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letter from the editor

Dear *CPER* Readers:

Let me use this opportunity to bring you news from the Public Employment Relations Board's advisory committee, which met for a second time at the board's headquarters in Sacramento. First, Chairperson John Duncan welcomed the group with promising words — that the board has entered a period of budgetary stability. No longer will it have to operate in a “crisis management mode,” he said. The board is in a position to look ahead and serve its constituents even better.

Chief Administrative Law Judge Fred D'Orazio happily reported that there are now two ALJs assigned to each region of the agency and, at the time of the meeting on January 26, that there were between 60 and 65 cases set for hearing. Asked about the breakdown in cases, Fred said the overwhelming majority of the cases arise under EERA. In second place are cases filed under the MMBA.

General Counsel Robert Thompson told the committee that case filings are up, with over 660 new unfairs submitted in the first half of the fiscal year. Despite that statistic, Bob said that the time for processing charges, either through dismissal or issuance of a complaint, has decreased from an 80-day average last year to about 60 days this year. Bob and his staff continue to work with the parties in an effort to reach voluntary resolutions, engaging in multi-day, informal conferences if there is “any glimmer of a chance of settlement.”

PERB staff proudly showed off its soon-to-be-launched electronic filing capability. Eileen Potter, the board's CAO, took us through a demonstration of the program that will permit charging parties to fill out an unfair practice form online, and upload and attachment documents to the charge. You can see how the program will work and offer your own input by going to <https://www.perb.ca.gov/efile>.

The committee discussed the possibility of having factfinders' reports posted on the PERB website.

Fred announced implementation of a new policy that will allow ALJs to travel to the location of unfair practice hearings. Recently, in order to rein in its budget, the agency had to insist that the parties and their witnesses travel to one of the board's regional offices. Now, on a case-by-case basis, the chief ALJ will entertain parties' requests that the ALJ do the traveling. Factors that will influence consideration of these requests include the number of witnesses a party must call, the anticipated length of the hearing, and the geographic remoteness of the location.

The assembled group intends to meet again in six months. On behalf of the committee, all interested practitioners are invited to participate.



Carol Vendrillo

PERB Sends the Wrong Message on Teacher Mailboxes

Priscilla Winslow

Priscilla Winslow is the assistant chief counsel of the California Teachers Association and has been representing public employees and their unions for over 20 years. She is lead counsel in San Leandro Teachers Assn v. San Leandro Unified School District and represented the SLTA in the PERB case described in this article.

During the waning days of the recent special election campaign, tens of thousands of teachers were treated to several unsolicited email messages at their worksites in hundreds of schools from the “Yes on Proposition 75” campaign urging them to vote for the initiative that would have drastically weakened the collective political voice of their unions. The campaign bragged that it diligently had obtained the email addresses through school websites and other public sources. Despite the literal wording of Education Code Sec. 7054 implying that no one may use “school district...funds, services, supplies or equipment...for the purpose of urging the support or defeat of any ballot measure...,” at least one district attorney declined to prosecute because no public money was expended in this effort. In his mind, the purpose of the statute is to prevent the school district itself from spending public funds for political purposes. Since no *district* funds were expended in this effort, no crime had been committed.

Contrast this position with that of the Public Employment Relations Board, which recently affirmed without analysis the most restrictive and literal interpretation of Sec. 7054 possible in *San Leandro Unified School Dist.*¹ In October 2004, the San Leandro Teachers Association used school mailboxes to distribute two flyers to unit members primarily to update them on the progress of negotiations. School board elections were coming up, and the union endorsed three candidates. News of the endorsements, information about the political action committee, and an exhortation to support the candidates were included in these flyers.

District officials ordered SLTA to stop using the mailboxes to spread these messages and threatened to suspend access to the slots if the union persisted in including campaign messages in its literature. The union filed an unfair practice charge, asserting its right of access under the Educational Employment Relations Act and urging the board to either clarify or reverse its 2001 holding in *San Diego Community College Dist.*²

At issue in both cases is the meaning of Ed. Code Sec. 7054, which prohibits the use of school district “...funds, services, supplies, or equipment” to urge the support or defeat of any ballot measure or candidate for elected office. PERB earlier had ruled in *San Diego Community College Dist.* that a union ran afoul of Sec. 7054 by using the district’s copy machine to reproduce political flyers, and was not permitted to use the mail system, including the system of distribution, which encompassed the mailboxes.

What are “services, supplies, or equipment” in this Internet age where the cost of communication is negligible beyond measurement?

If both PERB and the district attorney who declined to prosecute the Yes on Prop. 75 emailers are correct, a school district’s email system is fair game to any political campaign, but its physical mailboxes are off limits. The mailboxes, according to PERB, constitute “equipment or services,” while the Internet connection and computers paid for and provided by the public employer are not “equipment” or a “service.”

Such distinctions make no sense and leave both unions and the members of the public seeking to communicate with constituents at their own peril. For unions in particular, which have been given special access to school mailboxes by EERA, PERB’s position presents a poorly reasoned retreat from liberally interpreting employees’ access rights. Even more significantly, it represents an abdication of its duty conferred by the California Supreme Court in *San Mateo City School Dist. v. PERB*⁸ to harmonize apparently conflicting provisions of the Education Code with EERA.

The tension between PERB’s restrictive interpretation of Ed. Code Sec. 7054, EERA, and the constitutional rights of public employees needs to be resolved. PERB has rather neatly insulated itself from judicial review of its interpretation of Ed. Code Sec. 7054 by refusing to issue complaints and conduct evidentiary hearings in both *San Diego CCD*, and *San Leandro USD*. Gov. Code Sec. 3542(b) prohibits judicial

review of PERB’s refusal to issue a complaint. Thus, PERB’s rule now is ossified and immune from any good faith argument that it should be changed. Constrained by board precedent, the General Counsel’s Office will not permit a complaint to issue on a theory that employee organizations should be able to place “political” materials in their members’ workplace mailboxes.

Seeking an escape from this legal straitjacket, the San Leandro Teachers Association, CTA/NEA, moved its dispute over the district’s restrictions to superior court, claiming that the employer’s application of Ed. Code Sec. 7054 is unconstitutional. What follows is a suggested framework for harmonizing the two statutes and giving a

common-sense approach that honors the intent behind Sec. 7054 without doing violence to the equally important interest unions have in maintaining their statutory and constitutional right of access to their members, even when their communications contain political endorsements.

A Sensible Reading of Sec. 7054

The article of which Sec. 7054 is a part, “Political Activities of School Officers and Employees,” became effective in 1977.⁴ Its overall purpose was three-fold: to protect the political activities of public school employees, to prohibit influence peddling, and to

forbid the use of public funds in political campaigns.⁵

Far from restricting political activity, several sections of Article 2 protect it. Section 7052 sets the tone: “Except as otherwise provided in this article..., no restriction shall be placed on the political activities of any...employee of a local agency.” Section 7056 describes the conditions under which employees may solicit and receive financial contributions at the workplace for political campaigns, and Sec. 7057 assures that members of the classified service will not be discriminated against because of “political acts, opinions, or affiliations.” The final section of Article 2 enshrines the guarantee of equal access to forums under the control of the school employer. Section 7058 provides:

If both PERB and the D.A. are correct, a school district’s email system is fair game to any political campaign, but its mailboxes are off limits.

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

Since the legislature did not define “forum,” we can presume it is used in the same manner that courts use it — to denote physical places or means of communication under the control of the public employer, such as auditoriums, faculty rooms, faculty mailboxes, and, as argued in *CPER* several months ago, email systems.⁶

Obviously some, if not all, fora under the control of the school district also fall in the category of “equipment or services” proscribed from use by anyone in Sec. 7054. The chairs and stage of an auditorium are “equipment” by any definition. The janitorial service used to prepare the auditorium for use is a “service” presumably. School mailboxes, as PERB has held, are either “equipment” or a “service.” So if the legislature really intended such a draconian prohibition on the use of any physical thing owned by a school district in the furtherance of a private speaker’s political message, why was it necessary to guarantee equal access to all viewpoints if and when the district “opened” the forum? If PERB and San Leandro USD are correct that school mailboxes may never carry paper that has a campaign message on it, then Sec. 7058 is surplusage.⁷ Section 7058 clearly permits a district to allow political speech in its fora, and under the First Amendment it would be required to open the forum to all points of view if it permitted one point of view.

Other sections of the Education Code support the view that a school’s property may be used by non-governmental speakers to support or oppose a ballot initiative or the candidacy of a person. The Civic Center Act⁸ designates every school facility and grounds as a “civic center” where citizens, clubs, and associations formed for “educational, political, economic, artistic, or moral activities...may meet

and discuss...any subjects...which in their judgment pertain to the...political...interests of the citizens of the communities in which they reside.”⁹ The California Supreme Court has held that school districts cannot discriminate against speakers seeking access to school property based on the content of their speech.¹⁰

EERA itself supports the notion of a more liberal access right to school mailboxes. Government Code Sec. 3543.1(b) explicitly grants to employee organizations the right to use school mailboxes to communicate with unit members. In its earlier days, PERB held that the employer could regulate such access only by reasonable time, place, and manner restrictions, and could not interfere with the content of the communications unless it presented a substantial threat to peaceful school operations.¹¹

Finally, there is the Constitution to consider. It is well established in this state that public employees enjoy the right of freedom of expression guaranteed by Art. 1, Sec. 2, of the California Constitution.¹² California courts also have modified the federal “traditional public forum” doctrine to view the public forum as a “continuum, with public streets and parks at one end and the government institutions like hospitals and prisons at the other.”¹³ Rather than adopting the more rigid public forum analysis of the federal First Amendment jurisprudence, at least two California courts of appeal have

adopted a “basic compatibility test,” which analyzes whether the speech is compatible with the purpose that the forum serves.¹⁴

While no California case yet has considered where school mailboxes fall on the continuum, the purpose of this forum is obvious — to facilitate communications between teachers, between school administration and its employees, and between the employee organization and its members, according to Gov. Code Sec. 3543.1(b). In other words, the mailboxes are not a strictly controlled environment, available only to the government employer. This is especially so in the

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San Leandro Unified School District, where the mailboxes were used by local commercial interests to promote their wares.

With these four distinct pillars supporting the presumption that the property of a public school employer is indeed open to political speech, a far more sensible reading of Ed. Code Sec. 7054 would recognize that its purpose is more narrow and less ambitious than sequestering the school mailboxes for only “pure” non-political communications. Instead, it is more likely the legislature intended to prohibit the governmental institution itself from using public funds, equipment, and services to promote its own political message.

Just as Ed. Code Sec. 7053 prohibits any office holder (and those seeking office) from using his or her office to influence, aid, or confer any benefit in consideration of a vote or other action, Sec. 7054 provides a companion rule: public officials may not use the public fisc to promote their own political agendas. The statute was not intended to prohibit private speakers such as unions from using public property at *de minimus* or no cost to convey a political message that is clearly not that of the government speaker. Phrased differently, the government must provide the soapbox for private speakers, but may not itself get up on that soapbox to promote its own campaign message.

Balancing the Interests of Teachers and the State

*CTA v. San Diego USD*¹⁵ underscored the legitimate interest school districts have in disassociating themselves from a political campaign message. Indeed, that is one of the “good government” purposes of Article 2 — to ban the government as a speaker in political campaigns. In *CTA v. San Diego*, the Court of Appeal held that in striking a balance between the interests of the teachers to comment on matters of public concern and the interest of the state in maintaining the efficiency of the service, the district could restrict teachers

from wearing buttons urging a “no” vote on school vouchers while they were in the classroom engaged in instructional activities. However, “...school employees have the right to express to each other their respective political viewpoints on school property.” The court noted, “When teachers...express their views to each other, there is very little risk their views will be...implicitly attributed to the school district.”

The laudable goal of keeping the government neutral in electoral politics can easily be balanced with the constitutional and statutory rights of public employees to participate in the political activities of their organizations. When the San Leandro Teachers Association placed the newsletters in teachers’ mailboxes informing them of which school board candidates the union endorsed, there was no confusion about who sponsored that speech. The union logo was prominently featured on these periodicals sponsored by SLTA. Most of the newsletters’ content addressed the progress of negotiations from the union’s perspective. There was no part of the school district’s message on these flyers, and no one could mistake the documents for a message endorsed by the school board.

On the other hand, a political flyer or email message that has no information about who sponsors the message arguably presents a risk that the school district itself will be seen as endorsing the political message. In that case, the district probably would be justified in prohibiting the use of its mailboxes to convey the message, just as it was justified in banning teachers from wearing campaign buttons in the classroom in San Diego.

Reading Sec. 7054 to restrict the government from using its considerable resources to promote its own campaign message while permitting employee organizations access to physical equipment and services at a *de minimus* or no cost restores the Civic Center Act, EERA, and the Constitution to the interpretive equation. Such a reading also would fulfill the mandate of *San Mateo City School Dist.*,¹⁶ which directs PERB and any other decisionmaking body to harmonize

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EERA with the Education Code. “This [harmonizing], rather than the preemption theory...is the *correct approach* when several provisions of state law address a similar subject.” [Emphasis added.]

Hopefully, if PERB is called on to revisit its interpretation of Ed. Code Sec. 7054, it will take this perspective under more serious consideration than it seemed to do in its *San Leandro* decision. In the meantime, it will be up to the courts to apply constitutional principles to the issue. *

1 (2005) PERB Dec. No. 1772, 174 CPER 86.

2 PERB Dec. No. 1467, 152 CPER 86.

3 (1983) 33 Cal.3d 859.

4 Article 2 of Part 5, Chapter 1, added by Chapter 36, Sec. 396.5 of Stats, 1977.

5 The legislative findings that accompanied S.B. 82, the 1995 revision to Article 2, supports this. “The Legislature hereby finds and declares that...the use of public funds in election campaigns is unjustified and inappropriate.....(b) However, it is not the intent of the legislature, in enacting this act, to restrict the political activities of officers or employees of a school district...The right of speech of any...employee [of a school district or community college district] is in no manner affected by this act.” Stats, 1976, c. 1423, Sec. 2.

6 See, “Email Communications — A Union Perspective,” by Martin Fassler, *CPER* No. 171, pp. 17-21; and “Email Communications — A Management View,” by Bruce A. Barsook, *CPER* No. 171, pp. 22-28.

7 Interestingly, *San Diego CCD, supra*, the original board decision interpreting Sec. 7054, and the one that contains some analysis of the statute, does not discuss Sec. 7058. This oversight or omission is ironic in light of the lip service paid by the board in this decision: “...interpretations that render a term mere surplusage should be avoided, and every word should be given significance, leaving no part useless or devoid of meaning.” *San Diego CCD*, slip op. p. 7-8.

8 Ed. Code Secs. 38130 et seq.

9 PERB also has ignored the Civic Center Act in its consideration of Sec. 7054, in that there was no discussion of it in either *San Diego CCD* or *San Leandro USD*.

10 *Danskin v. San Diego USD* (1946) 28 Cal.2d 536.

11 *Richmond USD* (1979) PERB Dec. No. 99.

12 *Los Angeles Teachers Union v. Los Angeles City Board of Education* (1969) 71 Cal.2d 551, 557-58.

13 *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1985) 154 Cal.App. 1157, 1164.

14 *Prisoner Union v. Dept. of Corrections* (1982) 135 Cal.App.3d 930, 936; *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory, supra*.

15 (1995) 45 Cal.App.4th 1383.

16 *Supra*, 33 Cal.3d at 865-66.

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

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Board Case Law: A Year in Review

Michael Baranic

In 2005, the courts and the Public Employment Relations Board issued significant decisions that promise to shape public sector labor relations and employer and employee organization conduct for years to come. The cases ran the gamut, addressing agency fee issues, employee and organizational speech, and subcontracting. We saw more cases come to the board under the Meyers-Milias-Brown Act and heard the much-anticipated decision by the Supreme Court regarding the applicable statute of limitations for charges brought under the MMBA.

What follows is a recap of many of the decisions affecting board case law this past year.

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Dues and Organizational Security Cases

Charges against employee organizations are coming to the board with more frequency and, particularly in the case of agency fee payer cases, the charges are becoming increasingly sophisticated. *DuLaney* and *Abernathy* are but two of the cases the board addressed regarding charges against employee organizations in the last year and should serve as a warning that unions need to be particularly careful in handling non-member and fee-payer matters.

DuLaney. In *DuLaney v. City of San Diego and San Diego Municipal Employees Assn.*,¹ PERB addressed the issue of a non-agency fee payer's right to enroll in and access dental and eye care plans sponsored by the union.

The charging party, Taunya DuLaney, was a criminalist with the City of San Diego in one of four bargaining units represented by the San Diego Municipal Employees Association. She was not a member of MEA.

In its memorandum of understanding for the term July 1, 1998, through June 1, 2002, the city and MEA included a flexible benefits plan. As part of the plan, the city agreed to make a specific contribution of pretax money toward each employee's benefits. Using this money, each employee was required to choose one health insurance plan and one life insurance policy. With the remaining money, the employee had a choice among additional benefits. Two of those, an eye-care plan and a dental plan, were open only to union members. The union-sponsored plans were the only eye-care and dental plans available under the flexible benefits plan.

On May 12, 2002, the parties entered into a new, comprehensive MOU. The article regarding the flexible benefits plan was changed to provide that an employee must be an MEA member or an agency fee payer to be eligible for the union-sponsored dental and eye-care plans.

At the hearing, the parties stipulated that the MOU allowed an employee like DuLaney, who was neither an MEA member nor required by law or contract to be an agency fee payer, to enroll in the union-sponsored plans by voluntarily assuming the role of an agency fee payer or conscientious objector. DuLaney testified that she would have enrolled in the dental plan if she were not required to become an MEA member but would not become an agency fee payer just to enroll. She also testified that she was not a conscientious objector as defined by the contract.

The complaint issued by PERB alleged that MEA violated Sec. 3506 of the Meyers-Milias-Brown Act and PERB Reg. 32604(b) by discriminating against DuLaney, interfering with employee rights, and engaging in conduct inconsistent with MEA's duty of fair representation.

Relying on the board's decision in *Palo Verde Unified School Dist.*,² the city and MEA argued that the denial of this benefit opportunity was not an "adverse action" under board precedent. Neither the administrative law judge nor the board was persuaded. The ALJ determined that the case was more

akin to the Court of Appeal's decision in *Campbell Municipal Employees Assn. v. City of Campbell*³ than *Palo Verde*.

In determining that the loss of a benefit opportunity, as in DuLaney's case, was unfavorable, the ALJ noted that the applicable test is "whether [a] reasonable person under the same circumstances would consider [such] action adverse." The ALJ reasoned that, objectively, the benefit itself is considered a positive and noted that it was touted by MEA as an inducement to join the union. The ALJ concluded that if the benefit were favorable enough to be considered an inducement by the union then the denial of the opportunity was obviously unfavorable and therefore adverse. The ALJ observed that if the situation had been reversed and MEA

members were denied a benefit because they belonged to the association, that certainly would be viewed as an adverse action.

Noting that the facts in the instant case did not fit the mold of its prior decisions, the board agreed with the ALJ that *Palo Verde* was distinguishable and that *Campbell* was on point. The issue in *Palo Verde* was whether the office relocation of an employee who happened to be the union president was favorable or unfavorable. In *Campbell*, the city adopted a date for retroactive payment of salary and medical insurance premium increases that was less favorable for members of one

organization than for those of the other unions. The less-favorable date was imposed on the one organization that had opted to use impasse procedures during the latest round of negotiations. Organizations that did not use the impasse procedures — and acquiesced to the city's demands — were rewarded with the more-generous retroactive date.

In finding that DuLaney had suffered discrimination, the board reasoned that it does not matter whether the impact affects one person or a cast of thousands, "it is still a situation in which a person is being denied a benefit because of protected activity. It just happens that in [DuLaney's] case the protected activity is not joining the Association rather than joining it. Just as there should be no adverse action for

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joining the Association, there should be no adverse action for not joining it.”

Abernathy. In December 2005, the board issued another decision related to dues, membership status, and organizational security. In *Abernathy et al. v. UPTE, CWA Loc. 9119*,⁴ the board held that agency fee payers retain standing to challenge a union’s agency fee collection procedures notwithstanding the fact that the charging parties had received a complete refund of all fees collected during the period of the alleged violation. In 2004, the board issued its *O’Malley* decision⁵ holding that O’Malley lacked standing to pursue his charge regarding the union’s agency fee procedures because he no longer was an agency fee payer since the union had refunded all of the fees collected from him, advised him that it would not collect agency fees from him in the future, and sent advance refunds to him because the University of California continued to make deductions from his check and submit them to CNA.

After *O’Malley*, conventional wisdom was that a union could avoid an unfair practice charge based on violation of PERB regulations regarding agency fee procedures by tendering the fee collected, along with interest, to the charging party. That theory was short lived in light of the board’s *Abernathy* decision.

Abernathy involved three charges brought against UPTE, CWA Local 9119, at the University of San Diego. All three charging parties were fee payers who alleged that the union collected agency fees from them for three months prior to the union sending them the required *Hudson*⁶ notice. UPTE returned fees that were collected prior to the *Hudson* notice but continued to collect and use fees after sending the notice.

Because UPTE continued to collect fees from the charging parties, unlike the union in *O’Malley*, the board found that the charging parties continued to be agency fee payers and were entitled to the rights and protections provided by both case law and PERB regulations. While the board

recognized that there was no financial harm to the charging parties because the union returned the fees collected with interest, it concluded that the harm to the charging parties occurred when the statute was violated. Overturning the dismissal, the board announced that if there is no consequence for unions violating the statute, there would be no incentive for any union to adhere to the requirements of *Hudson*.

Duty of Fair Representation Cases

Nearly every year, the board is faced with a handful of cases alleging a breach of the union’s duty of fair representation based on the union’s failure or refusal to pursue a member’s dispute in some extra-contractual forum. While the result is almost always the same, two recent cases illustrate differing approaches unions employ in responding (or not responding) to members’ requests for representation.

Chen. In *Chen v. California State Employees Assn.*,⁷ PERB addressed a union’s duty of fair representation relative to a member’s request for accommodation of her disability. According to her charge, Karin Chen submitted a request for accommodation to her employer in March 2004. The state did not respond to her request. In September 2004, Chen faxed her accommodation form to the union, requesting assistance. The facsimile transmission may or may not have been received by the union. Nevertheless, Chen followed up the fax with a certified letter and, in October, sent an email message to the union asking about whether it had received her fax. Chen received no response and filed her charge alleging that the union breached its duty of fair representation by failing to assist her in her request for accommodation.

Adopting the rationale of the board agent, the board reiterated the often-cited rule that while a union’s duty of fair representation extends to its handling of grievances, absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does

In Abernathy, the board found no financial harm but that harm occurred when the statute was violated.

not constitute a breach of the union's duty of fair representation. The board also noted that a union is not required to process an employee's grievance if it believes the chances for success are minimal. The board pointed out that the charge did not allege any facts demonstrating that Chen's request for accommodation was covered by the collective bargaining agreement but rather appeared to be a request for accommodation under the Americans With Disabilities Act. As such, the board concluded that the union did not owe Chen a duty of fair representation because its duty extends only to contractually based remedies under the union's exclusive control.⁸

Huntsberry. The board reached the same conclusion in *Huntsberry v. Alameda County Probation Peace Officers Assn.*,⁹ regarding a union's obligation to pursue an appeal of a member's termination to the County Civil Service Commission. Diane Huntsberry, a counselor with the probation department, witnessed a fight between two minors that had been staged by county employees who wagered on the outcome of the fight. During an investigation, Huntsberry denied witnessing the fight or her coworkers' wagering. Other witnesses said Huntsberry was standing within close proximity of the altercation.

Huntsberry was placed on administrative leave and charged with two counts of child endangerment for failing to intervene in the fight. The union denied Huntsberry's request for representation at her criminal trial, and she was convicted of the two misdemeanor counts.

Huntsberry also requested the union represent her at the Civil Service Commission hearing regarding her termination. The union's counsel advised Huntsberry that success on appeal would be extremely remote because of her criminal conviction and that the commission likely would uphold her dismissal because of the lower burden of proof. In January 2003, the union told Huntsberry that, given the likelihood of failure on appeal, the union had determined not to pursue the matter on her behalf.

In June 2003, Huntsberry participated in the CSC hearing regarding her termination. The county relied entirely on the argument of collateral estoppel but failed to provide a transcript from the criminal trial or offer sufficient evidence about the issues presented during the criminal trial. As a result, the CSC hearing officer rejected the county's argument and ordered Huntsberry reinstated.

Huntsberry then filed an unfair practice charge with PERB nearly 18 months after the union advised her it would not pursue her CSC appeal.¹⁰ The board again held that the union's duty of fair representation did not attach to extra-contractual proceedings such as Huntsberry's criminal trial or her appeal to the Civil Service Commission.

