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letter from the editor

Dear *CPER* Reader:

In my "off-duty" hours, I have been immersed in the latest volume of a trilogy centered on the life of Dr. Martin Luther King, Jr. In *At Canaan's Edge: America in the King Years 1965-68,* Taylor Branch offers a detailed historical account of the struggle to win voting rights for African Americans during this period of the Civil Rights Movement. Branch recounts the specific events that inched the country along the road in that battle.

For me, among the book's many revelations is the extent to which the country has changed when measured against my own lifetime. While I hasten to add the obvious — that the attainment of civil rights still has not been achieved for all Americans — it is nonetheless nearly incomprehensible to think that as I sat in my 9th grade social studies class, African Americans were not allowed to vote. That the occurrences described so eloquently by Branch have temporal ties to my adolescence somehow personalizes the enormity and significance of the civil rights struggle.

Other changes to the social and political landscape have been witnessed by those of us whose professional histories go back to the earlier days of California labor relations. In fact, this issue of *CPER* marks an important milestone — the enactment 30 years ago of the Educational Employment Relations Act. To kick off what we hope will be a series of historical perspectives, well-known labor lawyer Stewart Weinberg takes us back to the pre-EERA days, when the Winton Act defined the bargaining relationship in California's public schools…inadequately so, in his opinion.

In future articles, we plan to explore how, coincident with EERA, the Public Employment Relations Board first flexed its muscle as the new agency on the block. We invite you to share any recollections you may have about the challenges and/or opportunities that emerged with enactment of the Rodda Act.

In addition to an historical perspective, this issue offers insights into many important recent developments. Three opinions of the board are highlighted along with some groundbreaking court decisions. Bargaining updates from jurisdictions throughout the state also are included. As always, you'll find this issue is one-part commentary, one-part "town crier," and one-part historical archivist.

Sincerely,

Carol Vendrillo
CPER Director and Editor

The Winton Act: A History Lesson About Special Interest Legislation

Stewart Weinberg

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Labor relations practitioners who began their careers after January 1, 1976, could, with some justification, simply accept the Educational Employment Relations Act[1] as a fact of life which, like Aphrodite, simply appeared out of the foam of the ocean.[2] It is the law, why worry about what preceded it? Because there is much truth to the saying that a people who forget the lessons of history are doomed to repeat its mistakes. One of history's mistakes was the Winton Act.[3] Contrary to the statement in a 1969 California Court of Appeal decision that "[I]t cannot be assumed that the Legislature in enacting the Winton Act had as its ulterior and improper motive the perpetuation in power of a monopoly organization,"[4] the Winton Act actually was designed for the purpose of shielding the dominant California Teachers Association from the aggressive competition of affiliates of the California Federation of Teachers.

The Educational Employment Relations Act was the first legislation in California that accurately could be described as a "little National Labor Relations Act." EERA created a statewide administrative agency comparable to the National Labor Relations Board, and charged it with (1) determining appropriate bargaining units in the public education system at levels kindergarten through 12 and community colleges; (2) conducting elections for exclusive representatives; and (3) enforcing the right of public employees to meet and confer with their public school employers through exclusive representatives with the objective of obtaining a collective bargaining agreement. Although there already had been legislation in the field of public sector labor relations, that legislation was not an adequate response to what the Court of Appeal said existed in *California Federation of Teachers v. Oxnard Elementary School*:[5] "The air is stirring with the demands of public employees for recognition and the right to organize in the interest of influencing their employment conditions, and they are entitled to have these demands

acknowledged and accorded to them within reasonable statutory bounds and limitations."[6] Workers in the public sector were becoming increasingly aggressive in pursuit of what they believed to be their inherent rights to organize. This carried with it the implied threat of the interruption of the services they were providing to the public.

