects Confidentiality of CSU Whistleblowers

The California State University successfully sponsored a bill to protect the identity of employees who report improper governmental activities to the university. The California Whistleblower Protection Act covers CSU employees, but because university employees are not in the civil service, the university was authorized to enact its own whistleblower procedures. The act did not authorize CSU to withhold the identity of whistleblowers if it received

tion to respond formally to any complaint that a whistleblower submits in writing. The identity of the whistleblower can be disclosed only to the Bureau of State Audits or a law enforcement agency that is conducting a criminal investigation, unless the whistleblower gives written permission for disclosure to others. Investigative audits are confidential except for reports that have substantiated an allegation, but the identity of the “individuals involved” must be maintained.

Employees claimed they were harmed when CSU disclosed their identities.

a California Public Records Act request to turn over investigative reports and other documents. By contrast, the act made confidential the reports of the Bureau of State Audits, the agency that investigates improper governmental activities disclosed by state employees.

CSU sponsored A.B. 706 (Parra, D-Hanford) to close the gap in protection. CSU complained that it was being sued by employees who claimed they were harmed when CSU disclosed their identities. The final version of the bill requires the university administra-

The governor vetoed A.B. 708 (Karnette, D-Long Beach), which would have authorized CSU to hire an independent investigator for complaints of improper governmental activity and set out detailed procedures for handling complaints within CSU. A.B. 708 was sponsored by California State University Employees Union (California School Employees Association). The governor viewed the bill as redundant and unnecessary because CSU has authority to hire an independent investigator and already enacted complaint procedures in 2002. *

Discrimination

Supreme Court Finds Employees Can Sue if Boss Has Affairs With Coworkers

In a unanimous decision, the California Supreme Court ruled in *Miller v. Department of Corrections* that employees who are passed over for promotion in favor of their bosses' lovers can sue for sexual harassment under California's Fair Employment and Housing Act. The court reversed the Third District Court of Appeal, which had dismissed the case brought by two female employees against the department for sexual discrimination and retaliation. (For a complete discussion of the Court of Appeal decision, see *CPER* No. 159, pp. 55-57.)

Factual Summary

Edna Miller began working for the department as a correctional officer in 1983. In 1994, while employed at the Central California Women's Facility, she learned that the chief deputy warden, Lewis Kuykendall, was having sexual affairs with three other employees: Kathy Bibb, his secretary; Debbie Patrick, associate warden, and Cagie Brown, a correctional officer. Miller complained to Kuykendall's superior officer, Warden Tina Farmon, about what she considered the "inappropriate situation" created by the affairs. Farmon told Miller she had addressed the issue.

Miller was transferred to the Valley State Prison for Women in 1995, where Kuykendall was now the warden. She served on a committee that considered the application of Bibb for promotion to correctional counselor, a move that would have involved a transfer to VSPW. When Bibb was not selected, Kuykendall told the committee he wanted them "to make it happen." Bibb was promoted, in spite of the opposition of Patrick, who also had been transferred to VSPW. Miller believed that Patrick had been transferred because of her affair with Kuykendall and that she enjoyed unusual privileges as a result.

Miller confronted Brown, now also at VSPW, about her affair with Kuykendall. Brown admitted the affair and bragged about her power over Kuykendall. In 1995, Miller and Brown competed for a promotion to a temporary position of facility captain. Prior to the interviews, Brown told Miller that Kuykendall would have to give Brown the promotion or she would "take him down" with her knowledge of "every scar on his body." Brown was given the promotion in spite of Miller's higher rank, superior education, and greater experience. The following year,

Miller and Brown competed for the position of permanent facility captain; Brown again received the promotion. In 1997, Brown was promoted to the position of associate warden and became Miller's supervisor. Kuykendall served on both interview panels.

Department employees were aware of Kuykendall's three sexual affairs at CCWF and VSPW. They believed that persons who had sexual affairs with Kuykendall received special employ-

*Department employees
were aware of
Kuykendall's three
sexual affairs.*

ment benefits.

Miller began to experience additional difficulties when Deputy Chief Warden Vicky Yamamoto arrived at VSPW. Miller refused dinner invitations from Yamamoto because she believed Yamamoto was a lesbian and sexually interested in her. Yamamoto interfered with Miller's direct access to the warden. Rumors circulated that Yamamoto and Brown had a sexual relationship.

In 1997, Miller complained to the department's sexual harassment advisor that Yamamoto was disrupting the work of the institution and that Kuykendall had not disciplined

Yamamoto because of his sexual relationship with Brown and Brown's close relationship with Yamamoto. Miller then complained to Kuykendall about Brown and Yamamoto's interference with her duties.

After her complaint, Brown and Yamamoto made Miller's work life miserable and diminished her effectiveness. They countermanded her orders, undermined her authority, reduced her supervisorial responsibilities, imposed additional duties, made unjustified criticisms, and threatened her with reprisals.

At one point, Brown physically assaulted Miller, holding her captive in her office for two hours. Miller's assistant, Frances Mackey, asked Yamamoto to help, but Yamamoto refused. Miller complained to Kuykendall about the assault and threatened to report his relationship with Brown to high authorities. Kuykendall said no one would believe her. He told her to take some time off work and, when she returned, she would not have to report to Brown or Yamamoto. He subsequently promoted Miller.

Brown and Yamamoto continued to interfere with Miller's work. Miller again complained to Kuykendall. Kuykendall told her that there was nothing he could do about the harassment because of his relationship with Brown and Brown's relationship with Yamamoto. He said he was "finished" with Brown and told her "I should have chosen you."

In 1998, Miller and three other

employees complained to Lewis Jones, Kuykendall's superior officer, that Kuykendall was failing to control Yamamoto and that the institution was out of control. Jones recommended an internal affairs investigation, and Miller cooperated. Although she was told her statements would be confidential, they were not, and Brown began a campaign of ostracism. She angrily confronted Miller about her statements to the investigator. Miller obtained a restraining order against

*Brown physically
assaulted Miller,
holding her captive
in her office.*

Brown. Yamamoto's harassment of Miller increased. And Kuykendall withdrew accommodations that previously had been accorded Miller because of a disability.

Miller suffered increasing stress and resigned from the department on August 5, 1998. As a result of the internal affairs investigation, Kuykendall retired, Yamamoto was transferred and demoted, and Brown resigned with disciplinary proceedings pending.

Frances Mackey, the second plaintiff in the lawsuit, joined the department in 1975 as a clerk. She transferred to VSPW in 1996 as a records manager, with the promise that she would con-

tinue to receive enhanced benefits for directly handling inmates. At her interview, she told Kuykendall that her ambition was to be a correctional counselor. Kuykendall told her that he would promote her if she improved the records office.

Mackey was aware of Kuykendall's affairs with Bibb and Brown. In 1997, Mackey learned that Brown thought she had complained to Kuykendall about his affair with Brown. Mackey's inmate pay was withdrawn, and Brown subjected Mackey to verbal abuse in front of coworkers.

Mackey cooperated with the internal affairs investigator and was assured her statements would be confidential; they were not. Kuykendall subsequently reduced her responsibilities and denied her the work experience she needed to be promoted. Brown interrogated Mackey repeatedly about her statements to the internal affairs investigator. Mackey was unable to work between August 1998 and January 1999 because of health problems caused by stress. When she returned to work, she was demoted, and suffered further mistreatment and humiliation. She resigned a few months later.

Miller and Mackey filed suit. The trial court dismissed their case. The Court of Appeal affirmed, holding that a supervisor who grants favorable employment opportunities to a person with whom the supervisor is having a sexual affair does not, without more, commit sexual harassment toward other, non-favored employees. It also found that

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Gloria Steinem

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the plaintiffs failed to show a pattern of harassment sufficiently pervasive to have altered the conditions of their employment on the basis of sex. The Court of Appeal rejected their claims of retaliation.

Supreme Court's Decision

Chief Justice Ronald M. George, writing for the court, began with a summary of its holding in this case:

For the reasons explained below, we conclude that, although an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as "sexual playthings" or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management.

In coming to this conclusion, the court noted that past state court decisions have established that the FEHA's prohibition against sexual harassment "includes protection from a broad range of conduct, ranging from expressly or impliedly conditioning of employment benefits on submission to or tolerance of unwelcome sexual advances, to the creation of a work environment that is hostile or abusive on the basis of sex." "Such a hostile envi-

ronment may be created even if the plaintiff never is subjected to sexual advances."

The court reiterated the standard set out in *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 138 CPER 54, relying on the United States Supreme Court case of *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 103 CPER 10: "to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex." The working environment is evaluated "by looking at all the circumstances" and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances."

Noting that California courts frequently look to federal authorities in interpreting Title VII of the Civil Rights Act of 1964 in interpreting the FEHA, the court relied heavily on the 1990 policy statement of the Equal Employment Opportunity Commission in concluding that the actions here constituted sexual harassment. The EEOC observed that widespread sexual favoritism may create a hostile work environment by sending the message that managers view women as "sexual playthings" or that "the way for women to get ahead in the workplace is by engaging in sexual conduct." In these cir-

cumstances, an atmosphere that is demeaning to women is created, the policy explained. “Both men and women who find this offensive can establish a violation if the conduct is sufficiently severe or pervasive to alter the conditions of their employment and create an abusive working environment,” it said.

The EEOC also instructed that “managers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by en-

Widespread sexual favoritism sends the message that managers view women as ‘sexual playthings.’

gaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment. This can form the basis of an implicit ‘quid pro quo’ harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive.”

The court found one California case that addressed this situation. In *Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 117 CPER 66, the court rejected a claim based on favoritism arising

from a single affair, but “it recognized sexual favoritism *could* create a hostile environment,” said the court.

“Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment,” held the court.

Applying this standard to the facts of this case, the court found sufficient evidence to establish a prima facie case of sexual harassment under a “hostile-work-environment theory.” Kuykendall promised and granted unwarranted and unfair employment benefits to his sexual partners, said the court. He allowed Brown to abuse other employees, and when Miller and Mackay complained, they suffered retaliation. “Further,” the court concluded, “there was evidence that advancement for women at VSPW was based on sexual favors, not merit,” pointing to the promotions of Bibb and Brown. Kuykendall’s sexual favoritism not only blocked advancement for Miller and Mackey, but caused them to be harassed by Brown.

This harassment, apparently retaliatory, included loss of work responsibilities, demeaning comments in the presence of others, loss of a pay enhancement and disability accommodation, and physical assault and false imprisonment. Since Kuykendall refused

to protect Miller because of his intimate relationship with Brown, his sexual favoritism was responsible for a campaign of harassment against them.

The court found this to be evidence of sufficiently pervasive conduct that altered the conditions of the plaintiffs’ employment “such that a jury reasonably could conclude that the conduct created a work environment that qualifies as hostile or abusive to employees because of their gender.”

The court took the Court of

Evidence established a prima facie case of sexual harassment under a ‘hostile-work-environment theory.’

Appeal to task for finding that the plaintiffs had failed to support a claim of sexual harassment, “especially in the absence of any evidence that they had been sexually propositioned or that the sexual affairs were nonconsensual.”