The differing approaches adopted by the unions in *Chen* and *Huntsberry* illustrate an important tactical decision. In light of the relatively short six-month statute of limitations under the MMBA and the other acts administered by PERB, when determining not to pursue a matter on behalf of a member, it may be prudent to unequivocally advise the member of that fact in writing, as counsel did in *Huntsberry*. This approach allows the union to establish a specific date from which to calculate the limitations period rather than risk making the argument that the member knew or should have known the union was not going to afford representation based on its lack of response to the member's representation request.

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Speech Cases

The board encountered a number of cases this past year that involved various types of employee and organizational "speech."

San Leandro. In *San Leandro Teachers Assn. v. San Leandro Unified School Dist.*,¹¹ the board revisited the issue, as it does every couple of years, of employee organization communications to its members regarding political elections. In *San Leandro*, the teachers union sought to

distribute its newsletter that contained information on the union's political endorsements. When the school district prohibited the union from placing the newsletters in its members' mailboxes, the union filed its unfair practice charge alleging that the school district had interfered with its right to communicate with its members.

Education Code Sec. 7054 prohibits the use of school district "services, supplies, or equipment...for the purpose of urging the support or defeat of any ballot measure or candidate." The board previously had addressed the issue in its *San Diego*¹² decision. The union attempted to distinguish its case from that of *San Diego* by arguing that the mailboxes were not "equipment" of the school district but had become "fixtures" because they were permanently attached to the wall and required no maintenance or service by the district. Finding that the plain meaning of Ed. Code Sec. 7054 prohibited such use of the mailboxes, the board was unpersuaded and upheld the dismissal of the charge. (For a reaction to that ruling, see "PERB Sends the Wrong Message on Teacher Mailboxes," by Priscilla Winslow, on p. 5.)

Sonoma. In another speech case, the board held that the Higher Education Employer-Employee Relations Act protected a university employee's statements about a supervisor to a coworker. In *California School Employees Assn. v. California State University (Sonoma)*,¹³ a chief steward for CSEA was reprimanded for portraying the dean's office as "vicious and malicious." The steward had become aware of an employee evaluation critical of the fact that the employee required too much supervision. Thereafter, when the steward met a probationary employee, he advised the employee that she should refrain from asking the dean's office for help because it was logging every request for assistance and would use the information against her in her probationary report.

As in other discrimination cases, the board applied the well-known three part test inquiring whether (1) the employee exercised rights under the act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated, or otherwise interfered with or coerced the employee because of the exercise of his rights.¹⁴ In *Sonoma*, there was no dispute that the union steward had been reprimanded for making the statements. The primary issue

was whether his speech critical of the dean's office was protected.

The board determined that it was. Criticism of a supervisor is protected when it is made for the purpose of advancing the employee's interests in working conditions. The board noted that the speech becomes unprotected only when it is insulting, defamatory, or insubordinate so as to cause substantial disruption in the workplace. Finding that the union had established its prima facie case, the board remanded the matter to the general counsel's office for issuance of a complaint.

Procedural Cases

In two important cases concerning the board's procedures, the California Supreme Court in *Coachella Valley Mosquito and Vector Control Dist. v. California School Employees Assn.*¹⁵ determined that a six-month statute of limitations applies to charges brought before PERB under the MMBA and, in *East Side Teachers Assn. v. East Side Union High School Dist.*,¹⁶ the board held that deferral to arbitration must be raised as an affirmative defense.

Coachella. On June 9, 2005, in a much anticipated decision, the California Supreme Court, affirming a decision by the Court of Appeal, rejected PERB's argument that the three-year statute of limitations provided in Code of Civil Procedure Sec. 338(a) applies to unfair practice charges brought before the board under the MMBA. Exercising a bit of judicial legislation, the *Coachella* court glossed over the

Criticism of a supervisor is protected when it is made for the purpose of advancing the employee's interests in working conditions.

fact that unlike all of the other labor laws administered by PERB, the legislature did not include a specific statute of limitations in the MMBA, neither when it was enacted nor when the act was amended to bring it under the purview of PERB.

PERB argued that since the MMBA previously had been enforced by way of a petition for writ of mandate under CCP Sec. 1085, and the enacting legislation required PERB to “apply and interpret unfair labor practices consistent with existing judicial interpretations,” the MMBA should be construed as requiring PERB to continue to apply the three-year statute of limitations. In an attempt to discount PERB’s argument that all initial unfair practice charges had been and should be subject to the three-year statute of limitations, the court cited *Anderson v. City of Los Angeles*¹⁷ for the proposition that not all MMBA “actions” had been subject to a three-year statute of limitations.

The court’s reliance on *Anderson* is questionable since that case did not involve an initial unfair practice charge brought to the court by way of a petition for writ of mandate under Sec. 1085. In *Anderson*, the complainant filed his initial charge with the Los Angeles County Employee Relations Commission, an administrative body similar to PERB, alleging that his union violated the MMBA by denying him reinstatement after it had expelled him from membership. When the commission ruled against him, he petitioned the superior court for a writ of *administrative* mandate under CCP Sec. 1094.5. The Supreme Court pointed to the fact that the statute of limitations applicable to an administrative mandate petition is 90 days, not three years. What the court failed to recognize, however, was that *Anderson* involved the *review* of an administrative agency’s decision under CCP Sec. 1094.5 that already had ruled on the unfair practice charge brought before the *agency*, not an initial unfair practice brought before the court by way of a traditional writ of mandate under CCP Sec. 1085.

The court also rejected PERB’s argument that when the legislature uses a critical word or phrase in one statute and omits that word or phrase in another statute dealing with the same general subject, that usually shows a different legislative intent. Rather than applying this general rule of statutory construction and leaving it to the legislature to correct its oversight — if in fact it was a legislative oversight — the court appeared strongly influenced by the fact that the six

other public employment relations laws within PERB’s jurisdiction contain an explicit six-month statute of limitations, and it read that same limitations period into the MMBA.

While the manner in which the court arrived at its conclusion is troubling, its decision in *Coachella* should be a blessing in disguise for PERB as it will preserve the board’s scarce resources by curtailing the number of charges it must process under the MMBA.

East Side. In another procedural case affecting board case law, PERB held that deferral to arbitration is an affirmative defense rather than jurisdictional barrier. By rejecting that portion of its *Lake Elsinore*¹⁸ decision holding that deferral to arbitration is

jurisdictional, the board in *East Side Teachers Assn.* maintained its position that parties should get their day in “court” and not get thrown out at the eleventh hour on a technicality. The *East Side* case involved a unilateral change charge by the school district regarding the use of public complaint forms. After a formal hearing and issuance of the ALJ’s proposed decision, the school district raised for the first time, in its exceptions, the issue of deferral to arbitration as a jurisdictional bar based on *Lake Elsinore*.

East Side is in keeping with the board’s recent decision in *Long Beach*,¹⁹ where the board announced that the statute of limitations is an affirmative defense that must be raised and is not jurisdictional. Consistent with public policy, the board found that treating deferral as an affirmative defense is necessary to preserve the scarce resources of PERB and

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the parties. Had PERB allowed the district to assert deferral for the first time in its exceptions, the parties and PERB would have wasted an enormous amount of time and money litigating the underlying charge.

Parties and practitioners should take note that deferral to arbitration (as well as the statute of limitations) now must be raised as an affirmative defense when answering a complaint issued by PERB and that a failure to affirmatively plead such a defense will, most likely, be viewed by PERB as a waiver. *

- 1 (1-20-05) PERB Dec. 1738-M, 29 PERC par. 57, 173 CPER 96.
- 2 (1988) PERB Dec. 689, 12 PERC par. 19121, 78 CPER 55.
- 3 (1982) 131 Cal.App.3d 416.
- 4 (12-1-05) PERB Dec. 1784-H, ___ PERC par. ___, 176 CPER 89.
- 5 *California Nurses Assn. (O'Malley)* (8-6-04) PERB Dec. 1673-H, 28 PERC par. 218, 169 CPER 80.

- 6 *Chicago Teachers Union, Loc. No. 1 v. Hudson* (1986) 475 U.S. 292, 68X CPER 1.
- 7 (2-7-05) PERB Dec. 1749-S, 29 PERC par. 74, 173 CPER 68.
- 8 *California School Employees Assn. (DeLauer)* (2003) PERB No. 1523, 27 PERC par. 73, 161 CPER 92.
- 9 (11-16-04) PERB Dec. 1709-M, 29 PERC par. 13, 172 CPER 98.
- 10 This case was decided by the board prior to the Supreme Court's decision in *Coachella Valley Mosquito and Vector Control Dist. v. California School Employees Assn.* (6-9-05) 35 Cal.4th 1072, 173 CPER 18, which held that a six-month, rather than three-year, statute of limitations applied to unfair practice charges brought under the MMBA. Had the case occurred today, the association could have asserted the statute of limitations as an affirmative defense to the charge and/or complaint.
- 11 (6-28-05) PERB Dec. 1772, 29 PERC par. 145, 174 CPER 86.
- 12 (2001) PERB No. 1467, 26 PERC par. 33014, 152 CPER 86.
- 13 (3-1-05) PERB Dec. 1755, 29 PERC par. 97, 173 CPER 92.
- 14 *Novato Unified School Dist.* (1982) No. 210, 6 PERC par. 13114 54 CPER 63.
- 15 (6-9-05) 35 Cal.4th 1072, 29 PERC par. 115.
- 16 (11-23-04) PERB Dec. 1713, 29 PERC par. 17, 173 CPER 70.
- 17 (1991) 229 Cal.App.3d 817, 89 CPER 24.
- 18 (1987) PERB Dec. 646, 12 PERC par. 19012, 75X CPER 13.
- 19 28 PERC par. 27.

VEBA: A Tax-Exempt Alternative for the Reimbursement of Health Care Costs

Daniel S. Connolly

Over the years, employers and employees have used a variety of plans to provide active employees as well as retirees with certain types of benefits. Whether by way of a 401(k) or a health savings account, participants have been able to secure substantial savings because of their contributions on a pretax basis. Employers and employees, though, have another vehicle available to achieve similar savings when paying medical expenses or premiums: a Voluntary Employees' Beneficiary Association.¹ A VEBA is a tax-exempt trust whose funds are used to pay eligible medical expenses.

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Once enrolled, a VEBA participant is assigned an account. A participant (along with employers) can fund the account by direct payroll deductions as well as with the proceeds derived from cashing out sick leave, vacation, and other accrued leave upon separation (if provided for in pertinent personnel policies or collective bargaining provisions). Assets in the individual, tax-exempt VEBA accounts can accumulate and compound, and they can be used to reimburse participants (or pay directly) eligible life, sick, accident, or other related benefits on a tax-free basis. A VEBA can be an extremely effective way to plan financially for current and future health care expenses.

This article summarizes the significant characteristics of a VEBA and provides a general overview of its operation.

Definition

A VEBA is a statutory creation whose origin is found in the Internal Revenue Code. Specifically, Internal Revenue Code Sec. 501 describes those entities that are tax-exempt, and Sec. 501(c)(9) specifically lists as tax-exempt a "voluntary employees' beneficiary association." Under Sec. 501(c)(9), a VEBA must provide

for the “payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries.” The general rule, as set out by the Treasury in 26 CFR Sec. 1.501 (c)(9)-1, tracks the statute and describes the four conditions that a plan must satisfy to qualify as a tax-exempt VEBA:

To be described in Sec. 501(c)(9), an organization must meet all of the following requirements:

- (a) The organization is an employees’ association,
- (b) Membership in the association is voluntary,
- (c) The organization provides for the payment of life, sick, accident, or other benefits to its members or their dependents or designated beneficiaries, and substantially all of its operations are in furtherance of providing such benefits, and
- (d) No part of the net earnings of the organization inures, other than by payment of the benefits referred to in paragraph (c) of this section, to the benefit of any private shareholder or individual.²

As explained by the Internal Revenue Service, the membership of a VEBA “must consist of individuals who become entitled to participate by reason of their being employees and whose eligibility for membership is defined by reference to objective standards that constitute an employment-related common bond among such individuals.”³ Examples of common bonds include employment by a common employer, coverage under the same collective bargaining agreement, membership in a labor union, or membership in a local of a national or international union.⁴

In making this determination of a “common bond” and deciding whether a group of individuals is defined by reference to a permissible standard, “all facts and circumstances” are to be taken into account; for example, tax-exempt status will not be denied to a VEBA if one or more of its participants are not employees but are the

proprietors of a business whose employees are members.⁵ Eligibility for membership may be restricted by geographic proximity or on objective conditions or limitations reasonably related to employment. For instance, limitations can be based on an employee’s classification, a reasonable minimum period of service, a maximum level of compensation, or employment on a full time basis.⁶ A trust that provides benefits to one employee does not qualify for tax-exempt status under Internal Revenue Code Sec. 501(c)(9).⁷

To establish the VEBA’s tax-exempt status, an application must be filed with the IRS on Treasury Form 1024. Review and approval of the application by the IRS is necessary for a VEBA to acquire its tax-exempt status.⁸

A VEBA will lose its tax-exempt status if it violates applicable non-discrimination rules. In particular, each class of benefits provided under the plan must not discriminate in favor of employees who are “highly compensated individuals.”⁹ For example, “the payment to highly compensated personnel of benefits that are disproportionate in relation to benefits received by other members of the association will constitute prohibited inurement.”¹⁰ Objective criteria used to restrict eligibility for benefits (or membership) “may not be selected or administered in a manner that limits benefits (or membership) to officers, shareholders, or highly compensated employees of an employer contributing to or

otherwise funding the employees’ association.”¹¹ The nondiscrimination requirements, however, do not apply to any organization that is part of a plan maintained pursuant to a collective bargaining agreement bargained in good faith.¹²

IRS regulations define the term “employee” to include an individual who is considered an employee for purposes of a collective bargaining agreement, an individual who became entitled to membership in the association by reason of being or having been an employee or the surviving spouse and dependents of an employee.¹³

A VEBA can be organized as a trust or as a corporation under local law, and it must have an existence independent of the member employees or their employer.

A VEBA can be organized as a trust or a corporation under local law, and it must have an existence independent of the member employees or their employer.¹⁴ An organization must be controlled by its membership, by an independent trustee(s) or by trustees (or other fiduciaries) at least some of whom are designated by, or on behalf of, the organization's membership.¹⁵ According to IRS regulations, "...generally such control will be deemed to be present when the membership (either directly or through its representative) elects, appoints or otherwise designates a person or persons to serve as chief operating officer(s), administrator(s), or trustee(s) of the organization."¹⁶ An organization will be considered to be controlled by independent trustees if it is an employee welfare benefit plan as defined in section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA) and as such, subject to the requirements of parts 1 (Reporting and Disclosure) and 4 (Fiduciary Responsibilities) of subtitle B, title 1 of ERISA.

ERISA requires that a summary plan description be provided to participants and beneficiaries within 90 days after one becomes a participant, or in the case of a beneficiary, within 90 days after one first receives benefits.¹⁷ Such a description "shall be written in a manner calculated to be understood by the average plan participant," and it shall describe in part the requirements for participation and receipt of benefits, circumstances that "may result in disqualification, ineligibility, or denial or loss of benefits," and the procedures to be followed in presenting claims for benefits under the plan as well as the remedies available under the plan for the redress of claims which are denied in whole or in part.¹⁸ A VEBA also must maintain records documenting the contribution amounts by employee (and employer) as well as the type and amount of benefits paid by the organization to or on behalf of each member.¹⁹

Benefits Provided

A VEBA exists to provide for the payment of life, sick, accident, or other benefits to association members or their dependents or to designated beneficiaries.²⁰ A "dependent" for purposes of Sec. 501(c)(9) means the member's spouse, any child of the member, or the member's spouse who is a minor or a student, or any other minor child residing with the member.²¹ "Life, sick, accident, or other benefits" may take the form of cash or noncash benefits.²²

The term "life benefit" means "a benefit (including a burial benefit or wreath) payable by reason of the death of a member or dependent."²³ It includes life insurance but does

not include a pension, annuity, or similar benefit.²⁴ The term "sick and accident benefits" means amounts furnished to or on behalf of a member or a member's dependents in the event of illness or personal injury to a member or dependent.²⁵ Such a benefit encompasses reimbursement for payments expended for illness or injury or for payments to a medical benefit or health insurance program.²⁶ It also includes an amount paid to a member in lieu of income during a period in which the member is unable to work due to sickness or injury, and includes benefits designed to safeguard or improve the health of members and their dependents.²⁷ The benefits also may be furnished in noncash form, for

example, "benefits in the nature of clinical care services by visiting nurses, and transportation furnished for medical care."²⁸

"Other benefits" include "only benefits that are similar to life, sick, or accidental benefits."²⁹ According to IRS regulations, a "benefit is similar to a life, sick or accident benefit if (1) it is intended to safeguard or improve the health of a member or a member's dependents, or (2) it protects against a contingency that interrupts or impairs a member's earning power."³⁰ Examples of "other benefits" include the payment of vacation benefits, the provision of vacation

A VEBA exists to provide for the payment of life, sick, accident, or other benefits to association members or their dependents or designated beneficiaries.

facilities, the reimbursement of vacation expenses, the subsidization of recreational activities such as athletic leagues, and the provision of child-care facilities for preschool and school-age dependents.³¹ The provision of job readjustment allowances, income maintenance payments in the event of economic dislocation, temporary living expense loans and grants at times of disaster (such as fire or flood), and education or training benefits or courses (such as apprenticeship training programs) as well as “personal legal services” are considered “other benefits” under 26 CFR 1.501(c)(a)-3(d) because they “protect against a contingency that interrupts or impairs a member’s earning power.”³²

“Other benefits” do not include the payment of commuting expenses such as “bridge tolls or train fares, the provision of accident or homeowner’s insurance benefits for damage to property, the provision of malpractice insurance, or the provision of savings facilities.”³³ Further, “other benefits” do not include any benefit that is similar to a pension or annuity payable at the time of mandatory or voluntary retirement or to the benefit under a stock bonus or profit sharing plan.³⁴ The benefits offered by a VEBA can be determined through collective bargaining and outlined in a collective bargaining agreement and/or established by the employees and set forth in the VEBA’s plan document so long as such benefits are consistent and comply with IRS regulations.

Many VEBA’s are established to pay for the qualified medical care expenditures (as defined by Internal Revenue Code Sec. 213) for active and retired employees as well as their dependents. Upon enrollment in a VEBA, a participant will be assigned an individual account held in trust. The source of an account’s assets can be employee and/or employer contributions made while the participant is an active employee as well as contributions derived from the participant’s cashing out of accrued sick or vacation leave (or compensatory time) upon separation. The manner in which a VEBA plan is funded typically is set forth in the collective bargaining agreement.

Significantly, because of a VEBA’s tax-exempt status, contributions to and disbursements from a VEBA account are made on a tax-free basis. While there is no statutorily required annual maximum or minimum contribution amount, such amounts may be established in a collective

bargaining agreement or plan document. Investment income generated from a participant’s account grows tax-free; administrative expenses may be paid by the employee through earnings or an assessment from assets in the plan or by the employer or through the earnings of total assets in the plan.

Unlike a health savings account, the unused funds in an individual VEBA account carry over from year to year and can continue to earn income on a tax-free basis. In the event of the death of the plan participant, dependents can continue to use the VEBA funds to pay for eligible benefits. If there are no dependents, the proceeds can be distributed to the beneficiary(ies) subject to an income tax.

While there are no specific vesting requirements, a VEBA may exclude employees who have not completed three years of service, employees who have not attained age 21, employees who are seasonal or less than half-time, employees who are not included in the plan by virtue of the terms of a collective bargaining agreement negotiated in good faith, and employees who are nonresident aliens and who receive no earned income from their employer, which constitutes income from sources within the United States.³⁵ When an employee terminates employment, the employee can continue to draw down his or her VEBA account for the reimbursement of eligible expenses; the employee cannot rollover his or her individual account into another VEBA plan.

Conclusion

All in all, a Voluntary Employees’ Beneficiary Association offers employers, employees, and retirees a cost-effective means to pay for eligible expenses by using tax-exempt dollars. In an era where pension plans and even the Social Security system have come under attack, employers as well as employees would be wise to take advantage of existing tax-exempt entities like a VEBA to plan for a more secure financial future.

As this article goes to press, the City of Hayward is meeting with representatives from its bargaining units about participating in the California Government Voluntary Employees’ Beneficiary Association, a multiemployer VEBA created by the City of Foster City to provide VEBA benefits to governmental entities within California. The CGVEBA pays for qualified health care expenditures as defined by the IRS.

Of course, employers, employees, and bargaining unit representatives should consult with counsel regarding VEBA's and their tax as well as ERISA consequences.³⁶ *

1 Internal Revenue Code Secs. 501(a) and (c)(9) provide as follows:

(a) Exemption from taxation. An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

...

(c) List of exempt organizations. The following organizations are referred to in subsection (a):

...

(9) Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries, if no part of net earnings inures (other than through such payments) to the benefit of any private shareholder or individual.

...

2 See also, *Lima Surgical Associates, Inc., Voluntary Employees Beneficiary Association Plan Trust, Huntington National Bank, Trustee v. The United States* (Fed. Cir. 1991) 944 F.2d 885, 887.

3 See, 26 CFR 1.501 (c)(9)-2(a)(1).

4 *Ibid.*

5 *Ibid.*

6 See, 26 CFR 1.501 (c)(9)-2(a)(2).

7 See, Rev. Rul. 85-199.

8 See, Internal Revenue Code Sec. 505(c).

9 See, 26 CFR 1.501(c)(9)-4(b).

10 Internal Revenue Code Sec. 505 addresses nondiscrimination requirements and provides in pertinent part as follows:

...

(b) Nondiscrimination requirements.

(1) In general. Except as otherwise provided in this subsection, a plan meets the requirements of this subsection only if—

(a) each class of benefits under the plan is provided under a classification of employees which is set forth in the plan and which is found by the Secretary not to be discriminatory in favor of employees who are highly compensated individuals, and

(b) in the case of each class of benefits, such benefits do not discriminate in favor of employees who are highly compensated individuals.

A life insurance, disability, severance pay, or supplemental unemployment compensation benefit shall not be considered to fail to meet the requirements of subparagraph (B) merely because the benefits available bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of employees covered by the plan.

11 See, 26 CFR 1.501 (c)(9)-2(a)(2).

12 Internal Revenue Code Sec. 505(a).

13 See, 26 CFR 1.501(c)(9)-2(b).

14 See, 26 CFR 1.501(c)(9)-2(c).

15 *Ibid.*

16 See, 26 CFR 1.501(c)(9)-2(c)(3)(iii).

17 See, P.L. 93-406, Sec. 101; 104(b)(l).

18 See, P.L. 93-406, Sec. 102.

19 See, 26 CFR 1.501(c)(9)-5(a).

20 Internal Revenue Code Sec. 501(c)(9).

21 26 CFR 1.501(c)(9)-3(a).

22 *Ibid.*

23 26 CFR 1.501(c)(9)-3(b).

24 *Ibid.*

25 26 CFR 1.501(c)(9)-3(c).

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 26 CFR 1.501(c)(9)-3(d).

30 *Ibid.*

31 26 CFR 1.501(c)(9)-3(e).

32 *Ibid.*

33 26 CFR 1.501(c)(9)-3(f).

34 According to 26 CFR 1.501(c)(9)-3(f), and for purposes of Internal Revenue Code Sec. 501(c)(9) and its corresponding regulations, "a benefit will be considered similar to that provided under a pension, annuity, stock bonus or profit-sharing plan if it provides for deferred compensation that becomes payable by reason of the passage of time, rather than as the result of an unanticipated event."

35 Internal Revenue Code Sec. 505(b)

36 The information in this article is not intended as legal or tax advice. Any questions regarding a VEBA, its structure and its tax consequences should be directed to counsel.

Local Government

San Bernardino P.D.s and D.A.s Reach Agreement With County

The public defenders and district attorneys who work in San Bernardino County have reached agreement on a new three-year contract that brings them a bit closer to where they want to be. The terms of the new contract include an incremental salary increase that totals 12.5 percent over the term of the agreement. But the attorneys came up short in their effort to gain the heightened benefits they are seeking.

One of the goals set by the 300 attorneys represented by the San Bernardino County Public Attorneys Association was salary parity with attorneys employed by the county counsel's office and with their counterparts in other Southern California counties.

The prior contract between the association and the county expired in July, and bargaining came to a standstill in mid-September. At that point, attorneys in the unit initiated a job action that had an adverse impact on the court system. On behalf of their clients, the public defenders exercised the right to insist on a preliminary hearing within 10 days. And, with the cooperation of the district attorneys, they made other demands that took full advantage of the rights conveyed to their criminal defendant clients. These tactics did not go unnoticed by the San Bernardino

superior court judges, who, according to reports compiled by the California Judicial Council, have the highest caseload in the state.