In 1957, the legislature enacted the Los Angeles Metropolitan Transit Authority Act, which gave employees of that agency the right to form labor organizations and engage in meeting and conferring with their employers. In 1959, the California Fire Fighters Act extended to firefighters the right to self-organization, but it pointedly denied to them the benefits of Labor Code Sec. 923. Section 923 generally states that the policy of the State of California is that the negotiations of terms and conditions of labor should result from voluntary agreement between employers and employees; therefore, individual workers should have full freedom of association, self-organization, and designation of representatives of their own choosing to negotiate the terms and conditions of their employment free from the interference, restraint, and coercion of employers. That language has been interpreted to mean that workers in California had the right to strike and engage in other "traditional" economic tools of labor.

The Winton Act, with one major exception, did nothing that the Brown Act had not already done for teachers. But the exception was important.

The first non-occupational or employer-specific legislation for employees of public agencies fairly can be said to have been the George Brown Act of 1961.[7] The Brown Act provided that employees of "the various public agencies in the State" had the right to form and join employee organizations that have as one of their primary purposes the representation of public employees and their relations with the public agency employer.[8] Once again, the legislature specifically provided that Labor Code Sec. 923 did not apply to public employees.

In 1965, the legislature passed the Winton Act. Public school employees already were covered by the 1961 Brown Act. Under the Winton Act, teachers were given the right to have their organizations recognized, and to meet and confer through them with their employers. But "meeting and conferring" did not result in written collective bargaining agreements. The Winton Act, with one major exception, did absolutely nothing that the Brown Act had not already done for public school teachers. But that exception was a very important one.

The Agenda Behind Negotiating Councils

The Winton Act created the "negotiating council." To understand the negotiating council, one must be aware of the competition that was going on in the world of public school labor relations. Although there were many public school teacher organizations, the two largest were the California Teachers Association, affiliated with the National Educators Association, and the California Federation of Teachers, affiliated with the American Federation of Teachers and the AFL-CIO. Other organizations tended to be ordered along lines of interest, such as reflecting the concerns of teachers of English or of teachers identified by ethnicity.

CTA was, and is, the largest organization representing public school professional employees in the State of California. One of its functions was in representing those employees with regard to wages, hours, and other terms and conditions of employment. But, in response to pressures coming from CFT, CTA billed itself as "more than a labor union." To give CTA its due, throughout its history, it has been a very effective lobbying organization on behalf of public school teachers and other public school professionals. Its success in getting the Winton Act adopted is evidence of its lobbying influence. CTA also has always provided outstanding benefits and legal services to its members and public school professionals. However, in the decades preceding the enactment of the Educational Employment Relations Act, CTA was not institutionally

interested in pursuing a traditional labor relations policy. CFT, an affiliate of the AFL-CIO, had as its principal tenet the organizing of teachers for the purpose of collective bargaining and obtaining written contractual guarantees from their employers.

CFT was a noisy upstart and, for the most part, a minority organization with certain exceptions in some large public school and community college districts. Generally, however, where local unions of CFT existed, chapters affiliated with CTA usually represented a majority of the certificated employees of the district. That fact rarely stifled CFT activists, who insistently demanded the attention of governing boards of school districts in reliance upon the Brown Act. The solution hit upon by CTA to the competition posed by CFT was the Winton Act, and specifically the negotiating council. Assemblyman Gordon Winton introduced legislation at the behest of CTA.

The Winton Act removed teachers from the Brown Act and invented the negotiating council. The council was to be formed *only* where there existed in a single school district two or more employee organizations seeking to represent certificated employees. In that event, a district was to form a negotiating council consisting of between five and nine members of employee organizations who were entitled to representation on the council in numbers that bore "as nearly as practicable the same ratio to the total number of members of the negotiating council as the number of members of the employee organization bears to the total number of certificated employees of the public school employer who are members of the employee organizations representing certificated employees."[9]

The governing board of the school district was enjoined to meet and confer only with the negotiating council. In other words, where there were rival organizations, the negotiating council was the exclusive medium for teacher representation, and the council would have to reflect the proportionate membership of the organization of the district. Where the CFT affiliate was a minority, the mere fact that it had creative activists would not be sufficient to permit that organization to represent the interests of its members or teachers generally. The Winton Act not only silenced CFT in those districts; the progressive programs it advocated lost their proponents.

