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letter from the editor

Dear *CPER* Readers:

If you consider this issue of *CPER* as a snapshot, it is immediately obvious that the public sector arena is dynamic and complex. In my interview with PERB Chair John Duncan, for example, one can sense that the board is a maturing, evolving entity, built on a legacy of the past, but clearly adapting to its new responsibilities. It was a pleasure to spend time getting to know John. I came away from our conversation with respect for his commitment to the task at hand.

The musings of Greg Dannis have appeared in *CPER* many times and, as has been true of past submissions, this article offers even-handed and thoughtful insight into the collective bargaining process that only a seasoned practitioner like Greg can provide. His negotiating strategy provides much food for thought — to labor and management representatives alike.

Recent developments include a newly forged agreement for attorneys and administrative law judges in state service that is likely to pique the interest of other bargaining units. Difficult bargaining is under the spotlight in San Francisco and Oakland, involving both classified and certificated personnel. In Santa Cruz, bus operators are back on the job after a month-long transit strike. Higher education employees in the CSU system have come away with a new agreement but continue to wrestle with the issue of merit pay. New federal court decisions addressing harassment and disability discrimination are reviewed in this issue, along with important rulings affecting undocumented workers and uniform allowances.

And then, of course, there's the fallout from the special election. More on that in future issues. But suffice it to say that the defeat of the propositions pushed by Governor Schwarzenegger have given a real boost to the public sector labor unions that went to the mat on these issues. What does this mean for 2006? We won't have long to find out!

Carol Vendrillo



CPER Director and Editor

How to Negotiate Using Core Values

Gregory J. Dannis

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I negotiate for a living. I travel to a different district everyday, sometimes even two or three. Each district is a different country, with distinct personalities, politics, protocols, and cultures.

Often, I am asked by the board or administration to review the negotiated agreement and recommend changes for upcoming negotiations. In many districts, I have served 20 or more years as chief labor counsel, and so I am familiar with the language of the agreement, and probably negotiated and wrote most of it. More importantly, however, I am familiar with the relationship between management and labor, and I know the past practices of the parties — the reality of the collective bargaining agreement in which words on paper are converted into real working conditions. And the two are rarely the same.

In these circumstances, I often work with my teams to suggest changes and improvements in the contract. These suggestions are based on knowledge and experiences unique to each district.

When I am asked this question in new or unfamiliar districts, however, my answer to the employer usually is, “If you ask me to suggest changes to your agreement, you will be wasting your time, my time, and your money.” Why? Simply because I do not know the district, the relationships, or the workplace and therefore cannot suggest how to change or improve them. Even more surprising is how often the district board and bargaining team do not know how to go about analyzing the need for change.

The school employer’s confusion over what to propose in negotiations is exacerbated by the labor law under which we negotiate — the Educational Employment Relations Act. In California, about a half-dozen comprehensive bills were proposed and defeated before EERA finally passed in the early fall of 1975.

EERA was the result of a compromise between school unions and employers. In exchange for the unions' demand for a comprehensive law mandating collective bargaining and binding agreements, school employers demanded and received restrictions on the scope of subjects falling within the mandatory duty to bargain, due to the unique characteristics of the public education sector.

This compromise was codified in two major sections of the law.

First, the "scope of negotiations" — the range of subjects over which we are required to bargain — was defined as "limited to matters relating to wages, hours of employment, and other terms and conditions of employment." And thus were the seeds of confusion planted: Did the legislature intend the scope of negotiations to be limited, as most employers asserted? Or was the original intent to create a broad scope of negotiability over *other* terms and conditions of employment, as most labor organizations argued?

Second, the law provides that "all matters not specifically enumerated [as negotiable] are reserved to the public school employer and may not be a subject of meeting and negotiating." This sounds good — an express reservation of management rights to those areas of public education not specifically listed as negotiable. However, what about all the other terms and conditions of employment that are not so specified? A conundrum was created at the inception of our bargaining law.

Our model, therefore, was intended to be a hybrid of sorts. We must meet and negotiate and reach binding agreements, just like the factory union and employer, but we are not required to bargain over subjects that go to the heart of educating children. Instead, we were supposed to have retained management discretion in those core areas. I say "supposed to," because this is not what has come to be.

Instead, the intended reservation of employer discretion to manage and direct the public educational system has been eroded, if not negated, through administrative and judicial

decisions, and a never-ending supply of legislative enactments. The system of labor relations in the public educational sector has been pervaded by private sector precedent resulting in elimination of many limitations that were intended to be placed on bargaining. The advocates of "other terms and conditions of employment" prevailed over the defenders of a "limited" scope of bargaining.

Thus, the original "compromise" of EERA has been lost.

Given this state of legal affairs, how can we as public school negotiators, plan for and conduct negotiations on behalf of the students and educational community we serve? How do we determine what to propose? How do we assess and decide whether to accept, modify, or reject what is proposed to us across the table? How do we establish and maintain a focus for our negotiations in the midst of all the political and economic turmoil constantly surrounding us?

For me, searching for answers to these questions sparked an evolutionary process. When I first began negotiating, I often felt that the unions were grounded with a sense of being on the "right" side and fighting the "good battle." They were, as the Blues Brothers said in the movie, "on a mission from God."

By contrast, my teams — my governing boards and administrators — often seemed to concede this "higher ground" to the unions and, by default, were left with a more defensive and reactionary approach to the process. I questioned this dynamic for years, asking myself: "What do we have to be defensive or embarrassed about? We are on a righteous mission too, serving the children of this nation and preparing them to be responsible citizens. We have every right to be extremely *proud* of what we do!"

The conventional negotiations process, however, did not seem to lend itself to articulation of our mission; in fact, talking about it appeared to be "against the rules." But then, I began to ignore those perceived rules. I challenged boards

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and administrations to refrain from adopting initial negotiation proposals until they could answer a few basic questions, like:

- What do we believe is the central mission of our organization?
- If we intend to seek change in the negotiated agreement, what are the underlying reasons for this effort?
- How do we define a successful outcome of these negotiations?
- And most importantly: What are our *core values*?

Only after they answered these questions did I proceed to work with my teams to formulate specific proposals.

I believe, and have experienced first hand, that this simple and forthright approach I created can break through the complexities that bedevil our world of bargaining in the public schools. I have concluded it is incumbent upon us — each local school district — to adopt our own core values as the philosophical benchmarks and anchors for all negotiations in the public school arena. To fully meet our obligation to our core constituency — the students — we must draw on the power of saying “what we believe,” rather than merely “what we propose.”

How do we do this? How do we negotiate with core values? Through the following steps:

- By understanding the “capacity” of the negotiations forum.
- By building the negotiations team.
- By establishing negotiations criteria: core values.
- By anchoring negotiations in core values from the very first proposal.

Understanding the ‘Capacity’ of the Negotiations Forum

We must return to the literal meaning and intent of our bargaining law by distinguishing between negotiable *working* conditions and teaching and learning conditions. Although we will continue to negotiate in good faith over working conditions as required by law, we must resist agreeing to any

contract terms that have an adverse impact on our ability to deliver quality education. We must redefine the very capacity of the negotiations forum to resemble what it was originally intended to be — negotiating over working conditions for employees without compromising the discretion originally reserved to the public school employer to make basic educational policy decisions.

Before we write our proposals, our board members, administration, and bargaining teams must answer the following questions:

- *What is the tolerable pace of change in our district?* If we seek changes in health benefits, or hours of work, or teaching time, or teaching duties, how quickly should we expect people and organizations to be able to change? The more fundamental the change and the more it touches employees on a personal level, the slower the tolerable pace of change is likely to be. This analysis should help inform our proposals, our dialogue, and our strategy.
- *Does the union lead or follow? What are the key relationships?* Before we articulate our core values and write our proposals, we need to know our key audience. Do we need to convince and persuade union leadership because they do in fact lead? Or is leadership merely following the direction of the rank and file? If the latter is true, then we must be sure our core values and proposals speak to that audience. And our communication plan must be shaped accordingly.
- *Is this an opportunity for improvement or are we opening Pandora’s Box?* After nearly three decades of negotiations, most agreements represent delicate compromises that have been refined again and again. When we ponder major change, we must ask: Is there a real opportunity for improvement here, or are we opening Pandora’s Box and creating an environment where decades of compromise may unravel into something worse than the status quo? When we challenge the unions to engage in “reality-based bargaining,” we must uphold our end by being realistic and seeking change that is attainable.
- *Is this the appropriate forum in which to seek change?* We are so used to thinking that every proposed change must

be brought to the bargaining table that we often do not stop to analyze whether it is indeed the appropriate forum. If we seek to change educational policy and direction, the table may not be the right place to do so. And, even if such change invokes a negotiable subject, we must clearly define the parameters of that negotiability so that we bargain working conditions and not teaching and learning conditions.

Building the Team

Bargaining with core values means that we must rethink how we select the teams that will best represent and communicate those values. Boards and superintendents must answer critical questions, such as:

- Why should an individual be on the team?
- What experience does he or she bring to the table?
- What perspective does he or she bring to the table?

We need to value different perspectives to be able to analyze whether proposals are consistent with our core values. The team makeup should signify to the district community that we are committed to the negotiations process and understand its potential for significant impact on the services we offer. The team must have manifest authority to bargain; it will be apparent immediately to the union team if it does not, and the process will be broken at its inception.

Establishing Negotiations Criteria Around Core Values

This is the key step, and probably the hardest to do. How do we agree on a list of core values that apply to our entire district? How do we start? Who do we ask? What do we ask? How many should there be? How do we gain

consensus on and ownership of the core values by all district constituents?

If we do not have core values to guide us, how can we have consensus on our missions? How do we determine how to prioritize our needs and goals and to best allocate our ever-shrinking resources for the benefit of students?

Most importantly, how do we inject the axiom that children are at the core of everything we do, now and in the future, into a process intended to address the needs of adults who serve those children?

Based on experiences I have had since creating this bargaining approach and refining it over the years, I offer these answers:

How do we inject the axiom that children are the core of everything we do...into a process intended to address the needs of adults who serve those children?

- *Start with the board and administration.* Gather as many board members and administrators together as possible, as well as your bargaining teams — all of them if you can. Set aside at least three hours. Have a skilled facilitator run the meeting. Divide into mixed groups — do not put all the board members together, for example. Each group should have chart paper and pens.
- *Ask the key questions.* Ask each group to answer one or more of the following key questions and to chart their answers. Ask them to answer as few questions as possible — even only one sometimes will do. Examples:
 - How would you define “success” in the upcoming negotiations?

- What are our most important values?
- What are the most serious issues facing the district?
- If you could change one area of the negotiated agreement, what would it be and why?
- If you could change one thing about how the district negotiates, what would it be?
- If you could change one thing about how the union negotiates, what would it be?
- If you could change one thing about how we deliver instruction on a daily basis, what would it be?

- Key questions are intended to be open-ended in order to allow for generation of the greatest variety of responses and to prevent “directing” the thought process to yield certain results.
- Key questions are intended to evoke *substantive* responses (our values, most serious issues, changes to the agreement), *procedural* responses (how we/they negotiate), and responses based on thinking about *educational* services for children, rather than the agreement (how we deliver instruction).
- Have each small group chart as many answers as possible to the key questions.
- Have each small group report out to the whole group; post the charts on the wall.
- Have the whole group work together to begin organizing the answers into recognizable categories, e.g., economic, substantive, procedural, the relationship, etc. This will occur surprisingly easily.
- Delegate to the bargaining team the task of reducing the grouped answers to a statement of core values. The resulting draft should be shared with the whole group for comment, input, and suggestions.
- The bargaining team should finalize the core values. The final version should be approved by the superintendent and governing board.
- The core values should be communicated to the district community even before negotiations begin.
- Include a statement of commitment by the district that not only its initial proposal, but all subsequent proposals, will be guided, informed, and assessed by these core values.
- Perhaps more importantly, include a statement that the core values will be used to assess the “merits” of all union proposals, and will guide and inform the district’s responses to such proposals.

Proposals and counterproposals. When writing proposals and counterproposals, refer continually to one or more of your core values, using as many or as few as are relevant to the subject matter at hand. For example:

- “The union has proposed that unit members be allowed to use 10 days of personal necessity leave without providing any reason. The district believes that a key component to student success is the presence of the regular teacher in the classroom as much as possible. Therefore, since the district cannot reconcile the union’s proposal with the district core value regarding student success, it must decline to accept the proposal.”
- “The union has proposed to spend down the reserve, which is one-time money, to grant an ongoing salary increase. The district’s core value regarding fiscal responsibility includes preserving its fiscal health now and in the future. Therefore, the district cannot accept the union’s proposal to use one-time revenues to support long term, ongoing fiscal obligations.”
- “The union has proposed a reduction in the workday and work year, with no reduction in salary. This would reduce the time spent in direct student contact as well as opportunities for professional development. The district must decline to accept this proposal since it would be inconsistent with its core value to enhance rather than impede the ability of the district to deliver quality education programs to students.”

Anchoring Negotiations in Core Values From the Initial Proposal

The initial proposal. Once your core values have been adopted, they should be incorporated in total into your initial proposal, where they will thereafter serve as a foundation for the district team throughout negotiations. How can we best use the core values in this manner? Here are a few things I have done over the years:

- Lead off the initial proposal with a statement of the core values and how they were developed.
- This statement should appear prior to any formal proposals.

Accepting union proposals. Application of core values to union proposals must be objective and even-handed. Therefore the district must be prepared to accept union proposals that are consistent with the district’s core values; failure to do so will undermine the integrity of the core values,

as well as the credibility of the district team. Utilization of core values means acceptance of good ideas either because of or despite their source. Even-handed application of the core values also will demonstrate the kind of behavior you want the union to emulate as the negotiation process evolves.

For example, a district had an established practice of adding three hours of aide time to classrooms that exceeded a certain number of students. The union proposed to codify this practice in the contract. The district agreed, but added language to its proposal that precluded a teacher from receiving the aide time if the teacher intentionally exceeded the maximum class size to secure an instructional aide. In response, the union team referred to the district's core values regarding student success and optimum learning environments. The union asserted it shared these core values and that teachers would not, therefore, deliberately seek to create larger class sizes just to obtain an instructional aide. The district caucused very briefly, returned to the table, withdrew its proposal on the additional language, and promptly accepted the union's proposal based on its consistency with the district's core values.

This example illustrates the effective and even-handed use of core values and reflects how consistent application often results in the union's eventual reference to the district's core values in its proposals. It also gave the district the opportunity to model good negotiating behavior by listening to the union and accepting its proposal very quickly, following an assessment of the proposal through the core values.

Writing proposals and counterproposals. Districts should continue to repeat and refer to their core values in each written proposal and counterproposal. No longer should we simply say "we accept" or "we reject" or "we respond with the following counterproposal." Instead, there should be a written rationale accompanying each written proposal that refers back to the core values. This is important not only for the purpose of reinforcement, but also for communicating the district's position in negotiations to a larger audience. This allows the district to remain constantly proactive regarding its own mission, beliefs, and values, rather than merely reacting to union proposals. This is an essential element of negotiating with core values.

Preclude conflict and seek change: reality-based negotiations. All too often, the traditional negotiations forum

involves two sides girding to wage battle with each other, as each seeks change for the benefit of its constituents. In order to preclude conflict that is likely to result from an effort to seek change, the school employer sometimes decides to not seek change at all. This is understandable, for the preservation of labor peace is a laudable goal.

However, my core values include the following:

- To preserve if not improve the existing cooperative relationships with the union, not as an end in itself, but because it furthers the accomplishment of the core value of promoting student success.
- To not place the preservation of labor peace at the pinnacle of the educational pyramid such that we must sacrifice the quality of educational programs to maintain the peace.

By using these or similar core values, we are able to enter and participate in the negotiations forum not from a battle-minded perspective (to which the union is compelled to respond), but rather from one of "this is what we believe." We seek change based on these beliefs, and not a desire to beat or defeat a union agenda. This is our agenda, and it is student-centered.

As such, we seek to engage in "reality-based negotiations." This means that:

- We will not make unrealistic or overreaching proposals that threaten core values of the union or its members.
- We will not engage in "wish-list" negotiations.
- We will make proposals that are based only on real substance and need.
- We will provide complete and absolute disclosure of all available financial information.
- We will respond to all proposals objectively and with supporting rationale.
- We will accept union proposals that are consistent with our core values.

Once the district team establishes and practices these norms at the bargaining table, it is likely that the union eventually will begin to respond in kind.

Common Mistakes Using Core Values

The adoption of core values represents a districtwide commitment to and “ownership” of philosophical benchmarks that are to be used fairly and consistently throughout the negotiations process. This creates a responsibility that the district must fulfill to preserve the integrity of those values. Core values cannot and should not serve as an excuse or rationale to avoid bargaining in good faith, or confronting issues posed by the union. In other words, core values are not an end unto themselves; rather, they are tools to help us organize our priorities in negotiations.

Here are some common mistakes to avoid.

Using core values as a pretext for rigidity and inflexibility. Once a district “owns” its core values, it is easy to fall into the trap of using them to justify a rigid and inflexible stance on all issues and proposals that appear at first glance not to align exactly with those values.

For example, after listening to the district repeatedly reject most of its economic proposals calling for the scaling back of programs to fund a salary increase, a union commented at the table, “We’re tired of hearing about your core values because all they are is an excuse to say ‘no’ to everything we propose.”

The district took this comment to heart and, after caucusing and consulting with the superintendent, realized that the union’s claim had merit. The district was citing its core value of “preserving quality education programs for students” as a rationale for rejecting all union efforts to reallocate funds from some programs to salaries. Upon reflection, we realized that our core value stressed “quality” educational programs, not every program currently in existence. The district team came to realize that not all programs were necessarily of the highest quality or of benefit to students. The district shared this perspective with the union, and negotiations moved forward.

In order to maintain our credibility at the bargaining table, we must be prepared to be self-critical of our positions as they relate to our core values.

Adopting positions contrary to our core values. Many districts facing financial crises continue to search for ways to reduce expenditures. Options sometimes include raising class sizes, increasing workload, seeking greater employee contributions for health benefits, and the like. If such proposals are on the horizon in your district, be sure to consider:

- How will the district reconcile a proposal to increase class sizes with a core value of enhancing learning conditions to promote student success?
- How will the district explain a proposal to increase workload with a core value that recognizes the contributions of all employees and seeks to preserve quality working conditions?
- How will the district reconcile a proposal to increase employee benefit contributions with a core value that promises not to threaten the core values of the union or the employees it represents?

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These apparent contradictions can be reconciled depending on the unique facts and circumstances of each district. The point, however, is to anticipate that the district’s core values likely will be used as weapons to attack the district’s own proposals.

The ‘people vs. programs’ paradox. Almost all core values statements will include at least one that promotes the preservation of educational programs for the benefit of students. This is not surprising, since the purpose of using core values is to put the needs of students at the forefront. Many districts use this core value, in good faith, as a reason to assert that all new revenues received by the district have been swallowed up by the expense of maintaining programs. Therefore, the argument usually goes, there is no money left over for any salary increase or cost items proposed by the union.

In short, the core value of preserving programs prevails over the possibility of providing people with a salary increase. This would appear to be an appropriate use of core values. However, consider the following example from a real district.

The district is experiencing rapid and continuing declining enrollment. There is no cap on active or retired employee benefits, and millions of increased dollars are being allocated annually due to the rising cost of benefits. Employees have not received a raise in three years. Although district teachers used to be among the highest paid in the county, they now are at the bottom in comparison to others. The district's chief human resources officer readily admits they no longer are able to attract the most qualified candidates, who can start at other districts for as much as \$20,000 more annually. The district is renowned statewide for offering excellent professional development and training to new teachers and for spending millions of dollars annually on such efforts. But, once teachers are trained, they are leaving the district in droves, and other districts are snatching them up because they know these teachers are among the best trained in the state. For the fourth year in a row, the district is asserting it cannot afford to provide a salary increase because it would mean sacrificing programs for students. The district has articulated a core value of preserving quality educational programs for students.

Do you see any contradictions in this picture? Is this district being true to its core value? This district is caught in the paradox of the illusory distinction between people and programs. At bottom, core values speak to the most effective and wise allocation of precious resources. Here, the district is spending about \$20,000 a year per teacher on professional development, and about \$60,000 a year per teacher on salary and benefits. Thus, if a teacher leaves after four years, the district has lost an investment of \$320,000. If 100 teachers leave each year, the district is losing an investment of \$32 million! As more teachers leave, the district is finding it increasingly difficult to attract the most-qualified

replacement teachers. The district has not critically examined the vast array of programs it currently supports.

Is this district being true to its core value of maintaining quality educational programs for children? The answer is no. The "people versus programs" paradox ignores the reality that the quality of programs depends entirely on the quality of the people who inhabit and deliver those programs. If those very people become disgruntled due to non-competitive salaries, and if they begin to leave the district, and if we cannot

attract quality replacements, the programs suffer and so, ultimately, will the students.

In order to be true to its core value, this district and many others like it must acknowledge the vicious cycle of decline in educational and instructional quality that already has begun. In order to be true to its core value, this district must:

- Stop and reverse the cycle by critically examining every program and curtailing or eliminating those not truly benefiting children, based on the level of expenditure.
- Set as a priority improved compensation for the people who inhabit quality programs.
- Establish a budget priority for equitable compensation increases with forethought to multiyear planning, rather than approaching compensation as an afterthought when all the money has been spent.
- Take these actions openly, transparently, and in a truly collaborative partnership with all stakeholders, including labor.

If this district is true to its core value of providing quality educational programs for children, it will show a commitment to the future of these programs by valuing the people who inhabit the programs. And, based on my experience, those people will be much more reasonable in their bargaining positions as long as they see the district has a true vision for the future.

People will be much more reasonable in their bargaining if they see the district has a true vision for the future.

In short, core values must be thoughtful, reasoned, and universal, no matter what actions they may appear to mandate. They derive their strength from their purity of purpose but are extremely vulnerable to challenge if actions do not measure up to the words.

Adopting boilerplate or overused core values. The worst mistake we, as school employers, could make would be to adopt boilerplate core values and start to use them statewide. This would be as wasteful and meaningless as union boilerplate proposals that we encounter. When we see such proposals, we exclaim, “What does this proposal have to do with the unique needs of our district?” And we question why our local union is seeking to inject a statewide agenda into our local community.

The same objections will occur if we as employers adopt a statewide agenda of identical core values. Instead, the core values of every district should be unique and consistent with local needs and priorities. All educational agencies will have a similar, student-centered theme, but the specifics of that theme should vary from district to district.

Another common mistake is to overuse a core value to the point where it loses substantive meaning. For example, we have all heard the core value of “attracting and retaining the most qualified employees.” I think this phrase has lost all meaning because the unions have used it as rationale to support any and all economic demands. I believe “attract and retain” has morphed into “attain and retract” — attain the highest salaries and benefits possible at the price of retracting the programs and working conditions that attracted employees to the district in the first place.

Core value statements do not rest on their own merits; rather, they must be explained, supported, and justified. Therefore, avoid the pitfall of latching onto core values that have become meaningless through overuse.

Conclusion

One would expect the core values that guide us to be self-evident. Since I have begun using them, however, reactions have ranged from surprise, to anger, to indignation. That these self-evident values become controversial when actually declared out loud proves, in my view, the critical need for districts to articulate them everywhere and at every opportunity, for they have been lost, forgotten, or overshadowed by the collective bargaining process. And we cannot allow them to become extinct, or we lose sight of the very purposes for which we exist.

Our role, our duty, and obligation as negotiators for public schools is to not allow our core values to be overshadowed in the shuffle of the negotiations process and lost altogether in the negotiated agreement.

This is not an easy task, for negotiation is a wondrous chaos; a swirling maelstrom of emotions, politics, substance, and symbolism. As the demands on public education increase, and the resources flowing to the system shrink, the chaos merely intensifies.

How can we bring order to this chaos? How can we cope with the dichotomy between expectations and resources? How do we stay focused on the achievement of our educational mission even as we are legally required to negotiate seemingly independent working conditions that, in reality, sometimes hamper the achievement of that mission?

The answer lies in the adoption and articulation of, and adherence to, a set of core values to guide everything we do in the negotiations process. If we do this, we as negotiators will be able to fulfill our obligation to represent and advocate on behalf of the educational interests of millions of children.