In December, with the help of a mediator, the parties agreed to pay increases of 4.74 percent during the first year of the contract and a second increase of 4.75 percent in July 2006. The attorneys will get a 3 percent increase in July 2007. As a result of these increases, when the contract expires in 2008, the San Bernardino lawyers will be paid a sum equivalent to the P.D.s and D.A.s in Riverside County.

However, the association was not successful in gaining the same benefits now enjoyed by the attorneys employed in the office of the county counsel of San Bernardino. That group has a more generous retirement plan, more comprehensive medical benefits, and a dental plan that covers family members.

While pleased with the deal finalized in January, the association still hopes to make gains in its benefits. With an eye toward future talks, the association has formed a political action committee that will support candidates who favor law enforcement interests and who will be more inclined to throw their support behind the criminal attorneys represented by the association. *

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

Aristotle Onassis

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

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

Pocket Guide to the Meyers-Milias-Brown Act

(12th edition)

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Local Government Employees Top List of Unionized Workforce

Newly released data from the United States Department of Labor's Bureau of Labor Statistics reveals that of all occupational groups, union membership among local government employees is the highest. While only 12.5 percent of all U.S. workers are union members, the unionization rate for government workers was 36.4 percent in 2005. Within the public sector, local government workers lead the pack with 41.9 percent unionization.

Among private sector workers, only 7.8 percent are represented by unions.

Local governments' high percentage of union workers stems from the fact that police and fire personnel are heavily unionized.

The largest numbers of union members live in California, with 2.4 million members, and New York, with 2.1 million members. Just over half of the 15.7 million union members in the country live in six states: California, New York, Illinois, Michigan, Ohio, and New Jersey. These states accounted for less than one-third of wage and salary employment nationwide. *

San Jose POA Settles With City on New Contract

After almost two years without a contract, San Jose police officers have given their approval to a new four-year-and-four-month pact that will increase officers' pay by 5.7 percent in July 2006, and again in July 2007. The contract also ushers in a higher level of retirement benefits, a gain that the San Jose Police Officers Association had made a priority.

The city's memorandum of understanding with its 1,344 sworn officers expired in February 2004. A separate contract addressing retirement benefits

expired in June 2004. Since then, the parties have been at the bargaining table. Last March, attempts to bring about an agreement through mediation proved unsuccessful. But efforts to reach an accord continued, and on December 13, with one dissenting vote, the city council signed off on the agreement.

Following the pattern set by other city employees, the contract includes no retroactive raises for the first 16 months of the agreement. The first increase, a 1.5 percent boost, is effective July 3,

If you're going through hell, keep going.

Winston Churchill

And hold on to a copy of CPER's PSOPBRA Pocket Guide. This resource explains the terms of the act and provides a clear explanation of the protections relating to investigations and interrogations, self-incrimination, privacy rights, polygraph exams, searches, personnel files, and administrative appeals. The Guide includes summaries of key court decisions, the text of the act, a glossary of terms, and an index.

This Guide is a must for each and every peace officer, and for those involved in internal affairs and discipline.

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

(11th edition)

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2005. Thereafter, the police officers will receive two 5.7 percent increases in consecutive years.

The wage portion of the agreement reflects a compromise by the parties. The association was very reluctant to agree to a zero percent increase for the first year. With its budget director predicting a deficit of \$76 million, the city worked hard to hold the line on salary and retirement costs. The city's employee relations director, Alex Gurza,

The wage portion of the agreement reflects a compromise.

estimates that with this increase, experienced officers will earn in excess of \$100,000 a year after premium pay is considered in the calculation. This wage hike — while not quite achieving parity with other Santa Clara County law enforcement agencies as the POA had wanted — hopefully will go far in attracting new officers.

One of the biggest gains garnered by the association is the change in retirement benefits. Under the prior agreement, the maximum pension was capped at 85 percent of an officer's final pay. The new agreement allows officers with 30 years experience who delay their retirement until July 1, 2006, to collect 90 percent of their final salaries. Unlike other public safety groups, the San Jose pact does not reach the 90

percent figure by using a formula based on 3 percent per years of service. Instead, retirement benefits are calculated using 2.5 percent of final compensation for each year up to 20 years of service, and 4 percent for years 21 through 30.

Prior to reaching agreement, the POA had worked hand in hand with the San Jose Firefighters Association in its efforts to win a new contract and gain enhanced retirement benefits. The police officers' overwhelming ratification of the new accord — by a vote of 715 to 184 — signaled that POA was ready to bring an end to the long bargaining battle. For the moment, no agreement has been reached with the firefighters. *

State Employment

SPB Only Recourse for Disciplined Civil Service Employees

Memoranda of understanding that allow employees to appeal disciplinary actions to a board of adjustment or arbitrator and bypass the review procedures of the State Personnel Board violate the state Constitution, held a unanimous California Supreme Court. Because “the public interest in a merit-based civil service is best served by recognizing that the State Personnel Board’s authority to review employee discipline is exclusive,” the legislature had no power to approve contracts that permitted the alternative means of contesting discipline.

SPB Review

The California Constitution mandates that civil service employees be appointed and promoted based on merit. It also provides that the SPB “shall enforce the civil service statutes and...shall prescribe probationary periods and classifications,...and review disciplinary actions.”

Under the civil service provisions of the Government Code, a civil service employee has the right to an evidentiary hearing to challenge disciplinary actions, except in cases involving minor discipline. The hearing usually is conducted by a hearing officer,

who prepares a proposed decision that is adopted, modified, or rejected by the SPB. The statute authorizes the board to revoke or modify the discipline if insufficient cause is shown or the employee was justified in engaging in the conduct on which the discipline is based. The losing party may petition for review by the superior court.

The Negotiated Provisions

In four bargaining units, the Department of Personnel Administration, which represents the state in collective bargaining, agreed to procedures that allowed civil service employees to appeal disciplinary actions to an entity or person other than the SPB. The California Department of Forestry Firefighters’ contract allowed bargaining unit 8 employees faced with major discipline to choose whether to appeal the action to a four-member board of adjustment or to the SPB. A minor disciplinary action could be appealed only to the board of adjustment. If the board of adjustment could not come to a decision, the disciplinary action would be sustained unless the union or the employee appealed to arbitration. Decisions of the board of adjustment and arbitrators were final and

binding, subject to extremely limited judicial review. To implement the provisions of the MOU, the legislature amended the Government Code to exempt firefighters from the requirement that the SPB investigate and hear disciplinary appeals of civil service employees.

California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment filed a lawsuit seeking to ban the grievance and arbitration procedure in firefighters’ disciplinary cases. When the superior court prohibited the use of alternative pro-

Employees faced with major discipline could elect between SPB review and the board of adjustment procedure.

cedures, CDFP and DPA modified the agreement to allow a choice of arbitration or SPB review only in minor disciplinary cases. The amended provisions also required arbitrators’ decisions to be submitted to the SPB to ensure that they did not conflict with “merit principles.”

In an agreement similar to the CDFP contract, DPA and the International Union of Operating Engineers negotiated a board of adjustment procedure for minor discipline for employ-

ees in bargaining units 12 and 13. Employees faced with major discipline could elect between SPB review and the board of adjustment procedure. The decision of the board of adjustment was subject to final and binding arbitration. The legislature amended the Government Code to state the IUOE provisions would control over conflicting provisions of Sec. 18670.

DPA also negotiated with the California State Employees Association provisions that allowed unit 11 employ-

*The Constitution
provides that the SPB
'shall...review
disciplinary actions.'*

ees who operate a commercial vehicle to appeal discipline for positive drug tests either through arbitration or to the SPB. The legislature amended the law to exempt unit 11 employees from SPB procedures in cases of discipline for positive drug tests.

Three lawsuits challenged the MOUs and implementing legislation. First, the SPB sought to prohibit enforcement of the provisions in the original CDFP contract, but the trial court ruled the board had no standing to file the lawsuit. The board appealed.

CASE then filed its lawsuit against CDFP and DPA. The SPB later filed a legal action against DPA, CSEA, and IUOE. In both cases, the superior court

issued a writ of mandate prohibiting use of the disciplinary review provisions. DPA and the unions appealed.

At the Court of Appeal, the three cases were consolidated. The court held the SPB had standing to challenge the CDFP disciplinary review procedure. It also concluded that all the MOUs, the amended CDFP provisions, and the implementing legislation violated Article VII of the California Constitution by infringing on the SPB's authority to review disciplinary actions taken against civil service employees. DPA, CDFP, and IUOE petitioned the Supreme Court for review.

SPB's Exclusive Authority

The Supreme Court acknowledged the legislature may exercise "any and all legislative powers" that are not denied to it by the Constitution. But, it pointed out, the Constitution provides that the SPB "shall...review disciplinary actions."

DPA and the unions argued that the language permits SPB review of disciplinary actions and also allows employees to choose alternative appeal routes. They relied heavily on two cases in which the Supreme Court had allowed other state agencies to adjudicate cases over which the SPB had jurisdiction.

In *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, CPER SRS 16, the court had rejected a challenge to the provisions of the State Employer-Employee Relations Act (now the Dills Act) that allowed the Public Employment Relations Board to investigate and adjudicate unfair practice charges.

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you free. But first, it
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PERB's authority to protect the state and employees from violations of the act did not overlap with the SPB's jurisdiction over disciplinary cases, the court had held, because the SPB and PERB had "different, but not inconsistent, public purpose[s]."

In *State Personnel Board v. Fair Employment and Housing Commission* (1985) 39 Cal.3d 422, 67 CPER 20, the court had held the commission had jurisdiction to consider the claims of three state applicants who asserted they were rejected from employment because of their disabilities in violation of the Fair

The court distinguished both Pacific Legal Foundation and Fair Employment and Housing Commission.

Employment and Housing Act. The court had reasoned that the merit principle administered by the SPB was enhanced by enforcing the FEHA in state employment since it guaranteed that non-merit factors such as disability would not be used in hiring decisions.

The court in the current case distinguished both *Pacific Legal Foundation* and *Fair Employment and Housing Commission*. It explained that PERB and the FEHC had specialized functions that

"supplemented rather than supplanted the central adjudicative function" of the SPB. "[I]n neither case did the statutory scheme undermine or compromise the State Personnel Board's jurisdiction to 'review disciplinary actions,'" it said.

The court sided with the SPB's argument that allowing employees to appeal discipline through a grievance and arbitration procedure would violate the constitutional principle that employees are selected and advanced "under conditions of political neutrality, equal opportunity, and competition on the basis of merit and competence." The court averred:

[W]hen a state civil service employee is removed from employment, the interest of the State Personnel Board in ensuring that the disciplinary action does not violate the merit principle is just as great as when an employee is selected for state civil service employment.

Since discipline less than discharge may affect future advancement in the civil service, the merit principle also is implicated for suspensions and other discipline, the court reasoned.

The court explained, "[A] state civil service based on the merit principle can be achieved only by developing and consistently applying uniform standards for employee hiring, promotion, and discipline." Therefore, divesting the SPB of the exclusive authority to review disciplinary actions would undermine the merit-based system. The court underscored this point by noting that the Constitution authorizes only the SPB to administer the civil service system.

The court also rebuffed the contention that its decision in *California Correctional Peace Officers Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133, 114 CPER 41, controlled the outcome of this case. In *CCPOA*, the court had held that the legislature could constitutionally provide for review of a disciplinary action in the superior court if the SPB failed to act before its statutory deadlines. That provision did not deprive the SPB of its authority, the current court noted. Although the *CCPOA* court commented that Article VII does not "limit the legislature's powers to es-

The Constitution authorizes only the SPB to administer the civil service system.

tablish civil service procedures," the quote did not help DPA and the unions. The *CCPOA* decision did not address whether the Constitution permitted the legislature to allow a disciplined employee to bypass the SPB, the court re-monstrated.

The court also rejected the argument that the MOUs merely allowed employees to waive their rights to SPB review. This contention rests on the incorrect assumption that the civil service system exists only for the benefit of employees, the court chided. But the

electorate that passed the civil service initiative in 1934 had the goal of promoting efficiency and economy in government, the court pointed out. The public interest in ensuring that partisanship plays no role in civil service employment “would be subverted if various ad hoc arbitral boards, operating beyond the control of the State Personnel Board and not bound to apply its merit-based standards, could review and reverse disciplinary actions.” Although an employee may waive SPB rights by not requesting review, that

kind of waiver is different than allowing the employee to bypass the SPB in favor of entities that lack express constitutional authority to oversee the merit-based civil service system, the court concluded. Without separately addressing the amended CDFP contract or provisions for review of minor discipline, the court affirmed the judgment of the Court of Appeal. (*State Personnel Board v. Department of Personnel Administration* [12-1-05] 37 Cal.4th 512.) ❁

leave. Fifty-five percent of physician manager positions are vacant. Over 35 percent of registered nurse positions are unfilled, and the vacancy rates for supervising nurse IIs and IIIs are 53 percent and 35 percent, respectively. Eighty percent of higher-level managerial positions in the prison medical system are vacant.

*Over 35 percent of
registered nurse
positions are unfilled.*

Judge Hikes Salaries of Correctional Medical Personnel

Over the objections of state lawyers, U.S. District Court Judge Thelton Henderson ordered the California Department of Corrections and Rehabilitation to pay large recruitment and retention differentials to physicians and nurses, and to expedite the hiring of medical professionals. Acting in a case filed by the Prison Law Office four years ago, the judge decided in June to appoint a receiver to improve medical services for inmates after he found that an average of one preventable death was occurring in the prison system each week. The higher pay and faster hiring procedures are aimed at reducing high vacancy rates within the medical system, a problem that some employee unions have been complaining about for years.

The State Objected

Because of the difficulties in finding someone competent to run a medical program that serves over 165,000 inmates in 33 facilities, a receiver had not yet been appointed by December. In the interim, the judge named a correctional expert to recommend immediate measures to increase clinical staffing and ensure that peer reviews or investigations occur when an inmate patient suffers a serious injury or death. A coalition of unions that represents healthcare employees in the prison system has contended that many problems stem from understaffing. (See story in *CPPER* No. 173, pp. 43-44.) Over the last two years, the vacancy rate for physicians has increased from 7 percent to 31 percent, not including physicians on

The court chose as its expert John Hagar, who has served as special master since 1997 in a case involving excessive force and medical care at the Pelican Bay State Prison. The expert was directed to meet and confer with the coalition of unions as well as with CDCR officials. Hagar recommended an 18 percent increase in salaries for registered nurses and a 10 percent pay boost for physicians and surgeons. He also urged the department to streamline the hiring process for medical personnel to avoid delays of several months between receiving applications and filling a vacancy.

Despite the presumed salary savings that normally come with a high number of vacant positions, the department protested that it might not have sufficient funds for the pay hikes. It objected that there were constitutionally required legislative procedures for compensation increases. It also asked

to withhold the raises until physicians had completed competency testing, a program it implemented last year without negotiating with the Union of American Physicians and Dentists. The department also complained the state could not process employment applications in less than 30 business days.

The department protested that it might not have sufficient funds for the pay hikes.

Pay Boosted

The court's order did not mince words. Not only had the state failed to back up its funding contentions with evidence, the judge said, lack of funds does not relieve the state of its duty to avoid violation of the prohibition against cruel and unusual punishment. He continued, "Nor do 'business as usual' budget procedures provide [the state] cover in the face of a known crisis." Noting the "adversarial manner" in which the competency testing program was initiated, and the likely effect on morale if the state withheld pay hikes to physicians who have not yet completed testing, the court rejected the proposed delay.

The pay increases are being implemented as recruitment and retention differentials. The court explained that

this method, rather than modifications to base salaries, was most appropriate for the court's purpose of addressing the current staffing crisis. He also noted that it would preserve for the parties the option of negotiating permanent salary increases during the normal bargaining process. It also would allow the receiver to modify the differentials when appropriate.

In particular, the court ordered the department to hire board-certified doctors or those eligible to take the board examinations. They are to be hired at the top step of the highest salary range and provided with a 10 percent differential, for a starting monthly salary of \$12,519.10. At the end of December, the department complied with the order to begin paying 10 percent differentials to all currently employed physicians and surgeons. As ordered, chief physicians and surgeons receive a supervisory differential of 7 percent above the modified monthly pay of their subordinates. Chief medical officers, who run the medical programs at each facility, earn a 12 percent higher salary than rank-and-file physicians, and chief deputies of clinical services will earn an annual salary of at least \$185,000.

The department must hire nurse practitioners at the top step of the highest nurse practitioner salary range and pay them and current nurse practitioners a differential of \$1,750 per month. The department also will be hiring physician assistants, a new classification of employees, and must establish a salary schedule for them that is "consistent

with" that of nurse practitioners. The court ordered the department to modify its vacant physician positions to allow hiring of these mid-level medical practitioners.

Registered nurses will receive an 18 percent differential that will push the annual pay of a newly hired nurse

The pay increases are being implemented as recruitment and retention differentials.

to about \$80,000. Supervising nurses will gain 7 percent more, and managers will receive 12 percent more than the rank-and-file registered nurse. Regional nursing directors will earn no less than \$98,000 annually.

The court order accomplished for medical professionals in the correctional system what their unions have been unable to persuade the state to do for unit members statewide. The nurses, represented by the Service Employees International Union, Loc. 1000, CSEA, have been seeking a substantial raise during lengthy negotiations for a successor contract to replace the one that expired on June 30, 2004. They demanded a 26 percent increase in compensation based on a survey of salaries in other parts of the health care industry, but initially were offered only a 5 percent raise that would have been

offset by hikes in retirement and health premium contributions and other concessions. In June 2004, as part of a deal with Governor Schwarzenegger to implement an alternative retirement program for new state employees, they received a 5 percent increase without reaching agreement on the full contract. (See story in *CPER* No. 167, pp. 56-57.) Last August, the state offered a 10 percent raise over two years, along with some pay differentials for long-term employees and those who work directly with patients, but the offer came with increases in employee contributions to retirement, delayed family health coverage for new employees, elimination of a holiday, and other take-aways the union would not accept.

Hiring Accelerated

To speed up hiring, Hagar recommended that CDCR conduct background checks, interview, evaluate, and decide whether to hire applicants within 10 days. The court's harshest retort was aimed at the state's professed inability to process applications in that short a time:

Defendants have offered no compelling justification or documentation as to why they require 30 *business* days to hire a clinician and instead rely on their "limited resources." The Court is convinced that this objection is more a reflection of Defendants' instinctive "can't do" attitude (which has plagued them throughout this case), than what can actually be accomplished with initiative and additional effort.

Especially galling to the court was the admission that neither CDCR Secretary Rod Hickman nor Undersecretary Jeanne Woodford was aware of the objections the department's lawyers made to Hagar's recommendations.

While unusual, the 10-day time line does not transgress any standing State Personnel Board rules for civil service hiring, says Bruce Monfross, senior staff counsel for the SPB. Each hire must be made from a list compiled based on an examination, but the examination for physicians and nurse practitioners is merely an evaluation of training, education, and experience as listed on the application or supplemental application. The burden to evaluate the applications falls on CDCR, which has brought on additional staff to in-

terview and evaluate applicants. The department has a new page on its website dedicated to encouraging applicants and streamlining health care hiring. It has instituted online examinations for registered nurses and physician assistants that substitute for the usual application process.

The effects of the higher salaries and expedited hiring procedures are just beginning to show. The department was unable to provide *CPER* with the numbers of new hires, but it was reported in a court hearing on January 9 that the department had made job offers to 55 physicians and 180 registered nurses. However, even if all accept, the department still would need to hire an additional 50 physicians and nearly 300 nurses. ❁

CAUSE Wins Election, Asks DPA for Pay Equity

CAUSE-Statewide Law Enforcement Association beat back the decertification efforts of Teamsters Local 228 in an election in which about 58 percent of the unit voted. The final tally by the Public Employment Relations Board showed that CAUSE garnered 2,593 votes out of 3,861 ballots cast. Only 884 votes were cast for the Teamsters, and 298 votes were for no representation. There were 86 challenged ballots.

CAUSE, which was originally named the California Union of Safety Employees, did not kick back and relax when it got the news though. Two

days later, its president, Alan Barcelona, fired off a letter to the governor and the Department of Personnel Administration demanding a meeting to discuss disparities between its members' pay and that of similar employees in local agencies. CAUSE reached a two-year agreement with DPA last May that did not contain general raises but did boost the minimums and maximums of the pay ranges of some classifications in which the state is having difficulty recruiting and retaining employees. (See story in *CPER* No. 173, pp. 40-43.)

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Barcelona's letter acknowledged the recent collective bargaining agreement but continued, "Recent reports indicate that the state may have underestimated revenues by as much as \$4 billion this fiscal year. Given that rev-

enue increase, we believe that the state can afford to address these inequities now." In particular, CAUSE cited severe understaffing of state dispatchers and turnover among special agents at the Department of Justice. ❁

Court Rejects PECG's Efforts to Limit the Effect of Prop. 35

Proposition 35, passed by the voters in 2000, exempted architectural and engineering services from the California Constitution's limits on the use of private contractors for work that state civil service employees perform. Professional Engineers in California Government, which represents state-employed engineers, architects, and land surveyors, claimed that since 2000, the Department of Transportation has engaged in illegal contracting practices. The California Court of Appeal upheld Caltrans' contractor selection procedures and its disregard of statutory restrictions that existed prior to Prop. 35. However, in an unpublished portion of the opinion, it agreed that Caltrans had failed to comply with the Administrative Procedure Act, which requires the opportunity for public comment and review of new regulations. PECG has asked the California Supreme Court to review the decision.

Lengthy Struggle

PECG has battled private contracting for decades, and the court re-

cited the lengthy history of legislation and litigation that led to Prop. 35. (See also the story in *CPER* No. 141, pp. 41-43.) The California Constitution establishes a civil service system under which appointment and promotions in state employment must be based on merit. While the Constitution does not expressly outlaw contracts for services with private entities, courts have found that the civil service provisions limit private contracting because contracting out traditional state services eventually would erode the civil service system.

In 1990, PECG successfully sued to invalidate several Caltrans contracts with private contractors when Caltrans failed to meet the statutory prerequisites for contracting out. These prerequisites included evidence that obtainable staff was unable to perform the work in a timely manner and that civil service employees would not be displaced. Caltrans also had to show it entered private contracts in accordance with guidelines designed to avoid sacrificing local or federal funds, short-term fluctuations in staff workload, or

unnecessary delays. (See the case summary in *CPE* No. 85, pp. 48-50.)

In 1997, the Supreme Court struck down the legislature's 1993 attempts to bypass constitutional strictures on contracting. (See *Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 124 CPER 58.)

Proponents of Prop. 35 wrote in the ballot materials that one purpose of the initiative was to reverse the effects of lawsuits which prevented Caltrans' use of private contractors. The initiative added Article XXII to the Constitution. Article XXII provides that the "State of California...shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement." It also states, "Nothing contained in Article VII of this Constitution shall be construed to limit, restrict or prohibit the State...from contracting with private entities for the performance of architectural and engineering services." In addition, Prop. 35 enacted a new chapter of the Government Code that declares it prevails over conflicting acts of the legislature.

After Prop. 35 was passed, Caltrans stopped complying with pre-existing statutory prerequisites for contracting. However, it continued to use a pre-existing, qualifications-based statutory procedure for selecting contractors. Caltrans' director issued a 2001 policy establishing criteria for contracting out architectural and engineering services.

In court, PEGC argued that the pre-existing statutes remained in effect. It challenged the qualifications-based selection procedure on the basis of a statutory provision of the initiative that requires a "fair, competitive selection process" which safeguards against conflicts of interest. The union also asserted that the director's policy amounted to "underground regulations" that had not been reviewed and opened to public comment.

After Prop. 35 was passed, Caltrans stopped complying with pre-existing statutes.

Pre-Existing Statutes Repealed

PEGC challenged Caltrans' lack of compliance with contracting laws that existed prior to the passage of Prop. 35. The union argued that Prop. 35 did not amend or repeal prior legislative restrictions. It merely removed state constitutional restrictions on the legislature's power to allow private contracting of architectural and engineering services on public works.

The initiative did not expressly repeal statutory restrictions on private contracting, but the court found that several provisions of Prop. 35 "can be given meaningful effect only if the ini-

tiative as a whole is construed as impliedly repealing those statutory restrictions." Courts usually refrain from finding that a later enactment impliedly repeals earlier legislation. But the court here found an implied repeal of contracting restrictions because the initiatives' new Government Code sections constituted a complete revision of the subject of contracting out architectural and engineering services. The court noted that Prop. 35's express intent is to comprehensively regulate the matter of contracting for those services. The initiative declares that it prevails over conflicting legislation and must be construed liberally to accomplish its purpose — to remove existing restrictions on private contracting for those services. It provides that it can be amended only to further its purposes.