Court Challenges to Winton

Apologists for the Winton Act denied that this measure silenced minority organizations. However, the cases interpreting the act belie that contention. The first reported challenge to the Winton Act occurred in the Berkeley Unified School District. The Berkeley Board of Education had been persuaded by the Berkeley local of CFT to hold a districtwide election of teachers for the purpose of selecting the nine members of the negotiating council. CTA's affiliate in the Berkeley USD immediately went to court and obtained an injunction to prevent such an election. The trial court agreed with the Berkeley Teachers Association, and the California Court of Appeal affirmed the issuance of a permanent injunction in *Berkeley Teachers Assn. v. Board of Education.*[10] The Court of Appeal held that a districtwide election was inconsistent with the Winton Act and that once the formula for the number of representatives accorded to rival organizations had been established, the organizations were free to use their own means to determine who the members of the negotiating council were to be.

Apologists for the Winton Act denied that the measure silenced minority organizations. However, cases interpreting the act belie that contention.

The second challenge to the Winton Act was filed by CFT and its affiliate in the Oxnard Elementary School District. In that case, *California Federation of Teachers v. Oxnard Elementary Schools,*[11] CFT engaged in a head-on, full-blown attack on the Winton Act, including its constitutionality. In a lengthy opinion, the California Court of Appeal rejected all of CFT's assaults. The court held that

the constitutional requirement of uniform operation of law did not compel the state to treat each member of its population in precisely the same manner. The legislature had wide discretion in establishing classifications, and the Winton Act was not, in the view of the court, an unreasonable exercise of that discretion:

> [C]ontrary to appellants' contentions, the minority organization is not by the Winton Act deprived either of meeting and conferring as to individual member grievances or *of presenting its proposals directly to the school board.* Where multiple employee organizations representing certificated employees exist in a single district, both the public school employer and the public school employee organizations are enjoined to negotiate through the Negotiating Council medium, but the act does not preclude one of such organizations from presenting proposals directly to the employer even though meeting and conferring on such proposals must be accomplished through the Negotiating Council.[12]

CFT, according to the Court of Appeal in *Oxnard*, did not demonstrate that the negotiating council had failed, in bad faith, to consider or present the CFT affiliate's proposals or to meet and confer with the governing board about the ideas and proposals of CFT's affiliate. The court noted, however, that the Winton Act did not specify what attention must be paid by the negotiating council to the proposals espoused by minority representatives of the council. The burden would be on the minority organization to show bad faith in the exercise of the discretion of the council. As quoted in the opening paragraph of this article, the court refused to impute to the legislature the goal of quashing minority views. The court found no abridgement of the right of teachers to assemble and freely petition their employer.

Both CTA and CFT were frustrated by the inadequacies of the act. Both had members who were prepared to strike to obtain improvements in wages, hours, and working conditions.

CFT's final judicial attack on the Winton Act occurred in the Campbell Union High School District and is described in *West Valley Federation of Teachers, Loc. 1953 v. Campbell Union High School Dist.*[13] CFT's affiliate was the minority organization in the district. In fact, it was such a small organization that it did not qualify to participate on the negotiating council. It attempted to make direct presentations in public meetings of the district's governing board. Not only did the governing board refuse to place on its agenda matters offered by CFT's affiliate, it refused to permit representatives of that organization to speak during the portion of the meeting set aside for presentations from the public if the subject matter of the oral presentation fell within the authority of the council but had not been considered by that group. In other words, the minority organization and its members had less standing to speak at public meetings than any other member of the public who could generally address any topic that came to mind.