We have core values that reflect this advocacy and it is time to place these values at the center of the negotiations forum. If we do this objectively, forthrightly, and consistently, each of us can stand up at the end of the day and say with pride, “We negotiated today based on what we believe is in the best interest of the students we serve.” *

“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

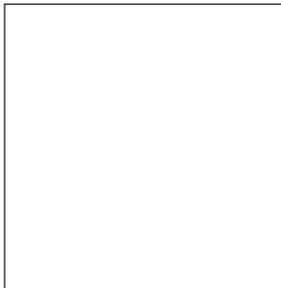
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John Duncan Talks About PERB

Carol Vendrillo, CPER Editor



Last year, John Duncan became the sixth chairperson at the Public Employment Relations Board. He talks with CPER Editor Carol Vendrillo about PERB's mission, expanded responsibilities, and progress.

■ ***CV: You were the first PERB member appointed by Governor Schwarzenegger. How did that come about? What is your prior relationship with the governor?***

JD: I didn't have a "prior relationship" to speak of until the recall election. While I knew some of Arnold Schwarzenegger's policy and political advisors, and had met him briefly at various events, I hadn't talked to him at length until I was asked to brief him on labor-related issues — particularly the state's workers' compensation crisis — about 10 days after his announcement on the Jay Leno show. Luckily, I was vacationing with my family in Malibu. My biggest problem was that I didn't have any clothes besides shorts and a swimsuit, so "business casual" was going to be stretch. (I barely made it to Malibu Sportswear before the end of the day.) The briefing was at his home in Brentwood, where I was joined by former State Labor Commissioner Victoria Bradshaw, Governor Pete Wilson's former Chief of Staff George Dunn, and eventually by Governor Wilson as well. I was very impressed with his business and overall marketing savvy and quick grasp of issues. He hardly fit the "action hero," "movie star," vacuous stereotype that some had suggested. (By the way, Arnold was wearing shorts and a polo shirt, I guess that's L.A. business casual.)

Later, I was asked to head up the Labor and Workforce Agency as a member of the transition staff. This turned out to be a pleasant, slight role reversal for me because I then had the opportunity to contact Steve Smith, who had contacted me on behalf of Governor Davis' transition team a few years before, when I was director of the State Department of Industrial Relations. The Public Employment Relations Board was one of the agencies that fell under my responsibility for review at the time.

I remembered being struck by how dire the budget situation was at PERB. I couldn't understand how this had been allowed to happen and felt it was somewhat ironic evidence of the incompetence of the previous administration. How could the governor and his staff not adequately fund their labor board? I felt that funding and the related backlog of cases at the board level needed to be addressed immediately. This was an important board with newly acquired jurisdiction over the Meyers-Milias-Brown Act, specifically designed to keep parties out of court and to handle disputes in a neutral and timely fashion. The board was failing the constituents it was supposed to serve. This had little to do with the hard work of the long-time, dedicated PERB staff, many of whom had been put on "surplus" funding — civil service terminology that often precedes actual layoffs.

Prior to the recall, my consulting business had started to take off after many months of hard work, so I wasn't sure I was ready to return to state service, even if I was lucky enough to have been presented with a political appointment. However once offered the PERB position, I was attracted to the challenge of turning an agency around, the role of adjudicating as a neutral, and the ability to author one's own decisions.

■ ***What is your labor relations background?***

Here are a few highlights. Prior to my appointment as PERB chair in February 2004, I was president of Duncan Consulting, Inc., where I specialized in providing labor-related advisory services to a variety of corporate, legal, and governmental clients. As I just noted, I was a member of the governor-elect's transition team handling the Labor and Workforce Development Agency. I also served in Governor Pete Wilson's cabinet for two years as director of the Department of Industrial Relations and, before that, as chief deputy director of that department. I also was the chairperson of the California Employment Training Panel from 1999 to 2000. I hold a masters degree in public administration from

Harvard University's John F. Kennedy School of Government.

■ ***What do you think the role of PERB should be in terms of practitioners engaged in collective bargaining in California?***

PERB is a small, quasi-judicial administrative agency that oversees collective bargaining statutes encompassing 7,000 public employers and over two million public employees.

Its mission in a nutshell, from my perspective, is to effectively provide employers, unions, and employees a neutral forum in which to resolve disputes — in a timely fashion. Its purpose to practitioners — as outlined in the various acts we administer — is to promote the improvement of personnel management and employer-employee relations within the public sector in the State of California.

It is important to recognize that the board emphasizes mediation and conciliation as a first step in the process, with a focus on getting a quick resolution. Approximately 75 percent of the board's complaints are resolved through voluntary settlement agreements. In cases where mediation is not successful, the parties have the opportunity to litigate their disputes, ideally quickly and efficiently. One of the board's most important jobs is to provide guidance to the parties through clear and concise decisions. The board itself issued a record 142 decisions in fiscal year 2004-05. I am proud of that fact, but we need to do even better in the months and years ahead, especially now, with a full complement of five board members.

■ ***What do you perceive as your role as chair of the board?***

In general, I perceive my role as trying to keep cases moving between board members' offices and to have decisions issued. Maintaining a friendly and collegial atmosphere is critical. (I have heard horror stories of past boards where a positive relationship was not the case.) As chair, I work closely with senior PERB managers, such as Chief Administrative Officer

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Eileen Potter, Chief ALJ Fred D’Orazio, and General Counsel Bob Thompson, on budget, regulatory reform, personnel issues, and other administrative matters. Also, as chair, I present PERB’s budget to the legislature and testify on other matters as necessary.

■ ***How important do you think it is that the board speak with one voice, and how important are dissenting opinions?***

While speaking with “one voice” is desirable, it is not critical. What is important is clear, concise, and timely decisions that offer guidance to the parties. I don’t believe in “muddying up” a decision just to achieve unanimity. Dissenting opinions are sometimes important markers in themselves, just as they are in the courts. Ideally, deliberation also should mean collaboration, no matter who is technically the author of each case.

■ ***What has been the most surprising part of the job?***

A nice surprise is that almost everywhere I go in this position I meet someone who worked at PERB at one time or another — including yourself. And I am impressed with the length of tenure of many of the staff. PERB has the benefit of excellent staff in every area. Many have been with PERB since it was created or came to the agency soon thereafter. Having the ability to discuss PERB’s history with these staff members has been a great help.

■ ***How do you respond to criticism about the backlog of cases on the board’s docket, and what are the statistics regarding case handling at the board level?***

When there is criticism about the backlog, I point out that when I was appointed there were more than 90 cases on the board’s docket. I have made reduction of the backlog my highest priority. At the end of the last fiscal year (June 30, 2005), the number of cases was down to 63.

At the beginning of January 2004, 20 cases had been on the board’s docket for over a year. At the end of the last fiscal year, that number was down to seven. Now that we have a full

five-member board, my goal is to encourage the other board members to work with me to get that number to zero and to assure that no case is on the docket for more than six months. Issuing timely decisions is paramount. We owe that to the parties.

■ ***I worked at PERB from 1979 to 1988, in its early days. At that time, most of our cases involved novel issues that the board had never before addressed. What are some of the issues currently facing the board?***

The board was faced with novel issues immediately upon the enactment of EERA in 1976. The board continued to face many novel issues with the subsequent enactment of the Dills Act and HEERA. Under EERA, bargaining units were formed for the first time and many elections were held in school districts around the state. The board then had to establish large statewide bargaining units under the Dills Act and HEERA, and to run large elections under those statutes.

After exclusive representatives were in place, there was the task of deciding cases that would establish bedrock principles of labor law in California. A few examples are the

analytic framework for discrimination cases (*Novato* in 1982) and interference cases (*Carlsbad* in 1979); the scope of bargaining and the question of how the Education Code and other state laws intersect with the collective bargaining statutes (*San Mateo* in 1983, *Anaheim* in 1981); the test to prove a unilateral change (*Grant* in 1982); the right to representation (*Redwoods* in 1984 and adoption of *Weingarten*, a 1975 case); free speech rights of employers (*Rio Hondo* in 1989); access rights under the Dills Act (two leading state cases in 1980 and 1981); employer domination of employee organizations (*Oak Grove* in 1986, *Redwoods* in 1987); right to information (*Stockton* in 1980); the right to strike (*Modesto* in 1983, *San Ramon* in 1984, *Compton* in 1987, *Sacramento* in 1987, and others); duty of fair representation (*Rocklin* in 1980, *San Francisco* in 1982); and agency fee regulations and decisions in the mid-1980s.

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This was an exciting time at PERB. The agency was establishing a body of law that would guide parties into the future, and the staff, as well as practitioners, were gaining experience and knowledge. Because California was one of the leading states to enact collective bargaining statutes for public employees, other states looked to us for guidance, and we looked to states like Wisconsin, New York, and Pennsylvania to see what they were doing.

When the case law was generally settled in these key areas, PERB proceeded to apply the law and refine the principles through the end of the 1980s and the '90s. No new statutes were enacted, and we operated more or less on a "business-as-usual" basis.

Then came what I would call a new era at PERB, when major developments presented novel issues once again. I believe it has re-energized the agency and the community we serve in ways that are similar to the atmosphere that existed in the late '70s and early '80s.

And again, we are breaking new ground. In 2001, we acquired jurisdiction over the MMBA. As a result, the number of unfair practice filings quickly almost doubled because of the huge number of bargaining units in local government and also because, for the first time, parties had an administrative agency to adjudicate their complaints. We provide a less-formal and less-expensive procedure than going to court, and the parties are taking advantage of it.

Then came the court employee, court interpreter, and transit acts. We now are faced with new issues that grow out of different employment settings, and we have promulgated new regulations to implement the new acts. We have cases dealing with the application of local government rules, strike rights of employees, bargaining disputes between unions and the courts, and more. We now are dealing with new practitioners we have never met before — union and management representatives and lawyers who work only for local government unions and county counsels. These

practitioners have new issues to bring before us and new ways of looking at the issues they bring. It's fresh and very interesting, especially to the staff who were around in the early days.

In addition, there is an overall greater interest in having PERB resolve disputes. Requests for injunctive relief are at an all-time high (15 this quarter), and the parties on both sides of the table are showing a greater interest in litigating PERB decisions. Appellate litigation is at an all-time high with cases in *Fresno* (discrimination), *U.C.* (health benefits), *Oakland* (subcontracting), and *King City* (change in contract formula), to

name a few. Further, some of the areas that appeared to be well settled, in fact, still present interesting and difficult questions. One example is a case that involves the accommodation between the State Personnel Board and PERB as a result of the Supreme Court's 1981 ruling in *Pacific Legal Foundation v. Brown*.

After many years of shrinkage, PERB has hired three new attorneys in the general counsel's office and an administrative law judge. All five seats on the board are filled. All things considered, this is a pretty exciting period for PERB and the community we serve. I think it rivals the early days when the agency was charting the course

for the future. Given our new jurisdiction and the influx of cases and issues, we are doing the same thing now.

■ ***What is the most rewarding part of the job? What part is most frustrating?***

The most rewarding part is when parties shake hands on a settlement arrangement. As a result, we, as a board, never see, or have to rule on, a dispute. Next is the moment when an important decision you have authored is issued. The most frustrating part is not being able to issue decisions even more quickly.

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■ ***Any advice for practitioners before the board? What do you see as the best practices for advocates, and what “turns you off” when you and your board counsel are reviewing the case record?***

Overall, many who practice regularly before the board are very experienced and in fact are leaders in the field of public sector law in the state. Nevertheless, if I could suggest two brief words of advice: ensure that you have an orderly and comprehensible record and always be open to the possibility of a settlement.

Also, please look at our website — www.perb.ca.gov. We’ve made many improvements over the last year, allowing

board decisions to be accessed and reviewed online as well as instituting a feature for parties to sign up for email notification when new decisions are issued. And, we are in the process of finalizing a pilot program so that unfair practice charges can be filed online as well as through the usual PERB process.

We have created an advisory committee composed of key members of the public sector labor and management communities to assist in developing further recommendations on how PERB can improve. In sum, PERB is dedicated to reaching out to its constituents in multiple ways. *

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Recent Developments

Local Government

Longest Bus Strike in Santa Cruz County History Is Resolved

After five weeks of labor discord, the Santa Cruz Metropolitan Transit District reached agreement with the United Transportation Union, Local 23, ending a 35-day strike by 141 bus operators. The parties began bargaining back in April, facing a contract expiration date of June 30, 2005. Talks appeared to stall, but on September 8, the parties agreed to forego a strike or lockout as they continued to work toward an agreement.

With the help of state mediators, members of both negotiating teams signed off on a tentative agreement. But, on September 23, the transit board voted it down and, according to attorney Carol Koenig of the San Jose law firm of Wylie, McBride, Jesinger, Platten & Renner, that provoked the work stoppage. Bus operators walked off the job on Tuesday, September 27. Thereafter, when the union presented a proposal for a three-year contract, the district took the position that it would return to the bargaining table but only if the bus operators came back to work.

Management officials had a different take. General Manager Les White told *CPER* that the board rejected its bargaining team's recommendation to agree to the mediated settlement be-

cause the board felt the deal unwisely would have increased medical benefit costs and created a crisis in the future.

At that point, according to Koenig, the district instituted some work-rule changes in line with its last and final offer. When the union filed a grievance protesting that action, management took the position that, since there was no longer a contract in place, there was no longer a grievance procedure to which the union could avail itself. "That was not acceptable," said Koenig.

The work stoppage that ensued proved disruptive to the 23,000 daily riders. It shut down 37 local and highway bus routes, turned the U.C. Santa Cruz campus into a parking lot, and prompted the Hub for Sustainable Transportation to give away about 100 bicycles to students and other low-income residents who were dependent on bus service to get to their jobs.

One of the more contentious items in the dispute concerned the union's desire to rebuff management's efforts to do away with a general leave program that allows a certain number of bus operators to take off up to one month without pay but with benefits. The board viewed the provision as an

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

Aristotle Onassis

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Pocket Guide to the Meyers-Milias-Brown Act

(12th edition)

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onerous work rule that forces taxpayers to pay for overtime shifts to cover for the operators on leave. The union countered that the demands of the job make time off a necessity.

The parties reached a compromise agreement on Saturday, October 29, and the board convened on Sunday evening to give its tentative approval. Because the board had rejected a prior team-supported accord back in October, union leaders informed management that its members would not vote on the

The district will pick up more medical benefit costs for employees' family coverage.

proposed pact until the transit district board first assented to the provisions. The board gave its unanimous approval to the proposed contract at the meeting on Sunday evening. By a vote of 108 to 14, union members ratified the agreement on Monday, October 31. The board formally adopted the new contract on November 2.

In the end, the union gave up some ground on the general leave provision. The number of slots will be decreased during the months when ridership is down. General Manager White told *CPER* that, overall, the number of available slots will decrease from 39 to 15.

Another concession provides that accrual of vacation time will be based on straight time, not on all hours worked, which has included overtime assignments.

But the new agreement, which runs from September 1, 2005, until June 30, 2008, addresses two matters of critical concern to union members. Koenig told *CPER* that the district has agreed to pick up more of the medical benefit costs for employees' family coverage. Under the old contract, the employer's contribution was capped at \$600 per month. During the term of the new contract, the amount of the employer's contribution gradually will increase to \$1,200 per month for family coverage. Premium costs above that amount will be picked up by the employee. Single employee coverage will increase from a zero contribution to \$50 per month. White explained that under the old agreement, full family benefits cost employees about \$400 a month. That amount will be reduced to \$115 until January 1, 2006, and gradually will increase thereafter. According to White, the parties' intent is to maintain an employer-to-employee payment percentage ratio of 90 to 10.

The new contract also adjusts downward the percentage of the employer's PERS contribution that will be charged to employees.

Future salary increases are dependent on a formula based on sales tax revenues and are tied to a percentage increase over previous years. White explained that there will be no increase in

the base wage for 2005. However, if sales tax revenues go up in 2006-07 to more than 3 percent over the 2005-06 level, 30 percent of that increase will be used to fund increased wages. Similarly, if in 2007-08, the sales tax goes up more than 6 percent over 2005-06, 30 percent of that increase will be allocated to employee salary increases.

The new agreement adds a longevity step increase for employees with 20 or more years of service with the district.

The new agreement adds a longevity step increase.

As part of the parties' accord, the union will dismiss all legal actions that were filed during the course of negotiations, including an unfair practice charge lodged with the Public Employment Relations Board. The final settlement also includes resolution of a dispute concerning implementation of an Industrial Wage Commission order involving missed meal breaks.

As a way to win back riders who came up with alternative means of transportation while the bus operators were on strike, White has pledged to propose that riders be given 10-days worth of free rides. *

S.F. Firefighters Win Local Bid to Preserve Staffing

By a solid margin, San Francisco voters endorsed a local measure that will require the city to maintain and operate all 42 firehouses, and emergency and rescue vehicles and equipment, at the same levels as were in place on January 1, 2004. Proposition F, entitled the Neighborhood Firehouse Protection

Language provides that all existing neighborhood firehouses remain open.

Act, was put on the ballot by Local 798 of the International Association of Firefighters. The local ballot measure was brought before the voters in reaction to a so-called “brownout” policy initiated by Fire Chief Joanne Hayes-White last year, whereby the city began temporarily closing firehouses on a rotating basis to save money.

Proponents of the measure charged that the brownouts pose a serious threat to the health and safety of San Francisco residents. They claimed that the firehouse closings lengthened the response times in one of the most densely populated cities in America.

The proposition adds detailed language to the city charter, mandating that all existing neighborhood firehouses remain open 24 hours a day, and that the emergency apparatus currently located at each firehouse be adequately staffed to be able to respond to a fire or medical or other emergency.

The proposition states: “The Fire Department shall not close, abandon or consolidate any existing firehouse, or provide a level of service at that firehouse or for the apparatus within that firehouse, lower than that existing as of January 1, 2004,” except under certain circumstances spelled out in the new charter provision. A firehouse can be closed only for unsafe structural conditions or to retrofit or renovate the building. These closures must be approved by the board of supervisors and accompanied by a detailed plan for restoring adequate services to the neighborhood served by that firehouse, “as soon as possible.”

The fire department can relocate apparatus from one firehouse to another only if it gets the board’s approval and demonstrates that the shift of equipment is necessary to meet the safety needs of the citizens, and that the change will not prevent 24-hour-a-day service in that neighborhood.

The initiative also requires that a minimum number of ambulances and

medical supervisors be made available around the clock.

The city controller estimated that the proposition would add an additional \$4.4 million to \$6.6 million a year to the city’s current fire protection budget of \$158 million. These costs, according to the controller, would result from increased firefighter salaries and benefits.

Prop. F supporters argued that the measure was “vital to public safety” because San Francisco has the seventh

Opponents charged the measure would thwart smart, cost-saving reform plans.

busiest fire department in the nation — with almost five times as many emergency responses as Oakland and four times as many as San Jose.

Opponents countered that San Francisco has more fire stations per square mile than any comparable city and that the proposition is an irresponsible raid on the city’s budget “under the false guise of protecting public safety.” They charged that the measure would thwart smart, cost-saving reform plans and called it “budget balloting at its worst.”

Supporters of Prop. F included the San Francisco Deputy Sheriffs Association, the San Francisco Police Officers

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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Association, the San Francisco Chamber of Commerce, and the San Francisco Building and Construction Trades Council. Elected officials signing on in support of the measure included Assembly Member Mark Leno, Senator Dianne Feinstein, Congressperson Nancy Pelosi, State Senator Carole Migden, and San Francisco Mayor Gavin Newsom.

Opponents of the proposition included the public policy group San Francisco Planning and Urban Research Association, Coleman Advocates for Children and Youth, the San Francisco Taxpayers Union, and San Francisco Tomorrow.

Approximately 57 percent those who voted voiced support for Proposition F on November 8. *

UAPD Wins Fight Over Health Benefits in L.A. County

After a protracted battle, the Union of American Physicians and Dentists and the Los Angeles County Employee Relations Commission appear to have reached a final resolution. In October, the California Supreme Court declined a request to review the decision of the Second District Court of Appeal that ordered the county to reinstate two medical benefit plans it no longer offered to county physicians once they opted for union representation.

During negotiations with UAPD, the county took the position that two superior health benefit programs — Flex and Megaflex — would not be offered to the doctors because a county ordinance provided that only unrepresented employees could participate in those plans. When collective bargaining reached impasse, the county unilaterally withdrew those plans from the benefits available to the physicians.

The union then took its case to Sacramento, where it won passage of an amendment to the Meyers-Milias-Brown Act which specifically instructs that the governing body of a public agency with a population of over 4 million — referring exclusively to Los Angeles — “shall not discriminate against employees by removing or disqualifying them from a health benefit plan...on the basis that the employees have selected or supported a recognized employee organization.” This amendment, Government Code Sec. 3504.5(c), was made retroactive to July 1, 2001.

When the dispute came to the Court of Appeal, the court concluded that the MMBA amendment took precedence over the local ordinance and, by operation of its retroactivity provision, nullified the county's decision to withdraw coverage under the two medi-

cal plans to the physicians once they opted to be represented by UAPD.

Bargaining History

In 1999, physicians employed in various county hospitals and clinics elected UAPD to represent them in their negotiations with the county. During the course of the election campaign, county representatives made it known that if the physicians voted to be represented by the union, they no longer

The MMBA amendment took precedence over the local ordinance.

would be eligible for inclusion in the Flex and Megaflex benefit plans. The county took this position in reliance on a county ordinance which provides that, absent a contrary designation by the county, only unrepresented employees may participate in the two superior health benefit programs.

Following an election, UAPD was certified as the exclusive representative of the county's physicians and commenced collective bargaining with the county in November 1999. During these talks, the county adamantly maintained that the newly represented physicians were eligible only for the Choices health plan, one less desirable than the Flex and Megaflex plans. While

negotiations continued and the parties reached agreement on approximately 30 other issues, they were unable to resolve their differences on the benefits plans.

Once impasse was declared, a factfinding hearing was conducted by Michael Prihar, who issued a non-binding report. He concluded it was unreasonable for the county to remove the unionized physicians from the Flex and Megaflex programs, and that doing so would be counterproductive to the county's goals of retaining and recruiting qualified professionals.

The county rejected the factfinder's reports and reiterated its position that represented and non-represented employees must receive different benefit packages. To no avail, UAPD argued that the physicians were the only county employees ever to lose Flex and Megaflex benefits. The union claimed that as a result of the county's action, each class member would lose \$20,000 a year. In August 2001, the county implemented the benefits change to take effect January 2002.

In October 2001, six doctors who feared losing the Flex and Megaflex plans launched a decertification drive. The effort was initiated by a letter sent in August 2001 by Dr. Lionel Cone, a physician supervisor in the bargaining unit. Cone urged five or six subordinate pediatricians to decertify the union. County management officials quickly advised Cone to remain neutral with respect to the decertification effort and to refrain from sending any more letters concerning it.

Unfair Practice Charges

The union filed two unfair practice charges with the commission. It alleged that the county failed to bargain in good faith by conditioning the eligibility for the more desirable benefit plans on employees' status as represented or non-represented. Hearing Officer Fred Horowitz considered the totality of the bargaining history and concluded that the county had engaged

A factfinder concluded that it was unreasonable to remove physicians from the programs.

in lawful hard bargaining. He noted that the parties participated in 18 bargaining sessions and six mediation sessions. Of the 37 articles in the newly proposed memorandum of understanding, tentative agreement was reached on 30. Only five articles remained unresolved after completion of factfinding. And, Horowitz found no evidence of delays or dilatory tactics by the county during the course of the negotiations. "There is no dispute the County remained steadfast" in its proposal to remove the physicians from the Flex and Megaflex plans and rejected all alternative proposals the union suggested to reach a compromise. But, he

said, the union failed to establish that management's intransigence on the issue violated the good faith bargaining demands under the county's employee relations ordinance or the MMBA.

Horowitz also observed that the county ordinance did not prevent the county from reaching an agreement with the union to extend eligibility for Flex and Megaflex benefits to represented employees. And he found no evidence that county negotiators had asserted at the bargaining table that eligibility under the plans was not negotiable.

Horowitz also commented on factfinder Prihar's recommendation that the county continue to provide the Flex and Megaflex benefit package to the represented physicians. "There is no requirement in the ERO or Meyers-Milias-Brown for a party to be forced to make a concession or yield to any particular demand so long as the overall course of bargaining is conducted in good faith," he said. The county's "rigid, inflexible approach" to the eligibility of the physicians for the two benefit plans was not unlawful or in bad faith.

UAPD's second unfair practice charge alleged that the letter and decertification petition circulated by Dr. Cone unlawfully interfered with employees' rights to have the union serve as their representative. Horowitz found that while Cone's memo to his colleagues reasonably could be viewed as management's direct interference with that right, there was no evidence that

the memo had any adverse impact on the physicians. With approximately 800 members of the bargaining unit, wrote Horowitz, "there was no showing the views or votes of the five or six pediatricians who received the memo were influenced as a result." Any harm caused by the Cone memo was de minimus, he concluded.