The court held that Prop. 35 impliedly repealed pre-existing statutes that prevented displacement of civil service staff, required a cost savings from private contracting, and allowed use of contractors only when certain guidelines applied. The court reasoned that these strictures mirrored the constitutional restrictions on contracting that the initiative removed, and that Prop. 35 would have little effect if they remained intact.

The court rejected PEGC's contentions that the implied repeal of contracting statutes left Caltrans without authority to enter into contracts. Statutory law gives Caltrans the authority to plan, design, and construct transportation systems. Contracting with private

companies to work on transportation systems falls within that authority, said the court. In addition, the court found the statute that allowed Caltrans to contract under certain conditions was impliedly amended to remove the conditions, but not to delete the authority to contract.

Furthermore, Prop. 35's new constitutional provision is self-executing; it does not require legislative action before Caltrans is "allowed to contract with private entities." The court rebuffed PECC's argument that removal of constitutional restrictions on legislative power normally is construed to increase the legislature's power to act in the subject area. Here, the initiative restricted the legislature's prospective power to regulate private contracting, the court observed.

Selection Procedure Upheld

The court also turned aside arguments that a pre-existing qualifications-based selection procedure violates Prop. 35's requirements of a "fair competitive selection process" and cost savings to the taxpayer. Because the qualifications-based selection procedure entails competition on the basis of qualifications and mandates rejections of firms that do not agree to a fair and reasonable price, it is not inconsistent with Prop. 35, the court found.

In addition, Prop. 35 mandates that the initiative not be implemented in a way that would jeopardize federal funds. Federal law requires a qualifications-based selection process to

build highways with federal aid. At a minimum, the court held, Prop. 35 requires use of the qualifications-based selection process on the 84 percent of architectural and engineering contracts that are subject to federal regulations.

The court determined that the initiative's references to cost-effectiveness, best value for taxpayers, and taxpayer savings did not constrain Caltrans to use private contractors only when it would be cheaper than using civil ser-

*The initiative
restricted the
legislature's prospective
power to regulate
private contracting,
the court observed.*

vice employees. "[T]he concepts of value and cost-effectiveness encompass more than simply the amount of personnel hours that can be purchased at a price," the court reasoned. "The concepts include considerations of quality of services, efficiency and speed of delivery, all referenced in the statement of purpose and intent." Furthermore, the court observed, the ballot materials disclosed that the initiative might not result in cost savings and did not require competitive bidding.

Policy and Manuals Enjoined

Caltrans argued that its 2001 Director's Policy and two manuals were internal management regulations exempt from the requirements that they be subject to public comment and review by the Office of Administrative Law. But the court dismissed this contention. The policy establishes criteria for determining when private entities will be used instead of civil service architects and engineers, and thus relates to contractual relations, the court pointed out. The manuals add to the regulations that describe the qualifications-based selection procedure, which applies to contractors, not just internal department management.

The court remanded the case to the trial court with instructions that it order Caltrans to refrain from using the policy or handbooks until the department fully complies with the Administrative Procedure Act. The act requires public notice of proposed regulations, a public comment period, departmental explanation of the need for the regulations, and review by the Office of Administrative Law. (*Professional Engineers in California Government v. Morales* [1st Dist. 11-16-05] 134 Cal.App.4th 15.) ❁

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Discrimination

Employer Not Liable for Sexual Harassment by Supervisor

The Ninth Circuit Court of Appeals has dismissed a lawsuit brought by an employee who was sexually harassed by his supervisor. The majority found that, although there was no question the harassment took place, the employee suffered no tangible employment action and the employer took reasonable care to prevent and correct the harassment. The court reached this conclusion despite the fact that the employer did not investigate the complaint and took no corrective action. It further found that the employee failed to take advantage of protective or corrective opportunities. Judge Richard A. Paez filed a lengthy, strong, and well-reasoned dissent.

Unwanted Sexual Advances

Hugh Hardage worked as a sales manager for CBS Broadcasting. He, along with another manager, Nadene Stauffer, were supervised by Patty Dean. Dean was supervised by Kathy Sparks. Hardage alleged he was sexually harassed by Sparks on several occasions and subjected to retaliation after he rejected her advances. Sparks flirted with him at work and, on at least five occasions over a six-month period, made explicit physical and verbal sexual advances to him outside the office. In October 2000, after Hardage again re-

jected her advances, she shouted obscenities at him and told him, "Don't fucking talk to me. You're finished." The next day, Hardage complained to Dean about Sparks but never told her that Sparks had touched him in inappropriate ways. Dean promptly notified an executive vice president, and Hardage was contacted by Paul Falcone of the company's Human Resources Department.

When the two met, Hardage did not tell Falcone the specific details about the harassment. He said only that "Sparks had made unwanted sexual advances that were denied, that he was uncomfortable with the situation, and that Sparks had lost her temper and was jeopardizing the success of the team." Falcone offered to talk to Sparks and treat Hardage's complaint as an anonymous one. Hardage refused and insisted on handling the situation himself. When Falcone contacted Hardage two weeks later to follow up, Hardage told him nothing new had happened and he still did not want Falcone to intervene.

Hardage testified that Sparks made comments such as, "Your number's up" and, "It's not going to be me that loses my job, it's going to be you."

About the same time, Hardage's performance was called into question.

Dean counseled both Hardage and Stauffer after they repeatedly failed to make sales goals, and she sent them joint memoranda discussing their work performance. On August 6, 2001, Dean sent Hardage a memorandum that cited performance problems and an incident of insubordination. The memo further stated that failure to make significant improvement within 30 days could result in his termination.

Hardage resigned on August 31, 2001, and filed a lawsuit claiming

The employee failed to take advantage of protective or corrective opportunities.

sexual harassment and retaliation in violation of Title VII of the Civil Rights Act and of Washington's Law Against Discrimination, which tracks Title VII. The trial court dismissed his case, and he appealed.

The Majority Opinion

The Ninth Circuit majority recognized that, under Title VII, an employer is vicariously liable for an abusive hostile work environment caused by the sexual harassment of a supervisor with authority over the employee. However, it noted, the Supreme Court has established an affirmative defense to vicarious liability in *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 131

CPER 14, and *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 131 CPER 14. The court summarized the defense as applied to this case, stating “even if we assume that Hardage was sexually harassed, CBS can avoid liability if it can show that (1) it took no ‘tangible employment action’ against Hardage, (2) it exercised reasonable care to prevent and correct harassment, and (3) Hardage unreasonably failed to take advantage of preventative and corrective opportunities.”

Hardage’s desire to handle the situation excused CBS from its duty to investigate and correct.

Hardage claimed he was constructively discharged as a result of a hostile work environment, and the constructive discharge constituted a tangible employment action. The majority disagreed. It pointed to the uncontroverted fact that the last incident of harassment occurred five months prior to Hardage’s resignation. It also found that the allegedly retaliatory actions did not amount to a constructive discharge because CBS proffered legitimate, nonretaliatory reasons for the performance memoranda. Some of the matters discussed were addressed to both Hardage and Stauffer, noted the court. Further, it was undisputed that Hardage

was insubordinate and failed to meet the company’s sales goals. Even if the memoranda themselves were assumed to be a tangible employment action, CBS still would be able to assert the *Ellerth/Faragher* defense because they were “unrelated to any harassment or complaint thereof,” reasoned the court.

To successfully assert the defense, CBS must show that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.” Because CBS had an anti-harassment policy with which Hardage had familiarity, it fulfilled its duty to take preventive measures, found the court, citing *Kohler v. InterTel Techs.* (9th Cir. 2001) 244 F.3d 1167, 148 CPER 53. As to the requirement that CBS take steps to correct the harassment, the majority noted that Dean reported the harassment as soon as Hardage told her about it and that Falcone would have intervened but for the fact Hardage asked him not to. It rejected Hardage’s argument that CBS should have investigated his complaint, as it was required to do by its own anti-harassment policy. The court found that Hardage’s statement to Falcone that he wanted to handle the situation himself and his failure to tell either Dean or Falcone the details about the harassment excused CBS from its duty to investigate and correct. “Considering the ‘overall picture,’ CBS’s response was both prompt and reasonable as a matter of law,” concluded the court.

As to the third prong of the *Ellerth/Faragher* defense, the majority noted

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that Hardage waited approximately six months from the first incident of harassment until the time he reported it. “In addition to waiting half a year..., when Hardage finally made his complaint he specifically asked the company not to investigate it. By specifically requesting the company not make use of its remedial and preventative measures, Hardage unreasonably failed to make use of CBS’s anti-harassment policies and procedures,” said the court.

The dissent disagreed that CBS had established a Faragher/Ellerth defense.

The majority also rejected Hardage’s contention that he was retaliated against for making a sexual harassment complaint when he was given the adverse performance memoranda and placed on a 30-day probation period. The court found these actions were unrelated to the sexual harassment complaint and that CBS had presented legitimate, un rebutted reasons for the memo. It concluded further that Sparks’ remarks were insufficiently severe to support a claim of retaliation.

Dissent Cites Importance of Investigation

Judge Paez, in his dissent, stated that, though he agreed with the

majority’s opinion regarding the constructive discharge and retaliation claims, and that Hardage had not shown he suffered a tangible employment action, he disagreed with the conclusion that CBS had established a *Faragher/Ellerth* defense. “In reaching its conclusion,” he wrote, “the majority departs from well settled case law requiring an employer to conduct an investigation and take prompt corrective action once it is on notice of alleged harassment.” He also differed with the majority’s finding that Hardage unreasonably failed to take advantage of corrective opportunities.

Judge Paez, citing *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, asserted that “notice of the sexually harassing conduct triggers an employer’s duty to take prompt corrective action that is reasonably calculated to end the harassment,” and that “once an employer is on notice of a sexual harassment complaint, it *must* conduct an investigation.” In this case, Paez wrote, “contrary to our case law, the majority holds that an employer’s response to a harassment complaint may be deemed reasonable as a matter of law even though the employer conducted *no* investigation and took *no* action to address the harassing behavior.” He chided the majority for overlooking the importance of conducting an investigation, as the court in *Swenson* specifically stressed:

The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to

determine whether the complaint is justified. An investigation is a key step in the employer’s response, and can itself be a powerful factor in deterring future harassment. By opening a sexual harassment investigation, an employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace. An investigation is a warning, not by words but by actions.

The majority was chided for overlooking the importance of conducting an investigation.

Referring again to *Swenson*, Paez stated, “we did not hold, nor have we ever held, that an employer may be deemed to have reasonably responded to a harassment complaint when it altogether fails to conduct an investigation.” In this case, not only was no investigation conducted, but no corrective action was taken. Falcone did not even inform Sparks that a complaint had been made, much less discipline her.

Paez also noted that the Equal Employment Opportunity Commission’s Enforcement Guidance on Vicarious Liability for Supervisor Harassment directly contradicts the majority’s finding that an employer is relieved of its duty where the harassment complainant asks the employer to take no action:

A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment.

Judge Paez also disagreed with the majority's view that there is no duty to investigate or correct harassment where an employee fails to offer details about the harassing behavior. "There is simply no authority for the proposition that an employer who is on notice of unwanted sexual advances is relieved of the duty to investigate and take corrective action merely because the employee did not *volunteer* the details of the harassing conduct during his initial complaint to the employer, especially where — as here — the employer *never asked* for specifics," he said. "The very point of an investigation is to gather the details about the alleged harassment." He argued that the majority's reliance on *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 244 F.3d 864, 149 CPER 24, was misplaced. In that case, Paez pointed out, where the employer did nothing to investigate or remedy the harassment after being notified of it, "we held that the employer did not exercise reasonable care and could not assert the affirmative defense to vicarious liability."

Judge Paez determined that a trier of fact readily could find that CBS failed to exercise reasonable care to correct Sparks' harassing behavior. "The majority's contrary conclusion marks a dramatic departure from our case law establishing that an employer breaches its duty of reasonable care when it fails to adequately investigate, and take steps

Judge Paez's dissenting arguments struck a nerve.

to correct, harassing conduct," he wrote, citing *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 88 CPER 48; *Nichols*; *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522; and *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 107 CPER 56.

Paez also disagreed with the majority's conclusion that Hardage failed to take advantage of CBS' corrective opportunities because he waited six months after the harassment began to complain about it. There was evidence that Hardage reported Sparks' harassing conduct to Dean on numerous occasions during those six months, that Dean personally had observed Sparks' harassing conduct, and that, in response to Hardage's complaints about Sparks' sexual advances, Dean suggested that "he just do it and get it over with" because "it may put her in a better mood." "Moreover," said Paez, "even if Hardage had not complained

until October 2000, such a delay could not be deemed unreasonable as a matter of law," citing the EEOC enforcement guidance.

In addition, the majority ignored evidence when it concluded that Hardage unreasonably requested that Falcone not investigate his complaint. In fact, wrote Paez, when Hardage made his complaint and Falcone asked him what he would like him to do, Falcone told Hardage that he had three choices: (1) Hardage could do nothing; (2) Hardage could talk to Sparks on his own; or (3) Falcone could "very nicely talk with" Sparks and ask her to "just lay back on this a little bit," without yelling at her or getting her in trouble. Paez found that "under these circumstances, it can hardly be said that Hardage's decision to deal with Sparks' sexually harassing actions himself was per se unreasonable in light of his other options."

Judge Paez's arguments seem to have struck a nerve. The majority amended its opinion to add a response noting that Hardage never cited the EEOC enforcement guidance in his briefs. "For that reason," said the majority, "we will not manufacture an argument on Harding's behalf and then rule on it in his favor. This argument was waived."

A petition for rehearing en banc is pending. (*Hardage v. CBS Broadcasting, Inc.* [9th Cir. 11-1-05, amended 1-6-06] No. 03-35906, 427 F.3d 1177, amended and superseded on rehearing [9th Cir. 1-6-06] ___F.3d___, 2006 WL27475.) *

Discriminatory Refusal to Reinstate Separate From Claim of Wrongful Termination

In a situation where “new elements of unfairness, not existing at the time of the original violation,” have arisen and attach to the denial of reemployment, that conduct can constitute a separate claim of discrimination, according to the Ninth Circuit Court of Appeals in *Josephs v. Pacific Bell*. The majority of the court affirmed the jury’s verdict in the employee’s favor, finding the employer’s refusal to reinstate him violated the Americans With Disabilities Act and the Fair Employment and Housing Act.

When Joshua Liams Josephs applied for a service technician position with Pacific Bell in 1997, he checked “No” in answer to a question on the employment application that read, “Have you ever been convicted of, or are you awaiting trial for a felony or misdemeanor?” After he was hired, PacBell obtained Josephs’ criminal history and discovered he had been arrested in 1982 for attempted murder and was found not guilty by reason of insanity, and that he had been convicted of misdemeanor battery on a police officer. PacBell discharged Josephs because of willful fraudulent entries on his application.

Josephs filed a grievance with PacBell, seeking reinstatement. The collective bargaining agreement provided for a three-step grievance process. The union representative testified

at trial that at step I, she was told the reason for Josephs’ termination was his failure to disclose his misdemeanor conviction and a name change. During step II, the general manager told her that he was concerned about employing someone with Josephs’ “background” to work in people’s homes because he might “go off” on a customer. The representative suggested that Josephs be given a different job at PacBell, one that did not involve customer contact. The manager replied that “people can still walk by” and that “under the advisement of legal...they were not going to bring someone like that back...they had an image to uphold.”

Josephs’ battery conviction was expunged a month before the step III grievance proceeding, and his union representative argued that Josephs should be treated similarly to another employee who had been reinstated after his conviction was expunged. The company representative saw the two situations differently, stating that, unlike the other employee, Josephs had spent time in a “mental ward,” and that PacBell could not afford to employ someone with such a history. Josephs was denied reinstatement and afforded no opportunity to reapply.

In the trial court, Josephs claimed unlawful termination of employment and unlawful refusal to reinstate in violation of the ADA and the FEHA be-

cause PacBell regarded him as mentally disabled. The jury determined that the termination was nondiscriminatory. However, it concluded that PacBell refused to reinstate Josephs because it regarded him as mentally disabled in violation of the ADA.

On appeal, PacBell argued that, as a matter of law, a claim for discriminatory refusal to reinstate under the ADA and the FEHA is not actionable separately from the termination itself, citing *Collins v. United Air Lines, Inc.* (9th Cir.1975) 514 F.2d 594. In *Collins*, the court found that an employee’s plea for reinstatement simply “seeks to redress

The general manager was concerned about employing Josephs because he might ‘go off’ on a customer.

the original termination” and, therefore, is not separately actionable. The Court of Appeals disagreed and found *Collins* distinguishable from the case before it where “new elements of unfairness, not existing at the time of the original violation, attached to the denial of reemployment,” quoting from *Inda v. United Air Lines, Inc.* (9th Cir. 1977) 565 F.2d 554. “Here,” said the court, “Josephs asserted and the jury found that PacBell’s denial of reinstatement was based on just such a ‘new ele-

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ment of unfairness,' the perception that he was mentally ill. While *Inda* involved a denial of reemployment, rather than a failure to reinstate, its holding is not limited to a particular employment action." In reaching this conclusion, the Ninth Circuit joined the First, Third, Fourth, Tenth, and Eleventh Circuits in recognizing discriminatory failure to reinstate as a separately actionable claim.

Contrary to PacBell's contention, the court found sufficient evidence to support the jury's findings. The ADA protects individuals who are regarded as having a "mental impairment," and the regulations implementing the act define this to include "any mental or physiological disorder, such as...emotional or mental illness." The jury heard evidence "that PacBell employees considered Josephs unemployable because he had spent time in a 'mental ward' and might 'go off' on a customer," said the court. Evidence showed that PacBell reviewed newspaper reports which included statements that Josephs was a "mentally disordered offender." PacBell employees read Josephs' autobiography that detailed his mental instability and his stay in the mental hospital. "Thus, the jury had ample evidence to support its finding that PacBell regarded Josephs as having a mental impairment covered by the ADA," concluded the court.

The evidence also supported the jury's finding that PacBell viewed Josephs as having a mental disability that "substantially limited" him in the "major life activity" of working, said the court, pointing to testimony of a

supervisor that the company wanted to "eliminate the possibility" of employing someone like Josephs.

The court also rejected PacBell's challenge to the jury's finding that Josephs was qualified for a position as service technician.

Denial of reinstatement was based on a 'new element of unfairness,' the perception that Josephs was mentally ill.

PacBell asserts that Josephs' past violent acts made him unqualified for the position. The jury heard testimony that Josephs was performing well on the job...and...other evidence of Josephs' ten years of experience performing a similar job with another company. While PacBell's counsel testified that it was her "belief" that someone who attempted to kill another person should not be in a service technician position, PacBell introduced no evidence of written company policy prohibiting employment of persons who had committed violent acts. In fact, the jury heard evidence that PacBell had reinstated one service technician who had a felony domestic violence conviction....The evidence simply does not compel a conclusion that, in the eyes of PacBell, Josephs was not qualified for the service technician position because of his past violent acts.

The Court of Appeals affirmed the jury's verdict in favor of Josephs.

Judge Consuelo M. Callahan dissented. Though she agreed with the majority that Josephs stated a separate claim for failure to reinstate, she disagreed with its ruling upholding the jury's verdict. "As presented to us, this case requires that Pac Bell reinstate as a service technician a person it believes may pose a danger to its customers. I dissent because unless it is determined that Pac Bell's concern that Josephs is dangerous is unreasonable, Pac Bell should not be required to send him into customers' homes," said Judge Callahan. Because of the admission of irrelevant evidence and improper jury instructions, she determined that the jury was not asked to decide this critical issue. (*Josephs v. Pacific Bell* [9th Cir. 12-27-05] 432 F.3d 1006.) *

Employer Liable for Harassment of Gay Employee by Coworker

The Second District Court of Appeal has upheld a jury award of \$2 million against the California Youth Authority for sexual-orientation harassment in violation of California's Fair Employment and Housing Act. The plaintiff, a gay man who worked as a cook in a correctional facility, alleged that he was subjected to derogatory remarks by his immediate supervisor and a coworker based on his sexual orientation.

Harassment

Bruce Hope began working as a cook at the Fred C. Nelles Youth Correctional Facility in 1996. At trial, Hope testified that his immediate supervisor, Felipe Marcellino, called him a "motherfuckin' faggot" and a "homo." Santos Ortiz, a security officer assigned to the kitchen, used those terms toward Hope and others, including "faggot ass bitch" and "faggot ass motherfucker," more than one hundred times. Michael Hedgepath, another one of Hope's supervisors, testified that Marcellino referred to Hope by derogatory terms every day, though usually not in Hope's presence. However, Hedgepath did hear Marcellino use the term "faggot" in front of Hope. He also testified that Ortiz used derogatory terms such as "faggot" in front of management, kitchen staff, and wards. On one occasion, Hedgepath heard Ortiz say "faggot" directly to Hope. Hedgepath told

Ortiz to stop, and Ortiz replied that he "didn't care" and didn't "give a damn what that homo had to say." Ortiz continued to call Hope names but Hedgepath did nothing to stop it, preferring to "just usually turn it off and leave it alone." Hedgepath testified that Ortiz sometimes was "cruel" to Hope and "mistreated" him.

Hope complained to his supervisors about the harassment, but nothing was done.

Ortiz called Hope a "faggot ass motherfucker" in front of the wards. He told a group of wards in the kitchen that Hope looked at them because he thought they were pretty. Thereafter, the wards began calling Hope a "faggot" and ignoring his instructions. One ward, in the presence of others, said to him, "What's up girlie-girl. I'm talking to you, Bruce."

Ortiz told the wards that they should not assist Hope with cooking and clean-up, even though they were assigned that duty, thereby making Hope's job more difficult. Ortiz threw trash all over Hope's work area. Ortiz tore up incident reports that Hope wrote about wards who misbehaved.

Subsequently, in front of other wards, a ward approached Hope carrying a toilet plunger and said, "I'll beat you down motherfucker."

Hope complained to his supervisors about the harassment by Ortiz and Marcellino, but nothing was done, even when derogatory remarks about him were made in front of supervisors. In fact, his complaints were used against him. He was denied a merit salary increase in part because his "working relationship with staff and wards has been substandard. For instance, you have had several disagreements with Mr. Santos Ortiz...and Mr. Felipe Marcellino."

In early 1997, Hope was promoted to the position of cook II, but the promotion was revoked within days. The only explanation given for the revocation was that Hope was "just not right."

Hope began missing work because of job stress. The anxiety caused Hope to develop a bleeding blister in the retina of his right eye, leading to permanent blindness. In July 2001, Hope was placed on medical leave of absence and did not return to work.

CYA's Appeal

On appeal, CYA argued that the jury's verdict was not supported by substantial evidence. The Court of Appeal disagreed. It found that there was substantial evidence of harassment to prove a violation of the FEHA.

The act provides that it shall be an unlawful employment practice for an employer to harass an employee because of sexual orientation. Further,

“harassment of an employee by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.”

The court set out the test for determining harassment, quoting from *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 174 CPER 61:

An employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough *or* sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their [sexual orientation]. . . . The working environment must be evaluated in light of the totality of the circumstances. . . . These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.

The court explained that, in determining whether the harassment is sufficiently pervasive, the plaintiff must show “a concerted pattern of harassment of a repeated, routine, or generalized nature.” Further, the harassment must meet both an objective and a subjective standard, i.e., “the plaintiff must prove that the defendant’s conduct would have interfered with a reasonable employee’s work performance and would have seriously affected the psychological well-being of a reasonable employee and that he was actually offended.”

Applying these tests, the court found that the evidence supported the jury’s determinations that “Hope was harassed and that the harassment was sufficiently severe or pervasive to alter the conditions of his employment and create a work environment that qualifies as hostile or abusive.” The court cited the acts of harassment listed above in support of its conclusion. It also focused on the impact of the harassment on Hope:

Ortiz tore up Hope’s “behavior reports” in front of the wards and told them he would continue to do so if Hope submitted a report. The reports served as a deterrent to physical violence and other misbehavior by the wards. Ortiz’s conduct conveyed to the wards that Hope was no longer protected by the system, placing him in danger of physical violence. This gave Hope reason to worry constantly about his safety.

The court noted that the evidence showed Hope “wasn’t the same person” after his promotion was revoked and, as Hope testified, the “situation just got worse and worse” until, eventually, he “no longer had any more control over his job.” He would call in sick to avoid dealing with Ortiz.