The court pointed to two California cases which held that plaintiffs may establish a hostile work environment even when they themselves have not been propositioned, *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 131 CPER 76, and *Fisher v. San Pedro Pen-*

insula Hospital (1989) 214 Cal.App.3d 590. "In focusing on the question of whether the sexual favoritism was coercive, the Court of Appeal overlooked the principle that even in the absence of coercive behavior, certain conduct creates a work atmosphere so demeaning to women that it constitutes an actionable hostile work environment," explained the court. "We believe it is clear under California law that a plaintiff may establish a hostile work environment without demonstrating the existence of coercive sexual conduct directed at the plaintiff or even conduct of a sexual nature."

The court also criticized the Court of Appeal for taking "too narrow a view of the surrounding circumstances." The lower court found that the situation involved isolated preferential treatment of a sexual partner and that this conduct, standing alone, does not constitute sexual discrimination. The Supreme Court, although not disputing that principle, found the evidence involved much more than isolated events: it demonstrated the effect of widespread favoritism in the work environment, creating an atmosphere that was demeaning to women.

The court also found that the Court of Appeal erred in agreeing with the contention that a reasonable person in the plaintiffs' position would not have found the work environment to be hostile toward women on the basis of widespread sexual favoritism. While the presence of "mere office gossip" is insufficient to establish widespread sexual

favoritism, there was much more presented in this case.

Defendants argued that the court should not inject itself into relationships that are private and consensual. "The issue of personal privacy should give courts pause before allowing claims" like those presented by Miller and Mackey to proceed to trial. The court disagreed. "It is not the relationship, but its effect on the workplace, that is relevant under the legal standard."

Contrary to the Court of Appeal, the Supreme Court found that both

*It is not the
relationship, but
its effect on
the workplace,
that is relevant.*

Miller and Mackey had presented sufficient evidence of retaliation to avoid pretrial dismissal of their claims. Both asserted that they engaged in protected activity in complaining about the sexual affairs and favoritism to Kuykendall and to others in the department. They showed that they suffered retaliation in a number of ways, including loss of benefits and accommodations, being publicly demeaned and undermined, being passed over for promotion, and, in Miller's case, by being physically assaulted.

The Court of Appeal held that the plaintiffs had not engaged in protected activity because they had not specifically expressed opposition to sex discrimination or sexual harassment. "Rather," said the appellate court, "plaintiffs' complaints and reports concerned the unfairness of promotions and other benefits given to paramours and the resulting mistreatment of them by those paramours." In response, the Supreme Court stated, "we do not believe employees should be required to elaborate to their employer on the legal theory underlying the complaints they are making, in order to be protected by the FEHA." Expanding on this conclusion, it said:

The FEHA's stricture against retaliation serves the salutary purpose of encouraging open communication between employees and employers so that employers can take voluntary steps to remedy FEHA violations, a result that will be achieved only if employees feel free to make complaints without fear of retaliation. The FEHA should be liberally construed to deter employers from taking actions that would discourage employees from bringing complaints that they believe to be well founded. The act would provide little comfort to employees, and thereby would fail in its ameliorative purpose, if employees feared they lawfully could lose their employment or suffer other adverse action should they fail to phrase accurately the legal theory underlying their complaint concerning behavior that may violate the act.

The court instructed the Court of Appeal to consider on remand two is-

sues not reached by it in its prior decision, i.e., whether the plaintiffs suffered an adverse employment action in response to their sexual harassment complaints, and whether any adverse action

was caused by their protected activity. (*Miller v. Department of Corrections* [7-18-05] Supreme Ct. S114097, 36 Cal.4th 446. *

impairment of a major life activity at the summary judgment stage,” pointing to two cases as illustrative. In *McAlindin v. County of San Diego* (9th Cir. 1999) 192 F.3d 1226, the court held that a statement in a declaration was enough to raise a genuine issue of material fact as to the plaintiff’s ability to engage in sexual relations, a major life activity, and no medical evidence was required. In *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032, the court relied

Showing That Disability Was Motivating Factor for Discrimination Sufficient

The Ninth Circuit Court of Appeals has determined that under the Americans With Disabilities Act, an employee need not show that the employer discriminated against him solely “because of” his disability, but only that his disability was one of the employer’s motivating factors. The court also held that the employee need not present medical evidence to support his claim that his disability impaired a major life activity. The employee’s testimony can suffice to meet his burden of proof.

Factual Background

In 2001, Matthew Head was diagnosed with depression or bipolar disorder, and notified his employer, Glacier Northwest, of this diagnosis. When he returned to work in May 2001, after a two-month leave, he was restricted from working more than 12 hours a day and was limited to working only the day shift. Before his leave, he had worked the graveyard shift.

On June 29, 2001, Head was fired when a loader he was operating got stuck in the mud. Head filed suit alleg-

ing disability discrimination and retaliation for requesting reasonable accommodation in violation of the ADA and Oregon state law.

The trial court dismissed Head’s claim of disability discrimination prior to trial because he had not produced any medical evidence to support his contention that his disability substantially impaired major life activities. His claims for discrimination on the basis of perceived disability and retaliation proceeded to trial. At the conclusion of the trial, the court instructed the jury that, in order to prevail, Head must have shown that Glacier terminated him “because of” his perceived disability. On the retaliation claim, the trial court instructed that Head had to show that Glacier terminated him “because” he requested accommodation. The jury found for Glacier, and Head appealed.

Court of Appeal Decision

The court found no Ninth Circuit precedent that requires “comparative or medical evidence to establish a genuine issue of material fact regarding the

*For the first time,
reading was found
to be a major
life activity.*

on the plaintiff’s testimony about her dietary regime in finding that she had established a genuine issue of material fact as to whether her diabetes substantially limited the major life activity of eating. Based on these cases, the court concluded that a plaintiff like Head is not required to present medical evidence to show that his infirmity impairs a major life activity.

Based on Head’s non-medical evidence, the court concluded that he had presented sufficient evidence of substantial impairment in the major life activities of sleeping, interacting with others, and thinking. The court also ruled that Head presented sufficient evidence of a substantial impairment

regarding reading, which it found for the first time to be a major life activity within the meaning of the ADA.

Turning to the trial court's instructions to the jury, the Ninth Circuit stated:

Causation analysis under the ADA is really a question of whether the ADA's use of the causal language "because of," "by reason of," and "because" means that discriminatory and retaliatory conduct is proscribed only if it was *solely* because of, *solely* by reason of, or *solely* because an employee was disabled or requested an accommodation. Although the Ninth Circuit has not answered this question, seven of our sister circuits have held that the ADA causation standard does not require a showing of sole cause.

The court, persuaded by the Eleventh Circuit's reasoning in *McNely v. Ocala StarBanner Corp.* (11th Cir. 1996) 99 F.3d 1068, joined the other seven circuits in concluding that "'solely' is not the appropriate causal standard under any of the ADA's liability provisions." The *McNely* court explained that "in everyday usage, 'because of' conveys the idea of a factor that made a difference in the outcome," and that reading the term "solely" into the statute would undermine the very purpose of the ADA: "the elimination of discrimination against individuals with disabilities."

Again agreeing with the other seven circuits, the court concluded that "a motivating factor standard is the appropriate standard for causation in the ADA context," because it is most con-

sistent with the plain language and the purposes of the ADA. "Therefore, we hold that the ADA outlaws adverse employment decisions motivated, even in part, by animus based on a plaintiff's disability or request for an accommodation — a motivating factor standard."

Because there was evidence that discrimination had a role in Head's discharge, the trial court erred by refusing to give the requested mixed-motive instruction, held the court. However, it also announced that, in a situa-

*The trial court erred
by refusing to give the
requested mixed-
motive instruction.*

tion where the trial court "determines that the only reasonable conclusion the jury could reach is that discriminatory animus is the sole reason for the challenged action or that discrimination played no role in the decision, the jury should be instructed to determine whether the challenged action was taken 'because of' the prohibited reason."

In his concurring opinion, Justice T.G. Nelson pointed out that this last holding is contrary to the court's statement earlier in its opinion that "'solely' is not the appropriate causal standard under any of the ADA's provisions." He

argued that a plaintiff in an ADA case is never required to show that impermissible animus was the sole cause of an adverse decision, but only that such animus at least partially motivated the employer. Therefore, he reasoned, "any jury instruction that requires a plaintiff to show that an impermissible animus solely caused an adverse employment action misstates the law." (*Head v. Glacier Northwest, Inc.* [9th Cir. 7-6-05] 413 F.3d 1053, 2005 DJDAR 8159.) *

General

Cost-Sharing Provision of Appeal Procedure Denies Employee Due Process Guarantees

The provision of a memorandum of understanding that required a city employee to bear half the cost for a hearing officer in a termination appeal was unconstitutional, said the Fourth District Court of Appeal, and that infirmity was not waived by the contractual provisions negotiated by the employee organization.

The cost-sharing provision had an impermissible chilling effect.

Relying on the Supreme Court's decision in *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, the Court of Appeal reasoned that the cost-sharing provision of the MOU had an impermissible chilling effect on employees and was intended by the city to reduce the number of appeals.

Factual Summary

When April Florio was terminated from her position as police dispatcher, she appealed her discharge under the terms of the MOU between the San

Bernardino Public Employees Association and the City of Ontario. The contract required that the cost of hearing officer services be borne equally by the city and the appellant. Florio lost her appeal and was required to pay \$3,290 as her share of the cost of the hearing. She then challenged the cost-sharing provision.

Court of Appeal Decision

In reaching its conclusion, the Court of Appeal adopted the analysis of the Supreme Court in *California Teachers Assn. v. State of California*. In that case, the court struck down as unconstitutional the cost-sharing provision embodied in Education Code Sec. 44944, which required a teacher to pay one-half the cost of an administrative law judge if the teacher lost a hearing regarding a threatened suspension or dismissal.

The Court of Appeal rejected the city's assertion that the *CTA* case was not controlling because, unlike the circumstances involving teachers operating under Sec. 44944 — who paid half only if they lost the hearing — the MOU mandated cost sharing regardless of the outcome. The “chilling effect of the barrier erected by the cost-sharing provision” is still significant, said the court.

The court also rejected the city's contention that there was no evidence the cost-sharing provision of the MOU actually discouraged hearing requests. It cited the city's admission that the MOU provision was an attempt to reduce costs by encouraging employees who suspect they are likely to lose their challenges to accept the city's decision, rather than delay termination through administrative and judicial appeals.

In an effort to defeat the constitutional invalidity of the provision, the city argued the constitutional flaw was contractually waived by the exclusive representative as part of the collective bargaining process. Quoting *Alexander*

An employee's right to due process cannot be waived.

v. Gardner-Denver Co. (1974) 415 U.S. 36, the court explained that “though the parties to a collective bargaining agreement may supplant existing procedures by which employees are disciplined or discharged, an employee's right to due process cannot be waived in a collective bargaining agreement.”

In the present case, said the court, “Florio's due process rights include the right to have a meaningful hearing without having to pay for it.”