The amendment was enacted for the express purpose of overturning the county's denial.

The commission affirmed Horowitz's decision. However, UAPD filed a request for reconsideration based on the legislature's intervening enactment of Sec. 3504.5(c) — which retroactively prohibited the county from denying represented employees participation in a health benefit plan available to non-represented employees. The commission denied the union's request, and UAPD sought judicial review through a petition for a writ of mandate. When the trial court denied the writ, the union appealed.

Court of Appeal Decision

In large part, the legislative history of Sec. 3504.5(c) formed the basis of the appellate court's opinion that the statutory amendment was enacted for the express purpose of overturning the county's denial of the Flex and

Megaflex benefits to the Los Angeles physicians represented by UAPD. According to the bill analysis, the proposed legislation was aimed at restoring the health benefits to UAPD members. And, the Assembly and Senate members who voted for the bill, and the governor who signed it, understood it to offer a solution to the dilemma facing physicians who wanted to join the union but would have to give up their health benefits to do so. The legislature also understood, said the court, that the statutory amendment would override the local county ordinance.

The fact that the local ordinance allows for the possibility that the union and the county might agree to accept the less-generous benefit plan during negotiations did not alter the court's decision. The court explained:

Both in its now overridden ordinance and its announced "firm and consistent" policy, the county "removed" and "disqualified" employees from this county-wide benefit plan if they "selected" an employee organization. Given the ordinance's clear provisions and the County's rigid policy, the remote possibility the County might agree to grant an exception during negotiations with the union was illusory and, in any event, insufficient to comply with the spirit, and indeed the letter, of 3504.5(c). In essence, the County's ordinance said "we'll discriminate against you by taking away this major health benefit if you unionize, unless we deign to give it back to you during negotiations with your union. But don't count on that because we have a 'firm and consistent' policy against making such an exception." Small won-

der the County itself admitted in its argument to the Legislature that 3504.5(c) *overrode* this ordinance.

The legislative intent behind Sec. 3504.5(c) sets up the presumption that represented employees must have available the same health benefits as unrepresented employees unless its union representative voluntarily agrees to a different arrangement.

In any event, said the court, the union never agreed that the county could remove or disqualify the repre-

The legislature made the terms of the new subsection retroactive.

sented physicians from the Flex and Megaflex health benefit programs. Instead, in August 2001, the county unilaterally implemented its policy of removing the physicians from the plans. But, said the court, the county's August 2001 action "came too late." By retroactive application of the new law, as of July 1, 2001, it was illegal for the county to remove or disqualify represented employees, "including and especially these 800 represented physicians," because the legislature made the terms of the new subsection retroactive. Therefore, at the time the county purported to act to disqualify the union members from the Flex and Megaflex plans, the county was barred from discriminating

against employees by disqualifying them from a health plan on the basis that the employees have selected a recognized employee organization.

Whether or not the county had engaged in bad faith bargaining largely became a "non-issue" once Sec. 3504.5(c) took effect and imposed a retroactive ban on the denial of benefits to represented employees, said the court. "Whether the County engaged in bad faith bargaining or good faith bargaining, the negotiations led to an impasse on the health benefits issue. The County refused to promise it would allow physicians who joined the union to remain in these two health benefit plans and indeed threatened to remove and disqualify them from such participation. But by the time the County got around to implementing its threat, the Legislature had intervened — albeit retroactively — and made it illegal for them to do so."

The Court of Appeal rejected the county's argument that it did not violate Sec. 3504.5(c) because it did not remove the unionized physicians from the two medical plans immediately after they joined the union but only after completing negotiations with UAPD. "Nothing in 3504.5(c) or its legislative history suggests delayed discrimination is permissible and only an immediate denial of benefits for union members would violate the statute," said the court.

Likewise disregarded was the county's contention that it did not violate Sec. 3504.5(c) because the Flex and Megaflex programs are "cafeteria" pro-

grams, not the health benefit programs mentioned in the statute. "This argument does not survive scrutiny," the court remarked. These two programs provide health benefits, the court noted, even though they also may offer other additional benefits. And, when the county removed the physicians from these programs, they were relegated to the Choices plan in order to continue their health care coverage.

With regard to the letter and petition of Dr. Cone, the Court of Appeal affirmed the opinion of hearing officer Horowitz that those efforts were de minimus. It noted that the letter only went to a handful of physicians and there was no evidence that these individuals were influenced by Cone's mis- sive. In addition, the court noted, the county took immediate corrective action, advising Cone to remain neutral as to union activities.

The court instructed the county to reinstate all physicians who were UAPD members retroactive to July 1, 2001, to the Flex and Megaflex programs and to make them whole for the benefits they were denied. What this make-whole award will amount to is uncertain at this point. However, Lawrence Rosenzweig, attorney for the union, told *CPER* the award may total as much as \$20 million. (*Union of American Physicians and Dentists v. Los Angeles County Employee Relations Commission* [7-25-05] B170644 [2d Dist.], 131 Cal.App.4th 386; petition for review denied 10-12-05.) *

CSC's Modification of Termination Not Abuse of Discretion

For a second time in as many months, the San Diego County Civil Service Commission and Sheriff William Kolender have squared off over the appropriate level of discipline to be meted out to an offending deputy sheriff. In a case discussed in *CPER* No. 174, pp. 38-40, the Court of Appeal determined

*The commission
disagreed concerning
Salenko's truthfulness.*

the commission had abused its discretion when it opted for a 90-day suspension rather than termination of a deputy who lied about his observations involving the abuse of an inmate.

Now, in a second case entitled *Kolender v. San Diego County Civil Service Commission*, the Fourth District Court of Appeal found no abuse of discretion in the commission's modification of discipline imposed by Sheriff Kolender for an officer's shoddy report writing. The court ruled that the commission was entitled to independently review the evidence concerning a sergeant's investigation into allegations of sick leave abuse and was not merely required to assess whether there was

substantial evidence to support the sheriff's conclusions.

Background

Sergeant Edward Salenko was assigned to investigate the circumstances surrounding a request for time off by Deputy Chris Pangalos. On September 14, 2004, Pangalos asked to be relieved of that evening's shift in order to socialize with visiting family members, and he told Sergeant Leroy Draheim he would call in sick if he did not get the time off. Draheim told Pangalos he would get permission if a deputy were found to cover for him. That evening, Pangalos called Lieutenant David McNary and said he needed time off because of his stepdaughter's illness. Pangalos did not report to work that evening.

Salenko's commander reviewed his report and sought clarification as to whether McNary had approved Pangalos' sick leave. Salenko revised the report, stating that he had asked McNary if he approved the use of sick time and McNary had replied "yeah." At a hearing before the commission, it was established that Salenko never asked McNary whether he approved Pangalos' sick leave and that Salenko did not reinterview McNary for the revised report. Salenko's report also included references to an interview he

allegedly conducted with Sergeant Brenna Madsen, an officer initially assigned to investigate Pangalos' conduct. Madsen disputed Salenko's characterization of the scope and nature of their conversation.

The sheriff viewed Salenko's report as unprofessional because it referred to formal interviews he never conducted and misattributed statements to two members of the force. As a result, Kolender terminated Salenko for failure to meet department stan-

*It is the exclusive
province of the trier
of fact to determine
credibility.*

dards, poor reporting, untruthfulness, and acts incompatible or inimical to the public service.

Commission's Review

Salenko appealed the termination to the civil service commission, and an evidentiary hearing was conducted by a hearing officer. Based on Salenko's testimony, the commission disagreed with the sheriff's accusations concerning Salenko's truthfulness. It concluded that Salenko's report was "admittedly abysmal" and "showed significant carelessness." However, it determined that although Salenko's inaccuracies were egregious, they did not appear inten-

tional. The commission found there to be no motive for him to be untruthful. It modified the sheriff's termination order and directed that Salenko be suspended for 90 days and demoted from the rank of sergeant to deputy sheriff.

Sheriff Kolender asked the court to vacate the commission's order, asserting that there was insufficient evidence to support it and that the commission should have given substantial deference to his department's factual findings. The trial court affirmed the commission's ruling, and Kolender appealed.

Court of Appeal Decision

The court's analysis first focused on the reasonable inferences to be drawn from Salenko's explanations for the two discrepancies in his report. The sheriff perceived Salenko to be untruthful, not merely sloppy and forgetful. But, in deference to the trier of fact's credibility determinations, the court found otherwise. It approved the hearing officer's decision to credit Salenko's testimony that his notes were disorganized while conducting the investigation and that he had lost track of how many individuals he spoke with and who said what.

In the court's view, conflicts in the evidence or testimony that is subject to justifiable suspicion does not warrant the reversal of a judgment. It is the exclusive province of the trier of fact to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends. "Tes-

timony may be rejected only when it is inherently improbable or incredible," said the court. It must be "unbelievable *per se*," "physically impossible," or "wholly unacceptable to reasonable minds."

The court concluded that the commission's modification of discipline did not demonstrate an abuse of discretion. It found in mitigation that Salenko was a 17-year veteran who had received mostly positive reviews and lacked training concerning the proper method of documenting investigative reports.

A second critical component of the sheriff's appeal was the argument that the commission should have reviewed his department's findings of fact for substantial evidence and should not have conducted an independent review of the evidence. But the court disagreed. The court focused on Government Code Sec. 31108, which authorizes the commission either to affirm, modify, or revoke the sheriff's termination order, and on Charter Sec. 904.1, which designates the commission to serve as the administrative body for the county in personnel matters and conveys to the commission the power to affirm, modify, or revoke any disciplinary order. While neither of these provisions specifies the appropriate standard of review, the court found the commission's broad authority to modify the sheriff's termination order is more consistent with an independent review than with a substantial evidence review of the sheriff's findings. The court reasoned:

The Commission modifies by using its own judgment to evaluate the facts and the law and reach a conclusion that might differ from the Sheriff. Otherwise, there would be no need for the statute to authorize the Commission's adjudicatory review, and the Commission could simply exist to rubberstamp the Sheriff's disciplinary orders.

In support of its conclusion, the court reviewed the legislative history of Government Code Sec. 31108, finding that, when modified in 1943, the commission's findings became binding on the county employer, not advisory, as was previously the case. Thus, the court concluded, the new version of the statute strengthened the commission's oversight role and, with respect to punitive action, placed ultimate authority in the commission. (*Kolender v. San Diego County Civil Service Commission; Salenko*, RPI[8-22-02; certified for publication 9-21-05] D045266 [4th Dist.], 132 Cal.App.4th 1150, 2005 DJDAR 11605.) *

Public Schools

Teachers Unions Beat Back Schwarzenegger

Teachers had the most to lose from passage of three of the four initiatives promoted by Governor Schwarzenegger in the November election, and their unions led the fight to defeat them. Proposition 74 would have extended teachers' probationary periods from two to five years and would have changed the dismissal process to make

Education unions contributed millions to defeat the propositions.

it easier to fire teachers. Proposition 75 would have required public employee unions, including teachers unions, to obtain written consent from each member before using his or her dues for political purposes. Proposition 76 would have given the governor the power to ignore Proposition 98 — the voter-approved, minimum-funding levels for schools. All of the propositions were voted down by a comfortable margin.

Teachers unions throughout the state raised dues, donated millions of dollars, joined coalitions, and mobi-

lized their members in an impressive effort perhaps unprecedented in California politics. Earlier this year, the California Teachers Association, with roughly 300,000 members, approved a fee increase of \$60 per member for a total of \$50 million to add to its political funds. The Virginia-based Right to Work Foundation filed a lawsuit against CTA in an attempt to restrain the union from using in its campaign the funds raised from the dues increase. A federal judge refused to issue a restraining order, and CTA was free to allocate the money to oppose the initiatives. It spent over \$55 million to fight the governor's propositions, far more than any other group. Other education unions that also contributed millions to defeat the propositions included the California Federation of Teachers, which spent approximately \$3.6 million; California School Employees Association, which spent approximately \$2.1 million; and, the Association of California School Administrators, which contributed approximately \$1 million.

In a successful public relations campaign, the unions recast each of the initiatives, turning them back on the governor.

Prop. 74, which Schwarzenegger termed the "Put Kids First Act," became the "Blame Teachers" initiative in the unions' parlance. The unions argued that Schwarzenegger was trying to make Californians believe that teachers were responsible for the woeful condition of the state's public schools. They maintained that there is no evidence that lengthening the probation period has any impact on teacher quality and charged that the focus should be on proven reforms known to boost student learning, like smaller class sizes and up-to-date textbooks. Opponents of the measure also raised the specter that its

The unions recast each of the initiatives, turning them back on the governor.

passage would discourage new teachers from entering the profession.

Prop. 75, called the "Paycheck Protection Act" by proponents, became the "Paycheck Deception Act" in ads and literature crafted by opponents. According to CTA, the initiative was "about politics, not fairness." In its literature, CTA argued that "the initiative is sponsored by corporate special interests who want to limit the political voice of teachers, nurses, police and firefighters," and, if passed, "public employees who wish to participate

would have to sign a form each year allowing union dues to be used for political activities, a restriction on political speech that would apply only to public employees, not to private sector employees or corporate contributions.” Recognizing the political power of the teachers unions, supporters of the initiative targeted teachers in a massive email campaign. A “Yes on 75” campaign letter was sent to 90,000 teach-

‘[The governor] doesn’t have the courage to say he was wrong, that we’re the real heroes of California.’

ers’ school-email inboxes in October. The letter, sent “from the desk of” two Southern California teachers and funded by two GOP donors, outraged educators. CTA claimed that the emailing violated a state law punishable by three years in prison. It referred the matter to district attorneys for investigation.

Prop. 76 was called the “Live Within Our Means Act” by Governor Schwarzenegger and was touted by supporters as the “keystone” measure in the governor’s plan to overhaul the state budget. It would have limited state spending to an average of the previous

three years’ revenue, giving the governor new powers to make unilateral cuts in the face of fiscal emergencies. It also would have eliminated the provision of Prop. 98 that sets a minimum funding guarantee for education and mandates the restoration of funding when the minimum funding level is suspended. Opponents renamed the initiative the “Cuts School Funding Act.” Though the proposition also would have allowed the governor to cut funding for health care, police, fire, and other vital services, it was the potential financial impact on schools that received the most attention in the “No on 76” campaign. Education groups said that the proposal would have immediately eliminated \$4 billion from schools and would have given the governor the power to cut education funding mid-year. This initiative gave the teachers union and other education groups another opportunity to remind voters that the governor broke his promise when he refused to repay the \$2 billion that he took from education two years ago.

“These were bad ideas,” said Barbara Kerr, president of CTA, after the election was over. “I’m not going to apologize for teachers pulling out of their pockets their money to fight bad ideas.” On election night, Kerr told a room full of elated activists that “this governor wasted \$50 million, and he does not have the courage to apologize to all of you for the trash he talked about you. He doesn’t have the courage to say he was wrong, that we’re the real heroes of California.” *

Having been unpopular in high school is not just cause for book publications.

Fran Liebowitz

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Pocket Guide to the Educational Employment Relations Act

(6th edition)

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Service Workers Stand Up To San Francisco Unified School District

San Francisco Unified School District custodians, secretaries, cafeteria workers, guards, and other employees represented by the Service Employees Union International, Local 790, are prepared to do whatever it takes to get what they consider to be adequate health insurance coverage for their families and a fair wage increase. The 1,200 members of Local 790 have been working without a contract for the past year, during which their leaders negotiated unsuccessfully with the district. The workers, without authorization from the union, organized and engaged in a one-day sickout on the first day of school, which did not result in any movement on the part of the district. Fed up, they voted to strike by an overwhelming margin.

The school district workers have not received a raise in over three years and do not have the same health care benefits for their dependents as do other district employees. The district maintains there is no money for significant raises or improved benefits because Governor Schwarzenegger has short-changed public schools. It points to the fact that it recently dealt with a \$22.5 million budget gap for the current school year, which resulted in the shutting of five schools.

Union Demands

During the course of the negotiations, the union has requested a 2.5 percent pay raise for two consecutive years plus cost-of-living adjustments, and improved health care coverage for dependents. The union also wants protection against the contracting out of bargaining unit jobs and is urging that

The 1,200 members of Local 790 voted to strike by an overwhelming margin.

some temporary positions be made permanent. It also has asked for provisions that would make custodians responsible only for tasks that principals request in writing, and is demanding the district eliminate the requirements that they wash the outside of windows and participate in the district recycling program. The district has rejected each of these demands.

The district declared an impasse in the negotiations in mid-September. The strike vote took place between September 21 and 23. Both sides agreed to engage in informal mediation pending action by the Public Employment Re-

lations Board, but those efforts broke down on October 2. The union repeatedly has asked Mayor Gavin Newsom to get involved, but he said he would do so only if both sides agreed. Initially, the district refused, then it reversed that position on October 11.

PERB has ordered the parties to engage in factfinding. Under provisions of the Educational Employment Relations Act, any findings of fact and recommendation of the factfinding panel are submitted in writing to the parties privately before they are made public. Each side has 10 days to decide whether to accept the panel's recommendations for resolving the impasse. If no agreement is reached, the district generally can implement its last and best offer, and the union can legally strike. Union leaders say they may not wait until that process is complete before staging a strike, even though such a job action likely would be illegal under state labor laws.

The union currently is seeking a 2 percent wage increase in June 2006, with another 1.25 percent in December 2006 and an additional 1.25 percent in April 2007. It is asking for free employee health care and 75 percent of the Kaiser rate for dependents, effective March 1, 2006. It also is requesting the consolidation of temporary, as-needed, and permanent-exempt positions "so people who've been with the district for years will stop being cheated out of benefits."

District's Situation

The district offered two options for wage and health care. One would provide a 2 percent raise in June 2006, and another in June 2007, but no increase in dependent care coverage. The other would allow only one 2 percent raise, on June 30, 2007, with free health care coverage for the employee and one dependent, and 75 percent coverage for other dependents. The provision would be valid for two years.

'The District thinks perks for top bureaucrats are more important than being able to take our kids to a doctor.'

The district has not agreed to any change in the classification language, meaning that workers now classified as "temporary" or "as-needed" would not be reclassified regardless of how long they have been with the district. "Permanent exempt" workers would continue to be paid for no more than 3.5 hours a day with no retirement benefits.

In early November, the board of education presented a new contract offer, which includes a 1 percent raise on June 30 and a 2 percent raise on June 30, 2007. It also offered to increase the monthly share of its cost for dependents

from \$225 to \$410. The union rejected the new proposal.

Union members are outraged by Superintendent Arlene Ackerman's recent 12 percent raise to \$250,000 and the fact that she will receive a \$375,000 severance package when she leaves her position on June 30, 2006. "The Superintendent's total compensation package for this year could pay for dependent health coverage for all of our families. But the District thinks perks for top bureaucrats are more important than being able to take our kids to a doctor," reads a statement posted on SEIU 790's website.

Ackerman claims her raise and severance package are normal for urban superintendents and that she is just an easy target. She argues that the district is in a bind because whatever it gives to SEIU 790, it will have to give to other unions representing district employees. Every union in the district is working under an expired contract, with the exception of the principals and vice principals. Ackerman calculates that giving raises and improved health care coverage to all workers would cost the district \$42 million, money it just does not have. "We'd have to start cutting teachers, and we'd have to look at closing a lot of schools," she said. "Our backs are to the wall, and there's no place for us to go."

Possible Strike

Josie Mooney, executive director of SEIU 790, claims the union's proposal would actually cost the district

\$2.5 million and that Ackerman's figure is a misrepresentation because she unfairly factored in costs associated with teachers and other district unions. Local 790 called for her immediate firing for giving misleading figures to the press. "We will never reach an agreement with someone who does nothing but lie," said Lawanna Preston, chief negotiator for the union. The school board declined to act on the union's demand. However, on November 9,

Local 790 called for Ackerman's immediate firing for giving misleading figures to the press.

2005, it named Deputy Superintendent Gwen Chan to succeed Ackerman on an interim basis starting in March or April 2006 when Ackerman starts using her vacation and sick days to fill out her contract. It is anticipated that Chan will stay in the position until a permanent replacement is found.

Ackerman offered to leave her position earlier than planned, while still waiting until July to receive her severance package, and to immediately withdraw from labor negotiations. In return, she demanded that the union put the district's latest proposal to a vote of its members, agree to wait to strike until

after receiving the factfinding panel's recommendation, and consent to give three days' notice before it strikes. The union rejected her offer.

If SEIU 790 does go out on strike, it likely will have the support of the teachers union, whose executive board has voted to call on all its members to honor a picket line. Dennis Kelly, president of United Educators of San Francisco, issued a statement reading: "We are doing everything in our power to

help SEIU and the district reach a settlement and avoid a strike. But make no mistake about it — denying health benefits for families of district workers is unacceptable to UESF and unacceptable to San Francisco."

The United Administrators of San Francisco, which represents principals and vice principals, also issued a statement in support of SEIU, though it said that their members will continue to work during a strike. *

Oakland Teachers Protest — District Threatens to Dock Pay

Approximately 400 teachers left work early on October 26 to protest the gutting of art and music programs in Oakland Unified School District classrooms. The rally, organized by the Oakland Education Association, began at about 2:30 p.m., after students had been dismissed but about an hour before most teachers' school days are scheduled to end.

In a letter sent to school administrators earlier in the week, district general counsel Roy Combs warned that teachers who participated in the rally could have their pay docked. "We appreciate every person's right to exercise their freedom of speech," he said. "But employees who leave work early to do so should not expect the district to pay them when they are not working."

Oakland's 2,600 teachers have been working under the terms of a con-

tract that expired in June 2004. The union has demanded a 4 percent raise over two years, which would restore previous salary reductions. The lowest starting salary for a teacher under the old contract is \$37,900, and the maximum teacher salary is \$66,680. The union also opposes the district's proposal to cap its share of teacher health insurance premiums at the current level.

Union leaders say that most of the district's 59 elementary schools — mainly those in the poorer neighborhoods — have no class periods dedicated to art. That is because most elementary schools no longer send arts instructors to fill in for teachers during their weekly "prep" periods, according to the union.

The union vowed to fight if the district docked any participant's pay. "We

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.

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Pocket Guide to the Family and Medical Leave Acts

See back cover for order information.

will protect you,” union executive board member Betty Olson-Jones told the crowd. “If we allow them to get away with this, our contract is not worth the

paper it’s written on.” School board member Dan Siegel, an attorney, said that his firm would represent any teacher whose pay is docked. *

The materials cannot be used to influence the religious beliefs of students, according to the agreement. It also specified that the district has the final say in determining whether instructional materials are appropriate. In exchange, Williams agreed to drop his suit. He resigned less than a week after the settlement was finalized.

Religion in California’s Schools

Recent headlines have focused on the trial in federal court in Harrisburg, Pennsylvania, regarding a local school board’s requirement that biology teachers there include the theory of “intelligent design” in the curriculum as an alternative to evolution. The plaintiffs, a number of parents, claim that the re-

quirement violates the constitutional proscription against teaching religion in public schools. But the growing conflict concerning the boundary separating church and state in public education is not limited to Pennsylvania. Several examples of the factional debate can be found right here in California.

lawsuit, Williams alleged the district illegally restricted him from using religious excerpts from the Declaration of Independence, various state constitutions, and writings by George Washington, John Adams, and William Penn. The administrators said the materials were inappropriate for elementary school students.

A federal judge threw out three of Williams’ four claims, finding that his constitutional rights were not violated because teachers do not have a First Amendment right to determine classroom curriculum. However, allowed to go forward was Williams’ claim that the principal singled him out as a self-described “orthodox Christian” by censoring and reviewing his teaching material while not doing the same for other teachers.

The parties settled the case in August, accepting the district’s existing policy that “allows teachers, no matter what their religious beliefs, to use appropriate educational material (including supplemental handouts of historical significance) during instructional time that has religious content — so long as it is objective, age appropriate, and in compliance with curriculum.”

In another case now pending in a Sacramento federal court, Larry Caldwell, the parent of a student in the Roseville Joint Union High School District, claims that the district violated his rights to free speech, equal protection, and religious freedom in the way it handled his request that it

The district restricted use of historical documents with religious references.

Materials cannot be used to influence religious beliefs.

quirement violates the constitutional proscription against teaching religion in public schools. But the growing conflict concerning the boundary separating church and state in public education is not limited to Pennsylvania. Several examples of the factional debate can be found right here in California.