CFT's affiliate contended that the Winton Act should be read to draw a distinction between the process of meeting and conferring and the right of "making proposals directly to the school board."[14] Notwithstanding the language quoted above from *Oxnard*, CFT's affiliate was in fact precluded from making direct representations to the school board. However, the Court of Appeal denied that this was what had happened. "As pointed out in *Oxnard*, a minority employee organization such as appellant here is not precluded from presenting proposals to the employer. Respondent has not refused appellant that right. It has simply directed that such proposals be referred to the Negotiating Council."[15] However, the legislature had not presumed to tell any negotiating council what it had to do with proposals coming from the minority organization. By extension, therefore, once the CFT affiliate attempted to vet a proposal with the council, if the proposal involved a meet

and conferrable matter, it "belonged" to the council. If the negotiating council chose to ignore the proposal or to recast it as it saw fit, then obviously, the minority organization's vision as reflected in the proposal was irrelevant.

Frustration by the judicial system when it came to the Winton Act was not unique to CFT. CTA experienced a setback when it claimed that the Winton Act prevented agents of a school district from meeting directly with teachers on matters within the scope of meeting and conferring. Not so, according to the Court of Appeal in *Torrance Education Assn. v. Board of Education of the Torrance Unified School Dist.*:[16]

> At oral argument of this case, the plaintiff's counsel seemed to be contending that the decision in the *Oxnard* case…means that the school employer may not confer with certificated employees in any way except through the Negotiating Council. The *Oxnard* decision does not support that contention….The *Oxnard* case dealt with a union attempting to bypass the negotiating council. That decision does not cast any doubt upon the propriety of school administrators discussing educational problems with teachers at a traditional teachers meeting.[17]

The Act Succumbs to Frustration

By 1975, both employee organizations were frustrated by the inadequacies of the Winton Act. Both employee organizations had within their ranks members who were prepared to strike their public school employers in order to obtain improvements in wages, hours, and working conditions. The Winton Act was not a vehicle that was going to satisfy those members. As noted above, "the air was stirring with the demands of public employees for recognition and the right to organize."[18] Although the *Oxnard* court editorialized that "[o]ur Legislature in its inimitable wisdom has responded to the challenge by evolving the Negotiating Council," CTA and CFT both had reasons to question the wisdom of the legislature. Therefore, beginning in 1972, the legislature was attempting to develop a new law with which both organizations could live. Three years later, the Educational Employment Relations Act was born. ✱

1 Gov. Code Sec. 3540.

2 Technically, according to Hesiod, the birth of Aphrodite came about as the result of even more bloody strife than preceded the advent of the Educational Employment Relations Act. It seems that Uranus, the father of the Greek gods, was castrated by his son, Cronus, who threw the severed genitals into the ocean, which began to churn and foam (aphros), and out of which arose Aphrodite. No such events have been reported concerning the drafting of EERA.

3 Former Ed. Code Secs. 13080 through 13088.

4 *California Federation of Teachers v. Oxnard Elementary Schools* (1969) 272 Cal.2d 514, 532-533.

5 *Supra.*

6 *Oxnard, supra,* 272 Cal.2d 514 at 539.

7 Former Gov. Code Secs. 3500-3509.

8 Former Gov. Code Secs. 3501 and 3502.

9 Former Ed. Code Sec. 13085.

10 (1967) 254 Cal.App.2d 660.

11 *Supra,* 272 Cal.App.2d 514.

12 S*upra,* at 533, emphasis added. This quotation was later put to the test in the last of the challenges to the Winton Act in *West Valley Federation of Teachers, Loc. 1953 American Federation of Teachers v. Campbell Union High School Dist.* (1972) 24 Cal.App.3d 297.

13 *West Valley, supra.*

14 *West Valley, supra,* at 299.

15 *West Valley, supra,* at 300-301.

16 (1971) 21 Cal.App.3d 589.

17 *Torrance, supra,* at 594.

18 *Oxnard, supra,* 272 Cal.2d 514 at 539.