The court distinguished the present case from the circumstances in *Armstrong v. Meyers* (9th Cir. 1992) 964 F.2d 948, 94 CPER 43, and *Jones v.*

Omnitrans (2004) 125 Cal.App.4th 273, 170 CPER 81. In those cases, while the courts upheld contract provisions that gave unions exclusive control over the decision to appeal a discharge in arbitration, the union's discretion in determining which grievances to arbitrate was circumscribed by its duty of fair representation. In contrast, said the *Florio* court:

The present case is not concerned with the union's exclusive authority to represent its members in arbitration or the union's corresponding duty of fair representation. The factors that led the courts in *Armstrong* and *Jones* to decide a union may bargain to be the sole decision maker as to whether to arbitrate an

employee's claim are not pertinent to the analysis of whether an employee can be required by the collective bargaining agreement to pay half the costs of arbitration.

The court rejected the city's contention that Florio had unduly delayed bringing the lawsuit or that she acquiesced to the cost-sharing provision because she chose to proceed with the hearing on her termination. Her challenge to the cost-sharing provision is separate from her right to a hearing, said the court, and should not have been allowed to delay the hearing. (*Florio v. City of Ontario* [7-13-05] E036598 [4th Dist.] 130 Cal.App.4th 1462, 2005 DJDAR 8453.) *

Under FMLA, Trip to Retrieve Family Car Not 'Caring For' Family Member

A mechanic working for Alaska Airlines in Seattle was not "caring for" his pregnant wife when he traveled across the country to Atlanta to retrieve the family car in order to provide psychological assurance that she would have reliable transportation. In *Tellis v. Alaska Airlines*, the Ninth Circuit Court of Appeals ruled that the employee's absence from work was not a protected absence from employment under the federal Family and Medical Leave Act.

Under the FMLA, an eligible employee is entitled to up to 12 weeks of leave during a 12-month period "to care

for" a family member with a serious health condition. In this case, Charles Tellis informed his supervisor that he needed to take a couple of weeks off because his wife was having difficulties with her pregnancy. His supervisor suggested that Tellis take FMLA leave and instructed him to contact the health benefits office to get the necessary forms. Tellis did not show up for his next scheduled shift, but left a leave request form seeking three days of holiday and vacation leave. During that period, Tellis' vehicle broke down and he decided to fly to Atlanta and drive

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

William James

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another vehicle he owned back to Seattle. While he was en route to Seattle, he called his wife regularly on his cell phone from the road. His wife gave birth to a baby girl before he returned.

Tellis failed to return to work for his next scheduled shift following his three days of requested leave. The airlines unsuccessfully attempted to call him and terminated him for unexcused absences.

Providing care to a family member under the FMLA requires some actual care.

Tellis contested the discharge under the FMLA, arguing that he had been caring for his wife because his trip to Atlanta to retrieve the family car provided psychological reassurance that she soon would have reliable transportation. He also argued that his phone calls to her while he drove back to Seattle provided moral support and psychological comfort.

Rejecting these arguments, the appellate court held, “as a matter of law, providing care to a family member under the FMLA requires some actual care which did not occur here.”

Referring to the Department of Labor’s regulations implementing the FMLA, and to *Marchischeck v. San Mateo*

County (9th Cir. 1999) 199 F.3d 1068, the court reiterated that caring for a family member with a serious health condition “involves some level of participation in ongoing treatment of that condition.” Other courts have concluded that a particular activity constitutes “caring for” a family member under the federal law “only when the employee has been in close and continuing proximity to the ill family member.”

For an example, the court cited *Scamihorn v. General Truck Drivers* (9th Cir. 2002) 282 F.3d 1078, where a son who moved to his father’s town for a month to help him cope with depression was entitled to assert protection under the FMLA because he spoke to his father daily, performed household chores, and drove his father to the counselor.

The court also took note of *Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 142 CPER 45, where a California Court of Appeal held that an employee was not protected under state law similar to the FMLA when she took leave to help her ailing mother move from her two-story home to a one-floor apartment. This conduct may have provided Pang’s mother some degree of psychological comfort, said the court, but was unprotected by the state leave law because Pang did not directly or indirectly provide medical care to her mother.

In this case, the court held that Tellis’ trip to retrieve a working vehicle may have provided his wife psychological reassurance, but “that was merely

an indirect benefit of otherwise unprotected activity — traveling away from the person needing care.”

The court also dismissed Tellis’ claim that his phone calls provided moral support and comfort. In contrast to the daily conversations and constant presence that tipped the balance in the *Scamihorn* case, the court concluded, “Common sense suggests that the phone calls Tellis made do not fall within the FMLA’s ‘care for’ requirement.” (*Tellis v. Alaska Airlines Inc.* [9th Cir. 7-12-05] 414 F.3d 1045, 2005 DJDAR 8371.) *

Public Sector Arbitration

No Waiver of Right to Arbitrate Found in Union's Procedurally Flawed Demand

In an important case recognizing the strong public policy favoring arbitration, the Sixth District Court of Appeal ruled that a union's timely but procedurally flawed request to proceed to arbitration did not demonstrate a waiver of its contractual right. The court relied on the language of the collective bargaining agreement, which did not expressly condition the union's ability to arbitrate a grievance on a procedurally proper demand, and on the fact that, were the court to find a forfeiture of the right to arbitrate, the union would be left with no recourse for resolution of the dispute by a neutral third party.

The dispute arose under the negotiated agreement between the Cupertino Union School District and Local 715 of the Service Employees International Union. The contract sets up a formal grievance and arbitration procedure, stating that if the union is not satisfied with the disposition of the grievance at step two, it "may submit the grievance to arbitration within twenty (20) working days from the receipt of the Superintendent's decision, by submitting a letter to the State Mediation and Conciliation Service (SMCS) requesting a list of arbitrators." A separate contract provision provides

that "any grievance not appealed to the next step of the procedure within the prescribed time limits shall be considered settled on the basis of the answer given in the proceeding step."

In December 2003, utilizing this procedure, the union filed a grievance on behalf of a district employee concerning the use of on-call workers to perform certain tasks. On January 8, 2004, at the second step of the process, the district's human resources manager

Strong public policy favors arbitration.

denied the grievance in writing; union representative Leah Berlanga replied on January 20, stating that the union intended to arbitrate the matter and would make a request for arbitration to the SMCS. On February 9, union attorney Daniel Boone advised the district in writing: "This is a formal request for arbitration." Boone sent a request for a list of arbitrators to SMCS on March 10, 2004.

The district refused to proceed to arbitration because the union had not

submitted the required letter to SMCS within the 20-day period. It took the position that the matter was settled based on its denial of the grievance conveyed to the union on January 8.

The union's petition to compel arbitration under Code of Civil Procedure Sec. 1281.2 was rejected by the trial court, which found that its failure to make a timely demand for arbitration waived its right to arbitrate.

Court of Appeal Reversal

The court first determined that while both the Berlanga letter of January 20 and Boone's letter of February 9 were timely under the terms of the contract, Berlanga's letter was not an unequivocal demand for arbitration but merely an expression of the union intention to seek arbitration at some future date. Boone's letter included a clear expression of the union's intent to arbitrate the grievance. However, he made no request for a list of arbitrators from SMCS until March 10, well beyond the 20-day limit. Thus, the court was faced with the question of whether the union's timely, but imperfect, arbitration demand waived its right to arbitrate.

To bolster its position, the union relied on *Napa Association of Public Employees v. County of Napa* (1979) 98 Cal.App.3d 263. In that case, the court found that waiver of the right to arbitration is improper unless, in addition to an untimely demand, there is proof of intentional abandonment of the right or prejudice resulting from the delay.

The district, for its part, relied on *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, which held a timely demand for arbitration was a condition precedent that must be performed before the contractual duty to submit the dispute to arbitration arises.

In this case, the court found both *Napa* and *Platt* distinguishable. *Napa* involved the timeliness for submitting a labor grievance, not a demand for arbitration, noted the court, a distinction that the *Napa* court clearly had emphasized. In *Platt*, which arose in the context of a construction dispute, the par-

The union would have no recourse for resolution by a neutral party.

ties' arbitration agreement clearly established that the demand for arbitration had to be made "in no event later than" a specific date. That language, said the court in *Cupertino*, "stands in stark contrast" with the permissive language of the collective bargaining agreement, which states that the union "may submit the grievance to arbitration within 20 working days."

Turning to principles of contract interpretation, the court observed that conditions precedent "are not favored by the law, and are to be strictly con-

strued against one seeking to avail himself of them." Inclined to avoid a forfeiture of the union's right to arbitrate, the court found the parties' contract did not contain words specifically conditioning the union's ability to arbitrate a grievance on it making a timely and procedurally proper demand. The court also underscored that, were it to find a waiver, the union would be left with no recourse whatsoever for resolution of the grievance by a neutral party. "We conclude that forfeiture of arbitration rights as a result of failing to make a demand that was both timely and procedurally proper was plainly *not* the unmistakable intention of the [collective bargaining agreement]."

The court found support for this conclusion in the strong public policy favoring arbitration as a speedy and relatively inexpensive means of dispute resolution. Guided by the well-settled policy favoring resolution of disputes on their merits, the court determined that the language of the contract did not create as a condition precedent to arbitration, a timely and procedurally proper demand. Therefore, the court concluded that the union did not waive its right to arbitrate the grievance, and it granted the union's petition to compel arbitration. (*Service Employees International Union, Loc. 715 v. Cupertino Union School Dist.* [8-3-05] Cal.App.4th 985, 2005 DJDAR 9426.) *

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

Molly Ivans

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Failure to Disclose Past Conviction Not Sufficient Cause for Termination

Can an employee be held accountable for incorrectly filling out a form when she based her actions on the advice of a professional in the field? And what consequence is there when the error goes undiscovered for years?

Under the Child Day Care Act, employees of licensed day-care facilities, such as the pre-school program operated by the Rosemead School District, must complete a statement regarding criminal convictions and submit to periodic fingerprinting for criminal background checks. The act prohibits convicted employees from working at the facility unless they are granted a criminal record exemption. The act is administered by the Department of Social Services.

The grievant was fingerprinted when she first joined the district in 1988 as a substitute in its after-school, child-development program. The following year, she became a permanent part-time instructor's assistant.

In 1995, the grievant was arrested for the theft of property over \$400. At the recommendation of the public defender, she waived her right to trial and was convicted of a misdemeanor; she was placed on probation for two years. She also was required to pay a fine and perform 30 days of community service, which she completed in September 1996. The grievant testified that the public defender told her there was no

need to inform the district of the theft conviction because it was not a crime that would prohibit her from working with children.

In 1996, after receiving recommendations from the principal, the program director, and parents, the grievant obtained a second position as a part-time instructor's assistant in the pre-school program.

Criminal Record Form

Before beginning her new position, the grievant was asked to complete a criminal record form. She testified that she completed the form hastily and forgot to answer a page of questions. She admitted to intentionally answering "no" to the question asking if she ever had been convicted of a crime. She assumed, based on the public defender's advice, that she did not have to report the misdemeanor to the district. She believed "it was completely over with" since she had paid her fine and completed her community service. The grievant acknowledged that a few months of her probation period remained, but she assumed the conviction would be deleted from her record once she had completed probation.