Stephen J. Williams, a fifth-grade teacher, sued the Cupertino Union School District’s superintendent, school board, and school principal when they restricted his use of historical documents with religious references. In his

add arguments against evolution into the biology class curriculum. Caldwell wanted the district to include videos and written materials challenging some aspects of Darwin’s theory of evolution. Roseville’s teachers sent the items to several universities for review and decided the lessons were not appropriate for their classrooms. Caldwell also proposed what he termed the “Quality Science Education Policy,” which, if adopted, would have required teachers to “help students analyze the scientific strengths and weaknesses” of evolution. The school board rejected the proposal

Pocket Guide to K-12 Certificated Employee Classification and Dismissal

By Dale Brodsky

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

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by a 3 to 2 vote. Caldwell claims that school officials prevented meaningful consideration of his proposals by refusing to put the policy on the board's agenda, defaming him in public meetings, and failing to provide a clear procedure for his requests. The district asserts that Caldwell had ample opportunity to present his ideas to the board and to science teachers.

Whether the words "under God" should be removed from the Pledge of Allegiance recited by students in the Elk Grove Unified School District is the

The Supreme Court will decide if 'under God' should be removed from the Pledge.

central issue in a case now pending in another Sacramento federal court. In September, the district court judge determined that inclusion of the words in the pledge violates the Constitution's Establishment Clause, relying on the Ninth Circuit's decision in *Newdow v. United States Congress* (9th Cir. 2002) 292 F.3d 597.

The issue ultimately will be decided by the United States Supreme Court, which sidestepped it last year in a case between some of the same parties. In that case, the court determined that the plaintiff, Michael Newdow, did

not have standing to complain on his daughter's behalf and dismissed the case. Newdow also is a plaintiff in the current case in which he is joined by two other parents. The district court,

in its September decision, also found that Newdow lacked standing to sue, but the court determined that the other two plaintiffs did have standing. *

Groups Sue to Stop Affirmative Action in Los Angeles Schools

Anti-affirmative action groups have filed two lawsuits against the Los Angeles Unified School District, claiming that some of its programs violate Proposition 209, the 1996 ballot initiative that made race-based affirmative action programs illegal in public education, contracting, and employment. The lawsuits were filed by the Pacific Legal Foundation on behalf of the American Civil Rights Foundation, a nonprofit organization whose members include Los Angeles residents and taxpayers.

The complaint in the first suit alleges the district used "racial discrimination and preferences" in assigning teachers to schools. "Its fixation with the skin color of teachers puts the district in direct defiance of Proposition 209," states the complaint.

Under the "Teacher Integration Transfer Program," any probationary or permanent teacher may file a teacher integration transfer request for the purpose of improving the racial and ethnic balance in a school, provided the teacher's transfer will not adversely affect the ethnic balance of the faculty at the sending school. The ACRF objects

that the percentage of minority teachers at any K-12 school or magnet school must follow a preset ratio. "In other words, if a particular school needs more white teachers to meet the racial 'balance' formula, a white applicant would receive a racial preference for transferring to that school, while a minority applicant might be denied — regardless of the teacher's seniority or qualifications," according to a statement released by the PLF.

The second suit is directed at the district's Magnet Program and the Permits With Transportation Program. The plaintiffs allege that the magnet program is based on "a district objective of maintaining racial or ethnic 'balance' at each school." They claim that student applicants to a magnet program must identify themselves as one of seven races or ethnicities and if the student does not, or identifies him or herself as multiracial/multiethnic, the student will be disqualified. The transportation program provides free transportation to minority students wishing to attend predominantly white schools and for white students wishing to attend predominantly minority schools. Students also

are required to state a specific race or ethnicity on their applications to this program.

“What we have in Los Angeles is a school system that identifies teachers and students by their race or ethnicity above all other factors,” said Ward Connerly, a principal advocate of Proposition 209 and spokesperson for the ACRF. “It’s a disgrace that the state’s largest school district is moving teachers and students around like pawns in their unconstitutional game of racial balancing.”

Prop. 209 states court-ordered desegregation plans should not be impacted.

Kevin S. Reed, acting general counsel for the district, said he was surprised and “a bit perplexed” by the lawsuits. “Proposition 209 specifically states court-ordered desegregation plans should not be impacted,” he said. “These policies are at the core of the court-ordered desegregation plan the district has had since the 1970s.” The magnet program and the transportation program have been the district’s main options for seeking integrated educational experiences. They grew out of a 1976 court order that required LAUSD to take steps to stop racial isolation, said the district.

“The school district is sending the wrong message to our kids that it’s okay to categorize people by the color of their skin,” said Sharon L. Browne, principal attorney for the PLF. “The district is illegally wasting staff time and taxpayer dollars tracking students’ and teachers’ race and calculating racial

quotas.” She said “the goal of the litigation is to force the district to end the use of race in its programs. “Otherwise, we want to see a California appellate court decision that says the use of race violates the Constitution. Then we’ll be satisfied.” *

Governor Vetoes CalSTRS Pension Bill

Governor Schwarzenegger rejected a bill passed overwhelmingly by the legislature that would have required the state to repay \$500 million withheld from the State Teachers’ Retirement System in 2003 to reduce the state’s budget deficit. (See story at *CPE* No. 161, pp. 46-47.) Authored by Assembly Member Gene Mullin (D-South San Francisco), A.B. 55 would have established a five-year payment plan starting in 2008-09.

Schwarzenegger cited a pending lawsuit between the state and CalSTRS as his reason for rejecting the legislation, which passed the Senate by a vote of 33-1 and the Assembly by 78-1. The Department of Finance is appealing a Sacramento Superior Court ruling that found the legislature violated the state Constitution by withholding the money from a special pension fund. The fund provides cost-of-living protection for approximately 63,000 retired teachers whose buying power is eroded by inflation.

“This bill does not end the lawsuit. If this bill made it clear it settled the lawsuit, I would consider signing it,” said Schwarzenegger in his veto message.

However, supporters of the measure said that the purpose of the bill was to end the lawsuit while giving the legislature two years to deal with the budget deficit before making the first payment. “We had always indicated if they passed the bill and the governor signed it we would go ahead and settle the legal case. By going through the appeals process, it essentially is going to cost the state more money,” said Ed Ely, spokesperson for the California Retired Teachers Association, one of the bill’s sponsors.

The governor also referred to the state’s legal argument that the \$500 million cut did not harm the fund and the system’s ability to meet its obligations. While current retirees are not expected to see any loss of benefits, CalSTRS officials say that the missed

payment could have a long-term impact on the pool if it is not paid back because the fund would shrink quickly if there is a sustained or double-digit percentage increase in consumer prices.

It is anticipated that the payment as set out in the bill would cost about

\$800 million, including annual interest. Under the provisions governing CalSTRS, members would lose any money not repaid by 2036. If the \$500 million is not repaid by then, the fund estimates that it will lose \$6.3 billion in principal and interest. *

child development or teaching methods and were required to complete only a self-study plan during the first three months of teaching.

Judge Warren did not rule on whether the credentials would be legal if the state met the public review requirement. He allowed the teachers to remain in their classrooms but without the “highly qualified” label. His order specified that the change would not affect the teachers’ positions, salaries, or benefits.

State Told to Void 4,000 Teacher Credentials

A San Francisco superior court judge has ordered the California Commission on Teacher Credentialing to revoke the credentials it issued to about 4,000 teaching interns since March 2003. Judge James Warren found the commission failed to comply with a state law that requires new rules to be subjected to public review.

The commission, in an attempt to comply with the requirements of the federal No Child Left Behind Act, created the new internship category in 2003 so that thousands of teachers working on emergency credentials could be reclassified and considered “highly qualified.” The act requires the states, starting in 2003, to hire only “highly qualified” teachers at schools receiving Title I funds for low-income students, about half of all public schools in California. It also requires that all teachers in core academic courses be “highly qualified” by the end of this school year. The act leaves the

definition of “highly qualified” up to each state but requires the teachers to have full state certification and specifies that a state cannot shortcut its own certification requirements by issuing emergency credentials.

The lawsuit, brought by Californians for Justice, an advocacy group for poor and minority students, alleged that California tried to get around the act’s requirements by issuing the new two-year credentials, known as Individual Internship Certificates. Californians for Justice contends that these were actually emergency credentials. Like emergency credentials, the certificates were issued to teachers who were college graduates enrolled in courses to qualify for regular credentials. The new credentials added the requirement that students hold a degree in the subject they planned to teach, or pass a test in that subject. However, unlike participants in established internship programs, they were not required to obtain training in

Californians for Justice contends that the Individual Internship Certificates were actually emergency credentials.

The judge’s order will impact only about 1,700 to 2,000 teachers, said Mary Armstrong, the commission’s general counsel, because many others have completed their internship programs and acquired preliminary teaching credentials. Armstrong maintained that the teachers in the certificate program “met the letter of the federal and state requirements for highly qualified teachers.” As of *CPER* press time, the commission responded to the court’s ruling by scheduling a public hearing on the program and a vote on the mat-

ter early this month. If adopted, the commission could start issuing new certificates again in January.

Re-enactment of the program could result in another lawsuit, however. The plaintiff's goal is to get the Commission on Teacher Credentialing to create an internship that meets legal standards and provides more mentorship and support for new teachers, explained Solomon Rivera, executive director of Californians for Justice. "The Individualized Internship Certificate will be on the table again, and if enough changes aren't made to it, we may have to go back to the court," she said. *

Higher Education

Equity Increases Edge Out Merit Pay Plans in CSU Compensation Agreements

Finalization of a state budget boosted the efforts of the California State University and its unions to wrap up salary negotiations. With both the CSU Employees Union, SEIU Local 2579, and the California Faculty Association, the university set aside battles over merit pay plans in an attempt to keep employees' salaries from falling further behind

Having watched employee salaries stagnate for several years as the CSU budget was cut, the Chancellor's Office augmented the 3 percent compensation pool by .5 percent for raises in jobs where pay disproportionately lagged the market. The university settled over the summer with the Union of American Physicians and Dentists and the State Employees Trades Council-United for total compensation increases of 3.5 percent. (See story in *CPER* No. 174, p. 57.)

CSUEU, which represents four bargaining units totaling about 15,000 employees in health care, operations, technical, and administrative/clerical support positions, began reopener negotiations by demanding a general raise of 17 percent in addition to equity and other compensation increases. CSU claimed the demand would boost employees' compensation 37 percent. The employees' last raise was a 1.5 percent increase in July 2002. The union asserted it had lost 17 percent in buying power over the last 13 years. The university was willing to agree to small raises, but also wanted to increase parking fees, which have remained level for several years.

The agreement contains a 2.075 percent general salary increase retro-

active to July 1. In addition, eligible employees with satisfactory service will receive a 2 percent step increase on their employment anniversary dates, the first service-based increase since 1999. The parties established, but did not fund, the service salary increase program during 2004-05 reopener negotiations. (See story in *CPER* No. 168, pp. 60-62.) Employees who have progressed more than 60 percent through their salary ranges are not eligible for service increases but will receive a \$400 bonus this month. Custodians who work too few evening hours to be eligible for a shift differential will receive a 4 percent bonus.

The market salary increases will go to about 3,000 employees.

market rates. So important was market equity to CSU that it agreed to implement 2005-06 salary increases for the faculty before completing negotiations on the rest of the contract. Soon afterward, the board of trustees announced a five-year plan to raise all employees' salaries to market rates.

CSUEU Reopener Pact

Although the total state funding for CSU rose 5.8 percent in 2005-06, the enacted state budget increased CSU's budget base by only 3 percent for expenditures such as employee compensation, maintenance, and inflation.

The union calls the merit salary increase a 'proximity increase.'

The market salary increases will go to about 3,000 employees. The raises range from 1 percent for custodians to 5 percent for nurses and pharmacists. Salaries in most of the targeted classifications will rise 3 percent.

There will be no merit-based increases for 2005-06. Dennis Dillon, CSUEU vice president of representation, told *CPER* that the union calls the merit salary increase a "proximity increase" because proximity to the campus president's office seems to be the most accurate predictor of whether an employee receives the discretionary increases. "No custodian has ever re-

ceived a merit salary increase," he said. CSU Assistant Vice Chancellor for Human Resources Sam Strafaci asserts merit pay increases will be back on the CSU agenda during full contract bargaining next year.

CSUEU was able to cap parking fees at their present levels. CSU will continue to provide a \$500 rural health-care subsidy for employees in areas without access to health maintenance

Average faculty salaries at CSU were 13 percent less than those in comparable institutions in 2004-05.

organizations. The university will continue to contribute an amount equal to 100 percent of the average health plan premium for its employees and 90 percent of the premium for dependents.

CFA Salary Increases

CFA is engaged in bargaining for a successor contract to replace the one that was set to expire last June but which has been extended through January 15, 2006. The parties started bargaining in the spring. At first no salary proposals were exchanged while the parties reached tentative agreements on minor issues. After the state budget was en-

acted, the chancellor announced his hope that salary increases of 3.5 percent could be provided quickly.

CFA was amenable to immediate raises, but the university wanted an agreement to set aside money from the compensation pool each of the following three years for a merit-pay plan that has not yet been designed. CFA insisted that merit-pay funding not detract from the pool of money available for general salary increases, which are needed to keep up with the cost of living and close the gap between CSU faculty salaries and those of faculty in similar universities. The California Postsecondary Education Commission reported in March that average faculty salaries at CSU were 13 percent less than those in comparable institutions in 2004-05, and projected to lag 17 percent in 2005-06.

Angry about the "strings" attached to the offer of an immediate pay raise, CFA called for a cooling-off period. Upset that management personnel were

receiving a straightforward salary increase while the parties dithered over complex pay plans, the Academic Senate called for a resumption of bargaining. A few days later, after a meeting of the collective bargaining committee of the board of trustees, CSU agreed to an immediate 3.5 percent general increase without reaching agreement on the full contract.

Strafaci told *CPER* that CSU did not want to hold up increases since the faculty had not had raises for several years and because the increases would be retroactive to July 1 no matter when bargaining concluded. He hopes that settling the 2005-06 salary issues leads to less-contentious negotiations. The major issues between the parties involve employment security for non-tenure-track lecturers, merit-pay plans, workload, grievance procedures for disciplinary cases, early-retirement programs, and pay for summer-term teaching. ❁

New Law Limits Public Access to Retirement Fund Information

As a result of S.B. 439 (Simitian, D-Palo Alto), the University of California and the California Public Employees Retirement System will be able to refuse to disclose certain documents relating to their investments in private equity funds. The law stems from a pair of lawsuits to force disclosure of information concerning public retirement

funds' investments in non-public companies such as venture capital firms. The suit against U.C. was filed by a professor and the Coalition of University Employees, which represents clerical and childcare workers at the university. That suit was inspired by a legal action the *San Jose Mercury News* and the California First Amendment Coali-

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tion filed against CalPERS for similar information.

Citing the California Public Records Act, the trial court ordered U.C. to turn over investment-related documents to CUE in 2003. The university was unable to persuade the Court of Appeal or the California Supreme Court to review the order. After U.C. was forced to hand over documents, the university and CalPERS complained that two venture capital firms refused to accept public retirement systems as investors in new funds.

In response, CalPERS and the University of California cosponsored S.B. 439 to protect from disclosure information regarding the investments of private equity funds, hedge funds, venture funds, and absolute return funds. Public retirement systems in California still will be required to disclose upon request the names of the "alternative investment" firms, the amount of contributions made to and received from the firms, internal rates of return, management fees, and annual profits from the investments. But the bill protects from disclosure portfolio positions of the alternative investment funds, quarterly and annual financial statements, meeting materials of alternative investment firms, due diligence materials, and capital call and distribution notices, as long as they have not been already disclosed.

The bill was drafted with the help of the California First Amendment Coalition. CUE took no official position on the legislation. ❖

APC Settles With CSU as Factfinding Begins

After 28 months of negotiations, the California State University has reached agreement on a new three-year contract with the Academic Professionals of California, Laborers' International Union of North America, Local 1002. The 2,100 student services professionals, lead library assistants, and other academic support employees will receive a 3 percent general salary increase retroactive to July 1, 2005. Raises of 3 percent for 2006-07 and 4 percent for 2007-08 are conditional on state funding. A new merit-bonus program will replace a prior performance-pay system. The probationary period for unit positions will be reduced from two years to one. CSU gained an agreement that APC will not engage in or support sympathy strikes.

Although the parties entered the factfinding process last spring, no hearing was held. A discussion between the factfinder and the other two panel members, one from CSU and one from APC, jump-started the stalled negotiations and led to the settlement.

Pay Plans

A contentious issue in the negotiations was merit pay. (See story in *CPER* No. 172, pp. 63-65.) APC did not want any portion of the compensation pool being diverted to "discretionary increases that go to few employees." However, CSU insisted on a merit pay plan. As a compromise, the permanent

increase in state funds will be divided, with the majority of the amount going to a raise in base pay; the remaining portion will prefund a merit-bonus program. APC agreed to prefund future bonuses by setting aside an amount equivalent to a .5 percent raise from both the 2005-06 and 2006-07 funding increases. Just under \$1 million will be available for merit bonuses each year afterward. Once the program is

APC believes a bonus is more appropriate to recognize superior performance than a permanent increase.

prefunded, money set aside for merit pay no longer will reduce the amount of new funding available for general raises and other pay boosts that benefit all unit employees. Barbara Peterson, Northern California vice president of APC, told *CPER* that APC believes a bonus is more appropriate to recognize superior performance in an applicable year than the permanent increase in an employee's base pay that was a feature of past performance-pay programs. The tentative agreement requires that the merit-bonus funding be exhausted on bonuses every year.

In the previous collective bargaining agreement, the parties set up similar funding for long-term satisfactory service bonuses, payable every five years after 10 years of service, and educational achievement stipends for masters and doctoral degrees received during the term of the agreement. The bonus pool is about \$1.1 million. As part of the tentative pact, the parties agreed to distribute to bargaining unit members any money left after payment of the long-term service bonuses and educational achievement stipends. If the amount

of 2.5 percent, and any compensation funding above that will be set aside for merit bonuses.

In 2007-08, a planned 4 percent raise for each employee will come from a 3 percent general increase and a 1 percent increase to the salary ranges. If state funding is less than requested, implementing the previously promised 2.5 percent raise will take precedence, followed by funding for the merit-bonus pool, before further salary increases occur. The compensation pools will not be reduced by more than they are reduced for other non-faculty units.

Leave Improvements

APC garnered increased leave that other units already have bargained — five days of funeral leave and 30 days of parental leave. The maximum donation an employee may make for the catastrophic leave of others was elevated to 40 hours per year.

The current contract limits vacation accrual to 320 hours for employees with less than 10 years of service and to 440 hours for longer-term employees. The college president can permit carryover of accumulated vacation leave in the event the employee is prevented from taking vacations in December because of emergencies, critical projects, injury, or sickness. APC negotiated another procedure to ensure that managers allow vacations for employees who may be forced to forfeit leave due to denials of vacation requests in the last quarter of the year. If the manager and employee cannot agree on vacation dates, the manager must choose one of three periods

the employee identifies in the first six months of the following year. If the employee does not propose three scheduling options, the manager dictates the vacation schedule.

Newly Arbitrable Terms

As might be guessed from the pre-occupation with forfeited vacation, APC is concerned that its unit members are overloaded. The new agreement will allow an employee to take a grievance claiming an “unreasonable or excessive workload” to expedited

APC negotiated another procedure to ensure that managers allow vacations.

payable to each full-time employee is less than \$100, the leftover money would be rolled over to the bonus/stipend fund for the next year.

While salary increases for 2005-06 are definite, the lack of certainty in state funding led to conditional language for 2006-07 and 2007-08 raises. Unit members are likely to receive a 3 percent general salary increase in the second year of the contract, and an amount equivalent to a .5 percent raise will be set aside for merit bonuses. In the event CSU does not receive the amount requested in its budget, salary funds will go first toward a general raise

An employee may take a grievance claiming an ‘unreasonable or excessive workload’ to expedited arbitration.

arbitration. The arbitrator will be limited to issuing a cease-and-desist order if he or she sustains the grievance.

The parties’ lengthy fight over CSU’s promulgation of new policies may be at an end due to new procedures, including arbitration as a last resort, for addressing future proposed policies. (See *CPER* No. 172, p. 65.) APC will accept disputed policies with modifications it has negotiated. All unfair practices over unilaterally

implemented policies will be withdrawn.

An employee can appeal a reprimand to the college president, but not use the grievance procedure. If, however, the reprimand is based on violation of a policy, and the reprimand is cited in a later disciplinary action, the employee can choose to appeal the disciplinary action through the grievance and arbitration process rather than the State Personnel Board.

The parties' battle over the savings clause was settled by an agreement to arbitrate any dispute over whether a contract provision conflicts with the law. The arbitrator's opinion may be vacated by the court.

CSU Vice Chancellor for Human Resources Sam Strafacci praised the union for its creativity in overcoming some of the most intractable obstacles. Peterson told *CPER* that APC believes the agreement is the best the union could have bargained. The new agreement provides APC the option to extend the contract for up to two years beyond 2007-08, without having to submit to new or altered merit-pay plans, if it agrees to accept compensation offers that CSU makes near the expiration of the contract. ❁

State Employment

New Review Requirements for State MOUs and Side Letters

More than 40 percent of the current collective bargaining agreements between the state and its employee unions were provided to the legislature less than 24 hours before the legislature approved them. That is the figure Senator Jackie Speier (D-San Francisco) cites to explain why she authored S.B.

MOUs often are submitted when there is little time to discuss them.

621. The new law requires the Department of Personnel Administration, which negotiates on behalf of the state, to provide the legislative analyst with a tentative memorandum of understanding and DPA's estimate of costs and savings stemming from the MOU. The legislative analyst has 10 days to issue the legislature an analysis of the fiscal implications of the bill. The legislature cannot act to approve or disapprove an MOU until the legislative analyst has issued the fiscal analysis or has had the MOU for 10 days.

To ensure the legislature obtains feedback from any interested party, DPA must post the entire MOU, as well as a summary, on its website as soon as the MOU has been ratified by union members and has been submitted to the legislature.

Speier pointed out that MOUs often are submitted to the legislature in the final days of the session when there is little time to discuss them and "imense pressure" to vote for them. Although agreements might still arrive on the last day of the session, this bill ensures that legislators have available a thorough financial review before they vote. The legislative analyst indicated that information about MOUs sometimes has reached her office after leg-

islative deliberations. While unions argued the bill was unnecessary because the Department of Finance already is responsible for submitting cost forecasts to the legislature, the legislative analyst pointed out that secondary or hidden costs have not been disclosed in some cases. She referred specifically to looser sick-leave approval provisions for correctional officers in the current MOU that resulted in a 20 percent jump in use of sick leave and likely increased overtime pay to cover the shifts of guards who were absent.

The new law also requires DPA to submit to the Joint Legislative Budget Committee any side letter or addendum that is not already contained in an MOU and that would require expenditure of \$250,000 or more in employee compensation. The committee then has 30 days to decide whether the side letter "presents substantial additions that are not reasonably within the parameters of the original memorandum of understanding." If so, the side letter must be approved by the legislature. *

Raises for State's Excluded Employees Delayed Indefinitely

Despite being warned by the Little Hoover Commission that the state's management personnel are not adequately compensated, the state employer has not taken any observable steps to address the problem for most occupational groups. In June 2004,

the Excluded and Exempt Employees Salary-Setting Task Force recommended the creation of an advisory commission to set salaries and benefits for excluded employees, managers, and supervisors who do not have collective bargaining rights. Only supervisors'

organizations, not managers' representatives, have the right to meet and confer with their employer, but the state can set salaries without their agreement. Legislation that would establish a salary commission for excluded employees, A.B. 1186 (Horton, D-Inglewood), became a two-year bill after the state Department of Personnel Administration registered its opposition.

Inadequate Compensation

There is no dispute that managers in state service do not receive compensation that is competitive with their counterparts in the rest of the public sector. The Little Hoover Commission, an independent state commission charged with reviewing the efficiency and effectiveness of state agencies, reported that career executives in state service make between \$69,000 and \$117,000, while employees in similar positions in the federal service earn between \$107,000 and \$162,000. The most a department director can make working for the state is \$131,400, but most top out at \$123,000. Their counterparts in Sacramento County make between \$106,000 and \$163,000 for managing smaller budgets and fewer employees. In *Serving the Public: Managing the State Workforce to Improve Outcomes*, the commission emphasized that a substantial number of managers are eligible to retire in the next 10 years, and the state must develop competitive pay packages to attract, retain, and reward others.