The court concluded, “the evidence supports a finding that the harassment would have interfered with a reasonable employee’s work performance and seriously affected the psychological well-being of a reasonable employee and that Hope himself believed that the work environment was hostile and offensive.”

CYA argued, however, that it was not liable to Hope because the harassment was at the hands of a coworker and, though Hope complained to his superiors about the harassment, he did not tell them that the harassment was motivated by his sexual orientation. Therefore, it contended, it did not know that the harassment violated the FEHA.

The court dismissed this argument, pointing out that one of Hope’s

The court focused on the impact of the harassment on Hope.

supervisors, Yamamoto, told Hope that “everyone thinks you are gay.” Further, “Marcellino, Hope’s immediate supervisor, would ‘rant and rave,’ say he was not going to work with ‘this gay guy,’ and referred to Hope as a ‘faggot’ — all in Yamamoto’s presence.” Hedgepath was also a supervisor and heard Hope being called a “faggot” on a daily basis, noted the court. Hedgepath testified that Ortiz disliked Hope because he was gay. “Thus,” concluded the court, “Hope’s superiors knew or should have known that he was being harassed because of his sexual orientation.”

CYA failed to take immediate and appropriate protective action to stop the harassment, found the court, and so could not avoid liability on that basis. “To the extent management took any corrective action, it was too little, too late,” said the court.

The court upheld the amount of the economic damages and non-economic damages, dismissing CYA's objections to the award. (*Hope v. Cali-*

fornia Youth Authority [2d Dist. 11-30-05] 134 Cal.App.4th 577, certified for publication, S138308, 2005 DJDAR 13780.) *

Participation in Good Faith Interactive Process Required to Determine Reasonable Accommodation

The Third District Court of Appeal has returned to the trial court for decision the issue of whether an employer violated its duty under the Fair Employment and Housing Act to engage in an interactive process to determine whether it could reasonably accommodate a disabled employee. Though the interactive process usually takes place between the employer and the employee without the involvement of attorneys, special circumstances existed that rendered unreasonable the employer's refusal to communicate with the employee's counsel, held the court in *Claudio v. Regents of the University of California*.

Michael Claudio was employed by the School of Veterinary Medicine at U.C. Davis until he contracted leptospirosis, a disease spread from animals to humans. He was disabled within the definition of the FEHA as he could not work in any area where he might become infected. Claudio went on medical leave and moved to Florida. An employment specialist with the university contacted Claudio about the possibility of finding him another job.

Because the university had told Claudio on four separate occasions that he had been fired, he requested that the specialist communicate with him through his attorney.

The specialist telephoned the

*On four occasions, the
university told
Claudio that he had
been fired.*

attorney's office and, without talking to the attorney, learned that the firm specialized in workers' compensation law. She determined that because Claudio's employment situation with the university was not a workers' compensation matter, she did not have to communicate with his attorney. Without further speaking to Claudio, the specialist checked his resume against available positions at the university and concluded that none was available that matched his job skills. She then effected his termination, and Claudio filed a

lawsuit. The trial court dismissed the case, finding that Claudio has presented no triable issue of fact.

Section 12940(n) of the FEHA requires an employer "to engage in a timely, good faith, interactive process with the employee...to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee with a known physical or mental disability or with a known medical condition." The Court of Appeal concluded that, "ordinarily, a disabled employee may not require an employer to communicate directly with the employee's attorney, because the interactive process contemplates that the employee and employer will communicate directly with each other to exchange information." But, found the court, this was not an "ordinary" situation:

In this case, however, unusual circumstances existed because the University had informed plaintiff on four occasions that he had been fired. In those unusual circumstances, created by the University itself, we cannot say it was unreasonable as a matter of law for plaintiff to request the University to communicate with his attorney. Moreover, the University's employment specialist did not act reasonably in unilaterally determining she did not have to communicate with plaintiff's attorney simply because the attorney worked for a firm that specialized in workers' compensation law. We therefore conclude a triable issue of fact exists with respect to whether the University violated its duty to engage in the interactive process required by the FEHA.

The court was not persuaded by the employer's argument that it had no alternate job available for Claudio. U.C. contended that Claudio was totally disabled and, therefore, the only accommodation that could have been revealed during the interactive process was an unlimited leave of absence, which it is not required to provide. The court found that "as is apparent from our recitation of the record, it is not at all clear that this is true." "At a minimum, it

The court was not persuaded that U.C. had no alternate job.

appears plaintiff may have been physically able to handle clerical positions," said the court. "Thus, this is not a case (at least not yet) where it can be said an interactive process would have been futile." (*Claudio v. Regents of the University of California* [3d Dist. 11-22-05] 134 Cal.App.4th 224.) *

General

Employee's Accident While Sightseeing Not Compensable Workers' Comp Injury

An employee who suffered injuries after the business part of his European trip had concluded is not entitled to workers' compensation benefits, ruled the Fourth District Court of Appeal. The driving accident occurred when the employee no longer was on a mission for his employer and was not involved in any compensable leisure-time activity or mission integral to the business trip.

The employee, John Moody, was a design manager for Fleetwood Enterprises, a manufacturer of recreational vehicles. Moody was sent to Dusseldorf, Germany, to attend a trade show. He picked up a rental car at the Dusseldorf airport, attended the show, and then traveled to Ferrara, Italy, with his wife and other employees for a meeting with a fiberglass representative.

When business in Ferrara was completed, Moody's coworkers returned to the United States. He and his wife remained in Italy with the rental car, traveling to Florence and then to Rome. On their trip from Rome back to Dusseldorf to return the car, Moody and his wife were in a serious automobile accident.

Moody used a company-issued American Express card for both business and personal expenses while on the

trip, and Fleetwood did not ask Moody to reimburse it for his post-business expenses. After the accident, Fleetwood paid for Moody's medical care and expenses, including the cost of sending an Italian-speaking employee to Italy and chartering an air ambulance to expedite his return.

Moody filed a workers' compensation claim with Fleetwood, which it denied. He then appealed that determination to a workers' compensation judge and to the Workers' Compensation Appeals Board. Both concluded that Moody's injury was compensable.

On appeal by Fleetwood, the Court of Appeal was asked to decide whether Moody's injuries either arose out of his employment or were suffered in the course of his employment. At the outset, the court announced it would disregard the statements or assumptions made by individual Fleetwood employees who interacted with Moody following the accident. Despite their commendable concern and generosity, said the court, their statements were not binding on Fleetwood. "If an employer *denies* compensability, obviously the denial has no probative value. By the same token, the fact that an employer initially believes that an injury is compensable is not evidence of compens-

ability unless the employer is in full possession of the facts and is competent to apply the governing law to those facts."

Turning to the circumstances surrounding the accident, the court concluded "that the evidence is susceptible *only* to the conclusion, fatal to applicant, that there was no continuing or resumed business purpose at the time of the accident."

The court acknowledged the well-established principle that an employer's liability extends beyond the normal workplace. There is no question, wrote the court, that if Moody had been in-

There was no continuing or resumed business purpose at the time of the accident.

jured on the road between Dusseldorf and Ferrara, the injury would have been compensable because a "commercial traveler" is covered at all times during a business trip. The court also explained that while the general rule is that an injury is *not* considered to have been suffered in the course and scope of employment while the employee is en route to or from work, an exception is recognized where the employee is on a "special mission" for the employer.

Relying on this theory, the court found the critical issue to be whether

Moody was still on a special mission for Fleetwood at the time of the accident. The workers' compensation judge and the appeals board were persuaded by testimony of Moody and his wife that after they left Ferrara, they continued to show interest in RV design elements that could be of use to the company. While deferring to the credibility determinations made by the judge and the board, the court remained unpersuaded

That Fleetwood facilitated his travel arrangements is immaterial.

that Moody's accident was compensable. "There is *no* evidence that Fleetwood expected or required applicant to continue photographing RV's in between admiring Michelangelo's David and the Coliseum. The fact that Fleetwood was aware of his plans and facilitated his travel arrangements is immaterial in the absence of evidence that it did so because it expected applicant to function as an employee during that portion of his trip or that it exercised any control over his route."

Moody also argued that, as a senior management employee, he was expected to be ever vigilant concerning Fleetwood competitors. It is true, said the court, that an employee injured while participating in recreational or

social activities is eligible for workers' compensation benefits if he or she can show that the activity was a reasonable expectancy of or impliedly required by the employment. However, "although it is commendable for an employee to keep his employer's business in mind at all times, such a unilateral devotion to duty cannot be permitted to expand the employer's liability for workers' compensation to a '24/7' basis." The court declined to extend the concept of "course of employment" to cover the applicant's "every waking hour."

In reaching this conclusion, the court accepted Moody's representation that he looked at RVs during his Italian holiday. "This did not transform his personal vacation into a business trip." "Although a trip which has components of both business and pleasure may give rise to a compensable injury," explained the court, "the business element must be integral to the trip. The fact that an employee performs 'some tid-bit of work' during a personal trip will not transform the journey into part of the 'course of employment.'"

A conscientious employee like Moody may give occasional thought to his employer's business, said the court, but that attention does not mean the employee is "at work" at such times. The court elucidated further:

Applicant, for example, may well have thought out design possibilities while at home, or while jogging, or while out for a Sunday drive, but Fleetwood would have not been liable to pay workers' compensation benefits if he had slipped in his hall-

way, suffered a heart attack on the track, or been involved in a collision. A unilateral, sporadic consideration of the employer's business, at times and locations that cannot be regulated or supervised by the employer, does not expand the course of employment.

The court also rejected the claim based on the rule recognized in *IBM Corp. v. Workers' Compensation Appeals Board* (1978) 77 Cal.App.3d 279 that

'Course of employment' does not cover 'every waking hour.'

injuries incurred during a business trip may be compensable even if the employee has deviated substantially from the expected route. In that case, compensation was extended to cover an injury incurred by an employee engaged in leisure-time activity during an intervening weekend while attending a 10-day training session. If Moody had been injured "during a sightseeing stop between Dusseldorf and Ferrara," said the court, the injury might well have been compensable. But that is not what occurred.

Similarly, the court was not persuaded that Moody's injury should be compensated under the rule that he was using a mode of transportation advantageous to the employer. Again, the critical point was that the business por-

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tion of the trip had not continued during the time of the accident.

The court considered Moody's strongest argument to be that since he was required to return the car to Dusseldorf, he had a business purpose in driving north from Rome. But under that theory, said the court, Moody could argue that the entire trip after he left Ferrara was a journey back to Germany to return the car. This reasoning would turn the entire vacation extension into an integral part of the business trip. Moreover, the court was unwilling to

characterize Moody as a reluctant caretaker of the car when it was a convenience to him.

After considering a variety of other legal theories, the court concluded that Moody's election to remain in Europe for his own pleasure relieved Fleetwood from any further responsibility for potential misadventures during that portion of the trip. (*Fleetwood Enterprises, Inc. v. Workers' Compensation Appeals Board* [4th Dist. 12-16-05] 134 Cal.App.4th 1316.) *

Agency Fee Cases Get New Treatment From PERB

In December, the Public Employment Relations Board issued a flurry of decisions concerned with allegations filed against University Professional and Technical Employees, CWA Loc. 9119. The complaints, all filed by Werner Witke on behalf of over 100 agency fee payers, asserted that the union violated the Higher Education Employer-Employee Relations Act by collecting agency fees from nonmembers prior to sending the notices required by *Chicago Teachers Union, Loc. No. 1 v. Hudson* (1986) 475 U.S. 292.

Hudson mandates that unions send nonmembers who are required to pay agency fees a notice which identifies the union expenditures deemed chargeable and nonchargeable under applicable legal rulings.

PERB Reg. 32992 further requires that the union send the written notices to nonmembers at least 30 days prior to the collection of fees and that fees subject to an objection by an agency fee payer be placed in an escrow account in conformance with PERB Reg. 32995.

In the recently decided cases, the charging parties alleged that UPTE had collected fees beginning in July 2005, prior to the provision of the *Hudson* notice in September. A board agent dismissed the charges for lack of standing based on PERB's decision in *California Nurses Assn. (O'Malley)* (2004) No. 1673-H, 169 CPER 80.

In *O'Malley*, CNA refunded the agency fees that had been collected prior to issuance of the *Hudson* notice

and took steps to stop the deduction of agency fees from O'Malley in the future. Based on those facts, the board in *O'Malley* dismissed the charge. It agreed with the administrative law judge that since CNA had refunded the agency fees with interest and no longer required O'Malley to pay fees in the future, he was not entitled to the procedural guarantees designed to allow nonmembers to challenge the use or amount of the fees.

*O'Malley was
inapplicable because
O'Malley was not an
agency fee payer.*

In the UPTE cases, the board found that *O'Malley* was inapplicable because O'Malley was not an agency fee payer whereas the charging parties in the UPTE cases are all fee payers.

According to the reasoning first advanced in *UPTE (Abernathy)* (2005) No. 1784-H, 176 CPER 89, the board now has concluded that charging parties maintain standing to bring claims contesting the propriety of *Hudson* notices even though they have not suffered any financial loss by virtue of the fact that the fees collected prior to receipt of the *Hudson* notice have been refunded with interest.

Union attorney Margot Rosenberg, with the Oakland law firm of Leonard

Carder Nathan Zuckerman Ross Chin & Remar, questioned the wisdom of the board's rulings. She noted that in prior PERB rulings, like *Paso Robles Public Educators (Andrus)* (2004) No. 1589-E, 165 CPER 73, the remedy ordered by the board for the conveyance of an untimely *Hudson* notice has been the refund of the entire agency fee. UPTE already has voluntarily done this, Rosenberg told *CPER*. Therefore, because the only remedy the board can order in these cases is the posting of a notice, Rosenberg questions whether these cases represent the best use of the board's limited resources.

In addition to *Abernathy*, PERB Decisions Nos. 1784-H through 1803-H concern this new perspective on agency fee law. (For further discussion of *Abernathy*, see "Board Case Law: A Year in Review," by Michael Baranic, in this issue of *CPER*, pp. 11-17.) *

Public Sector Arbitration

Legitimate Absences Lead to Termination

Attendance management can appear to be a contradictory concept. Employees earn a certain amount of paid time off for their personal use, but the employer typically retains the right to tell employees they can use only a portion of that time and to counsel them for their absences. In a recent decision, Arbitrator Frank Silver was asked

The grievant repeatedly had been counseled for excessive absenteeism.

where to draw the line in these situations. The dispute involved a grievance challenging both an employee's letter of reprimand for poor work performance and her termination for excessive absenteeism.

Work Performance Issues

The grievant was a long-term employee of the Contra Costa County Sheriff's Department who, since 1987, performed custodial services. During the course of her employment the grievant repeatedly had been counseled for

excessive absenteeism as well as failure to follow the rules, practices, and procedures.

In February 2004, the grievant was involved in a verbal altercation with a clerk in one of the buildings she cleaned. After that incident, the grievant's work habits were monitored and, during a three-week period, there were eight occasions when the grievant was in the building for less than the 1.5 hours allotted for cleaning it. The grievant was given a letter of reprimand by her supervisor. The grievant claimed she had adequately performed her duties and never had been spoken to about these issues before being written up.

At the same time, the grievant received a three-month reduction in pay for poor attendance. She was advised that the continuation of her excessive absenteeism would result in termination.

Despite this notice, the grievant's absences from work continued. During a six-month period, she missed approximately 47 hours of work. The grievant had an explanation for each absence. On one occasion, she left early because she had a bloody nose. On another, she left work after being informed that a cousin had died. She left work early on a day she experienced chest pains, when she felt nauseous, and when

she had an ear ache. She missed an entire shift to attend a workers' compensation deposition that started five hours after her shift began. On another occasion, she missed an entire shift because her nephew was in a serious accident. Three days later, she again missed an entire shift because her nephew was released from the hospital.

The county's absenteeism policy includes a 32-hour baseline for absences over a six-month period. In light of this, the grievant was notified that she was being terminated for her excessive absenteeism. The union grieved the letter of reprimand and the termination.

The county recognized that unavoidable absences occur.

County Cites Excessive Absences

The county argued that the grievant was properly discharged based on her performance and unavailability. Her absences were well above the set threshold and were not protected by the Family Medical Leave Act or covered by workers' compensation. As the grievant had received repeated counseling for her absences over a period of years, she was fully aware of the issue and had every opportunity to change her behavior. Her unplanned and sporadic absences were disruptive and made it difficult for the county to assure that jani-

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

Molly Ivans

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torial services were being performed. While the county recognized that unavoidable absences occur, the employer has a right to have employees come to work regularly and, at some point, these absences no longer can be tolerated. Employees who cannot report to work regularly may be terminated, regardless of the reasons for the absences. The attendance problem combined with the grievant's poor work performance were sufficient cause for termination.

Union Counters Insufficient Evidence

The union charged that the county failed to show just cause for the termination. The discipline the grievant received was unjustified because it was completely based on hearsay evidence. Furthermore, the only person who testified in the arbitration hearing about those issues was the grievant's supervisor, who admitted he wanted the grievant fired for her absences.

The union also contended it was inappropriate to dismiss the grievant for her absences. Even employees with absenteeism problems are entitled to miss an hour or two of work for matters outside of their control, such as illness. Second, the county's unilaterally adopted policy setting a 32-hour baseline for absences can be used only as an indicator, not as a basis for termination. The county must examine each situation individually. If it had done so here, it would have discovered the grievant's attendance had improved. Other than the absences for her nephew,

the grievant did not miss an entire day of work. While the grievant actually was entitled under the parties' agreement to take three to five days off for the death of a family member, she missed only a few hours for the death of her cousin. Other absences were caused by matters out of her control. The grievant clearly was making every effort to improve and therefore should be reinstated.

Arbitrator's Analysis

Silver first reviewed the letter of reprimand, noting that the county based its discipline on the interview of one clerk and failed to support its conclusions with anything but hearsay. Fur-

Termination could be justified only by clear proof that the grievant was on notice.

thermore, the grievant denied the allegations. Thus, while observing that some of the grievant's testimony was questionable, Arbitrator Silver found there was insufficient evidence to support the county's action.

Therefore, Silver reasoned, the grievant's termination could be justified only by the charge of excessive absenteeism. Such a charge must be supported by a history of absenteeism and counseling as well as clear proof that the grievant was on notice.

Silver found the county had demonstrated that the grievant had a longstanding record of attendance problems, and had been counseled and disciplined for it over the years. He also observed that the grievant had been disciplined within four months of her return to work after a three-year workers' compensation leave. That discipline placed the grievant on the final step of the process and clearly put her on notice that any further attendance misconduct would result in termination.

Evidence showed the grievant did not recognize her obligation to reliably come to work.

Silver then considered what was the appropriate standard for measuring the grievant's attendance during the critical six-month period thereafter. He determined the county's baseline was the appropriate standard. It warned the grievant as to the standard her attendance would be measured against and put her on notice that exceeding that level without extenuating circumstance could result in her termination. Silver observed that the attendance policy defined extenuating circumstances as absences that qualified for FMLA or workers' compensation and that the

union did not contend that any of the grievant's absences fell into those categories.

Silver analyzed the grievant's absences in light of the fact that she was on notice regarding her unavailability. He noted that while the grievant was entitled to time off for the death of a family member, the grievant had been caring for the terminally ill cousin on days off and, as "the cousin's death was presumably not unexpected," it was unclear why she could not have finished her shift once she learned of his death. It was understandable that the grievant would want to be at the hospital with her nephew, but she failed to adequately explain why she needed to be present for his release.

With regard to her absence for the workers' compensation deposition, Silver found that she was on notice about her attendance and should have known to come to work before her appointment. Overall, he concluded the grievant failed to prove that her absences should be excused or would qualify as extenuating circumstances.

Silver explained that excessive absenteeism is sufficient cause for termination even if the absences are for legitimate reasons. An employer has the right and the need to expect an employee to show up on a regular basis to ensure that their work is completed. Sporadic and unanticipated absences like the grievant's are particularly disruptive to the employer. The evidence showed that the grievant did not recognize her obligation to reliably come to

work and remain for her entire shift, even after she had assured the county that her performance would improve. The county met its burden of proving the grievant had a history of poor attendance, was on notice, and that her attendance continued to fall below the necessary standard. The grievance was denied. (*Contra Costa County and Public Employees Union, Loc. One* [4-25-05] 17 pp. *Representatives*: Roland M. Kats, Esq., for the union; Kelly M. Flanagan for the county. *Arbitrator*: Frank Silver.)

Arbitration Log

- Retirement Benefits
- Leave of Absence
- Contract Interpretation

California State University, Sonoma and California Faculty Assn. (2-7-05; 15 pp.) *Representatives:* Peter Nguyen, for the union; Joel Block, for the university. *Arbitrator:* Bonnie G. Bogue.

Issue: Is the issue arbitrable? Did the university violate the agreement by failing to provide the grievant with full retirement service credit and CalPERS pension contributions while he was on difference-in-pay leave?

Union's position: (1) The grievant is a psychology professor at Sonoma State University. During his 34-year tenure, he took four difference-in-pay leaves. DIP leaves allow faculty to participate in research, scholarly and creative activity, instructional improvement, or retraining. During the leave, faculty members are relieved from their regular teaching duties and are paid the difference between their regular salary and the minimum salary paid to the instructor rank.

(2) In 2001, the grievant learned that the university had incorrectly reported to CalPERS that he worked full-time at his regular rate of pay during his leaves. CalPERS corrected the error by reducing the grievant's service credit in proportion to the amount his salary was reduced during the leaves.

The reduction equated to .807 years, which the grievant was forced to buy back for \$14,607 to avoid a reduction in his retirement benefit.

(3) The contract provides that an employee on DIP leave shall receive "appropriate fringe benefits provided by the CSU in the same manner as if he/she were not on a difference in pay leave." Because this language is clear and unambiguous, there is no need to consider any other evidence to interpret this section. CalPERS retirement is an "appropriate fringe benefit" under this language and should be provided in the same manner as if the employee were not on leave.

(4) The parties' intent in negotiating this section was to ensure that members who exercised their right to take DIP leave were not disadvantaged. The university has violated both the letter and the intent of the agreement by reducing retirement benefits for employees on DIP leave.

(5) This dispute concerns the parties' agreement, not CalPERS policies and regulations. CalPERS policies were not incorporated or referenced in the agreement, and the contract's savings clause prevents the arbitrator from interpreting the agreement with reference to those or any other external policies.

University's position: (1) The grievance is not substantively arbitrable because the subject matter, CalPERS retirement benefits, is not governed by the parties' agreement, but by the California Public Employees Retirement Law. The parties never bargained over faculty retirement benefits; those benefits are determined and administered by CPERL. The grievant's issue should be resolved under the CPERL dispute procedures, not the parties' grievance procedure.

(2) If the issue is arbitrable, nothing in the agreement guarantees the grievant's receipt of retirement service credit or contributions. The fringe benefits clause does not provide any guarantees related to service credit. Interpreting it as doing so violates the past practice and state regulations as interpreted by CalPERS. The contract

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clearly lists those benefits that will remain whole during an employee's leave, and service credit is not one of them.

(3) The language covering DIP leaves has been the same since 1983, and the university consistently has followed the same policy for administering those leaves. The university reports the faculty as full-time work status and pays the required employer contributions to CalPERS. CalPERS then adjusts the credited service when it conducts audits.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The parties' grievance procedure defines a grievance as an allegation of a claimed violation of a specific provision of the agreement. Since the grievance alleges a violation of the DIP leave provisions in the contract, it meets the definition of a grievance under the contract and is substantively arbitrable.

(2) While the parties' agreement does not define fringe benefits, Roberts' *Dictionary of Industrial Relations* defines the term as "Nonwage or indirect compensation received by workers, paid for in whole or in part by employers, including such items as vacations, sick leave, holidays, pension, and insurance." The parties' agreement includes express provisions for all the above-listed fringe benefits, except pension and retirement benefits. Although there are references to retirement benefits in the agreement, it is silent on entitlement, calculations, or contributions.

(3) Under one principle of contract interpretation, when a contract specifically enumerates a list of items, it is assumed that the parties intended to cover only those items listed and exclude coverage of those of that class not listed. As there is no evidence of mutual intent to do otherwise, the evidence shows that the party did not intend to create a right or obligation with regard to members' retirement benefits.

(4) Another principle of contract interpretation requires examination of the contract as a whole to ensure the parties' intent is not defeated by a narrow interpretation of one provision that may be inconsistent with the rest of the agreement. Although another section of the contract provides that CalPERS deductions be based on the full-time rate of pay for employees electing to participate in a pre-retirement reduction-in-time plan, it is assumed that if the parties had intended to apply the same for the DIP leave, they would have included that language in the relevant section.

(5) A final principle of contract interpretation requires consideration of the parties' past practice in applying the negotiated provision. The evidence clearly shows that since the section was negotiated in 1983, faculty members have received their retirement benefits under the statutorily mandated program, and the university has been reporting and making contributions to CalPERS in a consistent manner.