The grievant was fingerprinted in March 1997, after starting her new position. On July 31, 2000, DSS informed the district that the grievant's fingerprints had not cleared and she would

need to be fingerprinted again. Two-and-a-half years later, the district again heard from DSS. This time, it informed the district that the grievant had not received criminal record clearance and would need to be fingerprinted again. The grievant was fingerprinted a fourth time. On June 27, 2003, DSS notified the district that since the grievant had a criminal record and had not requested an exemption, she must be removed from the facility immediately.

The public defender told her there was no need to inform the district.

The district informed DSS and the grievant that it would not act on the notice immediately. The grievant was fingerprinted a fifth time. She then filed a petition with the court to have her conviction expunged.

Before the petition was granted, the district received another DSS notice reiterating that the grievant did not have criminal record clearance and must immediately be removed from the facility. However, this notice advised that the district could obtain a criminal exemption for the grievant.

Criminal Exemption Request

On September 9, after the grievant's record had been expunged, she disclosed her 1995 criminal con-

viction to the district for the first time. At that meeting, the grievant was asked to assemble the documents needed to complete the criminal exemption request, and she was placed on paid administrative leave. The grievant submitted the documents to the district; however they were returned to her because she had failed to submit a copy of her 1997 criminal conviction form.

On September 22, after obtaining a copy of the form, the grievant submitted the completed packet to DSS, including a letter explaining the circumstances surrounding her failure to disclose the matter. The grievant was granted an unpaid administrative leave of absence while her request was pending.

On January 9, 2004, the grievant and the district were notified that her request had been granted and she was entitled to return to work.

Four months later, the district elected to terminate the grievant for violation of district policies, including falsification of information, conviction of a misdemeanor adversely affecting the ability to perform the job duties, and failure to maintain the necessary certification for her position. The district claimed that the grievant's failure to disclose her conviction on the 1997 form invalidated her exemption. The district said it did not discover the grievant's failure to disclose until a supervisor examined the form in February 2004, after the exemption had been granted.

The union argued that the criminal conviction form is like an employment application, and to demonstrate just cause for termination, the district must show that the employee intended to defraud or provide the district with misleading information. The union asserted the grievant lacked such an intent because she relied on the misin-

*The arbitrator agreed
that the criminal
conviction form is like
an employment
application.*

formation provided by the public defender and assumed the conviction had been deleted. Furthermore, the actions were mitigated by the significant lapse in time between the action and the consequence and the grievant's satisfactory job performance.

Exemption Valid

Arbitrator Walter Kaufman found the analogy between the forms and the cited just-cause standard appropriate. He found that the grievant had been ill advised by the public defender and that it was not unreasonable for her to assume her conviction would be deleted following her probationary period. Her assumption was reinforced by the fact that she did not hear anything for a long

time after submitting her fingerprints. However, noting that the grievant knew she was on probation at the time she filled out the form Kaufman admonished that it would have been more prudent for her to admit to the conviction.

Ultimately, Kaufman focused on the district's argument that the exemption was invalidated by the belated discovery of the completed criminal conviction form. The district argued that a proviso to the exception meant the exemption was not valid if an employee ever failed to disclose a conviction. In Kaufman's view, the proviso should be read to mean that the exemption is valid unless an individual has failed to disclose a previous conviction, other than the conviction exempted by the notice. Therefore, he found the proviso inapplicable in this case. Further, he noted the grievant had disclosed, and the DSS had considered, the conviction and omission when it made its decision to grant the exemption. It would require another crime to invalidate the exemption, and there was no evidence that the grievant was convicted of another crime before or after the exemption was granted. Therefore, the grievant has a valid exemption and was eligible to work.

*([Grievant] and Rosemead School Dist. [6-27-05] 15 pp. Representatives: d'Ann Madore, (California School Employees Assn.), for the union; Guy A. Bryant, Esq. (Bryant & Brown), for the district. Arbitrator: Walter N. Kaufman, CSMCS Case No. ARB-03-2423.) **

Arbitration Log

- Interest Arbitration
- Wages
- Severance

City and County of San Francisco and San Francisco Municipal Attorneys Assn. (6-2-04; 39 pp.) *Representatives:* James Lassert, Esq., for the union; Arthur Hartinger Esq., for the city. *Arbitrator:* Ronald Hoh (neutral panel chairman), Thomas Owen (labor panel member), Alice Villagomez (management panel member).

Issue: Which party's last offer of settlement should be implemented on the subjects of severance wages, retirement "pick up," floating holidays, and "deep class" step movement?

City's position: (1) Severance: Under the current contract language, all separated attorneys are entitled to severance pay, regardless of the reason for the separation. The city should not be required to pay these benefits to employees who willfully violate city policies. The city's final proposal sought to change the contract language so that attorneys would not be entitled to severance pay if they were terminated, demoted, or transferred for misconduct; it sought to create a standing arbitration panel to hear these cases within 60 days.

(2) Wages: The city offered to increase wages by 2 percent on November 5, 2005, and May 6 and June 30, 2006. The city attorneys have fared bet-

ter than non-sworn city employees because of a rich arbitration award in 2001. They also enjoy more generous benefits than similarly situated city employees. City attorneys fare better as compared to other cities and counties, where wage increases have been less than 3 percent. Attorneys in San Francisco have enjoyed pay increases totaling 19.93 percent, while the Consumer Price Index for the Bay Area has increased only 5.4 percent. The city faces a significant shortfall in fiscal 2006. The wage increase is a burdensome additional cost on top of the cost of the new deep-class agreement.

(3) Retirement Pick-Up/Floating Holidays: The current contract requires attorneys to pay their own retirement contribution equal to 7.5 percent of their gross salary until July 1, 2006, when the city will revert to full pick-up. The city proposes that from July 1, 2005, through June 30, 2006, the city will pick up 2.5 percent of the employees' retirement contribution (new plan) and 3 percent for the employees' retire-

ment contribution (old plan). Then, effective July 1, the city would pick up an additional 5 percent of EPMC. In addition, employees would receive four additional floating holidays for the fiscal year 2005-06.

(4) "Deep Class" Progression: The city sought to freeze automatic step increases for the trial attorney classification, a consolidation of four classifications into one class with 16 salary steps. The increases would be frozen from January 1 through June 30, 2006, and then resume effective July 1, with the parties agreeing to meet and confer on a merit and/or control-point step-increase system. Individual departments would be able to advance attorneys through more than one step.

Union's proposal: (1) Severance: The union's proposal acknowledges the city's desire not to reward misconduct. It would relieve the city of paying severance to employees dismissed for gross misconduct. The union's proposal would place the employee on paid administrative leave pending completion of the investigation. All other comparable public sector attorneys have civil service protection. No other represented city employees are "at will," with the exception of city-employed doctors.

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Severance pay is granted in exchange for the attorneys giving up the protection provided to other public employees. Therefore, the city should be required to show “gross misconduct” before it can take the punitive action of removing severance pay.

(2) Wages: The union’s final proposal sought a 2 percent increase retroactive to May 1, 2005, and additional increases effective November 1, 2005, and June 30, 2006. The city has the burden of showing that it cannot afford the increases. The parties have agreed that a 6 percent wage increase should be awarded in 2006, the only difference being the timing of the award. City attorneys have gone without an increase for two-and-a-half years; 24 other city bargaining units received wage increases in 2005. The last time attorneys received increases was in 2003, and those increases were less than those of all but six other city bargaining units. The union’s comparability evidence shows that the city attorneys’ wages are near the bottom of comparable jurisdictions in average total compensation and slightly below average on wages alone.

(3) Retirement/Floating Holidays: Effective July 1, 2005, the city should pick up the entire 7.5 percent employee contribution toward retirement, without any change to the floating holiday language. San Francisco is the only Bay Area county in the comparability group that does not pick up employees’ retirement contributions.

(4) “Deep Class” Progression: The deep-class agreement has been

implemented for only five months, and the city’s offer would dismantle it. The city’s claim of excessive cost is undermined by evidence that more than 30 percent of the attorneys in the trial attorney classification have never and will never receive the deep-class increase. The city was aware of the cost associated with this progression when it was first negotiated in 2003. There should be no change to the current deep-class progression.

Arbitrator’s decision: The union’s proposals on severance and deep-class progression are awarded. The city’s proposals on wages, retirement, and floating holidays are awarded.

Arbitrator’s reasoning: (1) Severance: The attorneys fare worse than other similarly situated city employees or employees performing similar services in other public agencies regardless of which plan is implemented. Although the city argues that the union is attempting to get around the “at will” employment status of the city attorneys, the union’s proposal only applies to severance pay and does not give employees the right to a “just cause” hearing concerning the termination itself. The city, as the party proposing the language change, bears the burden of showing the propriety of the change. While it did show a slight problem with the current language, the union’s final offer is more fair and equitable, and is awarded.

(2) Wages: The majority of the considerations weigh in favor of the city’s proposal. The wage increases for bargaining unit employees have outpaced changes in the CPI. Recent citywide tax

propositions have been defeated by the voters, and the city’s costs for mandated retirement and health benefits under the charter will be increasing greatly. The city’s budgetary reserve is extremely low. Comparison data presented by both sides show that city employees are comparably compensated to employees performing similar services. Although revenue projections for the city are positive, the evidence supports the city’s final offer on wages.

(3) Retirement/Floating Holidays: While city attorneys appear to have higher contributions as compared to other employees performing similar services, they vest earlier and receive supplemental benefits that others do not. However, the average level of contribution for comparable employees exceeds the 2.5 percent contained in the city’s proposal. Based on the preponderance of evidence, which is similar to that presented regarding wages, the arbitrator elects the city’s final offer.

(4) “Deep Class” Progression: In comparing the city attorneys to other bargaining units, all but four provide for increases conditioned on non-automatic step-progression features such as performance evaluations. No evidence showed that other units had step freezes or meet-and-confer provisions. This supports upholding the current language. Here, as with severance, the city bore the burden of showing there are problems with the existing language that it unsuccessfully has tried to resolve and there are no alternatives to its proposed language. This provision has been in place only five months.

The city could not show that there were problems or that they had tried to resolve them. The city agreed to this language in 2003, in exchange for a two-year wage freeze, which it received. The evidence does not provide a proper basis for the panel to change the existing language.

(Binding Interest Arbitration)

• Unilateral Change

Santa Clara County, Social Services Agency, and Service Employees International Union, Loc. 535 (12-19-04; 23 pp.) *Representatives:* Stewart Weinberg, Esq. (Weinberg, Roger & Rosenfeld), for the union; Lori E. Pegg, Esq. (lead deputy county counsel), for the county. *Factfinder:* Christopher D. Burdick

Issue: Did a triggering event enumerated in the contract occur to permit the county to adopt an interim workload standard? Was the county's or the union's last, best offer a more appropriate workload model?