Supervisors are insufficiently compensated even when compared to other employees within state service. While the state previously maintained at least a 10 percent differential between the salaries of supervisors and the highest salaries of those they supervised, DPA admits that there has been "salary separation erosion" in almost every occupational group. In 2002, A.B. 2477 (Steinberg, D-Sacramento) set up the State Excluded and Exempt Employees Salary-Setting Task Force to recommend a process for determining salaries for excluded employees. (See

*It is possible for the
supervisor to earn
15 percent less than
a subordinate.*

story in *CPER* No. 162, pp. 19-21.) The task force found that in one occupational class, base pay of the first-line supervisor was only 1.5 percent higher — \$83 a month more — than the highest-ranking subordinate. However, when collectively bargained recruitment and retention pay for the rank-and-file employees was factored in, it was possible for the supervisor to earn 15 percent *less* than a subordinate. Longevity pay, education pay, and other additions to rank-and-file salaries cause the same salary inversions. In some occupational groups, the fact that

subordinates can earn overtime pay while supervisors are exempt exacerbates low supervisor pay.

The task force attributed the compensation woes of excluded employees to DPA's practice of setting excluded employees' salaries after collective bargaining with the state's employee unions is concluded. DPA asserts it sets salaries after it looks at the effect of collectively bargained raises on the differential between supervisors and subordinates, and admits that excluded employees are an "afterthought." The task force summarized the process in its June 2004 report:

Under the current salary-setting process, compensation for rank-and-file is negotiated without regard to the impact on higher-level classifications. The impact of negotiated compensation on higher-level classes is typically determined only after the unit's collective bargaining negotiations are complete. At that time, it is often difficult or impossible to determine the impact on the higher-level classifications and then make appropriate adjustments because of a lack of appropriated funds and/or defined compensation ceilings.

No Raise Yet

That pattern of conduct is still on display. The excluded employees who have received pay increases for 2005-06 are those who supervise or manage employees in bargaining units where this year's compensation is settled, including highway patrol officers, correctional officers, and engineers. As for the

other excluded employees, DPA Labor Relations Officer Frank Marr says he is happy to meet with supervisors' organizations that have meet and confer rights, but DPA has no plan yet for an excluded employees' salary program. "We are currently in bargaining with the rank-and-file organizations. That will have an impact," he told *CPER*. He

DPA has no plan to address salary compaction.

identified funding and the governor's approval as obstacles to setting compensation for excluded employees. "We have no ability to put money out there."

It is this process that the task force found "seriously flawed" more than a year ago. The task force urged creation of an advisory commission that would conduct market surveys of compensa-

tion for benchmark classifications. The commission would use the data along with cost-of-living indexes, rank-and-file compensation, and other factors to make annual salary and benefit recommendations for excluded employees. The task force also exhorted the state to "take immediate steps to alleviate the impact of salary compaction associated with the degree of salary separation between supervisory employees and their rank-and-file subordinates."

But most supervisors' organizations say they see no progress. The Association of California State Supervisors asserts that its experience during a recent meet and confer session is symptomatic of the administration's disregard for excluded employees. On August 26, ACSS had scheduled a session with DPA. Assembly Member Jerome Horton attended, but no one from DPA showed up until Horton insisted on speaking to DPA Director Michael Navarro a half-hour after the meeting was scheduled to begin. Dur-

ing discussions, Navarro admitted DPA had no plan to address salary compaction and did not believe there would be any funding for supervisors' raises next year due to the \$7 billion budget deficit.

Marr told *CPER* that the mix-up was merely a misunderstanding. The meeting with ACSS was on Chief of Labor David Gilb's calendar, but he had been called to a deposition. The department was not notified that Assembly Member Horton would be there. When DPA Director Navarro found out that Gilb had not appeared, Navarro cleared his calendar to attend the meeting. Marr assured *CPER* that, despite the appearance that excluded employees' concerns are being ignored, there are strong advocates for them within DPA who are working "behind the scenes."

Legislation and Lawsuits

To implement the recommendations of the salary-setting task force, Assembly Member Horton introduced A.B. 1186. The bill would create an

acss bid for independence fails

Last spring, the Association of California State Supervisors attempted to disaffiliate from the California State Employees Association in a mail-ballot election, but not enough ballots were cast. (See story in *CPER* No. 173, pp. 39-40.) Believing that the low voting rate was due to the mail ballot procedure, ACSS followed up with a second attempt during the CSEA General Council meeting which all delegates attended in October. Sixty-one percent of the voting delegates cast their ballots for independence, but a

two-thirds supermajority was necessary to allow ACSS to break away. ACSS President Tim Behrens has no immediate plans to attempt another disaffiliation vote. His new focus is on enhancing communication between CSEA and its affiliates concerning efficiency in providing services. ACSS is operating at a budget deficit, and another affiliate, Service Employees International Union Local 1000, has refused to pay CSEA \$2 million that CSEA was counting on to balance its budget. The dispute will be arbitrated this month.

advisory commission that receives administrative support from DPA. It specifies the criteria the commission should consider and requires annual recommendations to the legislature after public hearings. DPA estimated its annual increased costs from the bill would be \$375,000. At the August meeting, Navarro reiterated DPA's opposi-

CDFP is trying to convince the department chief to allow supervisors to voluntarily demote.

tion to the bill. DPA says it recently has expanded its salary-survey unit to perform much of the work the commission would undertake. It also objects that the commission would be an obstacle to salary-setting, and would diminish executive authority. Although the bill was set for hearing in the Senate Appropriations Committee, it was held under submission.

One organization has lost patience with the lack of action. The supervisors section of CDF Firefighters voted in November to file a lawsuit. CDFP claims that the California Department of Forestry and Fire pays its supervisors 20 percent less than those they supervise. As a result, almost 40 percent of the supervisory positions are vacant and 90 percent of those eligible for pro-

motion will not apply. The disincentives are so great that the organization is trying to convince the department chief to allow supervisors to voluntarily demote while continuing their supervisory duties.

The Little Hoover Commission, the Excluded and Exempt Employees Salary-Setting Task Force, and the governor's California Performance Review each have urged quick action to create a policy for excluded-employee compensation, alleviate salary compaction, and implement market-based

compensation. DPA's own strategic plan set a goal to develop a "new approach" for determining excluded employee compensation by November 30, but the administration has not yet presented any details. Meanwhile the clock is ticking as massive retirements loom. As the task force reported, "Because of the compaction problem, some qualified and deserving employees are choosing not to step into leadership roles, thereby depriving the state — and the public — of creative and dedicated leadership." *

State Attorneys and Judges Agree to Pension Concessions

The Schwarzenegger administration won important concessions in a new two-year memorandum of understanding with the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment. CASE, which represents 3,400 unit members, agreed to increase employee retirement contributions and to allow unit members to opt out of the California Public Employees Retirement System. The agreement also will require the pension benefits of new employees to be based on a three-year final compensation average that moderates pension benefits. The pact will begin to remedy severe salary lags of senior attorneys at the top step of the salary range and reduce limits on promotions. A boost to the minimum salary for entry-level attorneys may help to counteract the effects on

new hires of phased-in employer contributions to dependent health care premiums and the use of the three-year average final compensation figure in pension calculations.

Working Without a Contract

The CASE contract expired July 2, 2003, after a 5 percent raise became effective July 1. Unlike other state employee unions, CASE did not agree with the Davis administration to defer the 5 percent raise in exchange for additional personal leave days and increased health benefit contributions. After the recall election, Governor Schwarzenegger's Department of Personnel Administration did not return to the bargaining table with CASE until October 2004. As a result, unit members' pay has been stagnant while they absorbed all the in-

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Gloria Steinem

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creases to health benefit premiums in 2004 and 2005.

CASE primarily has been focused on boosting the salaries of unit members. According to the union, attorneys' salaries increased only 29.5 percent from 1991 to early 2005, while the California Consumer Price Index rose 42 percent. On average, local county counsel, city attorneys, and district attorneys are paid 20 percent more than state attorneys with comparable experience or duties. Out of 40 attorneys employed by the University of California, all but six are paid more than the highest-paid state attorney. Entry-level state administrative law judges are paid 17 percent less than federal administrative law judges at entry level, and senior state ALJs are paid 28 percent less than senior federal ALJs.

DPA's Clout

The state entered negotiations demanding a reduction of two holidays, the right to impose up to five furlough days during fiscal emergencies, a change in overtime calculations, and caps on unused leave. In addition, the state proposed fixed-dollar health benefit contributions, rather than the formulas that 14 unions negotiated with the Davis administration, and phased-in eligibility for benefits for new employees. In line with the pension reform climate earlier this year, the state demanded that employees share equally in retirement costs, that unions agree to allow their employees to opt out of CalPERS in return for a salary stipend,

and that new employees only be allowed to enter a defined contribution plan, not a defined benefit plan.

Over the last year, DPA has won a number of these concessions from each union with which it has concluded negotiations. The California Association of Psychiatric Technicians agreed to fixed-dollar employer contributions to benefits and the exclusion of sick leave from calculations for overtime pay eligibility. (See story in CPER No. 170,

CASE agreed to allow employees to opt out of CalPERS.

pp. 57-59.) The California Union of Safety Employees agreed to those changes and also settled for phased-in dependent benefit contributions for new employees. CAUSE's new contract allows reduction in the number of holidays if all other unions agree. It also does not prevent implementation of furloughs or changes to the retirement system that are enacted by the legislature or through the initiative process. (See story in CPER No. 173, pp. 40-43.)

Pension Concessions

CASE successfully resisted language allowing furloughs, since most of its unit members are overtime-exempt professionals whose work is not confined to an eight-hour day.

Furloughs for most would amount to unpaid days of work. But the new MOU would allow a reduction of one holiday.

To the dismay of other state employee unions, however, DPA scored big in pension concessions in its negotiations with CASE. On July 1, 2006, employees will begin to contribute 1 percent more of their salary toward their retirement unless they have signed up for a low-benefit Tier II plan.

DPA scored big in pension concessions.

They also can avoid contributions to CalPERS altogether by opting out of the system and receiving a stipend of one-half the employer's normal retirement contribution.

CASE also agreed to implement for new employees a return to a formula that calculates benefits based on the average of the employee's salary in the last three years of employment. Current employees still will be entitled to benefits based on the final year of compensation.

The opt-out provision is highly controversial among public employee unions. They argue that large numbers of employees opting out of CalPERS reduces the retirement security of not only the individual employees, but all public employees. Since the contributions of active employees help cover the

liabilities for both current and future retirees, an exodus of active employees from the system eventually would reduce the size of the retirement fund and increase CalPERS' unfunded liabilities. The small size of the attorney unit, in addition to the likelihood that few current attorneys and judges will opt out of the system, renders the effect small for now. But if other state employee unions are pressured to settle for opt-out provisions and employees decide they want additional take-home pay, the need for higher employer contributions to offset underfunding could become real.

Proponents of the tentative pact contend that the impact of a three-year average is less for attorneys and ALJs than for many employees in state service because CASE unit members spend a large portion of their careers at the top step of the highest salary range and have few options for promotion. That may have been true for some stretches of time, but the pay raises due to senior attorneys in the next 10 months show that significant boosts to their salaries do occur and can dramatically affect the size of the retirement check.

Salary Lags Addressed

All unit members will receive a 2.5 percent increase retroactive to July 1. The minimum attorney salary will be raised 15 percent to \$4,410 per month effective July 1. On July 1, 2006, unit members will receive another cost-of-living adjustment. The increase is pegged to the Western Urban Consumer Price Index, but the raise will

not be less than 2 percent, even if the index rises less than 2 percent; nor will it be more than 4 percent. Senior attorneys at the top and bottom steps of their salary ranges will gain more than others. On July 1, 2006, the top and bottom steps of the ranges will be boosted 5 percent before the cost-of-living increase becomes effective. The monthly salary of the highest paid attorney IIIs will go from \$8,517 to at least \$9,350, and possibly to \$9,533. The new maxi-

Significant boosts to salaries can dramatically affect the retirement check.

imum for attorney IVs could range from \$10,336 after a 2 percent COLA to \$10,538 if a 4 percent COLA occurs. Half of the attorneys in the unit are at the top of the attorney III or IV ranges.

The pact increases the state's annual health care contributions in January 2006, by \$1,188 for single employees and \$2,724 for families. However, for the dependents of new employees, the state will contribute only half of its normal contributions in the first year of employment and only 75 percent of the contribution in the second year. There will be no increased contributions to cover rising premium costs in January 2007.

The agreement also settles a pending arbitration concerning the number of attorney IIIs that an agency may employ. Only 55 percent of the attorneys in an agency may now be at level III, but that cap has been raised to 65 percent, which will allow some deputy legal counsel IIs to receive promotions. The cap has been eliminated in any agency that is allowed to employ level IV attorneys.

The deal represents an immediate 15 percent raise for lowest-paid attorneys and nearly a 10 percent increase

The deal represents an immediate 15 percent raise for lowest-paid attorneys.

in compensation for the highest-paid attorney IIIs over the next 10 months if the 2006 cost-of-living increase is only 2 percent. By contrast, single employees in the second-lowest pay range will see only a 4.75 percent net boost in compensation this year, after factoring in the employer health contribution increase. But next year's higher retirement deduction and health premium increases in January 2007 could significantly erode the additional 2 to 4 percent increase they receive next July. As the Western Urban Area Consumer Price Index increased 4 percent from

September 2004 to September 2005, this year's increase will barely keep pace with inflation.

The contract was ratified by nearly 75 percent of CASE members. The legislature will need to approve the pact when it returns. There is a question

whether any other employee unions will try to persuade legislators to vote against the MOU. Although some lawmakers may be sympathetic, it would be surprising if they blocked concessions that union members overwhelmingly approved. *

Governor Signs Bills That Affect Pay and Benefits

Military Pay

State employees serving in the military may bring home more cash after passage of A.B. 276 (Baca, D-San Bernardino). Employees serving after September 11, 2001, in the "War on Terrorism" are entitled to payments from the state for one year to make up the difference between their military pay and the state salary they would earn if not in military service. In the past, deductions from state checks were made not just for standard military pay, but also for hazardous-duty and other bonus pay the soldiers earned. In some cases, the state has asked for repayment of salary that was calculated before the state became aware of extra pay. One youth correctional counselor was asked to return nearly \$4,000. Because of the legislation sponsored by the California Correctional Peace Officers Association, state law now excludes hazardous-duty, hostile-fire, or imminent-danger pay from the calculation of the difference between state salary and military pay.

Catastrophic Leave for Excluded Employees

Current regulations of the Department of Personnel Administration allow supervisors and managers to transfer accumulated annual leave, holiday leave, vacation leave, and compensating time-off credits to an employee who has exhausted all of his or her own leave due to the catastrophic illness or injury of the employee or a family member. Non-supervisory employees could not transfer leave to a supervisor or manager. The California State Employees Association sponsored A.B. 747 (Blakeslee, R-San Luis Obispo), which allows excluded employees to receive leave donations from rank-and-file employees as well as other supervisors and managers. It places the catastrophic leave program into statutory law. Use of donated leave is capped at 12 continuous months.

Post-Retirement Employment Cap

Employees who have retired from state employment can work for up to 960 hours annually for a state agency without affecting retirement pay. A.B. 1166 (Canciamilla, D-Martinez)

changes the period during which the calculation is made from a calendar year to a fiscal year. It also clarifies that the total of all hours worked for all state agencies combined cannot exceed the 960-hour cap. *

clarifies that agencies must report and monitor affirmative action plans relating to individuals with disabilities.

The bill emphasizes departments' responsibility to collect and report data. In a press release, the SPB explained, "The statistical information is necessary to insure that underutilization of any group is not attributable to discrimination, that outreach programs for attracting, promoting and retaining state employees are broad and inclusive, and that selection procedures are job-related." *

SPB Bill Clarifies State's Equal Employment Opportunity Obligations

State agencies are required to collect statistical information on the composition of the state's workforce. But some managers are confused about whether Proposition 209, the constitutional amendment that banned preferential treatment based on race and other attributes, invalidated equal employment opportunity measures in state law. The State Personnel Board sponsored A.B. 124 (Dymally, D-Compton) to remove statutory requirements that conflict with Prop. 209, such as the requirement to establish affirmative action goals and timetables. But it also reiterated state departments' duties to create and maintain equal employment opportunity plans and complaint procedures.

The SPB observed that many departments recently have failed to comply with statutory requirements to develop EEO plans, inform employees of complaint procedures, train managers in EEO issues, or submit workforce analyses and action plans to the board. Departments have reduced EEO staff and have used untrained EEO investi-

gators. Investigations are taking too long, and reports are inadequate, according to the SPB. The number of discrimination complaints filed with state departments was 78 percent higher in 2001 than in 1995, prior to the passage of Prop. 209.

The new law requires plans to remove non-job-related employment barriers.

The new law removes references to "improving the representation" or "correcting underrepresentation" of women and minorities from existing statutes but requires plans to remove non-job-related employment barriers. It clarifies that underutilization in the employment of members of racial, gender, and ethnic groups does not justify preferential action, but may be addressed by other means. It also

Discrimination

Offensive Conduct May Violate Title VII Even Where Not Facially Sex-Specific

Title VII's prohibition against sex discrimination in employment may be violated even where the employer's actions are not motivated by sexual desire or sexual animus, held the Ninth Circuit Court of Appeals in a case involving the harassment of female employees of a labor union representing teachers and other public school employees.

Three female employees alleged that Thomas Harvey, assistant executive director of the National Education Association of Alaska, harassed them verbally and physically on many occasions. The court found that "the record reveals numerous episodes of Harvey shouting in a loud and hostile manner at female employees," that "the shouting was frequent, profane, and often public," and that there was "little or no provocation for these episodes." The court noted that "Harvey's verbal conduct also had a hostile physical accompaniment," including lunging across the table at an employee, grabbing another's shoulders and yelling, "Get back to your office," and pumping his fist in the direction of an employee while stepping towards her. "Harvey's behavior clearly intimidated female employees," said the court, pointing to testimony that his actions had put one

employee in a "state of panic" and made her feel "physically threatened most of the time," whereas another omitted submission of overtime hours because she was "too scared of Mr. Harvey to turn them in."

The Court of Appeals reversed the district court's dismissal of the case, finding that the lower court erred in holding that the "because of sex" language in Title VII required that the behavior be either of a sexual nature, i.e., motivated by lust, or motivated by "sexual animus toward women as women." The Ninth Circuit stated:

In applying this sexual animus test, the district court seemed to find it significant that Harvey did not seek "to drive women out of the organization so that their positions could be filled by men." He noted that the workplace was a teacher's union, in which women were traditionally not a minority. However, a pattern of abuse in the workplace directed at women, whether or not it is motivated by "lust" or by a desire to drive women out of the organization, can violate Title VII. Indeed, this case illustrates an alternative motivational theory in which an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men. There is no logical reason why such a motive is any

less because of sex than a motive involving sexual frustration, desire, or simply a motive to exclude or expel women from the workplace.

But, said the court, the motive behind the actions is not the determining factor. "The ultimate question...is whether Harvey's behavior affected women more adversely than it affected men," it proclaimed, citing *Oncale v. Sundowner Offshore Servs., Inc.*, (1998) 523 U.S. 75, 129 CPER 11. Referring

The ultimate question...is whether Harvey's behavior affected women more adversely than it affected men.

to its holding in *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 88 CPER 48, in which it ruled that the courts must consider what is offensive and hostile to a reasonable woman, rather than a reasonable person, the court stated:

We acknowledge that our invocation of the "reasonable woman" standard, which renders sex-specific differences in the subjective effects of objectively identical behavior sufficient to ground a claim of discrimination, was rooted in the context of explicitly sex- or gender-specific conduct or speech. We now hold that evidence of differences in subjective effects (along with, of course, evi-

dence of differences in objective quality and quantity) is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific.

Evaluating the qualitative effects, the court found that there was at least a debatable question as to the differences in treatment of male and female employees. The record shows a few instances of hostile behavior toward male

The subjective effects of the treatment were very different for men and women.

employees that may have had a qualitatively different “bantering” character. On the other hand, there was a strong suggestion that the subjective effects of the treatment were very different for men and women. “There is no evidence in the record that any male employee manifested anywhere near the same severity of reactions (e.g., crying, feeling panicked and physically threatened, avoiding contact with Harvey, avoiding submitting overtime hours for fear of angering Harvey, calling the police, and ultimately resigning) to Harvey’s conduct as many of the female employees have reported,” said the court.

Turning to the quantitative comparison of treatment between male and female employees, the court rejected the association’s argument that because Harvey had more regular contact with female than with male employees the differential effect on women was merely incidental. The court announced that it was joining at least two other circuits, the Seventh and Eighth, in holding that “an unbalanced distribution of men and women in relevant employment positions, and the fact that some men were also harassed, does not automatically defeat a showing of differential treatment.” “To hold otherwise would allow the accident of a mostly female workplace to insulate even a culpable employer from liability,” explained the court.

The court also concluded that there was no question that there was a

triable issue of fact as to whether the work environment created by Harvey was sufficiently severe to violate Title VII:

The rule is that “the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct,” [citing *Ellison*]. Where the conduct in question was allegedly a “daily thing,” there can be little question that a reasonable juror might infer that Harvey’s pattern of verbal and physical intimidation, as confirmed by a wide range of employees, was sufficiently severe to satisfy the statute.

(*Equal Employment Opportunity Commission et al. v. NEA*, No. 04-35029; *EEOC et al. v. NEA, Alaska*, No. 04-35201 [9th Cir. 9-2-05] 422 F.3d 840, 2005 DJDAR 10858.) *

Monocular Employees Are Disabled Under FEHA, But May Be Barred From Driving UPS Trucks

In one opinion deciding three different cases, the Ninth Circuit Court of Appeals ruled that certain United Parcel Service employees with monocular vision are disabled within the meaning of California’s Fair Employment and Housing Act. The court also concluded, however, that UPS did not discriminate by refusing to allow them to drive trucks because the employer demonstrated that the employees would “endanger the health or safety of others

to a greater extent than if an individual without a disability performed the job.”

In analyzing the trial court’s finding that some of the employees were not disabled under the FEHA, the Court of Appeals first addressed the threshold question of whether the plaintiff’s qualifying medical condition “limits a major life activity” within the meaning of the act. The court distinguished this test from the federal Americans With Disabilities Act test requiring that a plaintiff’s condition

“*substantially* limit a major life activity.” The court quoted extensively from the Poppink Act of 2000, which amended the FEHA to include language spelling out how courts are to address limitations on a major life activity. It found that the language of the Poppink Act was applicable to the cases before it, even though the act was not passed until after the employees already had filed

The applicants were limited in the major life activity of seeing.

their lawsuits. This is because, as noted by the California Supreme Court in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 159 CPER 52, the amendments did not change the law but were enacted in “an effort simply to clarify the true meaning of FEHA’s limits test.”

Rejecting the finding of the trial court, the Court of Appeals found that the applicants in one case were limited in the major life activity of seeing. The applicants explained that their monocularly made a variety of activities difficult for them, especially because of their inability to perform stereopsis, the process of combining two retinal images into one, affecting depth perception, particularly at short distances. As the court explained:

Judging depths at near distances is a significant aspect of the major life activity of seeing. As the affidavits and testimony demonstrate, nearfield depth perception is important to a number of activities that sight normally is used to perform. The FEHA does not require that the disability result in utter inability or even substantial limitation on the individual’s ability to perform major life activities. A limitation is sufficient.

The court instructed that in deciding whether an individual’s limitation qualifies as a disability under the FEHA, “the proper comparative baseline is either the individual without the impairment in question or the average *unimpaired* person.” It is not proper to compare the individual’s limitation to those of other impaired people, said the court.

In short, under FEHA and its relevant interpretations, the district court erred by holding that [the drivers] are not limited in the major life activity of seeing simply because other people with common vision impairments are also limited. [The drivers] demonstrated that seeing, and a variety of tasks for which seeing is commonly used, are made difficult for them because of their monocularly and consequent inability to perform stereopsis. FEHA requires no more.

In one of the other cases before it, the Ninth Circuit affirmed the trial court’s holding that the applicants were disabled as they were limited in the major life activity of working. The court pointed out that Sec. 12926(k)(1)(B)(iii) of the Poppink Act specifies that “working” is a major life activity under the

Things are going to get a lot worse before they get worse.