From Don to Doff Shalt Thou Pay

Peter Brown and Didier Reiss

Many employees are required to wear safety and/or sanitary gear to properly perform their jobs. Such employees may spend several minutes at the beginning of each work shift waiting in line to retrieve such gear, putting it on, and then walking to their work stations before finally beginning their assigned tasks. Then, at the conclusion of each workday, those same employees spend additional minutes walking back to their changing areas, removing their required gear, and returning it to the employer's designated storage facility.

The U.S. Supreme Court recently addressed the extent to which such employee activities, essential to an employee's ability to perform the tasks for which he or she was hired, are compensable under the Fair Labor Standards Act.[1] The court ultimately ruled that, in the context of the food-processing workers at issue, activities that occur between donning and doffing — which, respectively, mark the start and end of each workday — are compensable under the FLSA, while any activities that take place before donning or after doffing are not. An employee's daily *wait* to receive the gear he or she must don for work is not compensable, but the actual donning of equipment, the walk from the donning area to the workstation, the walk back from the workstation to the doffing area at the end of the shift, as well as the actual doffing and returning of the gear, all are deemed compensable work.

The decision provides employers and employees with important guidance in determining which hours spent by employees on an employer's premises are compensable, but it does not break much new ground. Essentially, the court reiterates the old "whistle to whistle" concept, which states that all hours spent on behalf of an employer "within" the workday must be compensated, while preliminary and postliminary activities that occur before the start and after the conclusion of the workday are not compensable. The decision likely will have

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little impact in the public sector because the overwhelming majority of public sector employees are not required to be at the worksite prior to the scheduled start of their shift. However, because some public sector employers may be affected, this article sets out the logic of the court's decision against the backdrop of previous FLSA jurisprudence, considers the significance and limitations of the decision, and concludes with some practical suggestions.

A Fair Day's Pay for a Fair Day's Work

In 1938, Congress enacted the FLSA to promote the "health, efficiency, and general well-being of workers" and to ensure that employees receive "a fair day's pay for a fair day's work."[2] Among other things, the act sought to combat the twin "evils of 'overwork' and 'underpay'" by imposing a costly premium on any work performed by employees beyond a maximum number of weekly hours (usually 40 hours in a 7-day workweek).[3] Through the mechanism of mandatory overtime pay, employers are strongly discouraged from having employees work more than the statutorily designated maximum number of weekly hours.

Congress enacted the FLSA to promote the 'health, efficiency, and general well-being of workers' and to ensure 'a fair day's pay for a fair day's work.'

Employers who wish to avoid paying their workers at the premium overtime rate must carefully monitor the actual number of hours worked by their employees. The consequences, both legal and financial, of an employer's failure to properly record and compensate an employee for the actual hours he or she works in a given workweek can be significant.

Early cases. Although the FLSA clearly required employers to pay employees at a premium rate if they worked beyond a set number of hours in a workweek, the statute defined neither "work" nor "workweek." As a result, questions arose almost immediately regarding the compensability of certain employee activities associated with, but not directly constituting, the principal work duties for which employees were hired.

The U.S. Supreme Court initially defined these terms broadly. For instance, the court held that time spent traveling from iron-ore mine portals to underground working areas was compensable.[4] The court found that "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace" was included in the definition of "the statutory workweek."[5]

Portal-to-Portal Act. Congress, disapproving of the court's broad FLSA interpretations, amended the FLSA in 1947 by passing the Portal-to-Portal Act.[6] Among other things, the Portal Act clarified that travel, riding, and walking time to and from work, and other similar preliminary and postliminary activities performed before and after the workday, are not compensable unless made compensable by contract, custom, or practice. Section 4 narrows the FLSA's coverage by specifically excepting walking on the employer's premises to and from the actual place where the employee performs his or her principal activities, and activities that are "preliminary or postliminary" to that principal activity.[7]