Pertinent Contract Provision: "Article IX, Section 9.2 - Standards Changes: In the event of major changes

in work requirements or funding by Federal or State actions or level of service determinations made by the County, the Union and the County agree to meet and confer on adjustment of workload standards."

District's position: (1) Under existing case-based workload standards set out in the contract, county eligibility workers were assigned a specific number of cases each month; the remainder were assigned as overtime. Each worker carried the case through the entire process and could not be assigned a new case until the client went off the rolls or was transferred.

(2) Since 1997, the legislature has enacted rules, policies, and procedures that adversely affect the county's ability to administer the program. In addition, the county has seen a 14 percent increase in caseloads each year. This increase cannot be accommodated using the current model.

(3) The state froze funding levels in 2001; it then switched from a case-based to a person-based model. Most recently, the state calculated funding using a model that sets the county's

funding based on arbitrary calculations of other counties. This has resulted in a budget shortfall the county cannot cover out of its general fund. Nor can the county afford to hire additional workers. The state also has changed productivity measures, which has increased work, and enacted new performance standards that include provisions for fines of up to \$1.2 million.

(4) The triggers listed in the contract occurred, and the standards needed to be changed to reflect the current workload situation.

(5) As contractually required, the county initiated meetings with the unions and submitted a proposal to allow the county to assign only cases that needed work; all other questions would be referred to a call center. This model allows the county to meet its targets with the existing staffing levels.

(6) In contrast, the union's proposal set rigid limits on the amount of work that could be assigned, similar to the current model, and would not allow the county to meet its targets. The county presented extensive data showing that the union's proposal was untenable, but the union would not move from its position.

(7) After at least 23 meetings concluded without agreement, the county had no choice but to implement its last, best offer. However, the county did continue to negotiate with the union.

Union's position: (1) The county unilaterally changed the workload standards for eligibility workers in violation of the agreement.

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(2) Existing case-based workload standards in the MOU have been in place for over 25 years and cannot be changed without negotiation. There were no triggering events to allow the agency to implement a change.

(3) The state eliminated face-to-face determination meetings in 1999, and quarterly status reports in 2000, resulting in a decrease in work.

(4) Even if the triggers in the contract had occurred, the union provided a reasonable workload model, and it was inappropriate for the agency to implement its own, instead. The union's model allows the county to move away from the case-based standard, as it claims it needs to do, and use a time-based standard that assigns fixed amounts of time to various transactions, giving the county the flexibility it needs to assign work.

Factfinder's conclusion: The county complied with the contract.

Factfinder's analysis: (1) The burden of proof is on the county because it sought to alter the status quo. The contract allows the county to enact interim standards when a major change in work requirements, funding, or levels of service determinations have occurred.

(2) There have been significant changes in the work since 1999. While some changes decreased work, such as the elimination of status reports, new performance standards increased the workload. In addition, the state reduced funding and added costly consequences for not meeting the new standards. The county clearly demonstrated the major change in work requirements and fund-

ing required under Sec. 9.2 of the agreement.

(3) The county barely met performance standards under the old model and convincingly showed it could not meet the new measurements with the current model, therefore requiring a change.

(4) Between the two models, the county's is the more appropriate because it most closely complies with the state's standards. If the union's model were implemented, the county would not meet those standards and would face significant fines. The union's model is essentially the same rigid standard that exists in the contract. It fails to take into account transaction time and does not allow the county any freedom in assigning work. It would not be possible for the work to be performed with current employees using the union's model.

(5) The interim standards implemented by the county are more consistent with the terms of Sec. 9.2. Therefore, the county's standards should be adopted permanently and incorporated into the contract.

(6) The union's argument that the county violated the MMBA by not meeting and conferring in good faith is outside the jurisdiction of this factfinding process.

(Factfinding Recommendation)

• **Contracting-Out Bargaining Unit Work**
Stockton Unified School Dist. and California School Employees Assn., Stockton Chap. 318 (12-27-04; 12 pp.) *Representatives:* Karen

Daubendick, Esq. (Kronick, Moskovitz, Tiedemann & Girard, PC), for the union; Dan Morris (labor relations representative), for the district. *Arbitrator:* Joseph F. Gentile, CSMCS No. ARB-02-1040.

Issue: Did the district violate the contracting-out provisions of the agreement by eliminating instructional assistant positions and hiring AmeriCorp members?

Union's position: (1) In 2001, the district eliminated three instructional assistant positions and one bilingual assistant position at McKinley Elementary School. It then contracted with the California Human Development Corporation to have three bilingual AmeriCorp members perform the work previously performed by the assistants. In doing so, the district violated Sec. 21.1 of the contract, which restricts the district's ability to contract out work normally performed by bargaining unit employees, and Sec. 21.2, which sets out the notification procedure that must be followed before work can be contracted out.

(2) In 1997, the district was found to have violated those sections when it contracted out network installation work.

District's position: (1) In 2001, the district opened a new school, which resulted in McKinley losing some classroom teachers, students, and funding. The school site council decided to reduce the number of instructional assistants at McKinley to manage the budget loss. The affected assistants were notified per the contract and transferred

to other school sites. They suffered no loss of hours or employment as a result of their new assignments.

(2) The AmeriCorp members did not replace the instructional assistants. They were at the school before the assistants were transferred and had different responsibilities than the assistants. The district had the same number of AmeriCorp members performing the same work during the 2000-01 and 2001-02 school years.

(3) The AmeriCorp members were assigned to mentor specific students and to serve as a liaison between the students and their homes. Instructional assistants did not perform home visits.

(4) None of the AmeriCorp members spoke Hmong, which the bilingual assistant did.

(5) The AmeriCorp members were instructed not to do any bargaining unit work and did not perform any.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) There was no nexus between the elimination of the instructional assistant positions and the use of AmeriCorp members. The record clearly indicates that the decision to eliminate the positions was independent of the decision to contract with the California Human Development Corporation.

(2) As none of the AmeriCorp members spoke Hmong, they clearly did not perform the work of the bilingual assistant.

(3) The AmeriCorp members performed the same duties in 2001-02 that they had performed in 2000-01, before

the assistant positions had been eliminated. The AmeriCorp members did not perform work that was "customarily and routinely performed" by the instructional assistants. The work performed by the AmeriCorp members is more closely aligned with teachers than with the assistants. The AmeriCorp members' role as tutors and mentors to specific students routinely extended their involvement into the students' homes and communities, responsibilities more akin to teachers than assistants.

(4) AmeriCorp members performed only a de minimus amount of the work of the eliminated positions. The members did not perform the instructional assistant work on a customary and routine basis. Therefore, no contracting-out of bargaining unit work occurred, distinguishing this case from the situation that occurred in 1997.

(Binding Grievance Arbitration)

• Furloughs

Yolo County Deputy Sheriff's Assn. and County of Yolo (4-15-05; 25 pp.) *Representatives:* Timothy K. Talbot, Esq. (Carroll, Burdick & McDonough LLP), for the union; Steven M. Basha and Troy B. Smith (county counsel), for the county. *Arbitrator:* Joe H. Henderson.

Issue: Did the county violate the MOU by furloughing employees?

Union's position: (1) Yolo County implemented an employee furlough program for the 2004-05 fiscal year in violation of the MOU between the par-

ties. The county required association members to "suffer" a 60-hour pay reduction over 22 pay periods. The impact of the reduction was more dramatic for employees hired after the furlough implementation and prior to December 20, 2004, because the 60-hour reduction was completed over fewer pay periods, causing a more noticeable reduction in their paychecks.

(2) The MOU, which does not contain provisions for any form of furlough, does contain a zipper clause. The zipper clause precludes changing any terms of the MOU, such as adding a furlough provision, without mutual agreement. The only way for the furlough policy to apply to employees was for the union and the county to negotiate and agree to the application of the policy. The union did not agree to the furlough policy, nor was it required to bargain over it with the county because of the zipper clause.

(3) The county's furlough policy itself states that it applies "unless otherwise provided by a memorandum of understanding or law." As stated, the MOU does not provide for a furlough policy.

(4) The county cannot furlough employees under the management rights clause of the agreement. Furloughs are within the scope of representation under the MMBA and must be bargained. They are not subject to the "merits, necessity, or organization" exception to the duty to bargain under Gov. Code Sec. 3504. Furloughs impact employee compensation and work hours, which are terms and conditions

of employment agreed to in the MOU. The county cannot change the terms and conditions without agreement.

(5) The county incorrectly argued that the layoff policy covers furloughs. However, there is nothing in the layoff policy that allows for a reduction in employee hours. The policy only allows for a reduction in workforce through severance of employment status.

(6) The association's reliance on the zipper clause does not constitute a waiver of the union's right to meet and confer with the county over any future proposals to establish a furlough policy applicable to the represented employees.

County's position: (1) The MOU allows management to lay off employees for lack of work, lack of funds, or other reasonable and legitimate operations. Furloughs are temporary layoffs.

(2) Furthermore, the MOU allows management to take action as necessary to organize and operate the county in the most efficient and economical manner in the best interest of the public. The county was facing a budget deficit and determined that the temporary layoffs were the appropriate way to deal with the deficit, and so exercised its management rights as provided for in the MOU. The furlough was a cost-savings measure that fell within the management rights provisions of the agreement.

(3) A furlough is not a change in pay. An employee's base salary remains the same while on furlough; therefore a furlough does not constitute a salary reduction.

(4) In 1995, the board of supervi-

sors adopted an ordinance concerning furloughs that applied to all employees. While the county was willing to discuss the effects of the furloughs on employees prior to the adoption of the ordinance, in doing so it did not relinquish its management right to make financial decisions or decide to lay off employees. If the county were prohibited from exercising its budgetary rights, then it would have to be stated in the collective bargaining agreement. The county never waived the right to make fiscal decisions, such as furloughing employees.

(5) The association was aware that the county was applying the furlough policy to them, but did not raise it as an issue during negotiations for the 1997-99 MOU.

(6) The county was not obligated to meet and confer with the union over the decision to furlough because it was adopted as a budgetary decision. The county was required to offer to meet and confer with the union over the effects and implementation of the furloughs, and it did so. However, the union declined to provide any input at a meeting held for this purpose, claiming the furloughs did not apply to them. Therefore, the union should not have a right to complain about how the furloughs were implemented.

Arbitrator's decision: The grievance was upheld.

Arbitrator's reasoning: (1) Article 33 of the MOU states that it is a contract between the county and the union as to the matters negotiated, including all other matters relating to wages, hours,

working conditions, and other terms and conditions of employment of the bargaining unit members. Neither the association nor the county have the right to unilaterally change the terms and conditions.

(2) The zipper clause protects the MOU and prevents either party from making any unilateral changes to the agreement.

(3) Any change to mandatory subjects of bargaining as set forth by the MMBA and covered by the MOU must be negotiated.

(4) Management rights, such as making budget determinations, do not give the board the right to ignore the contract.

(5) The furlough policy was a change to the agreement.

(6) The county violated the agreement by making a unilateral change without negotiating with the union.