Lily Tomlin

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FEHA and that this is so “regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments,” citing Sec. 12926.1(c). The court rejected UPS’ argument that the word “employment” means “occupation” and that the district court had erred in holding that the applicants’ “exclusion from the single position of fulltime UPS package car driver, notwithstanding their ability to perform

UPS satisfied the act’s safety-of-others defense.

other jobs (both within and outside of UPS), constitutes a limitation” in working. The court stated:

Even if the district court interpreted “particular employment” too narrowly, however, we still would have to affirm its partial summary judgment for Plaintiffs with respect to working. Plaintiffs demonstrated that they are limited in working as commercial delivery drivers, not only because they are excluded from working as fulltime package car drivers for UPS, but also because they are excluded from any driving position that requires [Department of Transportation] or state certification. Thus, even if “particular employment” is interpreted more broadly than “single position with a single employer,” Plaintiffs’ monocularity limits their ability to work in the occupation of commercial delivery driver.

Though the applicants in both cases were disabled within the meaning of the FEHA, UPS did not discriminate against them unlawfully, held the court. This is because UPS satisfied the act’s safety-of-others defense. Section 12940(a)(1) provides that the FEHA “does not prohibit an employer from refusing to hire or discharging an employee where the employee, because of his or her disability cannot perform [the job’s essential] duties in a manner that would not endanger the health or safety of others with reasonable accommodations.” The Fair Employment and Housing Commission, charged with interpreting and enforcing the FEHA, issued a regulation explaining this section:

It is a permissible defense for an employer or other covered entity to demonstrate that after reasonable accommodation has been made, the applicant or employee cannot perform the essential functions of the position in question in a manner which would not endanger the health or safety of others to a greater extent than if an individual without a disability performed the job.

The court determined that, under the act, “even a modest increase in the risk that a problem will occur is significant when the potential consequences of that problem are very serious.” The court acknowledged that the safety-of-others defense requires an individualized showing that safety would be compromised, but the court pointed to the FEHC’s statement that “there is no ground for barring the application

of categorical evidence” to individualized defenses. The evidence presented in this case showed that monocular drivers as a whole are involved in more accidents than others as a whole and that “peripheral vision plays an important role in avoiding accidents and that the monocular driver has less opportunity to see a child or any other pedestrian or cyclist or car darting from the impaired side.”

The fact that each applicant was tested and that none met the central vision acuity standard of UPS’ Vision Protocol was a “sufficiently individualized determination” to satisfy the safety-of-others defense, found the court. The court concluded that “the [drivers’] failure to meet the Vision Protocol demonstrates that their performance of the duties of a fulltime package car driver would endanger the health and safety of others to a greater extent than if an individual without a disability performed the job.” (*Equal Employment Opportunity Commission, et al. v. United Parcel Service, Inc.*, No. 03-16855; *Bryan et al. v. UPS, Inc.* No. 04-15928; *Bryan et al. v. UPS, Inc.*, No. 04-16403 [9th Cir, 9-15-05] 424 F.3d 1060, 2005 DJDAR 11418.) *

General

Public Employers Not Required to Pay for Costs of Uniforms

In a case with application to the State of California, the University of California, and local governments, the First District Court of Appeal rejected the argument that public entities are required to pay all costs associated with purchasing, replacing, cleaning, and maintaining required work uniforms.

The MMBA provides a comprehensive collective bargaining process.

In seven consolidated cases — including claims brought by employees of the University of California, the counties of Fresno, Santa Clara, Tuolumne, and Yolo, the City of Fresno, and the Department of Corrections, California Youth Authority, Department of Forestry, California Conservation Corps, Military Department, Department of Parks and Recreation, and Department of Developmental Services — the court found that the indemnification provisions of Labor

Code Sec. 2802 are superseded by constitutional and statutory provisions and negotiated collective bargaining agreements.

Labor Code Sec. 2802 appears in the employment relations division of the statute and provides: “An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.”

City and County Employers

Consistent with their constitutional grants of authority, the court noted that the charters of Santa Clara County, Fresno County, and the City of Fresno provide for the compensation of all public employees. The general-law counties of Tuolumne and Yolo also have implemented negotiated uniform allowances.

In addition, the Meyers-Milias-Brown Act provides a comprehensive collective bargaining process. Under this law, each of the local governments has entered into a memorandum of understanding that contains provisions

for annual or quarterly uniform allowances. Those contracts are “indubitably binding on the contracting parties,” said the court, citing *Glendale City Employees Assn. v. City of Glendale* (1975) 15 Cal.3d 328, 27 CPER 35. “Against this background of public entity authority in the area of conditions and terms of employment of public employees, and express negotiation of uniform allowances, plaintiffs have the difficult task of explaining how a section of the Labor Code concerning indemnification can trump the constitutional and statutory authority expressly given to, and exercised by the public entity defendants.”

Payment to employees for work uniforms is a wage.

In an effort to meet that challenge, the employees first argued that the cost of an employee’s uniform is distinct from wages and, therefore, there is no conflict between Sec. 2802 and the wage-setting powers conferred by the Constitution. Rejecting this contention, the court cited several private sector cases as well as *Ventura County Deputy Sheriffs Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 126 CPER 19, which concluded that the county’s payment of an annual uniform allowance was compensation because it provided a benefit to the employee in that

it substitutes for other attire the employee would have to purchase.

The court concluded that, like any other payment of wages, compensation, or benefits, payment to employees for work uniforms is a wage. The impact of this determination, said the court, “places plaintiffs’ claim of entitlement to compensation for uniform expenses as indemnification under section 2802 in direct conflict with a public entity’s power to provide for compensation of its employees and to bargain with employee representatives under the MMBA concerning payment for expenses relating to uniforms.”

‘No case holds that an ordinary work uniform implicates worker safety.’

The court also rejected the argument that the right to indemnification claimed under Sec. 2802 is a matter of statewide concern as an indispensable part of the statutory scheme that protects employees’ rights to minimum wages. The court referred to *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 8 CPER SRS 1, holding that “the determination of wages paid to employees of charter cities as well as charter counties is a matter of local rather than statewide concern.”

The court also cited *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 160 CPER 19, which found that statutes like the Public Safety Officers Procedural Bill of Rights Act are “limited to providing procedural safeguards” and therefore impinge only minimally on the authority of a government employer to set employee compensation. “The fact that the Legislature may impose minimum standards or procedural requirements on government employers does not support the elimination of an entire component of employee compensation from the control or bargaining duty of local government employers,” said the Court of Appeal.

Those plaintiffs who were public safety employees also asserted that Sec. 2802 concerns a statewide interest because their uniforms are related to safety. “Assuming that protecting workers from safety hazards on the job is a matter of statewide concern,” said the court, “no case holds that an ordinary work uniform implicates worker safety.” Section 2802 has been a basic indemnification statute since its enactment in 1872, said the court, and “there is no reasonable definition...that would transform it into a worker safety statute.”

Summing up, the court concluded:

None of the cases relied on by plaintiffs support their attempt to apply the indemnification provisions of section 2802 to preempt the constitutional power of cities and counties to set the terms of employee compensation. They produced no authority construing section 2802 to nul-

lify the provisions of the constitution or the MOU’s entered into after the give and take of collective bargaining negotiations undertaken in compliance with the MMBA. The issue of public employee wages and terms of compensation are indisputably matters of local concern, as our Supreme Court has repeatedly stated.

University and State Employee Claims

The Constitution conveys to the U.C. regents a broad grant of authority to manage its own internal affairs, including the determination of employee compensation and benefits. As for the state, the court referred to Government Code Sec. 19850.1, which makes state employees responsible for the purchase of uniforms required as a condition of employment. It requires the state to provide for an annual uniform allowance “for the replacement of uniforms.” This statutory provision “evidences a clear intent that state employees are responsible for uniform expenses subject to the provisions agreed upon in the course of collective bargaining,” said the court.

“In summary, even if section 2802 applies to claims for the costs of work uniforms, counties and cities are not subject to that requirement by virtue of the constitutional powers granted to them to manage their own affairs and set the compensation of their own employees. Similarly, because of the unique constitutional status of the Regents, it is not subject to general laws relating to employee compensation. By

statute, the state is not responsible for purchasing uniforms, and is required by a different statute to provide an allowance for uniform replacement. No authority indicates that any of these

public entities are mandated by section 2802 to pay for work-related uniform costs.” (*Goshorn v. State of California* [10-11-05] A107130 [1st Dist.], 133 Cal.App. 4th 328, 2005 DJDAR 12187.) ❁

further establishes that, “for purposes of enforcing state labor and employment laws, a person’s immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person’s immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.”

The Court of Appeal first observed that the IRCA includes no express preemption language concerning state workers’ compensation laws. The only preemption provision indicates that it

Undocumented Worker Entitled to Workers’ Comp Benefits

An unauthorized alien worker is entitled to workers’ compensation benefits provided by California law, announced the Second District Court of Appeal, despite federal law that prohibits the hiring or continued employment of such an employee. The Court of Appeal reasoned that by prohibiting reinstatement remedies to undocumented aliens, state law avoids conflict with the Immigration Reform and Control Act, and with the United States Supreme Court ruling in *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137.

Farmers Brothers Coffee sought to block the provision of workers’ compensation benefits to Rafael Ruiz on the grounds of federal preemption and its contention that Ruiz had obtained employment and an expectation of benefits by means of fraud. The Workers’ Compensation Appeals Board rejected that assertion, and Farmers appealed.

Under federal law, it is unlawful to hire or continue to employ someone the employer knows to be an unauthorized alien, or one who is not lawfully admit-

ted for permanent residency or authorized to be so employed by federal immigration law. The IRCA provides for graduated civil penalties for violations and criminal penalties for employers who are found to have engaged in a pattern or practice of hiring unauthorized aliens in violation of the law. It also is a federal crime to knowingly accept a false immigration document for purposes of satisfying the requirements of the statutes.

In contrast, California Labor Code Sec. 3351(a) defines an “employee” as “every person in the service of an employer under any appointment or contract of hire or apprenticeship... whether lawfully or unlawfully employed,” including aliens.

Labor Code Sec. 1171.5 further provides that “all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.” That section

*State law is not in
conflict with the
IRCA’s express pre-
emption provision.*

supersedes state or local laws imposing civil or criminal sanctions on those who employ, recruit, or refer unauthorized aliens. Since the purpose of the California Workers’ Compensation Act is to furnish treatment and compensation for persons suffering workplace injury, irrespective of the fault of any party, its benefits are not a *penalty* imposed on employers. Therefore, the court concluded, since there is no provision in the statutory scheme impos-

ing civil or criminal sanctions for the employment of illegal aliens, state law is not in conflict with the IRCA's express preemption provision.

Observing that the IRCA does not provide for or prohibit compensation for injured workers, the court concluded that Congress had not occupied the field of workers' compensation and did not foreclose the possibility that the states may supplement it.

The court next considered whether California workers' compensation law presents an actual conflict with the IRCA by standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

California law expressly has declared that immigration status is irrelevant to the issue of liability to pay compensation to an injured worker, said the court. "Were it otherwise, unscrupulous employers would be encouraged to hire aliens unauthorized to work in the United States, by taking the chance that the federal authorities would accept their claims of good faith reliance upon immigration and work authorization documents that appear to be genuine." The court explained:

If compensation benefits were to depend upon an alien employee's federal work authorization, the Workers' Compensation Appeals Board would be thrust into the role of determining employees' compliance with the IRCA and whether such compliance was in good faith, as well as determining the immigration status of each injured employee, and whether any alien employees used

false documents. Benefits would be denied to the undocumented injured employee for the sole reason that he is undocumented. Thus, the remedial purpose of workers' compensation would take on an enforcement purpose, in direct *conflict* with the IRCA.

Farmers argued that the Supreme Court's *Hoffman Plastic* decision placed the states in just that position of enforcement. *Hoffman* held that the policies underlying the IRCA prohibited the National Labor Relations Board

Immigration status is irrelevant to the issue of liability to pay compensation.

from awarding backpay to illegal aliens as a remedy for unfair labor practices. The *Hoffman* court reasoned that an award of backpay would unfairly reward an illegal alien because of his or her inability to mitigate damages by working in the United States.

But, the court explained, Labor Code Sec. 1171.5 was enacted by the California legislature in response to *Hoffman* to avoid any conflict with the IRCA by providing that an employee's immigration status was irrelevant to his or her workers' compensation claim, except with regard to the issue of reinstatement since the employer would be committing a federal crime by rein-

stating the undocumented employee. "Section 1171.5, subdivision (b), avoids conflict with *Hoffman's* back pay prohibition by making an exception to the exclusion of evidence of the employee's immigration status 'where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law,' and by excluding any reinstatement remedy prohibited by federal law.... Thus, where reinstatement is prohibited by federal law, section 1171.5 would also prohibit backpay, which was the intent of the Legislature in passing section 1171.5 and related statutes."

The court concluded that the Workers' Compensation Act, with the addition of Sec. 1171.5 prohibiting reinstatement remedies to undocumented aliens, is not in conflict with the IRCA and comports with the reasoning of *Hoffman* since prohibited remedies include backpay.

The court made short shrift of Farmers' contention that Ruiz did not fall within the definition of "employee" set out in Sec. 3351 because he was "unlawfully employed" as a result of his use of fraudulent documents. Discounting what it called Farmers' "questionable logic," the court distilled the argument to be that, consistent with public policy and federal immigration law, an employee who obtains employment in a manner contrary to federal law should not benefit from an illegal employment relationship. It is the task of the legislature to establish public

policy, said the court. And, once it has done so, “the courts may not simply fashion a policy more to their liking.”

Finally, the court addressed the contention that Ruiz’s use of a fraudulent Social Security card and “green card” to secure employment violated Insurance Code Sec. 1871.4, which makes it a criminal offense to make a knowingly false or fraudulent material

Employment, not compensable injury, was obtained by fraudulent documents.

representation for the purpose of obtaining workers’ compensation benefits. The court found no evidence that Ruiz had been convicted of a violation of Sec. 1871.4. Furthermore, said the court, Ruiz was not required to be a lawfully documented alien to be an employee entitled to workers’ compensation benefits. It was employment, not the compensable injury, that Ruiz obtained as a direct result of the use of fraudulent documents. (*Farmers Brothers Coffee v. Workers’ Compensation Appeals Board* [10-17-05] B180839 [2d Dist.], ___ Cal. App. 4th ___, 2005 DJDAR 12381.)

Other state courts that have rejected preemption challenges to their workers’ compensation laws include Connecticut, Florida, Georgia, Minnesota, New Jersey, and Pennsylvania. ❁

Supreme Court Hears Important ‘Free Speech’ Case

The United States Supreme Court recently heard oral argument in a case that raises critical issues involving the free speech rights of public employees and the constitutional protections triggered by comments about matters in the workplace. The case before the high court involves a deputy district attorney in Los Angeles, Richard Ceballos, who alleged in a federal lawsuit that he was demoted for disputing the veracity of an affidavit prepared by a deputy sheriff to obtain a search warrant in a criminal drug case. Ceballos testified for the defense that he believed the affidavit included false statements. He subsequently sued the county and then District Attorney Gil Garcetti, alleging that, as a whistleblower who spoke out against police misconduct, his First Amendment free speech rights should be protected.

Ceballos’ suit was dismissed by District Court Judge Howard Matz, who found that the district attorney’s speech was not protected. But the Ninth Circuit Court of Appeals reversed, finding that Ceballos’ speech was protected because it addressed a matter of public concern.

At the core of the case are two important free speech rulings dealing with public employees — *Pickering v. Board of Education* (1968) 391 U.S. 563 and *Connick v. Myers* (1983) 461 U.S. 138, 22 CPER SRS 73. In *Pickering*, the court ruled that a school board violated

a teacher’s First Amendment rights when it fired him for writing a letter to the newspaper that was critical of the board’s action. That case announced that public employees could not be disciplined for exercising their First Amendment right to express them-

Ceballos sued as a whistleblower who spoke out against police misconduct.

selves on matters of public concern. *Pickering* enunciated a balancing test that requires the courts to balance the employee’s right of speech against the government employer’s interest in running an orderly and efficient workplace.

In *Connick*, the balance was tipped in the opposite direction. In that case, the court found that an attorney who circulated a critical questionnaire to her colleagues in the office was not speaking on a matter of public concern, but as an employee about a personnel disagreement with her boss.

In arguments before the Supreme Court in October, the justices focused on whether the Constitution protects public employees from retaliation for what they say in the course of their duties. Ceballos and his supporters argued

that he was a whistleblower and should be entitled to free speech protection. The other side argued that extending First Amendment protections to job-related speech would go too far because all speech uttered by a public employee could be cloaked in the mantle of speech about matters of public concern.

Some commentators have urged the high court to step back from the current focus on whether the matter at issue is one of public concern and, instead, to adopt an approach that looks more at the workplace disruption caused by the speech.

A decision in the case, *Garcetti v. Ceballos*, Supreme Court No. 04-473, is expected before the end of the court's term in June. ❁

Public Sector Arbitration

Arbitrator Pool Finds No Evidence to Support Termination

A custodian who had worked for the City of Modesto for almost 30 years was reinstated by Arbitrator C. Allen Pool for failure to produce adequate proof of *any* infraction, let alone reliable evidence to support termination.

The grievant in this case was part of the night custodial crew responsible for maintaining a group of buildings known as the corporate yard. Crew members worked from 7 p.m. to 3:30 a.m., but returned to the service yard 20 to 30 minutes before the end of their shift to unload the truck and prepare it for the next crew, store materials and machinery, and complete paperwork.

One morning in March 2003, a cleaning crew supervisor arrived early to find the night crew had left work before the end of the shift. Over a series of days, he proceeded to observe both his crew and the custodial crew, catching them leaving early on more than one occasion.

As a result of his observations, the city initiated a formal investigation to determine if there was a pattern of the crews leaving early. Crew members, crew leaders, and supervisors were interviewed. Based on the grievant's admission that he occasionally left early and that he had been disciplined for a

similar offense in 1995, the grievant was dismissed for neglect of duty, dishonesty, absence without leave, and other failures of good behavior that would discredit the city.

The city contended that it had afforded the grievant due process and that it had just cause for terminating the grievant based on his own admission that he had left his shift early, thereby violating the city's trust and accepting pay for time not worked. The grievant previously had been disciplined for a similar offense and had been warned that future occurrences could lead to termination. The city considered the grievant's long service, but found it was outweighed by the seriousness of the offenses.

The union charged that the city failed to conduct its investigation with due diligence and that just cause was lacking for the grievant's termination. The grievant was a dedicated employee with a long service to the city. Moreover, there was insufficient evidence to prove that the grievant left early or intentionally defrauded the city or deprived it of public funds. In addition, the city failed to provide sufficient notice or to follow principles of progressive discipline before implementing the termination.

Pool initially observed that without adequate proof of an infraction, any penalty would be considered unjust. Here, the evidence provided in the grievant's interview was unreliable and insufficient to support just cause.

First, Pool found the city failed to conduct a proper interview with the grievant, who was hindered by his unfamiliarity with the nuances of the English language. Interrogators led the grievant to answer what they wanted to hear. For example, based on the

The grievant was hindered by his unfamiliarity with the nuances of the English language.

grievant's statement that he returned to the service yard around 3:10 a.m. everyday to complete paperwork, the interrogators focused on how long the paperwork took to complete. They did not try to determine if he performed any other work when he returned to the yard. If they had asked, he would have informed them that he spent time unloading the truck and preparing it for the next crew.

The city also failed to credit evidence from the grievant's crew leader who said when interviewed that the crews spent 20 to 30 minutes complet-

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

Molly Ivans

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ing paperwork and housekeeping duties he described. The supervisor corroborated the grievant's statement that the grievant left work early only if he had worked through his breaks and had received permission from the crew leader.

While the city investigators relied on the supervisor's testimony that the grievant had not called to request authorization to leave early on the days in question, Pool noted that the supervisor had not been called to testify at the

The recommendation to reverse the discharge was based on an inaccurate summary of the investigation.

hearing and there was no evidence offered to support his statements. And, the city failed to acknowledge that the supervisor's statement corroborated the fact that the crew needed to leave the worksite early to return to the service yard.

Another critical flaw cited by Pool was the city's reliance on the observations of the garage crew supervisor. In his report, the supervisor stated that, although he observed the two crews leaving early, he could not identify individual members. However, the city's notice claimed the supervisor personally observed the grievant leaving early.

Pool found this was not only inaccurate, but bordered on being capricious.

Lastly, Pool based his recommendation to reverse the discharge on an inaccurate summary of the investigation which stated that the grievant admitted to misconduct. As demonstrated by a corrected copy of the transcript provided to Pool, at no time during the interview did the grievant admit to leaving work early or falsifying records.

Pool found the only corroborating evidence — a statement by a coworker — to be questionable. The statement was not made under oath and was made by a coworker whose relationship to the grievant was unknown and therefore unreliable.

Pool found "absolutely no reliable evidence" to prove the grievant had a pattern of leaving work early, with or without authorization, that he sat around wasting time, made fraudulent time entries, or was paid for time not worked. In fact, Pool found no evidence that the grievant engaged in any misconduct at all. As the city clearly failed to meet its burden of proof, the grievance was sustained and the grievant reinstated. (*[Grievant] and City of Modesto* [4-28-05] 10 pp. *Representatives*: W. Robert Phibbs, Esq. [Goyette and Assoc.], for the union; Carol Schmidt, Esq. [deputy city attorney], for the city. *Arbitrator*: C. Allen Pool.) *

Arbitration Log

• Contract Interpretation — Transfer

Orange Unified School Dist., Special Education Dept. and Orange Unified Education Assn. (4-13-05; 14 pp.) *Representatives:* William J. Shanahan (CTA Staff - retired), for the union; Steven Montanez, Esq. (Parker & Covert LLP), for the district. *Arbitrator:* Joseph F. Gentile.

Issue: Was the grievant's move to the elementary school a "transfer" or a "reassignment"?

Pertinent contract provisions: Section 4.110 – A transfer is a change in school or work site but within a position classification in a field covered by the unit member's credentials....All transfers shall be made for just cause.

Section 4.483 – Unit members shall not be involuntarily transferred in two consecutive school years.

Section 13.100 – In addition, the Board retains the right to hire, assign, transfer, reassign, evaluate, promote, terminate, and discipline employees.

Union's position: (1) The grievant is a resource specialist program (RSP) teacher in the district's Special Education Department. In 2002, the grievant was transferred from Panorama Elementary School to Riverdale Elementary School and then transferred again the following school year, this time to the Adult Transition Program. On July 1, 2004, the district informed the grievant that he was being transferred to

California Elementary School for the 2004-05 school year. This was the grievant's third transfer in three years and, as such, violated Sec. 4.483 of the agreement.

(2) In 2004, the grievant submitted a "Transfer Request – Certificated Staff" form, requesting a transfer to a high school RSP position for the 2004-05 school year, which the district accepted. The district's acceptance of this form "inferentially" supports the view that the grievant's move was a transfer and not simply an assignment, as the district argues.

(3) The contract language, which is clear and unambiguous, applies equally to all bargaining unit employees unless there is specific language exempting some members of the unit. There is no language exempting special education teachers from the involuntary transfer provisions, and so it must apply to them as well.

District's position: (1) The grievant's assignment to California Elementary

School was not a transfer, involuntary or otherwise, but a reassignment covered by Sec. 13.100.

(2) RSP teachers are part of the district's Special Education Department and are assigned from this department to school sites based on the number of special education students, the expertise needed, the available facilities, and other school site and district needs. This is supported by the posting process for special education positions. Special education postings list only the need, such as secondary, and that the posting will stay open until filled. Certified vacancy postings identify the grade, school, and a transfer closing date. Even the union acknowledged that the special education posting it provided from 2001-02, which identified a school site, was a unique situation.

(3) If the grievant's assignment does not qualify as a reassignment, then it would be considered an administrative transfer as permitted by Sec. 4.500.

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(4) Special education teachers do not need to complete a "Transfer Request – Certificated Staff" form, so the fact the district accepted it as a courtesy is not dispositive.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The union argued that Sec. 4.483 is clear and unambiguous and should be applied without considering extrinsic evidence. However, if the section were applied as is to the special education teachers, it would prevent the district from meeting its staffing needs at the various school sites.

(2) The evidence persuasively shows there is no dispute that special education teachers have been assigned differently than other teachers in the past.

(3) It has been acknowledged that the agreement distinguishes between transfer and assignment in the cited provisions.

(4) Section 4.483 is neither clear nor unambiguous when applied to special education teacher assignments and the past practice reasonably clarifies and untangles the ambiguity. Therefore, the past practice should be enforced.