(Binding Grievance Arbitration)

- **Contract Interpretation**
- **Involuntary Transfer**

Mt. Diablo Unified School Dist. and Mt. Diablo Education Assn., CTA/NEA (4-25-05; 18 pp.) *Representatives:* Diane Ross, Esq., for the union; Daniel A. Ojeda, Esq. (Miller, Brown and Dannis), for the district. *Arbitrator:* Jerilou H. Cossack.

Issue: Did the district violate the agreement by preventing involuntary transferees from bidding on vacant positions at a new school?

Union's position: (1) In the 2004-05 school year, the district opened a new elementary school, Delta View, that drew students from Rio Vista and Bel Air elementary schools, which in turn drew students from Shore Acres Elementary School.

(2) When the first voluntary transfer notice was posted on April 9, 2004, to fill the newly created positions, the district refused to allow teachers from Shore Acres to apply. Those teachers were not allowed to apply for the Delta View positions until a voluntary transfer notice was posted districtwide on May 7. Only one of the two Shore Acres teachers interviewed was selected.

(3) The district did not hire any teachers to work at Delta View until May 7. However, when involuntary transfer assignments were offered to teachers at Shore Acres on May 5, they were not offered Delta View vacancies. The district claimed that involuntary transferred teachers could not bid on new positions without an interview.

(4) On May 5, 5 of the 19 teachers who were involuntary transferred from Shore Acres said they would have chosen a position at Delta View if it had been offered.

(5) Section 5.16 of the parties' contract requires the district to use the procedures for voluntary and involuntary transfer concerning any positions that have not been assigned by May 1. This provision applies when there are changes in school attendance boundaries or grade-level reorganization between two or more sites due to the opening of a new school. Involuntarily transferred teacher are allowed to select from the available openings prior to those openings being posted for voluntary transfers. Accordingly, the Shore Acres teachers should have had the chance to select the new Delta View positions before they were filled by voluntary transfers.

(6) The district's argument that Section 5.17, which covers opening and reopening a new school, overrides Section 5.16 must fail because Section 5.17.1 specifically states that when a new school is opened, Section 5.16 will be followed. This language was modi-

fied during 1992 contract negotiations to provide surplus teachers with additional protections and allow them to apply for any openings, including those created at new schools.

(7) Attorneys' fees are requested because the district willfully violated the agreement.

District's position: (1) Section 5.17, when read with Section 5.16, requires the district to post known vacant positions for 10 days, give priority consideration to staff members who request placement at the new school, transfer teachers from the impacted school to the new school in proportion to the impact, and use voluntary transfers to give the impacted teachers priority. The district followed these steps.

(2) Management has a fundamental right to transfer employees that can be curtailed only by specific restrictions in the parties' agreement. The parties have not placed any such restrictions in their agreement. The contract requires only that individuals affected by changed attendance boundaries or grade-level reorganization be allowed to participate in the involuntary transfer pool by May 1. The union's inter-

pretation would prevent the district from staffing new schools according to student needs or selecting instructors based on their skill level and qualifications.

(3) When the district opened a school in 1997, it was staffed solely through the voluntary transfer process. None of the teachers was assigned through the involuntary transfer process. The union did not file a grievance.

(4) At the time of arbitration, none of the involuntary transferees from Delta View expressed any desire to work at Shore Acres. Therefore, there is no remedy.

(6) Even if the grievance is upheld, the contract does not authorize an award of attorneys' fees.

Arbitrator's decision: The grievance was upheld.

Arbitrator's reasoning: (1) The agreement is very clear that all of the procedures outlined in Section 5.16 apply to new school openings without exception. Just as clearly, Section 5.16.12 makes all positions unassigned as of May 1 available to the voluntary and involuntary transfer procedure, which gives first choice to involuntary transfers. There is no exception in the contract for new school sites.

(2) The district has not provided sufficient evidence of a binding past practice to prove otherwise.

(3) While the district is correct that the authority to direct its workforce is a fundamental management right, that right can be limited by agreements made with exclusive representatives. Here, the district clearly agreed to a

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modification of its rights. However, the district has the authority to fill the vacancies at the new school through proportional voluntary transfers and the interview process, so long as it completes that process prior to May 1. The district had determined its staffing needs and posted its first notice as early as April 9, and clearly could have accomplished its goals prior to the May 1 deadline imposed by the contract.

(4) The district shall offer the five teachers who were involuntary transferred the first opportunity to transfer to Delta View, in order of seniority. Attorneys' fees are not appropriate because there was no flagrant or persistent disregard of an unambiguous obligation.

(Binding Grievance Arbitration)

- **Arbitrability — Timeliness**
- **Waiver**
- **Work-Schedule Change**

Rancho Cucamonga Firefighters Assn. and Rancho Cucamonga Fire Prevention Dist. (8-25-05; 14 pp.)
Representatives: Deiter C. Dammeier, Esq. (Lackie and Dammeier), for the union; Steve A. Filarsky, Esq., for the district. *Arbitrator:* Robert D. Steinberg (CSMCS Case No. ARB-04-2733).

Issues: Was the grievance timely? If so, did the district violate the agreement by placing new trainees on a 56-hour weekly schedule instead of a 40-hour schedule?

Union's position: (1) In June 2003, the union learned that the district unilaterally had placed the current class of trainees on a 56-hour pay schedule.

(2) The union approached the district, and the parties discussed the matter over a six-week period. There was an understanding between the parties that while discussions were ongoing, grievance time limits would be waived.

(3) On August 18, when the district cancelled a scheduled meeting, the union concluded that informal talks had ended. On August 29, the union filed a timely grievance within 15 days of the end of the discussions. Deputy Chief Corcoran, who participated in the discussions on behalf of the district, testified he considered the grievance to be timely.

(4) Under the current agreement, newly hired firefighters are assigned to a 40-hour work week when they attend academy training. Only traditional fire-suppression personnel work 112 hours within a two-week period. Placing the trainees on the 56-hour schedule was a violation of the agreement.

(5) The contractual zipper clause prevents the district from making changes without the union's agreement. Modifying the trainees' schedule was a unilateral change.

(6) The union did not acquiesce to the change by failing to file a grievance when the change first occurred in 2002. Union officials did not become aware of the district's actions until June 2003.

District's position: (1) Because the parties' agreement does not toll the time limit for filing a grievance during informal discussions, and because it was filed more than 15 days after the union learned of the trainees' job assignments, the grievance was untimely.

Furthermore, when the union acquiesced to the 2002 schedule change, it waived its right to grieve.

(2) The district has the right under the agreement to modify the work schedule to meet its service needs as it did with regard to the trainees' schedule.

(3) Since the trainees were hired with the understanding that they would work a 56-hour schedule, they suffered no loss in anticipated pay.

(4) Suppression personnel taken off their regular schedule to attend training are not changed to a 40-hour schedule. Therefore, there is no reason to put trainees on a 40-hour schedule for training.

Arbitrator's decision: The grievance was upheld.

Arbitrator's reasoning: (1) Although the union knew by the end of June 2003 that trainees were assigned to a 56-hour schedule, evidence supports the union's assertion that the time limits had been waived by the parties. The union was particularly cautious about time limits because the district recently had denied one or more grievances as untimely. The testimony of retired District Chief Corcoran was particularly persuasive because he no longer was employed by the district. Therefore, the grievance was timely filed within 15 days of August 18, when the talks broke down.

(2) The district acknowledged that it unilaterally changed the trainees' schedule. However, the union did not acquiesce to the change because it was not aware of the 2002 schedule at the time of the action.

(3) Although, the district retained the right to direct its business, the contract limits the district's rights to unilaterally change employees' schedules only when it meets the needs of service and there is good and sufficient cause. Furthermore, the contract specifically prohibits the district from changing schedules for the purpose of avoiding overtime.

(4) Only two types of schedules are set out in the agreement. Only those engaged in fire suppression are intended to work the 56-hour fire-suppression schedule.

(5) The district's argument that captains retain their 56-hour schedule when they attend particular training assignments is not persuasive. The examples provided occurred before the most recent agreement between the parties was executed.

(6) The trainees' schedule falls within the zipper clause and cannot be unilaterally changed by the district. Therefore, the district violated the agreement by placing the trainees on a 56-hour-a-week schedule.

(Binding Grievance Arbitration)

- **Contract**
- **Workers' Compensation**
- **Return to Work**

Los Angeles County Metropolitan Transportation Authority and Amalgamated Transit Union, Loc. 1277 (10-11-05; 8 pp.) *Representatives:* William J. Flynn, Esq. (Neyhart, Anderson, Freitas, Flynn, and Grosboll), for the union, John Williams (senior employee relations representative), for the

transit authority. *Arbitrator:* Philip Tamoush.

Issue: Did the transit authority violate the agreement by refusing to return the grievant to work as soon as he was released by his physicians?

Union's position: (1) The grievant, a mechanic, first injured his back in July 2000, and was off work. He returned to work in November with a lifting restriction for one year. He then suffered a separate injury and did not work. The grievant was released to return to work without restriction in November 2002, but the transit authority insisted the grievant would be returned to work only with physical restrictions that prevented him from earning overtime.

(2) In May 2004, the grievant was forced to accept the transit authority's restricted offer to avoid an involuntary separation.

(3) The grievant was ready, willing, and able to return to work as early as October 2002, but the transit authority prevented him from doing so by placing unnecessary restrictions on his work.

Transit authority's position: (1) A good faith effort was made to get the grievant back to work. Management met with the grievant early in January 2003, after receiving his release to return to work, and offered him a position in the inspection shop in line with his restrictions. He appropriately was limited from bidding on overtime that would not comply with his lifting restriction. The grievant chose not to accept the position and to remain off work until May 2004. The grievant

never was prevented from returning to work.

(2) In March 2003, after the grievant failed to respond to the offer, the transit authority appropriately began the separation process and so informed the grievant. The employer had no obligation to determine why the grievant chose not to accept its offer of reinstatement.

(3) The fact that the grievant ultimately accepted the offer extended in 2003 demonstrates that he could have accepted it when first proposed.

Arbitrator's decision: The grievance was upheld.

Arbitrator's reasoning: (1) Although the grievant had been released to return to work in 2002 and 2003, the transit authority relied on a report from a third physician, which predated the two full releases by a year and required that the grievant return to work with a 25-pound weight restriction.

(2) The evidence demonstrates the grievant was ready and released to work in 2003, and therefore was justified in declining the conditional offer of employment.

(3) Management had ample opportunity to obtain the correct releases, which they ultimately did. It is irrelevant that the union could have been more aggressive in asserting the grievant's lack of restrictions. Management had the releases and should have returned the grievant to work without restrictions.

(Board of Arbitration)

• **Discipline**

Sayler and San Diego Community College Dist. (10-11-05; 8 pp.)
Representatives: Joshua D. Gruenberg, Esq., and Hilary J. Vrem, Esq. (Larabee and Gruenberg), for the grievant; Debra L. Bray, Esq., for the district. *Arbitrator:* Walter N. Kaufman (CSMCS Case No. ARB-04-2939).

Issue: Did the district have good cause to discharge the grievant?

District's position: (1) The grievant worked for the district as a plumber. The position required him to respond to plumbing emergencies in a one-ton truck bearing the district's logo.

(2) The grievant was involved in three collisions while in the district's vehicle. The police reports for each accident indicated the grievant caused the collision by driving at unsafe speeds for the conditions. The first two accidents caused chain reaction collisions for which the district was liable for \$175,000 in personal injury and property damage. Only the two most-recent incidents were considered in the termination.

(3) The district gave the grievant every opportunity to improve his safety performance, and it made him aware of the seriousness of his actions by applying progressive discipline. After the first accident, the grievant was counseled and given a written warning that emphasized the importance of defensive driving. After the second accident, the grievant was given a three-day suspension and warned that he would be terminated for any further safety incidents.

(4) Despite the grievant's claim that he was not at fault for the second incident and not on notice that the next accident would result in his termination, he did not file a grievance contesting the three-day suspension. At the time of the third accident, he asked if he was going to be fired.

(5) Prior to terminating the grievant, the district considered alternative positions that would not require the grievant to drive a truck; there were no feasible options. The grievant was terminated for negligence, causing damage to public property, and being a discredit to the agency.

Grievant's position: (1) The second accident was unavoidable because a mattress had fallen off a truck and the grievant was unable to slow down sufficiently to avoid hitting the car in front of him. An officer at the scene agreed that the mattress driver was at fault, but a different officer prepared the report.

(2) The district had an obligation to thoroughly investigate all the accidents. The grievant should not be held accountable for accidents that he was involved in but did not cause.

(3) The district failed to give the grievant notice after the second accident that the next incident would result in termination.

(4) The district should have found another position for the grievant, rather than terminate his employment.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The police report supported the district's conclusion that the grievant was at fault for

all three accidents. The grievant admitted he was responsible for the first and third accidents, and could produce no evidence to support his assertion that he was not responsible for the second. Even if the mattress contributed to the accident, the grievant was responsible because he was driving too fast to avoid the collision.

(2) Discipline for the second incident had become final at the time of the termination as it had not been grieved. Therefore, the circumstances surrounding that accident could not be disputed.

(3) The district complied with the collective bargaining agreement and the Education Code by excluding the first accident from its termination decision. The second and third accidents were appropriately considered because they occurred within two years of the termination decision.

(4) Although the district considered alternatives to termination, it had no obligation to place the grievant in another position. The district had good cause for terminating the grievant because his "driving behavior endangered himself and others and created a financial liability for the district."

(Binding Grievance Arbitration)

Resources

Ethics and the Employment Relationship

Following increased media coverage of many accounting and accountability scandals, the public is increasingly savvy about what can happen when employers do not adhere to ethical practices. This book expounds specifically on the application of ethics to the employment relationship and discusses the importance of treating employees as more than numbers.

The editors elaborate in their preface: "In the business and economic spheres, many of the most pressing ethical issues involve the employment relationship, such as the rights of employees versus shareholders, employee privacy and monitoring, whistleblowing, pay equity, discrimination, employee safety, anti-union campaigns, and minimum labor standards. Since the field of human resources and industrial relations is ultimately about people and quality of life, there is a pressing need to develop applications of business ethics for the employment relationship in the context of research, practice, and teaching."

The Ethics of Human Resources and Industrial Relations, edited by John W. Budd and James G. Scoville (2005) 350 pp. Cornell University Press, <http://www.cornellpress.cornell.edu/>. Softcover, \$29.95.

Restoring a Promise in Education

National Book Award-winning author Jonathan Kozol has been working with children in inner-city schools for more than 40 years. Over the past several years, Kozol has visited nearly 60 public schools. Virtually everywhere, he reports, conditions have grown worse for inner-city children in the 15 years since federal courts began dismantling the landmark ruling in *Brown v. Board of Education*.

First, he notes that a state of nearly absolute apartheid prevails in thousands of schools and that the segregation of black children has reverted to a level the nation has not seen since 1968. Few of the students in these schools know white children any longer. Second, he opines that a "protomilitary" form of discipline has emerged, modeled on stick-and-carrot methods of behavioral control traditionally used in prisons

but targeted exclusively at black and Hispanic children. And third, he finds that, as high-stakes testing takes on pathological and punitive dimensions, liberal education in inner-city schools increasingly has been replaced by culturally barren and robotic methods of instruction that would be rejected out of hand by schools that serve society's mainstream.

Quoting children, teachers, and some of the most revered and trusted leaders in the black community, *The Shame of the Nation* pays tribute to those educators who persist against the odds but directly challenge the practices now advocated for urban school systems by the Bush administration. In their place, Kozol offers a challenge to fulfill the promise made some 50 years ago to the nation's youngest citizens.

The Shame of the Nation, by Jonathan Kozol (2005) 416 pp. Crown Publishing Group, Random House, <http://www.randomhouse.com/crown/index.html/>. Hardcover, \$25.

The Right to Strike

Once a fundamental civic right, strikes are now constrained and contested. In an unusual history, Josiah Bartlett Lambert shows how the ability to strike has been transformed from a fundamental right that fostered the citizenship of working people into a conditional and commercialized function. He argues that the executive branch, not the judicial branch, was responsible for the shift in attitudes about the necessity for strikes, and contends that the rise of liberalism has contributed to the erosion of strikers' rights. Lambert analyzes this transformation in relation to American political thought. His narrative begins before the Civil War and takes the reader through a discussion of the permanent striker replacement issue and the alienation of workplace-based collective action from community-based collective action during the 1960s.

If the Workers Took a Notion maps the connections among American political development, labor politics, and citizenship to support the claim that the right to strike ought to be a citizenship right and once was regarded as such. Lambert argues throughout that the right to strike must be

protected. He challenges the current “law turn” in labor scholarship and takes into account the role of party alliances, administrative agencies, the military, and the rise of modern presidential powers.

If the Workers Took a Notion, by Josiah Bartlett Lambert (2005) 272 pp. Cornell University Press, <http://www.cornellpress.cornell.edu/>. Hardcover \$49.95; softcover, \$19.95.

Jobs and Wages in California

Despite recent job growth in California, these three reports from the Center for Labor Research and Education at the Institute of Industrial Relations, U.C. Berkeley, collectively identify troubling trends for California workers and their families. These and other Labor Center reports provide hard data and analysis to inform economic policy development in California and across the nation. The reports can be accessed through the Institute’s website, <http://iir.berkeley.edu/>.

Are We Recovering Yet? Jobs and Wages in California Over the 2000-2005 Period, by Arindrajit Dube. In the face of job growth in California and the country, this analysis nevertheless finds a slack labor market and wages taking a turn for the worse. The soft labor market gives employers little incentive to raise wages to attract and retain workers. Therefore, it is no surprise that workers in California and the United States have experienced a dip in inflation-adjusted wages in the past year, making this the second consecutive year that Californians have seen their real earnings drop.

Black Workers in the Bay Area: 1970-2000, by Steven C. Pitts and Steve Wertheim. The crisis of jobs in the black community is most often thought of as a crisis of unemployment, but Pitts and Wertheim find that for African Americans in the San Francisco Bay Area it also is a crisis of low-wage employment. Significant percentages of Bay Area blacks work at jobs that do not provide wages and benefits to properly raise a family — and things only have gotten worse since 1970.

Kids at Risk: Declining Employer-Based Health Coverage in California and the United States: A Crisis for Working Families, by Arindrajit Dube, Ken Jacobs, Sarah Muller, Bob Brownstein, and Phaedra Ellis-Lamkins. Over the past five years, employer-based health care coverage for dependent children has significantly decreased; without immediate action, this trend will continue to the point that, by 2010, fewer than half of California’s children will be insured through a parent’s employer. For families in the lower half of the income spectrum, only slightly more than one-quarter of children will be covered in this way. As a result, there will be a significant shift of health care costs from employers to working families and the public sector, and new state funding will be required to cover the cost of increased enrollment into public health programs.

Teachers Need Houses, Too

Author Dave Eggers, acclaimed author of *A Heartbreaking Work of Staggering Genius*, son and brother of teachers, cofounder of writing centers in New York and San Francisco, and passionate education advocate, joined forces with a teacher and a journalist to examine why many teachers today must work two or more jobs to survive and can’t afford to buy homes or raise families.

Teachers Have It Easy examines how bad policy intersects with teachers’ lives. Interweaving teachers’ voices from across the country with hard-hitting facts and figures, the book offers a view of the harsh realities of public school teaching. With a look at the problems of recruitment and retention, the myths of short workdays and endless summer vacations, the realities of the work week, and shocking examples of how society views America’s teachers, *Teachers Have It Easy* explores why salary reform may be the best way to improve public education and examines how innovative compensation plans can transform schools.

Teachers Have It Easy: The Big Sacrifices and the Small Salaries of America’s Teachers, by Dave Eggers, Ninive Clements Calegari, and Daniel Moulthrop (2005) 368 pp. The New Press, <http://www.thenewpress.com/>. Hardcover, \$25.96.

The Legacy of Labor's Past

American unions are weaker now than at any time in the past hundred years, with fewer than 1 in 10 private sector workers currently organized. In *Labor Embattled*, David Brody, professor emeritus of history at the University of California at Davis, says this is not just a problem for the unions but also a disaster for American democracy and social justice.

Brody explores recent developments affecting American workers in light of labor's past. Of special concern to him is the erosion of the rights of workers under modern labor law, which he argues is rooted in the original formulation of the Wagner Act. Brody explains how the ideals of free labor, free speech, freedom of association, and freedom of contract have been interpreted and canonized in ways that unflinchingly reduce the capacity for workers' collective action while silently removing impediments to employers' coercion of workers. His essays combine legal and labor history to reveal how laws designed to undergird workers' rights now essentially hamstring them.

Labor Embattled: History, Power, Rights, by David Brody (2005) 176 pp. University of Illinois Press, <http://www.press.uillinois.edu/index.html/>. Hardcover, \$40; softcover, \$20.

A New Generation of Early Childhood Teachers

State and local planning is well underway for a publicly funded "Preschool for All" effort for California's four-year-old children, with the raising of preschool teacher standards a likely outcome. This means building the capacity of California's higher education system to prepare a new generation of first-rate early childhood teachers.

In the past year, the Center for the Study of Child Care Employment, at the Institute of Industrial Relations, U.C. Berkeley, has conducted a full inventory of this system, from community colleges to PhD programs. Its findings are presented in *Time to Revamp and Expand: Early Childhood Teacher Preparation Programs in California's Institutions of Higher Education*.

This August 2005 report presents the results of an inventory of nearly all (98.5 percent) of California institutions of higher education that train adults to teach children under the age of five, including certificate, associate, bachelor's, master's, and PhD programs. The report includes data on student and faculty characteristics, coursework and practicum experiences provided, challenges faced by these programs, and available student supports to make programs accessible.

The center also recently published *Establishing Teacher Competencies in Early Care and Education: A Review of Current Models and Options for California*, by Dan Bellm (2005). Both reports are available on the center's website.

Time to Revamp and Expand: Early Childhood Teacher Preparation Programs in California's Institutions of Higher Education, by Marcy Whitebook, Dan Bellm, Yuna Lee and Laura Sakai (2005) Center for the Study of Child Care Employment, <http://www.iir.berkeley.edu/cscce/index.html>.

Effective Job Training

Job training continues to pose big challenges for workforce policymakers and practitioners as the 21st century takes root. For instance, while governments genuinely have improved the effectiveness of job training activities by making them more market-oriented, and while employment among welfare recipients has surged as a result of reforms enacted during the 1990s, labor-market success among the disabled and low-wage populations continues to lag.

Recognizing that training programs can't be all things to all people, Michael Bernick, a former director of California's Employment Development Department, sets out to show the types of training programs that do work and to describe for whom they work. He identifies ways to improve performance among Workforce Investment Act contractors while exploring the best uses for state discretionary WIA funds. He also describes what it takes to make an effective career ladder program, how post-employment welfare retention or skill-advancement programs can succeed, and

the type of training that workers with disabilities must go through to get and retain jobs. The book is aimed at policymakers and professionals who administer training programs both in the public and private sectors.

Job Training That Gets Results: Ten Principles of Effective Employment Programs, by Michael Bernick (2005) 273 pp. W.E. Upjohn Institute, <http://www.upjohninstitute.org/>. Hardcover \$40; softcover \$20.

Workplace Health and Safety

Unions and community organizations can integrate safety into every aspect of their work with this new resource from U.C. Berkeley's Labor Occupational Health Program. *Tools of the Trade: A Health and Safety Handbook for Action* offers advice on promoting worker health and safety while building unions and community groups at the same time.

It offers examples of successful workplace health and safety campaigns from around the country; strategies to actively engage workers in advocating for their own protection; specific tools for winning safety improvements, such as collecting information, using legal rights, and working with the community; and step-by-step instructions for using these tools, complete with checklists, forms, and resources.

Tools of the Trade: A Health & Safety Handbook for Action, by the Labor Occupational Health Program, U.C. Berkeley (2006) 180 pp. LOHP, <http://ist-socrates.berkeley.edu/~lohp>. Softcover, \$25 (includes shipping and handling).

New Work-Family Tool

The Labor Project for Working Families has a new resource to create effective work-family agendas in the workplace, win significant family-friendly provisions for union members, and help develop public policy benefiting all working families.

This 3½ hour workshop curriculum provides union instructors, facilitators, and discussion leaders with ideas on

how to educate union members and leaders on work-family issues, advance these issues on the job, and advocate for work-family issues in the community, on the legislative front, and in the public arena. A free download is available on the LPWF website.

"Work and family are no longer separate issues," states Netsy Firestein, executive director of the Labor Project for Working Families. "Each has a profound impact on the other. Yet far too often, Congress and state legislatures are focused on the narrow economic needs of corporations, threatening existing family-friendly laws on family leave and overtime pay. In this political climate, it is more important than ever for the labor movement and advocates to be involved in work-family issues."