(Binding Grievance Arbitration)

• Discipline — Just Cause

County of Sacramento and International Union of Operating Engineers, Stationary Engineers Loc. 39, AFL-CIO (6-2-05; 10 pp.) *Representatives:* Felix De La Torre, Esq. (Weinberg, Roger & Rosenfeld), for the union; Timothy D. Weinland, Esq. (Office of County Counsel), for the county. *Arbitrator:* Jerilou H. Cossack.

Issue: Was it appropriate to reduce the grievant's pay step for 11 pay periods?

County's position: (1) The grievant is a park maintenance worker at the county golf course.

(2) On April 2, 2004, the grievant's supervisor found him sleeping on his riding mower while it was running. The supervisor observed the grievant for a few minutes before turning off the mower and waking the grievant. It is unsafe to operate the mower when drowsy because the equipment can easily move on its own when turned on. The operator does not need to engage any gears; pressure on the pedal is all that is required to make the mower move. The supervisor wrote a memo documenting the incident.

(3) The grievant had been found sleeping on equipment with the engine running on two prior occasions and had been informed that it was unsafe to operate equipment when he was not alert.

(4) On April 5, 2004, the grievant failed to call in within the first 15 minutes of his shift to say he would be late; he never showed up for work that day. On April 9 and 10, the grievant called in sick.

(5) Based on his continuing pattern of misconduct, the grievant's pay was reduced one step for 11 pay periods. The disciplinary action took into account the four incidents in April and was the appropriate response to the grievant's transgressions.

Union's position: (1) The grievant was not sleeping on his mower on April 2; he was in the process of mowing the green when his supervisor approached him. Because the grievant was focused on his task and wearing earplugs, he did not notice the supervisor until his name was shouted. The supervisor could not have approached the grievant as claimed because he would have

had to walk in front of the mower and the grievant would have noticed him.

(2) The grievant was not aware of being counseled for sleeping on equipment on other occasions.

(3) The grievant called in on April 5, but could not recall the exact time he made the call indicating he would not be coming to work. The employer failed to prove that the grievant did not call in on time.

(4) The grievant's relationship with his supervisor had been strained since the grievant put the wrong flag in one of the greens during a tournament. Since then, his supervisor has been "out to get" the grievant. The story about finding the grievant asleep on the mower was fabricated.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) It is unreasonable to believe that the supervisor would fabricate the accusation because the grievant placed the wrong flag on a green. The supervisor was clear and unequivocal about seeing the grievant asleep on his mower and wrote a memorandum that same day capturing his observations. The memo was, with only a minor deviation, consistent with his testimony. Thus, the evidence supports the supervisor's accusation that he found the grievant asleep on his mower.

(2) The employer did not prove the grievant called in late on April 5. It produced no records or evidence to support the allegation. However, the grievant admitted that he did not report to work that day and provided no evidence that his absence was approved.

(4) The grievant had sick leave on the books on April 9 and 10, and the employer failed to prove that the grievant was on controlled sick leave at that time, which would have required a doctor's verification. Therefore, there is no proof the grievant engaged in any misconduct by using his sick leave on those days.

(5) The reduction in pay for 11 pay periods was a reasonable penalty for the grievant's proven offenses.

(Binding Grievance Arbitration)

Resources

Due Process Rights for Public Employees

The right to procedural due process is one of the most significant constitutional guarantees provided to citizens in general and to public employees in particular. Its entitlement is created by constitutional provisions and other local laws or enactments. To help employees and employers understand what is encompassed by this right and to determine eligibility, CPER has published its fourteenth title, *Pocket Guide to Due Process in Public Employment*. Written by Emi Uyehara, a partner in the law firm of Liebert Cassidy Whitmore, the guide provides an overview of due process to assist public employees and their employers in understanding their respective rights and obligations.

The guide explains who is protected, what actions invoke due process protections, what process is due to employees, remedies for violations of the right, and more. Along with information applicable to all public employees, specific sections focus on those in state civil service, public officers, police officers, school district employees, and community college district employees. The guide includes key cases that further illuminate the scope of due process protections.

Portable, readable, and affordable, *Pocket Guide to Due Process in Public Employment* is valuable as both a source of current information and a training tool. Copies are \$12 each. Order directly through the CPER website, <http://cper.berkeley.edu/> or download an order form. Visa and Mastercard are accepted.

Chronically Overworked

One in three American employees say they are chronically overworked, according to data published earlier this year by the Families and Work Institute. Of the more than 1,000 wage and salaried employees interviewed for the study, *Overwork in America: When the Way We Work Becomes Too Much*, 54 percent said they felt overwhelmed by how much work they were asked to complete. The study identifies for the first time why being overworked and feeling overwhelmed have become pervasive in the American workplace.

“Ironically, the very same skills that are essential to survival and success in this fast-paced global economy, such as multi-tasking, have also become the triggers for feeling overworked,” reports Ellen Galinsky, president of the institute and a lead author of the study. “Being interrupted frequently during work time and working during non-work times, such as while on vacation, also are contributing factors for feeling overworked.”

Employees’ priorities have an effect on their state of mind as well. Employees who are work-centric are more likely to be overworked than those who maintain a dual-centric lifestyle, giving equivalent priority to their lives on and off the job. Possibly contrary to expectation, employees with greater family responsibilities were no more likely to be overworked than those without these responsibilities, except for those coping with elder care.

Because there is a great deal of interest in vacations and their relationship to stress reduction, the study explored this issue in depth. Researchers found that 79 percent of employees had access to paid vacations in 2004, yet more than one-third of employees (36 percent) had not and were not planning to take advantage of their full vacation allotment. On average, American workers take 14.6 vacation days annually with more than one-third (37 percent) taking fewer than seven days. Only 14 percent of employees take vacations of two weeks or more.

“Perhaps the most important finding from the study related to vacations is that the more one works during vacations, the more overworked one is. Although one might hypothesize that employees who work during vacations are doing themselves a favor in avoiding a pile-up of work when they return,” says Terry Bond, vice president of the institute and an author of the study, “the opposite seems to be true. Sometimes being truly away from work helps employees return less overwhelmed and more able to engage energetically in work.”

The author emphasizes that employers should take seriously being overworked. Employees who are overworked are more likely to make mistakes at work, to be angry with

their employers for expecting them to do so much, and to resent coworkers who do not work as hard as they do. In addition, nearly half of employees who feel overworked report that their health is poor.

For more information about *Overwork in America: When the Way We Work Becomes Too Much*, including a self-assessment quiz, go to <http://www.familiesandwork.org>. The Families and Work Institute is a nonprofit center for research that provides data to inform decisionmaking on the changing workforce, changing family, and changing community.

Leaders in Higher Education

Through the stories of six prominent university presidents — including former U.C. President Clark Kerr — the author looks at what it takes to lead an institution of higher education. The stories focus on three themes: the university as a complex organization; the patterns, theories, and commonalities of leadership; and case studies of exemplary leaders. Each leader's story covers childhood; formal schooling; senior leadership roles and major defining events, successes, and failures; and forecasts for higher education and its leadership. The profiles include an assortment of public and private universities, representing a diverse group of leaders who faced different challenges in terms of control, financing, and oversight.

The author explains the enormous role that persuasion (rather than domination or power) plays in successful leadership and emphasizes that persuasion is particularly effective in the university environment because stakeholders are so varied and so numerous.

Portraits in Leadership: Six Extraordinary University Presidents, by Arthur Padilla (2005) 288 pp. Praeger Publishers, <http://www.greenwood.com/>. Hardcover, \$39.95.

L.A.'s Living Wage Law

In June, U.C. Berkeley's Institute of Industrial Relations released the results of its *Los Angeles Living Wage Analysis*, the first living wage research in the country to use rigorous

random sample surveys of workers and employers affected by a living wage law.

The section titled, "Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses," includes the findings that employers have cut costs by making small reductions in employment and fringe benefits; employment reductions total an estimated 112 jobs, representing 1 percent of all living wage employment in affected firms; and employers cut fringe benefits for less than 5 percent of living wage jobs in affected firms, including cuts in health benefits, merit pay, and bonuses.

The study also found that the use of overtime has declined, representing a further reduction in labor costs. And, training for new hires stayed the same at living wage firms, while non-living wage firms have increased their training, representing a relative decrease for living wage firms.

Labor turnover was found to decline as a result of the ordinance. Current rates of turnover at living wage firms average 32 percent, compared to 49 percent at comparable non-living wage firms. These turnover reductions represent a cost savings for the average firm that is 16 percent of the cost of the wage increase, based on various estimates of the cost of replacing a low-wage worker.

The ordinance has had no impact on the use of part-time workers, the intensity of supervision, the tendency to fill vacancies from within or the use of equipment and machinery. Firms have not actively displaced workers in order to hire workers who are better qualified, and most firms have not changed hiring standards as a result of the ordinance. Compared to the original workforce, workers hired after the living wage have similar levels of education, are of similar age, and are no less likely to be members of racial or ethnic minority groups.

New hires are more likely to be male and to have higher levels of formal training. Fifty-six percent of new hires are male, compared to 45 percent of workers hired before the living wage ordinance took effect. Twenty-two percent of new hires had formal training before being hired, while

only 12 percent of workers hired before the law had such training. These changes occurred primarily through normal attrition. They suggest somewhat diminished job opportunities in city contract work for women and for workers with less formal training, as compared to before the ordinance.

The full 78-page text of the Summary Report can be found online at http://www.losangeleslivingwagestudy.org/Examining_the_Evidence.pdf/.

Safety First

In 2001, there were approximately 3.7 fatal workplace injuries per 100,000 workers (including 9/11), workers made 2.1 million trips to the emergency room, and workers' compensation insurance cost employers \$63.9 billion. In addition, the indirect costs of workplace accidents — lost wages, equipment damage, and training and rehabilitation — were several times this amount. Despite the fact that human resource management (HRM) practices can directly affect the severity and costs of such accidents, HRM usually is seen as an auxiliary function that contributes nothing to an employer's output.

Richard J. Butler and Yong-Seung Park hope to draw attention to this oversight by presenting a scholarly analysis of the impact of various HRM practices on workers' compensation costs; specifically, they focus on which practices lower costs and whether the impact is the result of changes in technical efficiency or workers' behavior. Their results show that HRM practices do affect employees' injury claims and may help reduce their frequency and severity.

Safety Practices, Firm Culture, and Workplace Injuries, by Richard J. Butler, Yong-Seung Park (2005) 105 pp. W.E. Upjohn Institute for Employment Research, <http://www.upjohninst.org/>. Hardcover, \$40; softcover, \$15.

A Critique of Teacher Accreditation

The National Council for Accreditation of Teacher Education has been in existence for 50 years and claims to accredit approximately 700 teacher education programs that

prepare two-thirds of the nation's teachers. The authors argue, however, that there is no convincing research that NCATE's "stamp of approval" makes a difference in teacher preparation programs or in beginning teachers' competencies. In their opinion, NCATE is masterful at self-promotion, marketing, and aligning itself with policymakers and politicians. The book illustrates the NCATE processes and requirements the authors feel are unnecessary, and brings to light the high costs expended by universities seeking NCATE accreditation.