(5) The grievant's move is to be considered an assignment, not a transfer. Therefore, there was no violation of the agreement. As this conclusion is dispositive, there is no need to consider the district's alternative argument that the move was an administrative transfer.

(Binding Grievance Arbitration)

• Grievance Timeliness

Irvine Teachers Assn. and Irvine Unified School Dist. (5-27-05; 11 pp.) *Representatives:* Laurie Atkinson (executive director), for the union; Anthony P. DeMarco, Esq. (Parham and Rajcic), for the district. *Arbitrator:* Katherine J. Thomson.

Issue: Was the grievance timely? If so, did the district violate the agreement by not allocating enough middle school counselors?

Pertinent contract provisions: 21.2.2. – Level One: Within fifteen days or after grievant knows by reasonable diligence after the occurrence of the alleged act or omission giving rise to the grievance, the grievant shall complete and file a grievance form with both the district and the association. The filing of the grievance shall be acknowledged by the dated signature of the person receiving the grievance. The unit member and the immediate supervisor shall confer within ten days following the filing of the grievance.

Union's position: (1) The contract clearly states that when enrollment exceeds 750 students, the school will staff additional counselors. Although the district claims it has been providing extra funding rather than staff for a number of years, the union was not aware that the district was not following the agreement until contract negotiations in May 2003, and it was not until a December 9 meeting with the district that the union actually was provided with the data showing the violation.

(2) On January 9, 2004, after receiving this proof of the district's actions, the union filed a grievance regarding the under-allocation of counselors. As noted in the grievance, the union became aware of this issue as of December 9, 2003.

(3) The parties historically have placed matters on hold while attempting to resolve issues and, in this case, the district confirmed its agreement to set aside the contractual time line to discuss the grievance. The district did not object to the filing of the grievance.

(4) The grievance was timely filed as the union had not seen the data on school enrollment and counselor number until the December 9 meeting. Furthermore, the district agreed to set aside the time-line issue when it did not object to the filing of the grievance in the first place. If it were going to deny the grievance for untimeliness, it should have refused to process the grievance in the first place and should not have taken it to arbitration. The district gave up any right to object to timeliness when it accepted the grievance.

District's position: (1) The district's long-standing practice has been to assign only one counselor to each middle school regardless of enrollment. As attested to by the previous union president, the union had been informed of the practice as early as 1994. At the very least, the current union leadership acknowledged that the issue was discussed during the May 2003 contract negotiations. Furthermore, they admitted they had access to the data they needed to verify the enrollment and staffing lev-

els, as it was posted on the district website. The union clearly knew about the issue well before December 9, 2003. Therefore, the grievance was untimely when it was filed in January 2004.

(2) While the district agreed to set aside the time line to discuss the grievance, it did not agree to waive the 15-day time line for filing the grievance and made timeliness objections at each step of the process. The time limits should not be extended merely because an employee did not think to file a grievance or because the union was not aware of facts that were known to its members. The agreement requires that a grievance be filed within 15 days of the time the union knew by reasonable diligence of any violation.

(3) The grievance is not timely and should be denied. If it is not denied, it should be noted that the counselor staffing practice has been handled this way for 15 years and has gone unchallenged by the union that entire time.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) Unless the parties have been lax in their practice, failure to file a grievance within the contractual time limits will result in a

grievance being dismissed. The contract between the parties contains a clear 15-day limit for filing a grievance once a party knows or, with reasonable diligence, should have known of the act or omission. There is no evidence that the parties were lax in their practice, so the contractual limits apply.

(2) The union had knowledge of the district's practice long before December 9, and perhaps as far back as 1994. However, each year the district made counselor assignments marked a separate act in violation of the contract. The issue focuses on whether the union timely filed the grievance for the 2003-04 counselor allocation at the middle schools. While the union contended it was not aware of the enrollment until the December 9 meeting, evidence was presented that the union knew of it earlier and easily could have obtained the information sooner if it had wanted to challenge the practice. Furthermore, the union failed to state why the information was not requested or discovered earlier.

(3) Despite the union's argument that the district waived its timeliness defense, it is undisputed that the district made timeliness objections at each

step of the grievance. In addition, there is no evidence that the union requested, or the district granted, any extension to file the grievance. Lastly, it would discourage the resolution of grievances to hold that the district waived its objection by agreeing to take the grievance to arbitration. Therefore, as long as a party clearly maintains its objections as did the district, it does not waive the defense by agreeing to process the grievance.

(4) The grievance was not timely filed and the district did not waive its timeliness objections. Therefore the grievance was dismissed and will not be considered on the merits.

(Binding Grievance Arbitration)

- **Absenteeism**
- **Discrimination — Disability**
- **Discrimination — Reasonable Accommodation**
- **Discipline — Attendance**

University of California, San Francisco and Coalition of University Employees (6-23-05; 31 pp.) *Representatives:* Mary Higgins (Coalition of University Employees), for the union; Jesse Drucker (Human Resources), for the university. *Arbitrator:* Bonnie G. Bogue.

Issue: Did the university have just cause to suspend the grievant for five days or to dismiss her?

University's position: (1) The grievant, employed as an administrative assistant at the adult psychiatric clinic since November 1998, has a chronic attendance problem and has performed unsatisfactorily.

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(2) The grievant's very first evaluation documented that she socialized excessively, had difficulty arriving at the office in a timely manner, and was not always present for the full eight-hour workday. The grievant subsequently was issued counseling memos and was warned about her attendance problem.

(3) In her next performance review in 2001, the grievant again was informed of continuing performance problems caused by her unpredictable absences, excessive tardiness, and failure to inform her supervisor when she would be late. In 2002, the grievant again was counseled for not informing her supervisor she was going on vacation, leaving work unfinished, and conducting personal business during work hours.

(4) In 2002, the grievant was permitted a temporary reduction of her work hours to accommodate the diagnosis of multiple sclerosis. When the grievant resumed a full-time schedule in 2003, she was permitted to start work at 8:30 a.m. Her attendance problems continued.

(5) From January 2 through January 31, 2003, the grievant was late every day but one and did not notify her supervisor. She was issued a warning letter and advised that failure to improve her performance could result in discipline up to and including dismissal.

(6) The grievant's next evaluation in June 2003, later determined to be invalid, clearly put her on notice that her attendance was unacceptable. It also noted that she had difficulty performing time-sensitive and complex

tasks, was erratic in her billing-slip input, was late filing notes needed by clinicians, failed to call insurance companies for authorization, and had other performance problems.

(7) The grievant's attendance continued to decline. Between January 31 and July 28, she had called in sick or was late to work 103 of the 113 workdays.

(8) On July 28, the grievant was issued a five-day suspension for excessive absences, poor work performance, and an incident involving unprofessional conduct.

(9) The grievant's performance did not improve after the suspension. In the 16 workdays after her return, the grievant only worked a regular work schedule on two days. She arrived late, and failed to notify her supervisor. On August 26, the grievant was advised of the university's intent to terminate her.

(10) The grievant was given ample opportunity to improve her performance, but failed to do so. Her deficiencies placed an additional burden on the other staff members and had a direct impact on patient care. Her accommodation request was granted and yet her performance continued to slide. The university followed principles of progressive discipline, giving the grievant every opportunity to rectify her problems, but she did not do so. The suspension and termination were the appropriate levels of discipline, and the university did not discriminate against the grievant in any way.

Union's position: (1) The university discriminated against the grievant for

her disability when it disciplined her. It did not have just cause for the discipline it delivered and it failed to accommodate her.

(2) The record does not show any specific performance problems. In fact, the grievant's December 1999 evaluation noted her performance as more than satisfactory. Subsequent performance issues were not ongoing problems, but isolated events that arose as the grievant adjusted to new work. Group emails were complimentary and the warning letter did not address performance issues. Prior to October 2002, the grievant received no evaluation notifying her of performance problems; instead, she received a merit increase, indicating that her performance met expectations.

(3) The grievant's tardiness and absences reflected her deteriorating health and the university's refusal to accommodate her medical condition as requested. Permitting the grievant to select between an 8 a.m. or 8:30 a.m. start time was discriminatory because the university allowed other employees to have more-flexible schedules. The university failed to participate in an interactive process with the grievant to find a reasonable accommodation.

(4) The grievant always informed her supervisor when she was going to be tardy or absent. She also called a co-worker. The grievant stated that any failure to inform her supervisor of her tardiness was because of her medical condition about which her supervisor was aware.

(5) The grievant is a conscientious, hard-working employee who was afflicted with a debilitating illness. When she returned from her medical leave in late 2000, she had to contend with new job responsibilities, which she did. Her supervisor was unsupportive and hostile towards her, making a challenging situation even more difficult.

(6) The university lacked just cause for the suspension and for the termination. The law clearly requires the university to engage in the interactive process to determine if an accommodation is possible. The university failed to do so despite evidence that it should have been able to accommodate her.

Arbitrator's decision: The grievance was upheld.

Arbitrator's reasoning: (1) The university bears the burden of proof that it had just cause to suspend and dismiss the grievant. Both analyses are affected by the possible discrimination for the grievant's disability.

(2) The collective bargaining agreement, as well as federal and state law, prohibits discrimination based on an employer's physical disability. The union has shown the necessary nexus existed between the disciplinary actions and the grievant's protected status. The evidence demonstrates that the grievant's attendance issues were caused primarily, if not exclusively, by the effects of her disability; her supervisor was aware of this.

(3) The university was required by law to provide reasonable accommodation. It offered a temporary accommodation through January 2003, and

there was no evidence the grievant or her representative made an accommodation request after she returned to work; instead the evidence shows that the grievant developed her own system of flexible hours. Therefore the record does not support a finding that the university unlawfully discriminated against the grievant. Disability, however, is still a mitigating circumstance in the discipline.

(4) The university based the suspension on overall poor performance, continuing attendance and tardiness problems, and inappropriate behavior. Although the university had made the grievant aware of her performance deficiencies, the evidence did not support disciplinary action for poor performance alone. As for her attendance, the university clearly showed the grievant was aware of the work rule requiring regular attendance and how it related to the university's operational needs. It provided the grievant ample notice that she was not meeting those expectations. This was sufficient cause for the suspension, assuming there was no discrimination.

(5) The university based the decision to terminate on the grievant's performance in the month following her return from the suspension. While the university showed that the grievant's attendance did not improve upon her return to work, it did not demonstrate there were any general work performance deficiencies or misconduct during that period.

(6) While the university has borne its burden of proving it had just and non-

discriminatory reasons for disciplining the grievant, the grievant's medical condition is a mitigating circumstance that must be taken into consideration, as the university was aware of it when it made the decision to terminate.

(6) The five-day suspension was for just cause and was an appropriate step in the discipline process. However, mitigating circumstances require something less than termination for the grievant's conduct during the brief period after the suspension. Therefore the termination is overturned.

(Binding Grievance Arbitration)

• **Contract — Discrimination for Union Activity**
Enterprise Elementary Teachers Assn., CTA/NEA, and Enterprise Elementary School Dist. (7-8-05; 14 pp.) *Representatives:* Tammy Cole (CTA Chapter Services Consultant), for the union; Ralph D. Stern, Esq. (School and Colleges Legal Services), for the district. *Arbitrator:* Paul D. Staudohar.

Issue: Did the district violate Articles 21, 26, and 28 of the agreement by attempting to investigate the issues raised in the grievant's letter to union membership, which was published in the union newsletter, and by retaining the documentation in his personnel file?

Pertinent contract provisions: Article 21 – Section 1. Complaints Affecting Evaluation: 1.1 – The district shall not utilize any complaint by a citizen which might affect the evaluation of a unit member or which is entered into the

permanent personnel record without first providing the following rights....

Article 26 – Organizational Security – Section 1. Employees Rights: 1.1 – The District and the Association recognize the right of employees to form, join, and participate in the employee organization and the equal, alternative right to not form, join, or participate in the employee organization. Neither party shall discriminate against an employee in the exercise of those rights.

Association's position: (1) The grievant, a teacher with the district, is the editor of the association's newsletter. The grievant wrote a letter to union members stating specific concerns about the district administration and published it in the newsletter. The district initiated an investigation and notified the grievant that he would be required to provide the factual bases for the allegations contained in the letter. The district then required the grievant to attend a tape-recorded interview with an independent investigator. When the union representative determined that the grievant would not be provided with a copy of the tape, she suspended the meeting. The district made two more attempts to schedule a meeting with the grievant, until the union filed a grievance demanding that the district cease its efforts to interrogate the grievant and that it remove the letters from his personnel file. The district terminated its investigation, but it did not remove the letters.

(2) Contract language clearly and unambiguously states that the district shall not discriminate against an em-

ployee for exercising his rights to participate in union activities. The district's actions were an ongoing and purposeful interference with the association's right to communicate with its members and the right to participate in activities of the employee organization. Because the human resources director never intended to take disciplinary action against the grievant, the only reasonable explanation for the district's actions was that it was trying to discriminate and intimidate the grievant so he would not criticize the district in the future. The district clearly retaliated against the grievant for making critical comments in the newsletter.

(3) Despite insistence that the investigation has been closed, the district retained in its file documents relating to the investigation.

(4) The district treated the situation as if a complaint had been filed, but it failed to follow the complaint procedures in the agreement.

District's position: (1) The grievant published 12 unsubstantiated accusations about the district's administration. Of particular concern were the allegations of illegal conduct, the statement that the district kept secret files on teachers, and that it was disingenuous in its dealings with the union at the bargaining table. The district felt it had a duty to investigate, but it ceased its investigation once the grievance was filed. There has been no disciplinary action or other adverse action taken against the grievant.

(2) This is not the correct forum for this issue. PERB has jurisdiction

over employer conduct that arguably constitutes an unfair practice. Therefore, the arbitrator lacks jurisdiction to decide this issue.

(3) The grievant failed to use the appropriate administrative remedy. Under Ed. Code Sec. 44031(b)(i), an employee is allowed to respond to a derogatory statement in his personnel file in writing, which the grievant chose not to do.

(4) Article 26 refers to agency shop fees and should not be applied to this situation.

Arbitrator's decision: The grievance was upheld.

Arbitrator's reasoning: (1) It was appropriate for the district to investigate the grievant's allegations of improper district actions. The use of a neutral investigator was acceptable as well, although the discussion of the issues could have been conducted in a less formal and intimidating situation. However, it was not fair for the district to acquire copies of the recording or transcript, without providing them to the grievant.

(2) There is no apparent violation of Article 21. It is questionable as to whether the district administrator would qualify as "a citizen" covered under this section; however, even if so, the grievant was provided with the opportunity to confront the complainant at the meeting and there is no evidence that the complaint was included in any evaluation.

(4) Although PERB has jurisdiction over unfair practices, there has been no unfair practice allegation made in this case. Instead, the association is

relying on the language of the agreement. The arbitrator is not precluded by case law or statute from applying contract language to resolve this grievance.

(5) Contrary to the district's contentions, Article 26 unambiguously provides that the district and association shall not discriminate against an employee for exercising the right to participate in the employee organization.

(6) Employees have the right to share their opinions with fellow union members, which the grievant was doing when he wrote that letter. The grievant testified that he felt the district decision to have him interrogated was an impediment to his participation. Indeed, to allow a transcript of the interrogation to be used for the benefit of the district but not for the grievant discriminates against him for exercising his rights to engage in association activities. Although the district claimed to be unaware that the investigator was not going to provide the grievant with a copy of the interrogation, the investigator was acting as an agent of the district. His actions are imputed to the district.

(7) The grievant was discriminated against for exercising his rights to engage in association activities, and the documents related to the investigation must be removed from his file. The district may retain copies of the documents for its records, but they may not be used against the grievant in any way.

(Binding Grievance Arbitration)

• Discipline — Workplace Violence

Stationary Engineers, Loc. 39, and City of Fresno (7-25-05; 22 pp.)
Representatives: W. Daniel Boone, Esq. (Weinberg, Roger & Rosenfeld), for the union; Victoria Parks Tuttle (deputy city attorney), for the city. *Hearing Officer:* Carol A. Vendrillo (CSMCS Case No. ARB-04-2877).

Issue: Was the appellant terminated for just cause?

City's position: (1) The appellant, a heavy-equipment operator, told a coworker, Wayne Wulf, that Mark Fox, another coworker, had called him for instructions on how to operate a machine used for street repair work. Fox denied making the calls.

(2) On September 29, 2004, Ray Tackett, another coworker, mentioned the alleged phone calls in the presence of the appellant, Fox, and approximately 70 other workers while they were in the "doghouse" completing their paperwork at the end of the day. When Fox denied calling the appellant, the appellant called him a liar and the two had a heated verbal exchange. Their supervisor interrupted the exchange and asked the two men to step outside. Fox agreed, but the appellant refused.

(3) After Fox clocked out and was walking to his car, he was accosted by the appellant. The appellant shoved Fox against the wall, holding his forearm against Fox's neck. Fox said he saw a knife in the appellant's other hand and that the appellant said he was going to stab him.

(4) Another coworker, John Lowe, who came on the scene, testified he did not see a knife, but said the appellant remarked, "You didn't see nothing." Later the appellant called Lowe at home, to discourage him from providing any information about the incident.

(5) Following a thorough investigation, the city determined the appellant's actions were a clear violation of the city's policy. Regardless of who started the conversation in the doghouse, the appellant clearly was the aggressor in the interaction at the lockers, whether or not he had a knife.

(6) The appellant was terminated for behavior that violated the city's policy prohibiting workplace violence and for insubordination. The workplace violence policy prohibits any kind of bodily harm at the worksite. In addition, the appellant was insubordinate for refusing his supervisor's directive to step outside to discuss the verbal conflict in the doghouse.

Union's position: (1) The city failed to prove by clear and convincing evidence that the appellant made threats or was insubordinate.

(2) The discipline rests on the conflicting testimony of Fox and the appellant, as Lowe testified he saw no physical contact. Fox's description of the incident is not reliable because, as was demonstrated by the occurrence in the doghouse, he overreacts and exaggerates.

(3) There is no evidence the appellant coerced Lowe. The appellant called Lowe at home because Lowe asked him

to at the time of the incident. The appellant had no ulterior motive for the call.

(4) The workplace violence policy was not violated because it specifically refers to behavior during work hours. The incident with Fox occurred after he and the appellant had clocked out.

(5) The appellant's supervisor testified he did not believe the appellant had been insubordinate. Thus, there was no support for that allegation.

Hearing officer recommendation: The appeal was denied.

Hearing officer's reasoning: (1) This case turns on the credibility of the witnesses, and based on the evidentiary record, Fox's version of the events is more credible.

(2) One basis for discrediting the appellant's testimony concerns his interaction with Lowe. Contrary to the appellant's contention, Lowe testified he did not ask the appellant to call him or tell the appellant he was expecting his call. Lowe had no reason to lie about this issue. The appellant, in contrast, knew the city was aware of the incident at the time of his call and had reason to ask Lowe not to provide information.

(3) The appellant's denial of ever telling Wulf that Fox had called him was contradicted by Wulf's testimony and the appellant's statement about the calls in the doghouse. The appellant's credibility was further eroded by the fact that he told police he had not argued with Fox outside the building; during the hearing, he testified that he and Fox continued their argument into the parking lot. Furthermore, the appellant tes-

tified that he did not own a pocketknife, but he told police that he did not have a knife on him the day of the encounter.

(4) Fox's testimony is supported by his supervisor's observation that he appeared agitated and fearful immediately after the exchange with the appellant. Although the presence of a knife was not corroborated by other evidence, from the outset Fox consistently reported having seen it. However, the use of a knife was not necessary to support termination under the city's workplace violence policy.

(5) The purpose of the city's policy is to provide a safe work environment free of violence and the threat of violence. The policy refers to the city's priority of ensuring effective handling of critical workplace situations and states that any threat of violence is unacceptable. One does not need to inflict violence to fall within the policy. When the appellant pushed Fox against the wall, his conduct could reasonably have been perceived as a threat.

(6) Based on Fox's version of events, it is concluded that the appellant physically assaulted Fox and thereby violated the city's workplace violence policy. On that basis alone, it is recommended that the termination be upheld. While there is no support in the record for the insubordination charge, that does not defeat the decision to terminate the appellant.

(City Appeal Procedure)

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

District did not follow agreement when it calculated teachers' salaries: King City JUHSD.

(King City High School Teachers Assn., CTA/NEA v. King City Joint Union High School Dist., No. 1777, 9-14-05; 13 pp. + 35 pp. ALJ dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The district violated the collective bargaining agreement by failing to follow the provisions for salary calculations. However, there was no violation for failure to provide information.

Case summary: In 2000, the district and association negotiated a new three-year agreement in which they adopted a formula for salary increases. For the past decade, the parties had been negotiating salaries on an annual basis. The new salary formula involved apportioning a percentage of the district's designated revenue sources to bargaining unit employees. The percentage was to be determined by the number of teachers currently on staff. During implementation of this provision, the parties arrived at different increase amounts and continued to meet in an attempt to resolve those differences. In January 2002, the district announced it would make no more adjustments to its calculations, even though the parties had not reached agreement. The association continued to disagree with the bargaining

unit members used in the district's calculations and the determination of restricted versus unrestricted revenue.

The association filed an unfair practice charge alleging the district had unilaterally changed the policy related to the calculation of salary increases based on a revenue-sharing formula established in the agreement. The association also alleged that the district failed to provide it with requested information pertinent to the salary increase calculations.

The ALJ determined the evidence and testimony presented by the association on revenue calculation to be persuasive and supported its interpretation of the agreement. Therefore, he found that the district's failure to include those revenues in its calculations was a unilateral change in violation of EERA. The ALJ determined the record did not support the association's allegation that the district failed to provide the requested information. The ALJ found that the district had responded to the association's requests and that any failure to do so was attributable to miscommunication between the parties. The ALJ noted that the burden to demonstrate an unreasonable delay in the provision of information rests on the association. Here, the association failed to show that the district did not provide the information in a timely manner.

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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 also are available on PERB's website at <http://www.perb.ca.gov>.)

The district filed exceptions to the ALJ's proposed decision and requested the opportunity for oral argument. In *Arvin Union School Dist.* (1983) No. 300, 57 CPER 67, the board denied an oral argument request where there had been a full and fair hearing, the parties had extensive opportunity to present briefs, and they availed themselves of those opportunities. Here, as in *Arvin*, the board found that there was a voluminous record, extensive documentary evidence, the opportunity for the parties to brief their positions, and comprehensive briefs. Therefore, it denied the request for oral argument.

The board also reviewed the association's allegations that the district improperly included the salaries of non-unit teachers as part of its calculation of total teacher compensation and that the district improperly excluded non-restricted revenues in its computation of the formula. Based on an extensive review of the language of the parties' agreement, testimony of those involved in negotiations, and relevant past practice, the board upheld the ALJ's assessment of these charges as evidence of a unilateral change.

No violation for eliminating position or transferring duties: Klamath-Trinity JUSD.

(*California School Employees Assn. and Its Chap. 347 v. Klamath-Trinity Joint Unified School Dist.*, No. 1778, 10-6-05; 6 pp. + 7 pp. B.A. dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The unfair practice charge was dismissed because the district demonstrated that the bargaining unit position was eliminated for lack of funds, a non-discriminatory reason, and the association failed to provide enough information to demonstrate that the transfer of duties from the eliminated position to other classifications was a violation.

Case summary: In 2002, the Klamath-Trinity Joint Unified School District received a funding increase and created four new positions, including that of database analyst. Terry Tyner, then the high school secretary, was hired into the analyst position. Tyner served as the association's chapter president, chairperson of the negotiating team, and job steward. In 2004, the district's funding was reduced and, as a

result, it eliminated three of the new positions, including Tyner's. After the database analyst position was officially eliminated, Tyner returned to her previous position and several of the database analyst duties were transferred to other positions.

In March 2004, the district required that Tyner attend a meeting, but it declined to inform her of the purpose of the meeting in advance. At the beginning of the meeting, the district informed Tyner and her representative that the purpose was to review the accounting practices for one of the high schools when Tyner was a secretary.

The association filed an unfair practice charge alleging that the district had discriminated against Tyner for her union activities by eliminating her position, unilaterally transferring her duties to another classification, and failing to provide requested information.

The board agent found that the association did not provide evidence of recent protected activities or adverse action and therefore failed to state a prima facie case of discrimination. The B.A. noted that Tyner had not been disciplined as a result of the investigatory meeting. While the association provided several examples of the district's allegedly prejudicial treatment of Tyner up through early 2003, the B.A. viewed those events as being so remote in time as to be immaterial to the charge. Furthermore, the B.A. did not find a discriminatory reason for the elimination of the position. Therefore, the B.A. dismissed the unfair practice charge.