Making It Work Better: A Work Family Educational Program (2006) by the Labor Project for Working Families. Free, online at <http://www.laborproject.org>. For more information, call (510)643-7088 or email lpwf@berkeley.edu.

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, MMBA and the Trial Court Act – and subdivided by type of case. In-depth reports on significant board rulings and ALJ decisions appear in news sections above.

Dills Act Cases

Duty of Fair Representation Rulings

No duty to represent before State Personnel Board: Stationary Engineers Loc. 39.

(Quigley v. Stationary Engineers Loc. 39, No. 1790-S, 12-21-05; 2 pp. + 6 pp. B.A. dec. By Member Neuwald, with Members Whitehead and McKeag.)

Holding: The unfair practice charge was dismissed because the union had no duty to represent bargaining unit members before the State Personnel Board.

Case summary: The charging party received a notice of dismissal and was represented by the union at his Skelly hearing. He was dismissed. Thereafter, the union notified the charging party that it had conducted an investigation and decided not to pursue his dismissal before the SPB because it was likely the appeal would be denied. The union informed the charging party of his right to pursue an appeal independently.

On June 20, 2005, Quigley filed an unfair practice charge alleging that the union breached its duty of fair representation on a number of occasions, by failing to successfully resolve any grievance and by failing to represent him before the SPB.

The board agent dismissed all but one allegation as untimely filed because they had occurred more than six months prior to the filing of the charge. The B.A. noted that

the board has held there is no duty of fair representation in extra-contractual proceedings before agencies such as the Department of Fair Employment and Housing or the SPB. Therefore, the union had no duty to represent the charging party in his appeal before the latter. The B.A. dismissed the unfair practice charge.

On appeal, the board refused to consider new allegations and evidence because they were known to the charging party at the time the initial charge was filed. And, he failed to show good cause why the information had not been raised before the B.A. The board adopted the B.A.'s decision as its own and dismissed the charge without leave to amend.

EERA Cases

Unfair Practice Rulings

Unfair practice charge withdrawn: Tamalpais UHSD.

(CSEA and Its Chap. 549 v. Tamalpais UHSD, No. 1786, 12-8-05; 2 pp. dec. By Member McKeag, with Chairperson Duncan and Member Whitehead.)

Holding: The unfair practice charge was withdrawn at the request of the charging party.

Reprint Service

Copies of PERB decisions and orders are available from *CPER* at \$.30 a page. When ordering, identify the decision by the case title and decision number given at the beginning of each abstract. Send your prepaid order to *CPER*, Institute of Industrial Relations, 2521 Channing Way, University of California, Berkeley, CA 94720-5555. Make checks payable to Regents, U.C. (The number of pages in each decision is indicated at the beginning of the synopsis.) All orders will be filled promptly and mailed first class.

(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>.)

Case summary: The association appealed a board agent's dismissal of its unfair practice charge alleging that the district violated EERA by unilaterally changing a health benefit plan. After filing the appeal, the association petitioned the board to withdraw the charge without prejudice because the parties had developed a mutually satisfactory resolution of their dispute.

The board reviewed the record and found the withdrawal to be consistent with the purposes of EERA and in the best interest of the parties. The board granted the request, and the charges were withdrawn without prejudice.

No nexus between protected activity and teacher's dismissal: LAUSD.

(*Thomas v. Los Angeles USD*, No. 1787, 12-8-05; 2 pp. + 14 pp. ALJ dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The unfair practice charge was dismissed because the charging party failed to show a nexus between her protected activity and the dismissal.

Case summary: Althea Thomas worked for the Los Angeles Unified School District on an emergency permit, beginning in 1997. Thereafter, she enrolled in credentialing courses and took, but did not pass, the CSET. However, during her tenure, Thomas received satisfactory performance reviews and was elected chairperson of the math department.

During her employment, Thomas' thumb was injured by students during an altercation. On one occasion, she informed the principal and an assistant principal that she was going to talk to the union about filing a grievance. The assistant principal told her she could not file a grievance against the employees who witnessed the incident because they were unit members.

On another occasion, Thomas reported to the same assistant principal her intention to file a grievance. The assistant principal denied that Thomas mentioned filing a grievance.

Thereafter, while off work at the direction of her physician, Thomas made repeated attempts to get the appropri-

ate forms filled out for her injuries and to report the incidents.

Thomas received a certificate of qualification for the district's pre-intern program for the 2002-03 school year. The certificate could be renewed for one year regardless of whether Thomas passed the CSET, provided she continued to participate successfully in the program. Thomas' employment contract for the same year was renewable at the sole discretion of the district.

At the end of the 2002-03 school year, in order to comply with the No Child Left Behind Act, the district released over 500 provisional teachers. Thomas was one of the four teachers at the middle school, selected from a list of 40 provisional teachers, who were released. Thomas was the only provisional math teacher released from the school. The four remaining provisional math teachers had passed the CSET subject-matter exam, and two had bachelor's degrees in relevant subjects.

Thomas filed an unfair practice charge against the district, alleging that it violated EERA by releasing her in retaliation for protected activity.

Following an evidentiary hearing, an administrative law judge determined that Thomas engaged in protected activity when she informed the district of her intent to file a grievance and when she submitted forms to report her work-related injuries. The ALJ also found that the district was aware of her protected activities. However, the ALJ determined that the district did not retaliate for those protected activities. The ALJ noted that the assistant principal's response showed that he did not believe a grievance could be filed and therefore did not expect or fear one. There was no evidence that the district retaliated against employees for filing injury report forms. Furthermore, the ALJ found that Thomas was arguably the least-qualified teacher in the math department by the NCLB's standards. The ALJ noted that the district had made mistakes but that they did not demonstrate unlawful motivation.

Thomas filed exceptions to the ALJ's proposed decision. The board reviewed the decision and adopted it as that of the board itself.

Supervisor's orders not adverse action: LAUSD.

(*Kahn v. Los Angeles Unified School Dist.*, No. 1791, 12-29-05; 3 pp. + 10 pp. R.A. dec. By Member Whitehead, with Members Shek and Neuwald.)

Holding: The unfair practice charge was dismissed because the charging party failed to demonstrate any evidence of an adverse action.

Case summary: John Kahn, an IBEW member and steward, is employed in the electrical department of the Los Angeles Unified School District.

On September 3, 2004, Kahn's supervisor, Bruce Rose, phoned him to ask where he was on August 12. Kahn said he could not recall, did not have his logbook with him, and suggested Rose check his time card. Rose then instructed Kahn to meet him in his office on September 7 at 7 a.m. and bring his logbook. Kahn did not think this request was appropriate because his logbook contained personal and private information. Rose restated his order and ended the call. Kahn called Rose back 15 minutes later to request that Rose fill out a supervisor's report of injury because of Kahn's anxiety, apprehension, and tension. Rose refused and recommended that Kahn quit if he could not talk to his supervisor.

On September 7 at 7 a.m., Rose approached Kahn and asked if he had brought his logbook. Kahn replied he did not think it was a lawful order. Rose then ordered Kahn to go to the electrical shop and "do nothing" until he figured out what to do with him. While in the shop, Kahn made several calls to Rose, requesting phone numbers for the EEOC and the district superintendent. At 8 a.m., Kahn called Rose and told him he was ill; he requested that Rose fill out an injury report. Rose refused. After determining Kahn was not requesting medical help, Rose had someone else complete the injury report. At 8:50 a.m., Kahn sought medical help and was taken by ambulance to the emergency room.

On March 2, 2005, Kahn filed an unfair practice charge against the district. He alleged the district discriminated against him 10 times between April 2001 and January 2004, and retaliated against him and interfered with his rights when Rose required him to bring his logbook and wait in the elec-

trical shop, virtually imprisoned. Kahn alleged that the logbook was a gift from the district; the district viewed it as a tool given to employees for work purposes.

The regional attorney dismissed as untimely the discrimination charges referring to incidents that had occurred more than six months prior to the filing of the charge. The R.A. noted that, to demonstrate a prima facie case, there must be evidence of an adverse action. The test is whether a reasonable person under the same circumstances would consider the action to have an adverse impact on his or her employment. The R.A. held that a reasonable person would not consider it an adverse action if requested to bring his district-issued logbook or remain in the shop while his supervisor figured out what to do.

The R.A. also concluded that the same evidence did not demonstrate that the district's conduct resulted in any harm to Kahn's rights guaranteed by EERA and therefore failed to demonstrate a prima facie case of interference. The R.A. found no threats in any of Rose's statements, including the comment that Kahn should quit if he could not talk to his supervisor.

The R.A. discounted Kahn's allegation that he was imprisoned by Rose, noting that he freely had made phone calls during that time. The R.A. noted that even if Kahn could demonstrate an adverse action, he failed to demonstrate a nexus between it and his protected activity.

Kahn appealed the dismissal of his charge; however, the district argued that Kahn's appeal was untimely. The board noted that, even after adding the five-day extension for mailed filings sent in response to documents served by mail, Kahn's appeal was three days late and that Kahn had not requested an extension or provided any information to demonstrate good cause for the late filing. The board dismissed the appeal as untimely and adopted the R.A.'s decision as its own.

HEERA Cases

Unfair Practice Rulings

Agency fee refund does not remedy faulty *Hudson* notice: UPTE, CWA Loc. 9119.

(*Abernathy et al. v. UPTE, CWA Loc. 9119*, No. 1784-H, 12-1-05; 9 pp. dec. By Chairperson Duncan, with Member Whitehead; Member Shek concurring.)

Holding: As agency fee payers, the charging parties have standing to file a charge, even though the union refunded the collected fees with interest.

Case summary: In 2004, UPTE collected agency fees in July, August, and September, but did not send out its *Hudson* notices until September 3 and 7. UPTE later returned the money collected from the agency fee payers for July 1 through September 7, with interest. The charging parties, UPTE agency fee payers, filed individual unfair practice charges alleging that UPTE violated HEERA by collecting agency fees prior to providing *Hudson* notices to non-members and by benefiting from an interest-free loan for the period it retained the improperly collected agency fees. The board agent dismissed the charges for lack of standing based on *California Nurses Assn. (O'Malley)* (2004) No. 1673-H, 169 CPER 80, where the board dismissed the charge because the union did not accept fees from the charging party.

In consolidated appeals, the board noted that, unlike O'Malley, who was not a fee payer, the charging parties in this case are fee payers from whom UPTE continues to collect fees. Based on this factual distinction, the board found that the charging parties here had standing.

The board also asserted that while the charging parties may not have suffered any financial harm because the fees were returned to them with interest, there was harm because *Hudson* was not being followed. That harm, said the board, could not be remedied by returning the fees. The board held that, taking the charging parties' assertions as true, the charges must advance through the board's hearing process to determine whether or not the tenets of *Hudson* had been met. The board ordered that the charges be remanded to the general counsel for issuance of a complaint.

Member Shek issued a separate concurring opinion in which she agreed with the majority's opinion that the B.A.'s dismissal based on *O'Malley* was in error. Shek noted the board had determined that because the union had exempted O'Malley from paying agency fees, he was not a fee payer and the agency fee regulations did not apply to him. Shek contrasted that to the present case in which the charging parties were ongoing fee payers, despite the refund of three months of agency fees. Shek agreed that the charges should be remanded to the general counsel.

Unfair practice charges withdrawn: UPTE.

(*Trout et al. v. University Professional and Technical Employees*, No. 1785-H, 12-8-05; 2 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: The unfair practice charges were withdrawn at the request of the charging parties.

Case summary: The charging parties originally appealed a board agent's dismissal of their unfair practice charges against the University Professional and Technical Employees. They alleged that UPTE's notification and escrow/refund procedures for agency fee payers violated *Hudson*. After UPTE filed a response to the appeal, the board received notice from the charging parties' representative that the cases had been resolved by the parties and the appeal withdrawn.

The board noted that, if a case appears on the board's docket, once it has been settled, one or both parties may request that it be withdrawn following settlement. The board will review the request to determine whether it is consistent with the governing statute and in the best interest of the parties. Citing *ABC Unified School Dist.* (1991) No. 831b, 88X CPER 15, the board observed it has discretion to grant or deny such a request to withdraw a charge and may even vacate a proposed decision. Here, the board reviewed the request and the entire record, and determined that granting the withdrawal was consistent with the purposes of HEERA and in the best interest of the parties. The board dismissed the charges with prejudice.

Unfair practice charge withdrawn: CSU.

(*Academic Professionals of California v. Trustees of the California State University*, No. 1788-H, 12-9-05; 2 pp. dec. By Member Neuwald, with Chairperson Duncan and Member McKeag.)

Holding: The unfair practice charge was withdrawn and the appeal dismissed without prejudice at the request of both parties.

Case summary: The union filed an unfair practice charge against the university, alleging that it had violated HEERA by unilaterally implementing computer policies at several campuses and a telephone policy at the San Luis Obispo campus. An ALJ issued a proposed decision, and both parties filed exceptions. The parties then developed a mutually satisfactory resolution of the issues and petitioned the board to withdraw their exceptions to the proposed decision without prejudice.

The board reviewed the record and determined that granting the withdrawal was consistent with the purposes of HEERA and in the best interest of the parties. The board granted the request to withdraw the charge and dismissed the appeal without prejudice.

Unfair practice charge withdrawn: CSU.

(*Academic Professionals of California v. Trustees of the California State University*, No. 1789-H, 12-9-05; 2 pp. dec. By Member Shek, with Members McKeag and Neuwald.)

Holding: The unfair practice charge was withdrawn and the appeal dismissed without prejudice at the request of both parties.

Case summary: The union filed an unfair practice charge against the university, alleging that it had violated HEERA by unilaterally implementing an “Ombuds Program” at several campuses. The board agent dismissed the charge, and the union appealed the dismissal.

Exceptions, but not underlying ALJ decision, withdrawn: CSU.

(*Academic Professionals of California v. Trustees of the California State University*, No. Ad-350-H, 12-9-05; 3 pp.

dec. By Chairperson Duncan, with Members Shek and Neuwald.)

Holding: Exceptions filed to the conclusion that the university failed to comply with ordered posting requirements were withdrawn and the appeal dismissed with prejudice at the request of both parties. No withdrawal of the ALJ decision was ordered.

Case summary: A board agent determined that the university failed to comply with the posting requirements ordered in an ALJ’s proposed decision. The university filed exceptions to the B.A.’s ruling but did not contest the merits of the ALJ’s proposed decision.

The parties then resolved the matter and requested that the board consider the matter closed.

The board observed that, even when a case has reached the board, the parties may continue to work to resolve the issues themselves and may be able to reach an agreement. The board reviews each request to determine whether it is consistent with the governing statute and in the best interest of the parties. When exceptions have been filed, PERB Reg. 32320 directs the board to either “issue a decision based on the record of hearing” or “affirm, modify or reverse the proposed decision, order the record re-opened for taking of further evidence, or take such action as it considers proper.”

The board noted that in this case the parties resolved only the issue related to compliance and did not address the substance of the ALJ’s decision. Accordingly, the board held the ALJ’s decision still stands. The board determined that granting the request to withdraw the exceptions to the compliance decision was consistent with the purposes of HEERA and in the best interest of the parties. The board granted the request to withdraw the exceptions and dismissed the appeal with prejudice.

Board remands agency fee cases consistent with *Abernathy*: UPTE, CWA Loc. 9119.

(*Aldern et al. v. UPTE, CWA Loc. 9119*, No. 1792-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Carter et al. v. UPTE, CWA Loc. 9119*, No. 1793-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Gill et al. v. UPTE, CWA Loc. 9119*, No. 1794-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Chanes et al. v. UPTE, CWA Loc. 9119*, No. 1795-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Welch et al. v. UPTE, CWA Loc. 9119*, No. 1796-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Boylan v. UPTE, CWA Loc. 9119*, No. 1797-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Van Sluis v. UPTE, CWA Loc. 9119*, No. 1798-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Cooper v. UPTE, CWA Loc. 9119*, No. 1799-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Lee v. UPTE, CWA Loc. 9119*, No. 1800-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Joshel v. UPTE, CWA Loc. 9119*, No. 1801-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Widman v. UPTE, CWA Loc. 9119*, No. 1802-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Brooks v. UPTE, CWA Loc. 9119*, No. 1803-H, 12-30-05; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: As agency fee payers, the charging parties have standing to file a charge, even though the union refunded the collected fees with interest. (See story in General section.)

MMBA Cases

Unfair Practice Rulings

County established prima facie case of failure to negotiate in good faith: County of Inyo.

(*County of Inyo v. United Domestic Workers of America*, No. 1783-M, 11-7-05; 4 pp. + 10 pp. R.A. dec. By Chairperson Duncan, with Member Neuwald; Member Shek dissenting.)

Holding: Based on the allegations in the charge, the county met its burden of showing the union failed to negotiate in good faith. Disputed facts are to be determined through the board hearing process.

Case summary: In May 2003, the county and the union agreed to a set of ground rules for negotiations which limited negotiations to the "negotiation team." In an addendum to the ground rules, the union agreed not to go to the county board with negotiation issues for 60 days.

Early in the negotiations, the union stated it would not accept a wage package below \$8.50 and its position would remain firm. Thereafter, the union sent a letter to the board of supervisors criticizing the county's best and final offer. In a second letter, the union asked the board to intercede in negotiations. The county filed an unfair practice charge alleging that the union violated the MMBA by sidestepping the ground rules, refusing to meet and confer in good faith, attempting to circumvent the employer's representatives, and refusing to discuss or agree to new or additional ground rules.

The board agent dismissed the charge, finding that the county had not demonstrated that the union had refused to deal with the employer's representatives. The B.A. held that the union's letters amounted to permissive public advocacy. Under the standard established in *Westminster School Dist.* (1982) No. 277, 56 CPER 16, the letters did not demonstrate that the union had unlawfully bypassed the employer's designated representatives.

The board found the B.A.'s decision to be in conflict with *Golden Plains Unified School Dist.* (2002) No. 1489, 156

CPER 91. There, the board held that any disputed facts or competing theories of law should be left for the board hearing process to address. The board agreed with the B.A. that adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith, but unlike the B.A., the board found the charge demonstrated that the union did more than just remain adamant. The board found the county presented sufficient information to establish a prima facie case of failure to negotiate in good faith. Moreover, the board announced that it was not necessary for the charging party to include all its evidence or theories of law in the charge.

In a dissenting opinion, Member Shek found the B.A. dismissal to be free of prejudicial error and supported by the facts and applicable law. Considering the elements of surface bargaining, Shek found that the union's firm stand on the wage increase, standing alone, was not enough to establish a prima facie case of refusal to bargain. Furthermore, Shek concurred with the B.A.'s finding that there was no evidence that the union refused to deal with the employer's chosen representative. She noted that the union had not presented any new proposals or concessions directly to the board or sought to engage in the give-and-take of direct negotiations with it.

Trial Court Act Cases

Board lacks jurisdiction over due process violations: Lake County Superior Court.

(Keiser v. Lake County Superior Court, No. 1782-C, 11-1-05; 4 pp. + 8 pp. R.A. dec. By Member McKeag, with Members Whitehead and Neuwald.)

Holding: The unfair practice charge was dismissed because the board lacked jurisdiction over the due process violation raised under the Trial Court Employment Protection and Governance Act.

Case summary: In 1999, Lake County modified its personnel rules and separated court employees into three bargaining units: non-management, management, and confidential. The change was made to comply with the Trial

Court Act, scheduled to take effect January 1, 2001. The Lake County Employee Organization continued to serve as the representative of the non-management employees after the separation. The confidential bargaining unit, comprised of judicial secretaries and lead judicial secretaries, remained unrepresented.

In 2004, the court modified its rules to comply with changes in the act and added meet and confer requirements for non-management court employees. However, confidential and management employees were provided with only a non-appealable disciplinary hearing before the Court Executive Committee.

Eva Keiser initially was hired as a judicial secretary in 2000. She later became lead judicial secretary. In 2004, the court learned that Keiser had been convicted of two misdemeanors which she failed to disclose on her job application. She was suspended for 60 days. During Keiser's suspension, the court discovered over 100 instances of work-related neglect and violations of court policy. When she returned to work, the court advised her of its intent to terminate her. Although not required under the personnel rules, the court offered Keiser the opportunity for an evidentiary hearing before an independent hearing officer.

In response, Keiser filed an unfair practice charge alleging the court violated the Trial Court Act by failing to meet and confer and provide her due process rights. Keiser asserted for the first time that she was being discriminated against for protected activity. Keiser also stated the court failed to provide her notice that she was not represented by an employee organization.

The regional attorney first noted that the Trial Court Act requires the court to give notice and an opportunity to bargain only to recognized employee organizations. The court is not obligated to bargain changes with individual employees in the absence of such an organization. Since confidential court employees did not have a recognized representative, the court did not violate the act by unilaterally changing the terms and conditions of employment.

The R.A. rejected Keiser's contention that the act required LCEA to represent all court employees because it

represented some employees before the act took effect. The R.A. held the act required only that the court continue to recognize existing exclusive representatives, which the court has done. The R.A. further disagreed with Keiser's contention that the act required the court to give employees notice they were not represented.

The R.A. held that Keiser failed to state a prima facie case that she was discriminated against. While Keiser alleged that she spoke with court reporters regarding their wages and hours, she failed to provide specific information about those discussions or proof that the court was aware of them. The R.A. also observed that although Keiser was aware of her confidential placement when she was hired in 2000, she did not complain until after she received the termination notice. Therefore, the charge failed to allege that Keiser engaged in protected activity or the required nexus.

On appeal, the board noted the act vests power to review due process violations with the court, not the board. Therefore, the board lacked jurisdiction over Keiser's claims concerning those violations. The board declined to decide whether it has jurisdiction over other provisions of the act. Lastly, the board noted that since Keiser was aware of her unit placement in 2000, that allegation was not timely filed and must be dismissed.

Higher Education

Compensation Practices Under Fire at U.C.

Recent revelations of undisclosed compensation for senior management employees at the University of California have roiled unions, students, and the tax-paying public. The university insists that very little of the \$871 million in extra cash identified by the *San Francisco Chronicle* went to senior manage-

U.C. contends below-market salaries for senior management affect recruitment and retention.

ment. U.C. contends the extra perquisites and compensation it has paid are necessary because its below-market salaries for faculty and senior management affect recruitment and retention. But several unions contend that the lagging salaries and recruitment and retention issues in their units are not treated seriously.

'Hidden Pay' Charged

In mid-November, the *Chronicle* ran a series of articles charging that the university had distributed \$871 million

in bonuses, severance pay, relocation expenses, and other compensation in 2004-05 that was not publicly reported. More than 105,000 of U.C.'s 121,000 employees got some share of the compensation, but \$599 million went to 8,500 employees who received at least \$20,000 over their regular salaries.

The *Chronicle* trumpeted extreme examples. David Kessler, dean of the U.C. San Francisco School of Medicine, not only had an annual salary of \$540,000 in 2003, the paper reported, he also received a relocation allowance of \$125,000, reimbursement of expenses he incurred in moving from Connecticut, round-trip airline tickets for his family to look for housing, \$30,000 for six months' rent, and a low-interest home loan. When M.R.C. Greenwood, the former chancellor at U.C. Santa Cruz, moved from her university-provided residence in Santa Cruz to Oakland to become provost in 2004, she was paid \$125,000 in addition to her \$380,000 salary, as well as \$17,950 for temporary housing, \$9,527 for moving expenses, and a low-interest loan to buy a condominium, the *Chronicle* disclosed.

Recently, the *San Diego Union-Tribune* reported that U.C. San Diego Chancellor Marye Anne Fox received \$700,000 last year. The regents had

approved only a \$350,000 salary, \$87,500 relocation allowance, and expenses she incurred when she moved from her job in North Carolina. But the university also paid her \$248,000 for a sabbatical she had earned in her prior job, but had not taken.

Most to Faculty and Staff

The university has called the charges of secret compensation misleading and counters the impression that most of the sum went to senior management employees. The \$871 million is the difference between base

The university has called charges of secret compensation misleading.

salaries of employees and the total compensation paid, not including overtime pay, U.C. says.

More than 69 percent of the money went to faculty, the university asserts. Approximately \$151 million was paid for summer session teaching and research, activities beyond the nine-month academic year for which faculty outside of the health sciences are appointed. The Academic Personnel Manual provides that faculty can receive additional compensation for teaching during the summer session and for non-university funded research.

Another \$449 million went to professors in the health sciences schools, many of whom practice their profession in university clinics and hospitals in addition to teaching. They may be paid above their base salaries with non-state money under the university's Health Sciences Compensation Plan, which seeks to provide "a competitive salary structure indispensable to the health sciences schools' recruitment and retention efforts." The plan uses fees from professional services at U.C.'s hospitals and from other sources to add to the base salaries of health sciences faculty or for bonuses and incentive pay.