The authors make the case that NCATE's standards do not address the major issues that impact teaching and learning. They say that NCATE supports teacher testing in the face of evidence that such tests lack predictive validity. The time spent by teachers in fulfilling NCATE demands, they argue, would be better spent on their students and research. And the authors urge teacher educators, college faculties and administrators, state education officials and legislators, parents of school-age children, and concerned citizens to take a second look at this powerful organization, and to examine what it has done to teacher education in the last half century.

Trivializing Teacher Education: The Accreditation Squeeze, by Dale D. Johnson and Bonnie Johnson (2005) 272 pp. Rowman and Littlefield Publishers, Inc., <http://www.rowmanlittlefield.com/>. Hardcover, \$75; softcover, \$26.95.

A Voice for Nurses

As the need for nursing services increases, members of the largest profession in health care must become more visible, vocal, and influential. This communication guidebook helps nurses understand and overcome the "self-silencing" that often leads RNs to downplay their expertise and their contributions to the care of the sick and the health of the public. The authors' goal is to teach nurses, nurse educators, and nurse researchers the skills to explain their work to other health-care professionals, journalists, policymakers, and political representatives.

The book features stories about nurses who ensure that patients receive appropriate, timely, and even life-saving care, i.e., nurses who make all the difference but whose contributions are neglected in medical charts and “thank-you” notes. Detailed accounts of nurses who make their voices heard and who take their concerns public are also included — to show how those successes can be duplicated. Buresh and Gordon draw on real-world examples to help nurses gain respect for themselves as professionals, communicate well with both patients and health-care colleagues, understand how the news media work, collaborate with public relations professionals, write effective letters-to-the-editor and publish op-ed pieces, appear on television and radio, and promote research on nursing.

From Silence to Voice: What Nurses Must Know and Communicate to the Public, by Bernice Buresh and Suzanne Gordon (2003) Cornell University Press, <http://www.cornellpress.cornell.edu/>. Softcover, \$19.95.

Public Employment Relations Board

Orders & Decisions

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

EERA Cases

Unfair Practice Rulings

Subcontracting within scope of representation: Oakland USD.

(*California School Employees Assn. and its Chap. No. 1 v. Oakland Unified School Dist.*, No. 1770, 6-21-05; 16 pp. + 58 pp. ALJ dec. By Chairman Duncan, with Members Whitehead and Shek.)

Holding: The board adopted the ALJ's proposed decision finding that the district violated EERA Secs. 3543.2 and 3543.5(a), (b) and (c) by unilaterally subcontracting police services to the Oakland Police Department. (See pp. 29-33, in the issue of *CPER*, for the complete story.)

Union cannot distribute political material to teachers' mailboxes: San Leandro USD.

(*San Leandro Teachers Assn. v. San Leandro Unified School Dist.*, No. 1772, 6-28-05; 2 pp. + 5 pp. B.A. dec. By Member McKeag, with Chairperson Duncan and Member Whitehead.)

Holding: The union cannot use school mail facilities to distribute political material, regardless of who pays for the material or when it is distributed, because the prohibition on the use of district funds or equipment imposed by Education Code Sec. 7054 supercedes access rights under EERA.

Case summary: San Leandro Teachers Association distributed to teachers' mailboxes two newsletters that urged them to support school board candidates endorsed by the association. The newsletters were prepared and distributed on non-work time. The district notified the association that the newsletters' political endorsements were impermissible under Ed. Code Sec. 7054 and warned that the district would not allow the association access to faculty mailboxes if future distributions contained such endorsements. Section 7054 provides that "[n]o school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district."

The association filed an unfair practice charge alleging the district violated EERA by prohibiting the union from distributing its newsletters with its political endorsements in teachers' mailboxes.

The board agent relied on *San Diego CCD* (2001) No. 1467, 152 *CPER* 86, where the board held that Ed. Code Sec. 7054 supercedes access rights under EERA and, therefore, unions may not use school district mail facilities to distribute political material, regardless of who pays for the material or when it is distributed. The B.A. noted that while the political items were not the only issues addressed in the

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(Note: PERB headquarters in Sacramento will provide copies of decisions, currently at \$5 a case, plus \$3 shipping and handling. Also, PERB decisions are collected in the government documents section of all state depository libraries, including the libraries of major universities. Most county law libraries and major law school libraries also receive copies. The decisions are also available on PERB's website at <http://www.perb.ca.gov>.)

newsletters, their inclusion made it unlawful to distribute the newsletters in the teachers' mailboxes. Accordingly, the B.A. dismissed the charge.

The board adopted the B.A.'s decision as that of the board itself and dismissed the charge without leave to amend.

PAR program within terms and conditions of employment: Standard S.D.

(*Standard School Dist. v. Standard Teachers Assn., CTA/NEA*, No. 1775, 8-26-05; 4 pp. + 19 pp. ALJ dec. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: The association violated EERA when it unilaterally refused to participate in the negotiated local peer assistance and review policy.

Case summary: In 1999, the legislature created the California Peer Assistance and Review Program for teachers. Codified at Education Code Secs. 44500-44508, it confers on districts and exclusive representatives the authority to develop local peer assistance and review programs that meet conditions set out by statute. The legislature also amended the Stull Act to provide that PAR participation results would be included in teachers' evaluations and that teachers receiving unsatisfactory ratings would participate in the program.

In January 2001, during reopener negotiations for the 1998-2001 contract, the district and the association agreed to a PAR program; it was incorporated into the parties' 1998-2001 agreement.

With the collective bargaining agreement set to expire on June 30, 2001, the parties began negotiations for a successor agreement in the spring of 2001. On July 26, while negotiations were still ongoing, the association advised the district that it should cease and desist operation of the PAR program because the agreement had expired. On September 5, the association further informed the district that since contract negotiations had not settled, and since the PAR program was a contractual issue, association members would not be participating in the program. In response, the district filed an unfair practice charge alleging that the association violated EERA by unilaterally changing the negotiated policy.

The ALJ began by analyzing whether the PAR program was a term and condition of employment within the scope of representation. The ALJ found that, while the legislation did not explicitly state that the program was a term or condition of employment, two facts were persuasive: the legislation required districts to negotiate the development and implementation of the program, and it allowed participating teachers to be referred by the union pursuant to local agreements. Furthermore, the ALJ noted that EERA Sec. 3543.2(a) states that terms and conditions of employment include "procedures to be used for evaluation of employees." Lastly, the ALJ analyzed the PAR program in light of the test for unilateral change set forth in *California State Employees Assn., SEIU Loc. 1000* (2004) No. 1601-S, 166 CPER 68, noting that in order to be within the scope of representation, a program does not need to be an evaluation procedure itself, just logically and reasonably related to evaluation procedures. Applying the *CSEA* test, the ALJ found that the program was related to and intertwined with the evaluation procedure, necessarily and appropriately covered by negotiations between labor and management, and that negotiations over the program would not significantly intrude on the union's managerial prerogatives essential to its mission. Thus, the ALJ concluded that the PAR program was within the scope of representation and subject to negotiation.

The ALJ discounted the association's argument that the PAR agreement expired with the contract; he found that the PAR agreement was analogous to an arbitration clause, which the board has held generally does not expire when a collective bargaining agreement expires. The ALJ found no merit to the association's arguments that its repudiation of the program was not a change in policy or that the district had waived the right to challenge the action because it did not make a demand to bargain. The ALJ stated the association's repudiation was "total and unambiguous," and the district was not required to pursue negotiations from that position. Therefore, the ALJ concluded that the association unilaterally and unlawfully changed the negotiated PAR policy in violation of EERA.

The association filed exceptions to the ALJ's decision, citing a decision by the Commission on Professional Competence involving a certificated employee in another school district. The board held that the decision did not fall within the parties' stipulation that the ALJ should consider the PAR program enabling legislation and relevant legislative history; the decision concerned an entirely different district and an individual certificated employee. Furthermore, the association failed to show that this information was not available or discoverable at the time the evidence was presented to the ALJ. The board adopted the decision of the ALJ as a decision of the board itself.

Representation Rulings

Food facility manager is management position: Sacramento City USD.

(*Sacramento City Unified School Dist. and Classified Supervisors Assn.*, No. 1773, 7-15-05; 26 pp. + 14 pp. H.O. dec. By Chairperson Duncan, with Member McKeag; Member Whitehead concurring; Member Shek dissenting.)

Holding: The unit modification petition was denied because the position in question was a management job that did not share a community of interest with the cafeteria site supervisors.

Case summary: In 2002, the district moved its headquarters and created two managerial positions to oversee the food facility at the new location; these positions replaced the manager of the old facility. The association filed a unit modification petition with the board seeking to modify the bargaining unit to include these new positions. The district later combined the positions into one managerial post. The manager, who the district classified as management, was responsible for operations and catering at the new food facility. His duties included ensuring the facility made a profit, developing policies for the facility, and determining menus and vendors.

The hearing officer noted that in *Lompoc USD* (1977) EERB No. 13, 33 CPER 42, and *Hartnell CCD* (1979) No. 81, 40 CPER 57, 67, the board determined that, to be ex-

cluded, a manager must both formulate district policies and administer district programs. Here, the H.O. found the evidence demonstrated that the manager had the authority to exercise his discretion to develop and implement policies affecting the district, used independent judgment in administering the operations and catering department, and had significant responsibilities for formulating policies and administering programs. Based on the evidence, the H.O. held the position to be that of a management employee and therefore excluded from the bargaining unit. The H.O. dismissed the unit modification request, and the association filed exceptions to the H.O.'s proposed decision.

The board agreed that the manager had autonomy over institutional policies relating to the food facility that were different and apart from those of the school cafeteria site supervisors. The board found that the district had met its burden in establishing a manager was a management job without a community of interest with the cafeteria site supervisors. Accordingly, the board adopted the H.O.'s proposed decision and dismissed the unit modification.

Member Whitehead concurred with the result but not the rationale of the plurality opinion, without further comment.

Member Shek dissented, finding that the district had not sustained its burden of proving by a preponderance of the evidence that the manager had significant responsibility in formulating district policy and administering district programs. Shek held that the evidence showed that the manager did not have any significant responsibility in implementing policy and therefore would not withstand the test set forth in *Hartnell CCD* (1979) No. 81, 40 CPER 57, 67. She therefore concluded that the manager should be included in the supervisory unit.

Duty of Fair Representation Rulings

Uncorroborated illness not sufficient to excuse late filing: UTLA.

(*Mohseni v. United Teachers of Los Angeles*, No. Ad-348, 6-10-05; 3 pp. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: A late filing was not excused because the charging party failed to corroborate his illness and provide a reasonable and credible explanation of how it prevented him from filing promptly.

Case summary: Masoud Mohseni requested that the board accept his late-filed exceptions to a proposed ALJ decision because Mohseni had been sick for several months. The exceptions were due to be filed with the board by January 25, 2005; Mohseni did not file them until March 17. Mohseni's request stated that he had visited several doctors and would provide proof if necessary.