While the board concluded that the association had demonstrated that Tyner participated in protected activity, it found no proof that the district eliminated the position for a discriminatory reason or deviated from established procedures or policies. The board also found that the association failed to provide enough information to determine whether or not the transferred work was directed to newly created classifications, within or outside the bargaining unit. Absent this factual record, the board was unable to make a determination regarding the transferred work. The board adopted the B.A.'s decision as its own and dismissed the charge without leave to amend.

Duty of Fair Representation Rulings

DFR claim remanded for further investigation: Santa Ana Educators Assn.

(*O'Neil, Salgado, Barham v. Santa Ana Educators Assn.*, No. 1776, 9-1-05; 2 pp. By Member Neuwald, with Members Whitehead and Shek.)

Holding: The dismissed duty of fair representation charge was remanded to the general counsel for further investigation.

Case summary: The charging parties appealed the board agent's dismissal of their charge against Santa Ana Educators Association alleging that the union had denied them an opportunity to participate in union activity and had failed to satisfy its duty of fair representation. The parties claimed that they did not receive the B.A.'s warning letter prior to the case being dismissed.

The board has adopted a procedure in which the general counsel reviews cases dismissed by board agents. As the board explained in *CSEA (Morrow)* (1986) No. 568-S, 69 CPER 71, and *CSEA and its Chap. 302 (Lauer)* (1990) No. 809, 86 CPER 64, the reason for the review is to minimize and reduce appellate litigation prompted by inadequately processed unfair practice charges.

The general counsel reviewed the dismissal and requested that the case be remanded for further investigation. The board found that the general counsel's request met the board's purpose, and it granted the request.

Decision not to arbitrate substitute teacher's grievances not a violation of DFR: UTLA.

(*Chambers v. United Teachers of Los Angeles*, No. 1781, 10-27-05; 2 pp. + 8 pp. R.A. dec. By Member Neuwald, with Chairperson Duncan and Member McKeag.)

Holding: The unfair practice charge alleging a breach of the duty of fair representation was dismissed because the charging party failed to demonstrate that the union acted in an arbitrary, discriminatory, or bad faith manner.

Case summary: Joseph Chambers, an adult education substitute teacher for the Los Angeles Unified School

District, appealed the regional attorney's dismissal of his unfair practice charge against United Teachers of Los Angeles alleging that UTLA failed to satisfy its duty of fair representation by not pursuing his grievances.

In October 2002, Chambers filed a grievance regarding the district's decision to assign his class to another teacher. In June 2004, that grievance was settled by the union and the district.

Chambers was issued an unsatisfactory report from the principal in October 2003 for falsifying his resume and telling the principal, "screw you, screw you." The union filed a grievance on Chambers' behalf, and it was heard at the first step of the process. The union requested a second-step meeting, but it ultimately decided not to pursue the grievance based on Chambers' acknowledgment of his actions. Chambers appealed the union's decision, but on January 19, 2005, he was informed that the grievance would not proceed to arbitration.

In October 2004, Chambers was issued another unsatisfactory report, this time for inadequate service. Chambers filed a grievance, which the district denied because it believed Chambers was not a member of the bargaining unit since he had not worked enough days during the preceding school year to qualify. The union did not pursue that grievance.

In March 2005, Chambers filed an unfair practice charge alleging that the union had failed in its duty of fair representation by not pursuing his grievances to arbitration and by refusing a request he made in November 2004, to have another representative assigned to his grievances.

In order to state a prima facie violation of the duty of fair representation, the R.A. noted, the charging party must show that the union's conduct was arbitrary, discriminatory, or in bad faith. The R.A. observed that the union successfully settled the 2002 grievance and found no violation. The R.A. did not comment on the untimeliness of the claim. Regarding the 2003 grievance, the R.A. found that, even crediting Chambers' assertion that he did not admit to the actions cited, he failed to demonstrate the union acted in a discriminatory manner when it decided not to pursue the grievance

to arbitration. The R.A. found the union merely exercised its discretion in determining how far to pursue the grievance. Furthermore, Chambers was permitted to appeal the union's initial decision not to move forward. The R.A. discounted Chambers' contention that the grievance was deliberately delayed in retaliation for his request for a new representative, noting that the union reached agreement with the district to toll the statute of limitations period. As to the 2004 grievance, the specific language of the agreement excluded Chambers from the unit and thereby prevented him from filing a grievance. The R.A. could find no rational argument for pursuing the grievance.

Lastly, the R.A. concluded that even though the union failed to provide Chambers with another representative, there was no evidence that his representative acted in an arbitrary, discriminatory, or bad faith manner. Therefore, the R.A. dismissed the unfair practice charge.

Chambers appealed the R.A.'s dismissal to the board, presenting new allegations and new supporting evidence. The board refused to consider this information because it was known to Chambers 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 as its own.

MMBA Cases

Unfair Practice Rulings

General counsel's request to remand charge for further processing granted: City and County of San Francisco.

(*San Francisco Institutional Police Officers Assn. v. City and County of San Francisco*, No. 1779-M, 10-7-05; 2 pp. By Chairperson Duncan, with Members Whitehead and Shek.)

Holding: The board remanded the unfair practice charge to the general counsel for further processing.

Case summary: The San Francisco Institutional Police Officers Association appealed the board agent's dismissal of its charge alleging that the City and County of San

Francisco violated the MMBA by unilaterally changing past practice. The association filed a timely amended charge in response to the B.A.'s warning letter, but it was not forwarded to the B.A. until after the dismissal letter had been issued.

The board has adopted a procedure in which the general counsel reviews cases dismissed by board agents. As the board explained in *CSEA (Morrow)* (1986) No. 568-S, 69 CPER 71, and *CSEA and its Chap. 302 (Lauer)* (1990) No. 809, 86 CPER 64, the reason for the review is to minimize and reduce appellate litigation prompted by inadequately processed unfair practice charges.

The general counsel reviewed the B.A.'s dismissal and concluded that further investigation would serve the board's express purpose and would provide the most efficient method for review of this case. He also noted that in *Hartnell CCD* (2000) No. 1405, 145 CPER 59, where the B.A. had not received the timely filed, amended complaint, the board remanded the charge for further processing. Taking into account the general counsel's careful review, the board remanded the charge.

Duty of Fair Representation Rulings

No DFR violation when union settles grievance rather than pursuing arbitration: Public Employees Union, Loc. 1.

(*Coleman v. Public Employees Union, Loc. 1*, No. 1780-M, 10-11-05; 3 pp. & 9 pp. B.A. By Chairperson Duncan, with Members Whitehead and Neuwald.)

Holding: The duty of fair representation charge was dismissed.

Case summary: The charging parties alleged that the union violated the MMBA by failing to follow the promotion and bidding provisions in the collective bargaining agreement. In an amended charge filed in May 2005, it was alleged that in 2001, several employees informed the union that the county had filled institutional service worker positions without posting. The union contacted the county and determined that there had not been a violation. In October 2003, the charging parties complained to the union that,

again, these positions had not been posted. This time, when the union contacted the county, it received information that contradicted the previously provided response. The union then filed a class-action grievance on behalf of all ISWs. The county denied the grievance as untimely, but the union continued to pursue it. In late 2004, the county and union reached agreement on the matter. The union notified the charging parties of the settlement, the reason for it, the county's position, and an explanation as to why certain contract provisions did not apply.

Although the board agent found that the amended charge had not been served on the union, she reviewed it on the merits. The B.A. found that the facts demonstrated the union pursued the issue for more than two years and resolved it in a manner that benefited the classification as a whole. As such, there was no indication that the union acted arbitrarily, capriciously, or in bad faith. Accordingly, the B.A. dismissed the charge, and the charging parties appealed.

The board reviewed the B.A.'s findings and adopted them as a decision of the board itself, noting that the charging parties failed to introduce any new issues on appeal.

The union sought to have its untimely response to the appeal excused because the individual who had prepared it did not regularly practice before the board and had assumed the board would send a notice regarding timeliness. Noting that ignorance of the law does not demonstrate good cause, the board did not excuse the late filing.

Activity Reports

ALJ Proposed Decisions (By Region), July 1-October 31, 2005

Sacramento Regional Office — Final Decisions

SEIU Loc. 1000, CSEA v. State of California (California Conservation Corps), Case SA-CE-1443-S. ALJ Donn Ginoza. (Issued 9-2-05; final 9-28-05; HO-U-883-S.) During lay-off-effects negotiations, an information request for Department of Finance salary-savings calculations achieved by the personal leave program and credited to the California Conservation Corps was found to involve relevant and necessary information, notwithstanding that no layoffs occurred. The information was pertinent to potential future grievances and layoffs. However, no violation was found because the request was for information that did not exist and the union failed to clarify its request to ask for available information that was necessary and relevant.

San Francisco Regional Office — Final Decisions

California School Employees Assn. v. Evergreen Elementary School Dist., Case SF-CE-2433-E. ALJ Fred D'Orazio. (Issued 9-2-05; final 9-28-05; HO-U-882-E.) The district unilaterally changed the terms of the collective bargaining agreement when it refused to provide a holiday to classified employees based on presidential proclamation of a National Day of Mourning after the death of President Reagan, where the agreement provides for an additional holiday for, among other things, "every day declared by the President or Governor as a day of 'mourning.'" The district also breached its duty to bargain when it refused to provide the union with a list of employees who would have been entitled to compensation if the holiday had been recognized, despite the fact that the district did not have the list and would have had to compile it from monthly timecards.

Los Angeles Regional Office — Final Decisions

American Federation of State, County and Municipal Employees, Loc. 2076 v. County of Orange, Case LA-CE-197-M. ALJ Ann Weinman. (Issued 8-9-05; final 9-7-05; HO-U-881-M.) The county's post-impasse implementation of a performance incentive program was unlawful, where evi-

dence showed it was not reasonably comprehended within its last, best, and final offer. While the county mentioned the program during bargaining, the union did not clearly and unmistakably waive its right to negotiate by the negotiator's response that "you've got to be kidding."

The county unlawfully implemented a one-year extension of the MOU, in violation of MMBA Sec. 3505.4, which permits implementation of a last, best, and final offer but does not permit implementation of a memorandum of understanding. The one-year extension, moreover, was not reasonably comprehended within the county's last, best, and final offer.

California School Employees Assn. and its Chap. 121 v. Garden Grove School Dist., Case LA-CE-4714-E. ALJ Ann Weinman. (Issued 9-26-05; final 10-25-05; HO-U-884-E.) A bus driver-union activist was not disciplined for protected conduct, despite the existence of an unlawful motive by certain district representatives and establishment of a prima facie case by the union. Evidence showed that representatives who harbored an unlawful motive did not participate in the decision to discipline and that the district representative who did participate was unaware of the driver's protected conduct. The driver refused to take a required drug test or participate in the medical-testing process. She would have been disciplined for these reasons alone, even if she had not engaged in protected conduct. No collateral estoppel effect was given to the district's personnel commission decision to reduce termination to a five-month suspension, where the issue of retaliation for union activity was not fully considered by the commission.

Sacramento Regional Office — Decisions Not Final

Sarca v. California State Employees Assn., Case SA-CO-23-H. ALJ Ann Weinman. (Issued 7-22-05; exceptions filed 8-10-05.) No violation of *Hudson* procedures was found where the employee lacked standing to challenge the agency fee calculation because he was not required by the union to pay the agency fee.

Wunder v. California Faculty Assn., Case SA-CO-24-H. ALJ Fred D'Orazio. (Issued 8-26-05; exceptions filed 9-13-05.) The union did not breach its duty of fair representation

when it decided not to arbitrate a tenured tax professor's grievance challenging his assignment to teach an entry-level accounting course. Although the professor was a tax specialist accustomed to teaching advanced courses and had not taught an accounting course since 1994, the collective bargaining agreement gave the department the discretion to make teaching assignments after consultation with professors. Evidence showed the assignment was not unreasonable and the department satisfied its duty to consult. The ALJ rejected the argument that the union decided not to appeal to arbitration because it missed the filing deadline, as well as the argument that the union breached its duty in the way it processed the grievance at lower levels of the grievance procedure. The ALJ found the latter claim was not within the scope of the complaint and was time-barred.

Siskiyou County Employees Assn., Loc. 3899 v. County of Siskiyou, Case SA-CE-255-M. ALJ Donn Ginoza. (Issued 8-26-05; exceptions filed 9-15-05.) The proposal that the county lay off all extra-help employees before laying off permanent employees in targeted job classifications was found to be within the scope of representation. However, no violation was found because the union failed to establish a practice that lesser-status employees were laid off prior to permanent employees in the targeted classifications, and neither the collective bargaining agreement nor the county ordinance describe the policy in accord with the union's interpretation.

California School Employees Assn. and its Chap. 250 v. Clovis Unified School Dist., Case SA-CE-2285-E. ALJ Fred D'Orazio. (Issued 10-20-05; exceptions due 11-9-05.) The district breached its duty to bargain in good faith when it refused a request for information relating to the district's reporting requirements regarding CalPERS and Social Security benefits. Retirement benefits are matters within the scope of representation and thus the request was for presumptively relevant and necessary information for future negotiations. The request was in the form of a questionnaire and was not burdensome.

San Francisco Regional Office Decisions — Not Final

No proposed decisions for this period.

Los Angeles Regional Office Decisions — Not Final

Academic Professionals of California v. Trustees of the California State University, Case LA-CE-843-H. ALJ Ann Weinman. (Issued 8-15-05; exceptions filed 9-20-05.) CSU did not unilaterally change a policy when it refused to add a performance-pay award by an arbitrator to base salaries, where elements of *res judicata* applied to extinguish CSU liability, CSU has continued to comply with all contractual obligations regarding salary, and the incident was a one-time event over a contract dispute.

Buck, Jr. v. Amalgamated Transit Union, Loc. 1704, Case LA-CO-29-M. ALJ Ann Weinman. (Issued 8-31-05; exceptions filed 9-23-05.) The duty of fair representation was breached when the union representative told a bus driver it would file a grievance challenging his discharge for drinking on the job but negligently did not do so, thus extinguishing his rights. The ALJ declined to award a remedy of backpay because the employee failed the alcohol test, rendering it highly unlikely he would have prevailed on the merits; the union would not have taken the case to arbitration because it lacked merit; and the arbitration was advisory in nature.

Desert Sands Unified School Dist. and California School Employees Assn., Cases LA-UM-703-E and LA-UM-730-E. ALJ Thomas Allen. (Issued 10-7-05; exceptions due 10-27-05.) Five employees in the positions of personnel specialist, certificated personnel operations specialist, and classified personnel operations specialist are neither supervisory nor confidential and should be placed in the bargaining unit, where the parties stipulated that they are not required to develop or present management positions with respect to employer-employee relations, and their duties do not normally require access to confidential information used to contribute significantly to the development of management positions.

The position of associate personnel analyst-examiner for the personnel commission is not that of a confidential employee, where no evidence shows the incumbent has access to confidential information that significantly contributes to the development of the district's positions regarding examinations she designs. The incumbent in the position of

personnel analyst for the personnel commission who assigns work and directs employees while using independent judgment is properly excluded from the bargaining unit as supervisory.

The incumbents in the position of confidential office specialist in the superintendent's office are excluded from the bargaining unit as confidential employees, where evidence shows they have access to information and documents that concern grievances and negotiations.

The incumbent in the position of credentialing analyst in the personnel services office is excluded from the bargaining unit as confidential, where the employee helps develop management positions, advises the bargaining team, and drafts responses to grievances. However, the credentialing technician in the same office is not excluded from the unit as confidential, where her role in developing the district's positions is limited to instances that occur every four years and her participation in such matters is the exception rather than the rule.

The incumbent in the position of office specialist in the business office is excluded from the unit as a confidential employee, where her actual duties include regular access to bargaining materials, grievance files, and related confidential information. It is irrelevant that her job could be redefined. Budget technicians in the same office are excluded from the bargaining unit as confidential employees, where they run computer simulations of the budgetary effects of district proposals regarding salary and benefits. Premature release of such information would compromise the district's bargaining positions.

The incumbent in the position of executive assistant in the educational services office is excluded from the bargaining unit as confidential, where the employee maintains grievance files, is exposed to information relating to the district's bargaining proposals, and prepares weekly confidential reports to the school board.

Academic Professionals of California v. Trustees of the California State University, Case LA-CE-799-H. ALJ Donn Ginoza. (Issued 10-18-05; exceptions due 11-07-05.) CSU unilaterally implemented a new family-leave policy at its East Bay campus without affording the union notice and the

opportunity to bargain, where the new policy adopted, among other things, the right to demand verification of an employee's health condition and certain aspects of the Family and Medical Leave Act. The applicable MOU did not require verification. The unilateral changes involved matters within the scope of representation and not otherwise superseded by either the FMLA or the California Family Rights Act.

Jones v. SEIU Loc. 99, Case LA-CO-1192-E. ALJ Thomas Allen. (Issued 10-20-05; exceptions due 11-09-05.) The complaint that the union breached its duty of fair representation for failing to attend a grievance meeting was dismissed where the union's failure was due to mere miscommunication and the employee had the right to represent himself at the meeting. The union did not breach its duty by placing the grievance in abeyance pending outcome of two independent investigations into facts underlying the grievance, where the decision was reasonable in light of perceived difficulties in obtaining the employee's desired remedy through arbitration.

Academic Professionals of California v. California State University, Case LA-CE-800-H. ALJ Bernard McMonigle. (Issued 10-31-05; exceptions due 11-21-05.) On two occasions, CSU unilaterally changed its policy regarding irregular or compressed work schedules without affording the union notice and an opportunity to negotiate. The ALJ found the methodology used in making wage adjustments and determining when employee wages are changed in connection with the various schedules is a matter within the scope of representation, and CSU did not establish that the Fair Labor Standards Act sets an inflexible standard or contains an immutable provision such that negotiations were precluded.

SEIU Loc. 1000, CSEA v. State of California (Dept. of Motor Vehicles). Case SA-CE-1473-S. ALJ Fred D'Orazio. (Issued 10-31-05; exceptions due 11-21-05.) The unfair practice charge alleging the denial of access rights was deferred to arbitration, where the MOU provided the employer could not unreasonably withhold access. The complaint alleged that the Department of Motor Vehicles interfered with union and employee rights when it unilaterally imposed a notice requirement on union representatives and revoked the ac-

cess badge of a union representative; the union filed a grievance under the MOU, challenging the same conduct. The ALJ found the conduct alleged in the complaint was arguably prohibited under the MOU; although the theories in the unfair practice and the grievance arguably are different, they arise out of the same conduct.

Report of the Office of the General Counsel

Injunctive Relief Cases

There were 15 requests for injunctive relief filed between July 1 and October 31, 2005.

California Nurses Assn. v. Regents of the University of California, IR No. 485, Case SF-CE-762-H. Request for injunctive relief was filed on 7-13-05 and denied on 7-18-05. Issue: Did the employer unlawfully reprimand employees who participated in a sympathy strike?

California Department of Veterans Affairs and Dept. of Personnel Administration v. SEIU Loc. 1000, IR No. 486, Case SA-CO-278-S. Request for injunctive relief was filed on 7-08-05. PERB denied the request on 7-18-05. Issue: Did the union engage in bad faith bargaining and commit a unilateral change in policy by staging a sickout?

Regents of the University of California v. California Nurses Assn., IR No. 487, Case SF-CO-124-H. Request for injunctive relief was filed on 7-14-05. PERB granted the request on 7-19-05. Issue: Did the union engage in bad faith bargaining by calling for a one-day pre-impasse strike?

SEIU Loc. 1000 v. California Department of Transportation, IR No. 488, Case SA-CE-1494-S. Request for injunctive relief was filed on 8-05-05 and denied on 8-12-05. Issue: Did the department interfere with the union's access rights by banning union representatives from state facilities?

Trout v. University Professional and Technical Employees, IR No. 489, Case LA-CO-334-H. Request for injunctive relief was filed on 8-10-05. PERB denied the request on 8-22-05. Issue: Did the union improperly collect agency fees?

Aldern v. University Professional and Technical Employees, IR No. 490, Case LA-CO-335-H. Request for injunctive relief was filed on 8-10-05 and denied on 8-22-05. Issue: Did the union improperly collect agency fees?

Statewide University Police Assn. v. Trustees of the California State University, IR No. 491, Case LA-CE-901-H. Request for injunctive relief was filed on 8-12-05. PERB denied the request on 8-24-05. Issue: Did the university interfere with union and employee rights when it communicated with employees regarding the status of bargaining?

California Department of Corrections and Rehabilitation and Department of Personnel Administration v. SEIU Loc. 790, IR No. 492, Case SA-CO-281-S. Request for injunctive relief was filed on 8-30-05 and denied on 9-9-05. Issue: Did the union engage in bad faith bargaining and commit a unilateral change in policy by staging a sickout?

San Francisco Unified School Dist. v. SEIU Loc. 790, IR No. 493, Case SF-CO-663-E. Request for injunctive relief was filed on 9-2-05. PERB denied the request on 9-15-05. Issue: Did the union engage in bad faith bargaining by calling for a one-day sickout?

Statewide University Police Assn. v. Trustees of the California State University, IR No. 494, Case LA-CE-901-H. Request for injunctive relief was filed on 9-12-05 and withdrawn on 9-14-05. Issue: Did the university interfere with union and employee rights when it communicated with employees regarding the status of bargaining?

Coalition of University Employees v. Regents of the University of California, IR No. 495, Case SF-CE-776-H. Request for injunctive relief was filed on 10-6-05. The request was placed in abeyance at the parties' request. Issue: Did the university unilaterally implement changes to health care benefits?

University Professional and Technical Employees v. Regents of the University of California, IR No. 496, Case SF-CE-775-H. Request for injunctive relief was filed on 10-6-05. The request was placed in abeyance at the request of the parties. Issue: Did the university unilaterally implement changes to health care benefits?

California Nurses Assn. v. Regents of the University of California, IR No. 497, Case SF-CE-777-H. Request for injunctive relief was filed on 10-11-05. The request was placed in abeyance at the parties' request. Issue: Did the university unilaterally implement changes to health care benefits?

Hicks et al. v. Compton Unified School Dist., IR No. 498, Case LA-CE-4900-E. Request for injunctive relief was filed on 10-21-05 and denied on 11-1-05. Issue: Did the district discriminate against the charging parties for participating in protected activity?

Teachers Association of Long Beach v. Long Beach Unified School Dist., IR No. 499, Case LA-CE-4902-E. Request for injunctive relief was filed on 10-27-05. Issue: Did the district interfere with union and employee rights by denying the union use of its email system?

Litigation Activity

Four new litigation cases opened between July 1 and October 31, 2005.

International Association of Fire Fighters, Loc. 188, AFL-CIO v. Public Employment Relations Board, Superior Court Contra Costa County, Case No. N05-0232 (Case SF-CE-157-M, No. 1720-M). Issue: Did PERB err in dismissing the unfair practice charge? On 7-19-05, a writ of mandate was filed. On 8-30-05, PERB filed its opposition to writ.

Public Employment Relations Board v. California Nurses Assn., Superior Court Sacramento County, Case No. 05AS03167 (Case SF-CO-124-H). Issue: Should CNA be enjoined from engaging in a pre-impasse strike? On 7-20-05, the court issued a TRO. On 9-2-05, the court issued a preliminary injunction.

Oakland Unified School Dist. v. Public Employment Relations Board, Court of Appeal, First Appellate District, Case No. A110794 (Case SF-CE-2226-E, No. 1770). Issue: Did PERB err in finding that the district unilaterally subcontracted bargaining unit work? On 7-21-05, the district filed a petition for writ of review.

King City Joint Union High School Dist. v. Public Employment Relations Board, California Court of Appeal, Sixth Appellate District, Case No. H029420 (Case SF-CE-2272-E, No. 1777). Issue: Did PERB err in finding that the district unilaterally changed the compensation formula? On 10-13-05, the district filed a petition for writ of review.

Personnel Changes

Eric Cu was hired as legal counsel for the Los Angeles Regional Office on September 6, 2005.

Carolyn Kubish was hired as legal counsel in the Sacramento Regional Office on August 22, 2005.

Alicia Clement was hired as legal counsel in the San Francisco Regional Office on September 6, 2005.

Christine Bologna has returned to PERB from the State Personnel Board as an administrative law judge I and was hired on September 15, 2005.

Heather Glick was hired as legal advisor to Board Member Karen Neuwald on October 7, 2005.