Some of the \$871 million went to unionized employees, the university points out.

About \$8.5 million went to some newly hired faculty under the category of temporary housing allowances. None of the amount identified as temporary housing allowance was paid to senior managers in 2004-05, according to U.C.

Some of the \$871 million went to unionized employees, the university points out. About \$70 million was shift differential pay for unionized and unrepresented employees — mostly at the five medical centers and the Department of Energy laboratories — who worked evening, night, weekend, holiday, or "on-call" shifts. DOE lab employees are not paid with state general funds.

Another \$57 million was paid to contract workers or through contractual agreements. The university pays some students and research fellows with funding provided by grants or outside funding agencies. Some non-tenure-track professors and university extension program teachers are paid under contract. Student employees are sometimes paid by the assignment rather than on an hourly basis. The labor contract between U.C. and its police officers union required payment of \$500,000 to officers who had attained Peace Officer Standards and Training certification. Some of this category of payments is due to unusual accounting practices at certain campuses, such as recording paid compensatory time as contract payments.

Different Perks

Senior management, a group of about 360 employees, received \$7 million of the total for severance pay, unused vacation at separation, stipends, automobile allowances, and performance bonuses or incentive pay. Only automobile allowances are unavailable to employees outside of senior management, but certain items of compensation were paid to senior management pursuant to policies that are more lucrative for them than for other employees.

For example, U.C. identified \$14 million in severance pay to employees who left university service, approximately half of which went to DOE laboratory employees. About \$500,000 of the remainder was paid to laid-off unionized employees who chose to forego preferential recall and rehire rights in return for severance pay man-

dated by their collective bargaining agreements. Unrepresented professional and support staff employees who have been laid off have similar rights under the Personnel Policies for Staff Members.

But senior managers, who received \$2.5 million in severance payments, accrue severance pay in the same way most employees accrue unused vacation. They earn an amount equal to 3 to 5 percent of their monthly compensation each month. Upon separation from the university, an employee receives a lump sum unless involuntarily terminated. If the employee dies while em-

Senior managers accrue severance pay the way most employees accrue unused vacation.

ployed, the payment goes to the beneficiary. Policy dictates that these payments may not be made from the university's general funds, which include state general funds and student fee revenues.

Another \$40 million was paid out in unused vacation leave to employees who left U.C. employment. Of that, \$1 million was earned by senior managers, who earn vacation at a faster rate than some other groups of employees. Professional and support staff who have been employed less than 10 years earn 15 days vacation each year. Senior managers, managers and senior profession-

Finally...a resource to the act that governs
collective bargaining at the University of California and
the California State University System

Pocket Guide to the Higher Education Employer-Employee Relations Act

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

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

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als, however, earn 18 days annually with less than five years of service and 21 days annually if employed more than five but less than 10 years. It takes support staff 20 years to earn the 24 days of annual vacation that senior managers, managers, and senior professionals earn when they reach their 10-year anniversary, and that some non-faculty academic employees earn from the first day of employment. Faculty on nine-month appointments do not accrue vacations.

Automobile allowances totaling \$500,000 went to senior managers, the university asserts. Monthly allowances of \$743 are for employees who are not required to use a university car.

The university paid stipends worth \$26 million to employees “for undertaking temporarily assigned responsibilities that are outside the scope of an employee’s regular responsibilities and usually of a higher-level position.” Only \$500,000 of this sum was paid to senior managers. The policy for senior managers states that they ordinarily do not earn additional compensation for temporary additional duties, but in the exceptional case can earn a stipend up to 15 percent of their base salary for the year. Some unionized employees, such as clerical workers and researchers, earn out-of-classification pay at a higher rate than their regular pay if they work at least 20 days full-time in a higher classification. The rate is usually 4 to 4.5 percent higher unless the minimum rate of the higher classification is greater.

U.C. identified an additional \$58 million paid to employees who earned special performance awards, incentive pay, or bonuses. Only \$2.5 million — 4.3 percent of this amount — went to senior managers, who constitute about .3 percent of the university’s 121,000 employees. U.C. policies provide that senior managers may receive incentive awards, like other unrepresented staff, to reward significant achievement or outstanding performance.

*Most clerical
employees’ salaries are
more than 20 percent
below market.*

Competition Cited

Although university leaders have pledged to make compensation decisions more visible to the public, U.C. asserts that its pay practices are necessary to preserve the quality of the institution. The average chancellor salary of \$312,370 lags that of peers in comparable universities by 33 to 38 percent, it emphasizes. The university acknowledged that the salary set for four new chancellors at Berkeley, Santa Cruz, San Diego, and Irvine is 26 percent higher than their predecessors, “in keeping with market requirements.”

In fact, as employee unions have been complaining for years, the salaries of most U.C. employees are below market rate. An independent factfinder last year reported that most clerical employees’ salaries are more than 20 percent below market. Researchers claim that they are paid 25 percent less than market rate. A study by Mercer Human Resource Consulting, prepared for the regents’ September 2005 meeting, concluded that employee salaries, excluding those at the labs and medical centers, lag the market by an average of 15 percent, but that U.C.’s benefit programs brought the university as a whole to market level in total compensation.

But the university has begun increasing employee contributions to health and welfare premiums, and will reinstitute employee retirement contributions in a couple of years. These actions will decrease the value of the benefits. In September, members of the regents’ Committee on Finance proposed board adoption of a resolution to establish goals to increase salaries of all groups of employees to market level between 2006-07 and 2015-16.

The committee also proposed new procedures for setting senior leadership compensation that it asserted would be “clear, comprehensive, and accountable.” The regents would continue to approve salaries for 32 senior positions. But the university president would have the authority to determine salaries for other senior management within salary ranges approved by the regents.

Only salary increases that result in salaries that exceed the range maximum or that are greater than 15 percent in one year would be subject to the regents' approval.

The academic senate reacted positively, though guardedly, to the proposals. It agreed that the salaries of all groups should reach market parity "in as short a time as possible and without any decrease in total compensation." However, it insisted that priority be

The academic senate insisted that salary increases for senior management be 'proportionate' with those of other employees.

given to employees most central to the teaching, research, and service missions of the university, and that salary increases for senior management be "proportionate with those of other employee groups." It demanded that it be allowed to review planned compensation structures for senior management and that the structures be "instituted in a measured fashion with transparency and accountability, and include appropriate consideration of performance."

Raises and Higher Ranges Adopted

Two days after the *Chronicle* published the initial articles, the regents adopted both the proposals to ensure competitive salaries for all university employees and to adopt new senior management compensation procedures.

The next day, the U.C. board of regents approved "regular, annual merit increases" averaging 2.5 percent for senior management, a group that does not receive cost-of-living increases. Even recently hired chancellors at the Irvine, Santa Cruz, and San Diego campuses received 2.5 percent merit increases. U.C. announced that unrepresented staff employees received general salary increases "based on a 3.5 percent funding pool." In fact, the funding is to be distributed as annual merit increases. Several bargaining units received 3.5 percent increases on October 1, but some, such as researchers and technical employees, received only 3 percent raises. (See story on p. 52-55.)

Academic salary scales, including those of librarians and faculty, rose only 2 percent, despite evidence that faculty salaries lagged those of their competitors by 9.3 percent in 2004-05, and would fall further to 13.9 percent below market without raises in 2005-06. Funding equivalent to 1 percent of salaries is available for merit increases, but academic employees receive merit increases only once every three years.

Union leaders protested what they viewed as different treatment. Kathryn Klar, president of the Berkeley local of

the University Council-American Federation of Teachers, wrote to local members:

While UC argues that executive salaries are 15% below industry average, and that the cost of living in the Bay Area necessitates offering large housing perks, they refuse to recognize the same salary discrepancies for librarians and lecturers, or to even consider cost-of-living as a factor in setting our salary scales.

Union leaders protested what they viewed as different treatment.

As *CPER* went to press, the regents approved a plan to place senior management in specified salary ranges and to give the president of the university the authority to grant up to 7.5 percent increases within those ranges without regent approval. Compensation of those earning more than \$200,000 would need the sanction of the regents. The highest proposed salary range would have a minimum of \$494,700 and a maximum of \$791,600. *

U.C. Settles With Four Unions

In a few short weeks, the University of California wrapped up negotiations with four unions representing five units of university employees. Lengthy negotiations with the Coalition of University Employees and the University Professional and Technical Employees, CWA Local 9119, suddenly concluded in December. A contentious battle with the California Nurses Association also resolved. (See story on p. 57.) The university succeeded in its effort to insert in each contract clauses that prohibit unit members from engaging in sympathy strikes with other unions. Legal uncertainty regarding whether general no-strike clauses bar sympathy strikes had led to demands for a clear ban as nurses, clerical employees, researchers, lecturers, and technical employees walked off the job in support of recent CUE and UPTE job actions. All bargaining units now have agreed not to engage in sympathy strikes, according to U.C. spokesperson Noel Van Nyhuis. While the language does not appear in the contract that covers health care workers represented by UPTE, Van Nyhuis told *CPER* that the bargaining history clearly waives their right to engage in such strikes.

Librarians

Reopener bargaining between the university and the University Council-American Federation of Teachers,

which represents about 400 librarians, concerned only salary, professional development funds, and the right to work rather than take forced vacation leave when the campus is closed during the winter holidays. As the contract already guarantees that unit members will receive the same general range adjustments that non-represented academic employees receive, UC-AFT focused on attempts to bump up the salaries of its lowest-paid unit members.

The librarians' general range adjustment for 2005-06 is only 2 percent.

Librarians argued that their salaries increased 54 percent between 1985 and 2003, while the consumer price index for urban wage earners increased 68.6 percent. Nevertheless, U.C. informed the union that the general range adjustment for 2005-06 would be only 2 percent, although the state provided a base revenue increase of 3 percent for employee raises. The remaining 1 percent would be reserved for merit increases. UC-AFT proposed non-general range adjustments that boosted lower salaries more than higher ones, in addition to the 2 percent raises.

U.C.'s response was to restructure the 2 percent increase so that higher-paid employees would receive only 1 percent and lower-paid librarians would receive raises of up to 5 percent. The union's attempt to add \$2,100 to each employee's salary, in addition to the 2 percent increase, also failed. UC-AFT was successful only in raising the bottom step of the assistant librarian range from \$37,920 to \$39,000 effective October 1, 2005, and then to \$40,008 in October 2006. General range adjustments in 2006-07 will be 2 percent, and in 2007-08 will be 3 percent, contingent on the state increasing base revenues 3 percent and 4 percent respectively, as the governor promised in his compact with U.C.

The librarians gained a 24 percent increase in funds available for attending conferences and other professional development, one criterion the university considers in awarding merit increases. A side letter makes clear that librarians at UCLA will have the same rights as those on other campuses not to be unreasonably denied the opportunity to make alternative arrangements to work during holiday closure of the libraries.

Researchers and Technical Employees

After a year-and-a-half of bargaining for a successor contract, frustrated UPTE leadership decided in December to allow members in the researcher and technical employee units to vote on U.C. offers for a four-year contract

that the bargaining team would not accept. The team, which represents approximately 4,600 researchers and 4,200 technical employees, was taking a firm stand against the university's demand to waive the right to engage in sympathy strikes and was insisting that U.C. pay employees step increases in addition to passing on the cost-of-living raises from state funding. (See story in *CPER* No. 173, at pp. 33-34.)

UPTE placed before its members two pay-package options for ratification. Neither option contained raises for 2004-05, and both were contingent on state funding increases for the university being exactly 3 percent in 2006-07 and 4 percent in 2007-08. In the straightforward cost-of-living increase option, pay would have been boosted 3.5 percent on October 1, 2005, 4 percent on October 1, 2006 (only 3.8 percent for technical employees), and 4.5 percent on October 1, 2007. The lower COLA for technical employees is due to equity increases of 2 to 10 percent that the technical unit gained for some classifications.

The other option provided for increases, in January 2007 and 2008, to employees whose performance is satisfactory or better. The university and the contract refer to these increases as "merit" increases; UPTE refers to them as step increases. Despite a lack of step increases in 2005-06, the COLA will be only 3 percent. On October 1, 2006, another general raise of 2.8 percent (2.7 percent for technical employees) will occur, and on October 1, 2007, employ-

ees will receive an additional 3.8 percent across-the-board increase (3.7 percent for technical employees). The merit increases are half-step increases that will range from 2 percent to 2.3 percent for different classifications of employees.

The bargaining team argued that the university was saving money in the long term by offering the step-increase proposal. The university would save money with step increases because it offered a lower across-the-board increase, using funds that would have gone to general raises to pay step in-

The UPTE bargaining team recommended against ratification.

creases. The problem with this approach, according to the union, is that step increases do not result in higher compensation to the bargaining unit due to high turnover among technical and research employees. As a result, the bargaining team calculated that the step proposal would cost the university \$14 million less than the across-the-board plan over the four-year term of the contract. In addition, the team noted, the salary ranges do not increase as fast, and therefore do not keep up with inflation or the market, if across-the-board raises are reduced in exchange for steps.

Van Nyhuis told *CPER* that the cost difference in the two proposals from the university's perspective is negligible. "Since we don't know how UPTE calculated the costs of the proposals, we don't know how to gauge that," he said when asked to respond to the claim of a \$14 million difference in the value of the two packages.

Although the bargaining team recommended against ratification, and particularly against the step-increase option, the executive board recommended ratification of the step-increase alternative. The university's step proposals were ratified in both bargaining units at all campuses except among Berkeley technical employees.

In addition to the step and range increases, employees will receive a \$220 ratification bonus. Committees have been established to study further equity increases and to analyze the hotly disputed cost of longevity step increases and turnover savings. Shift differentials will increase, and the contract now requires premium pay for all holiday hours worked.

UPTE gained language that will preserve the status quo for retirement contributions and retirement health benefits through July 1, 2007. UPTE retains the right to strike, after impasse, over retirement benefits bargaining, which may begin this year. The contract will expire on June 30, 2008.

Clerical Employees

CUE, which represents approximately 16,000 clerical workers and

child-care employees, was the last of the four unions to settle with the university. With the help of a mediator, the parties tentatively agreed on a four-year contract to succeed the one that expired in September 2004. The results of a ratification vote will be announced in the middle of this month.

CUE started bargaining by asking for a 21 percent increase over a three-year contract, but it ended up with a 12 percent increase over a four-year contract. A 3.5 percent increase retroac-

A 3.5 percent increase will be followed by a 5.1 percent equity increase for library assistants.

tive to October 1, 2005, will be followed by a 5.1 percent equity increase for 750 library assistants whose salaries are 33 percent below market wages. In addition, the top steps of most salary ranges will increase by 9 percent.

On October 1, 2006, clerical employees will receive a 3.25 percent increase, contingent on the university receiving a 3 percent increase in base funding, and library assistants will advance 2.25 percent within their ranges. On October 1, 2007, salaries and salary ranges will rise another 4.5 percent, contingent on the university's receipt

of a 4 percent funding increase. The top steps of most salary ranges will rise another 4.5 percent.

A lump sum of \$180 will go to each unit member employed in December 2004. This sum, and the ability to carry over eight hours of professional development leave from one year to another, settles a dispute over forced vacations during winter holiday curtailment periods. The university refused to agree to give clerical employees two bonus vacation days as it did to employees represented by UPTE and the American Federation of State, County and Municipal Employees following bargaining in December 2004. (See story in *CPER* No. 170, pp. 64-66.)

CUE obtained language that prohibits the university from making changes to retirement benefits until July 1, 2007. After that point, the university may bargain changes that reduce retirement benefits, but the union will have the right to strike after impasse.

CUE agreed to parking fee increases and to hefty employee health benefit contribution increases. Those employees earning less than \$40,000 annually — most of the unit — will see their health maintenance organization contributions for two adults or family rates rise more than 50 percent, although contributions for Kaiser's plan remain under \$12 monthly. Employees who earn more make higher contributions. Because wage increases will move more employees into the higher bracket, CUE demanded discussion of a plan to index the tiers so that they will

rise along with salary-range increases. The university agreed to meet in April on the proposal.

U.C. gained an ability to use temporary "floater" employees for up to 36 months instead of only 24 months. CUE garnered an increase from 30 to 45 days minimum notice of layoff and an increase in severance pay for short-term employees who give up their rights to be recalled after a layoff.

CUE agreed to parking fee increases and to hefty employee health benefit contribution increases.

In a separate side letter, U.C. agreed to drop an unfair practice charge it filed over CUE's strike and sympathy strikes with other unions last spring. Disciplinary actions resulting from participation of unit members in the strikes will be rescinded, and any reductions in pay will be refunded.

Yet another symptom of the unions' distrust of U.C.'s compensation practices is the establishment of a joint compensation committee. The university agreed to meet with CUE this month to account for the funding earmarked for equity increases for library assistants. Since the percentage of library assistants varies from campus to cam-

pus, but .5 percent of the unit's payroll will be available for the equity increases on each campus, CUE anticipates that some money will be left over at certain locations. The parties will bargain the distribution of the remaining funds. If unable to reach agreement, the dispute will go to mediation and, if unresolved, to a three-member panel for a binding

decision. The parties also agreed to meet quarterly to discuss salary surveys, compensation methodologies, additional funding for staff salaries, and the specific means of reaching the regents' recently announced goal to bring all employees' salaries to market rate in 10 years. *

ket-equity increases in certain staff classifications represented by the CSU Employees Union, SEIU Local 2579, CSEA. In recognition of the serious market lags, the university did not insist on retaining a pool of funds for merit increases, but instead applied the entire 3 percent to across-the-board raises and step increases in 2005-06. Because faculty salaries lagged the market by at least 13 percent in 2004-05, CSU agreed to boost their pay 3.5 percent. (See story in *CPER* No. 175, at pp. 41-42.) Employees represented by other unions received raises of 3 or 3.5 percent, in addition to other small compensation increases.

CSU Executive Pay

Employees at the University of California are not the only ones shocked at news about the compensation of their executives. Late last fall, the Board of Trustees of the California State University voted to raise the pay of its executives an average of 13.7 percent and, at the same meeting, raised student fees for the next school year 8 percent to an amount that is 76 percent higher than four years ago. Executives at CSU receive similar benefits to those of faculty and staff. But two benefits that other employees do not have, housing and automobile allowances, were also boosted for the chancellor of the system and 23 campus presidents. All executive compensation is paid with state funding and student fees.

Salary Lags

As the California Postsecondary Education Committee reported in October 2004, the salaries of the chancellor and presidents of CSU have lagged the average salaries of their counter-

parts at 20 comparator institutions since at least 1993-94. In 1996-97, they were 32 percent below market rate, but the lag was reduced to just under 9 percent in 1999-2000. However, by 2003-04, average compensation of CSU executives was 37.8 percent below their peers at institutions such as Arizona State University and the University of Colorado.

Board policy provides that its executive compensation should approximate the mean for comparable positions in the 20 comparator institutions. In 2002, the trustees discussed their concern that low salaries were affecting their ability to recruit campus presidents, but they took no action because of the state budget crisis.

When the state provided a funding increase of 3 percent for salary increases and other inflationary costs this year, however, the trustees decided to address the salary lags of all CSU employees. It threw in an extra .5 percent increase beyond the 3 percent for mar-

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Then it was the executives' turn. According to a presentation of the Committee on University and Faculty Personnel, Mercer Human Resource Consulting found in its January 2005 study that the difference between CSU executives' salaries and their peers' pay had grown to 49.5 percent. The committee reasoned that, since CSU had closed about 27 percent of the faculty

salary gap, it should narrow the executives' gap by the same percentage.

The trustees approved the committee's recommendation for salary increases for the presidents, chancellor, and other system officers. According to CSU policy, the salary of a campus president is based on the mission, scope, size, complexity, and programs of the campus as well as the leadership and merit assessment of the president, regional costs of living, and

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recruitment and retention concerns. Although the average of the increases was 13.7 percent, several individuals received \$40,000 raises, representing more than a 20 percent increase. Presidents' annual salaries now range from approximately \$220,000 at the Maritime Academy and Monterey Bay campus to about \$286,000 at California Polytechnic University in San Luis Obispo. The chancellor's salary rose to \$362,500 annually.

Benefits

Executive benefits do not differ significantly from the fringe benefits and leave provided to other employees,

except for an enhanced life insurance policy and a long-term disability plan that is provided to management, faculty, and a few other groups of employees. Executives also receive the same paid leave as management and faculty, except for a "transitional leave" for a year after the executive quits CSU service. However, in addition to these benefits, executives are provided with either a CSU-owned residence or a housing allowance, and an automobile or a car allowance.

Noting that California's housing market has "exploded" since 2000 as the median house price has more than doubled, the committee recommended an increase in housing allowances for those for whom there is no available CSU residence. The prior housing allowances ranged from \$23,000 to nearly \$37,000 annually. The trustees approved increasing the allowances to \$50,000 for some campuses and \$60,000 for others. In addition, the trustees raised automobile allowances from \$750 per month to \$1,000 per month.

Faculty and staff were floored by the compensation hikes. The California Faculty Association observed that the combination of raises and increased allowances for many of the presidents amounted to more than the starting salary of most assistant professors. CSUEU derided the move as "shameful."

Plan to Boost All Pay

The trustees did hear about a plan to raise the pay of all employees to market levels over five years, but the proposal did nothing but enrage students. Trustees Roberta Achtenberg and William Hauck announced a plan to raise student fees by 8 percent next year and 10 percent annually for the following four years to be able to afford the pay increases. In its press release, CSU observed that student fees would be at the

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same level as they are today if they had risen 10 percent a year for the last 24 years. The Consumer Price Index for urban consumers in the west has risen less than 7 percent every year in that time period, including the dot.com boom years. The student trustee, Corey Jackson, protested, "Starting today, I will no longer call them fees. I will call them student taxes." *

Nurses Settle With U.C.

A neutral factfinder helped the University of California and the California Nurses Association reach a new two-year contract to replace the collective bargaining agreement that expired in July. The pact provides all 9,000 registered nurses with at least a 6 percent raise during the 2005-06 year. The parties agreed in September that U.C.

A showdown over increased employee contributions to retirement was delayed.

could implement its proposed market increases, which varied by location and classification, without settling the full contract. Another 4 percent across-the-board raise became effective January 1, except that clinical nurses at U.C. Los Angeles received an 8 percent increase. In March, U.C. will boost the salaries of its San Francisco nurses another 3 percent. The total increase for some nurse anesthetists at UCSF and nurse practitioners in San Diego will reach nearly 30 percent, while most nurses in the student health centers will see increases of only 6 to 7 percent.

Nurses no longer can be forced to work overtime except during emergencies. In addition, CNA prevailed on its

demand that minimum nurse-to-patient ratios be incorporated into the collective bargaining agreement, a contentious issue that led to a near-strike in July until the Public Employment Relations Board obtained a court injunction at U.C.'s request. (See story in *CPER* No. 173, pp. 35-37.) Each medical center will address conflicts over staffing ratios through its Professional Practice Committee. Unresolved disputes may be taken to binding arbitration. The committees also will be involved in decisionmaking over new technology that CNA worries will replace nurses' judgment and will reduce their patient advocacy role.

The union also gained an agreement that each medical center will implement a policy that provides for assistance to nurses who need to lift patients. Nurses have been requesting round-the-clock lift teams or lift devices to prevent injuries at work.

A looming showdown over increased employee contributions to retirement benefits was delayed for another year. The university agreed that it would make no changes to pensions through June 30, 2007. Retiree health benefit contributions that are promised to employees who retire with at least five years of service are safe through December 2006.

CNA agreed to hikes in employee contributions to health care premiums that apply to all U.C. employees. Dur-

ing reopener negotiations for 2007 benefits, the union plans to demand a health maintenance organization plan that is free for families.

In April, the parties will reopen bargaining on penalties for missed meal times and breaks, in addition to salaries and benefits. In 2000, private hospitals in California became subject to penalties if nurses were not allowed mandatory 15-minute breaks and lunch. CNA claims that U.C. nurses routinely are forced to skip breaks and

U.C. expressed frustrations with CNA's bargaining behavior.

meals, and the association hopes that it can pressure the university to provide relief nurses for breaks.

After the contract was ratified in mid-December, U.C. expressed its frustrations with CNA's bargaining behavior. In addition to asserting that the union had used the bargaining process to promote its political battles over staffing ratios and lift teams, the university complained in a bargaining update that CNA already was threatening to strike this summer. In its announcements to its membership, the union had touted the fact that the new agreement preserves the union's right to strike over salaries, retirement, and health benefits mid-contract. It could not be clearer that the parties anticipate another round of contentious negotiations this year. *