Citing *North Monterey County USD* (1996) No. Ad-274, 118 CPER 81, and *State of California (Dept. of Social Services)* (2001) No. Ad-308-S, 148 CPER 751, the board noted that when a late filing is caused by an alleged illness, the party still must demonstrate a conscientious effort to timely file. The board found that the evidence of Mohseni's doctors' visits, when uncorroborated by a reasonable and credible explanation of how his illness prevented his prompt filing, did not reasonably excuse him from his obligation to make a conscientious effort to file timely. Accordingly, the board denied Mohseni's request to accept his late-filed exceptions.

Union's reasonable explanation for not proceeding to arbitration is sufficient: AFT.

(*Paige v. AFT Loc. 1521*, No. 1769, 6-10-05; 3 pp. + 7 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The duty of fair representation charge was dismissed because the union provided a reasonable explanation for its decision not to pursue the charging party's grievance to arbitration.

Case summary: On November 3, 2003, the union agreed to proceed to arbitration with a grievance filed on behalf of James Paige. On August 4, 2004, the union informed Paige that, based on a committee review, it had decided not to pursue the grievance because the department had not taken action until after Paige had received several unsatisfactory evaluations and had refused to accept recom-

mendations for improvement. Paige argued that the union violated its duty of fair representation by not pursuing his grievance and by not informing him that its initial decision was provisional pending further review. Paige filed a charge against AFT Local 1521, alleging that the union violated its duty of fair representation.

The regional attorney explained that in order to state a prima facie violation of the duty of fair representation, the charging party must show that the union's conduct was arbitrary, discriminatory, or in bad faith. Citing *California State Employees Assn. (Cohen)* (1993) No. 980-S, 99 CPER 47, the R.A. stated that filing a grievance does not commit the union to proceed through all steps of the grievance process and that a union may withdraw a grievance if facts come to light that cast doubts on the merits of the grievance. The R.A. stated that the union provided a reasonable explanation for its decision not to proceed to arbitration and the charge did not demonstrate that the union failed to base its decision on a rational assessment of the grievance. Accordingly, the R.A. dismissed the charge.

Paige appealed the R.A.'s dismissal to the board, raising new allegations and providing new supporting evidence. The board refused to consider the new information because it was known to Paige at the time the initial charge was filed and he 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.

Late-filed extension request denied: AFT College Staff Guild.

(*Mrvichin v. AFT College Staff Guild, Loc. 1521*, No. Ad-349, 6-17-05; 4 pp. By Member Shek, with Chairperson Duncan and Member Whitehead.)

Holding: The request to excuse the late filing of a second request for extension of time to file an appeal was denied because the party failed to demonstrate how his medical condition or pending litigation prevented him from timely filing.

Case summary: In November 2004, a board agent dismissed George Mrvichin's unfair practice charge.

Mrvichin requested and was granted an extension of time to file an appeal until on or before January 20, 2005. On January 20, the appeals assistant notified the parties by mail that no appeal had been filed and the case was closed. That same day, after the assistant had issued her letter, PERB received a second request from Mrvichin for an extension of time. The assistant denied the request because it was not filed at least three days before the expiration of the time set for filing the appeal. Mrvichin then filed an administrative appeal of the assistant's denial of his extension, asserting that his late-filed request was based on his medical condition, the need to conduct additional research, and pending litigation before the National Labor Relations Board.

PERB Reg. 32136 allows the board to excuse a late filing for good cause. In previous cases, good cause had not been found when the party failed to state how an illness prevented a timely filing. In *California State Employees Assn., Loc. 1000 (Janowicz)* (1996) No. Ad-276-S, 119 CPER 82, the board declined to find good cause where the party claimed that a ruling concerning litigation in another forum excused a late filing.

In this case, the board determined that Mrvichin had failed to provide information specifically describing how his medical conditions prevented him from timely filing. The board held that Mrvichin had not shown good cause to excuse the late filing, and it dismissed the request.

HEERA Cases

Unfair Practice Rulings

Allegations concerning the Skelly hearing were untimely: U.C.

(*Sarka v. Regents of the University of California*, No. 1771-H, 6-24-05; 4 pp. + 10 pp. R.A. dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The charges concerning Skelly hearing deficiencies were untimely, and the allegation that an independent investigator was an agent of the university was not supported.

Case summary: On July 2, 2002, the university issued George Sarka a notice of its intent to terminate him. A Skelly hearing was held two weeks later and, on August 16, the university issued Sarka a final dismissal notice. On May 6, 2003, an independent-party reviewer held a factfinding hearing regarding Sarka's termination. On August 31, the IPR issued his report stating the termination was appropriate. On October 1, the executive chancellor concurred with the IPR's finding.

On April 2, 2004, Sarka filed an unfair practice charge alleging the university violated his Skelly rights by allowing Sarka's supervisor to participate and conduct the Skelly meeting, and by failing to provide him with documents prior to the meeting. He also asserted that the IPR erroneously considered whether Sarka's union activity was the basis for Sarka's termination. In an amended charge Sarka alleged that the university failed to provide him with documents he requested at the factfinding hearing and that he did not receive the IPR's report until October 3, 2003.

The regional attorney concluded that the allegations, with the exception of those concerning the IPR's report, were untimely since the charging party knew about the events when they occurred, more than six months prior to the filing of the charge. The R.A. dismissed the remaining allegation because Sarka failed to show that the IPR's conduct was attributable to the university. In addition, the R.A. noted that the board's jurisdiction does not include enforcement of due process rights under the U.S. or California Constitutions and therefore would not cover the allegations of due process violations concerning the Skelly hearing.

The board upheld the R.A.'s determination that charges regarding the Skelly hearing and document requests were untimely. The board noted that Sarka's belief that the IPR behaved like an agent of the university was not sufficient to support an allegation that the IPR was an agent. Accordingly, the board dismissed the charge without leave to amend.

Representation Rulings

CFA modification rejected: CSU.

(Trustees of the California State University and California Faculty Assn., No. Ad-347-H, 6-9-05; 2 pp. + 11 pp. R.D. dec. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: CFA's unit modification petition was denied because it was not filed until after UAW had been recognized as the exclusive representative of the academic student union.

Case summary: In January 2004, UAW filed a petition to become the exclusive representative of a unit of academic students at CSU. The board previously had granted a 1991 unit modification petition, requesting to exclude students from CFA Unit 3. In February 2004, CFA filed a unit modification petition seeking to include instructional student positions in Unit 3. The board upheld its previous ruling and denied CFA's modification petition. In August, the California Alliance of Academic Student Employees/UAW became the exclusive representative of an academic student unit. While the UAW petition did not list the instructional student assistant classification, the classification was created in the subsequent agreement by the parties in order to differentiate ISAs from the student assistants who did not grade, tutor, or instruct. In October, CFA filed the current petition requesting that the board add the classification of instructional student assistants to Unit 3.

The regional director stated that the board certification of UAW as exclusive representative was issued following an administrative determination that UAW had demonstrated proof of majority support among employees included in the agreed-on unit. The R.D. noted that CFA did not file a competing claim of representation while the UAW petition was pending and did not file proof of employee support. Furthermore, the R.D. observed that while the ISA classification technically was new, the work being performed by the incumbents in the classification was identical to the work performed by employees covered by the UAW petition. As the R.D. noted, there was no competing petition for the stu-

dent employees in question when the UAW agreement was reached; therefore the current petition was denied.

The board adopted the R.D.'s decision as that of the board itself and dismissed the petition without leave to amend.

MMBA Cases

Representation Rulings

Only employee organization may petition for unit modification: Modesto Irrigation Dist.

(Tacke v. Modesto Irrigation Dist., No. 1768-M, 6-10-05; 7 pp. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The unfair practice charge was dismissed because PERB regulations and the local employee relations rules provide that employee organizations, not employees, may petition for unit modification.

Case summary: In 2004, the Modesto Irrigation District's board of directors amended its local employer-employee relations resolution. It placed the district job classifications into three bargaining units. Professional employees, including senior engineers, were placed in the professional and supervisory unit. Fourteen professional employees submitted a petition to the district requesting that it move them to the management and confidential unit. The district general manager responded that it would not be appropriate to place the engineers in the management and confidential group, but that the group's request met the requirements for seeking a separate unit. Two months later, eight professional employees submitted a petition to the district requesting they be placed in a separate unit. The district denied the request as untimely, stating that it fell outside the open period for unit modification requests under local rules.

Spencer Tacke filed an unfair practice charge alleging that the district violated the MMBA by placing senior engineers in a bargaining unit with nonprofessional employees.

The board agent stated that while MMBA Sec. 3507.3 protects the right of professional employees to be represented separately from nonprofessional employees, it does not prohibit professional employees from being represented in a unit including nonprofessionals; nor does it provide a right for employees to opt out of union representation when there is no separate professional employees' unit. The B.A. noted that the first petition only requested that professionals be treated the same as management and confidential employees and that the second petition only requested a separate unit, instead of requesting that the employees be "represented separately from nonprofessional employees by a professional organization." The B.A. determined that neither petition met the requirements of MMBA Sec. 3507.3 and dismissed the charge.

In its review of the B.A.'s dismissal, the board first affirmed that MMBA Sec. 3507.3 affords professional employees the right to a separate unit. The board also observed that the district's local rules include procedures which authorize an employee organization, not an individual employee or group of employees, to file an authorized petition to create a separate unit of professional employees. The board therefore concluded that the unfair practice charge against the district should be dismissed because the petition was filed by professional employees, not an employee organization.

Duty of Fair Representation Rulings

Union's representation of grievant satisfied duty: SEIU Loc. 790.

(*Paez v. SEIU Loc. 790*, No. 1774-M, 8-10-05; 2 pp. + 10 pp. R.A. dec. By Member Neuwald, with Members Shek and McKeag.)

Holding: There was no duty of fair representation violation because the union called most of the charging party's witnesses and presented a large amount of evidence to support his claim.

Case summary: Ricardo Paez, a custodial supervisor, was terminated by the City and County of San Francisco for violating the city's sexual harassment policy and engag-

ing in other inappropriate and unprofessional conduct. SEIU represented Paez in the grievance process up through arbitration and provided him with an attorney for assistance at a hearing before the civil service commission. After Paez's termination was upheld, he filed a charge with the board, alleging that SEIU violated its duty of fair representation by not calling all the witnesses he had suggested and failing to provide the arbitrator with all the available evidence.

The regional attorney observed that facts in this case showed the union provided Paez with an attorney who presented evidence and witnesses on his behalf, and vigorously cross-examined the city's witnesses. This was supported by the arbitrator's decision, which noted the amount of evidence the union presented on Paez's behalf. The R.A. found that the duty of fair representation does not require that the union introduce every document, raise every argument, or call every witness the charging party thinks is important. Citing established PERB precedent, the R.A. found that since the union called most, if not all, of Paez's witnesses and presented a large amount of evidence to support his claim, he had failed to state a prima facie violation of the duty of fair representation.

Paez appealed the R.A.'s dismissal and submitted additional documentation to support his allegations. The board refused to consider this information because it was known to Paez at the time the initial charge was filed and he 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.