Continuous Workday Rule. In 1947, the Department of Labor promulgated an interpretative regulation of the Portal Act, which concluded that the act did not affect the computation of hours worked "within" the workday. The Portal Act excluded activities from the FLSA workday as "preliminary" or "postliminary" only if they took place "prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases, the principal activity or activities which he is employed to perform."[8] The DOL also adopted the continuous workday rule, which defines the "workday" as the continuous "period between the commencement and completion on the same workday of an employee's principal activity or activities."[9]

Steiner v. Mitchell. The continuous workday rule established that employee activities performed after the employee's first, but before the employee's last, "principal

activity or activities" were compensable under the FLSA. However, it did not define what would constitute the first or last "principal activity" of a day.

In 1956, the Supreme Court, in *Steiner v. Mitchell*, decided a case involving battery plant workers who were "compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employers to provide."[10] The court, emphasizing the important health and safety risks associated with the production of batteries, held that these employee activities (but not "changing clothes and showering under normal conditions") were compensable under the FLSA.[11] The court held that the term "principal activity or activities" contained in Section 4 of the Portal Act "embraces all activities which are an 'integral and indispensable part of the principal activities,' including showering and changing clothes under the unique health and safety hazards of work in a battery plant."[12]

Thus, according to *Steiner*, activities such as donning and doffing of specialized protective gear "performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the FLSA if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1) [of the Portal Act]."[13]

The time workers spend walking between their donning/doffing areas and their work stations at the start and end of the day is compensable under the FLSA.

The Workday Is From Don to Doff

The Supreme Court's recent *IBP, Inc. v. Alvarez* decision resolved a conflict between the Ninth and First Circuit Court of Appeals regarding the compensability under the FLSA of certain activities preceding and following the donning and doffing of certain employee gear deemed "integral and indispensable" to the employees' principal activities.

The decision's consolidated review of *IBP, Inc. v. Alvarez*[14] and *Tum v. Barber Foods, Inc.*,[15] clarifies whether activities such as waiting to don or doff protective gear, or walking to and from the changing area to the employee's workstation, should be considered "an integral and indispensable part" of an employee's principal work activities under *Steiner* (i.e., compensable under the FLSA) or whether such activities must be considered "preliminary" or "postliminary" under the Portal Act (i.e., not compensable under the FLSA).

Ultimately, the Supreme Court agreed with the Court of Appeals for the Ninth Circuit (and against the First Circuit) that the time food-processing workers spend walking between their donning/doffing areas and their work stations at the start and end of every workday is compensable under the FLSA. However, the Supreme Court also held that the time employees spend waiting to put on the protective gear at the start of each workday is not compensable.

***Ninth Circuit in* IBP, Inc. v. Alvarez.** IBP is a large producer of fresh beef, pork, and related products. At its plant in Pasco, Washington, it employs approximately 178 workers in 113 job classifications in the slaughter division, and 800 line workers in 145 job classifications in the processing division. All workers in both divisions must wear outer garments, hard hats, hairnets, earplugs, gloves, sleeves, aprons, leggings, and boots. Many also must wear a variety of protective equipment for their hands, arms, torsos, and legs; this gear includes chain-link metal aprons, vests, Plexiglas armguards, and special gloves. IBP requires its employees to store their equipment and tools in company locker rooms, where most of them don their protective gear.[16]

Production workers' pay is based on the time spent cutting and bagging meat. Pay begins with the first piece of meat and ends with the last piece of meat. IBP pays for four minutes of clothes-changing time. Employees filed a class action to recover compensation for pre- and post-production work, including the time spent donning and doffing protective

gear, and walking between the locker rooms and the production floor before and after their assigned shifts. The district court found that, for instance, processing division knife-users engaged in 12 to 14 minutes pre- and post-production work, including 3.3-4.4 minutes of walking time.[17]

The district court held that donning and doffing of protective gear that was unique to the jobs at issue was compensable under the FLSA because it was integral and indispensable to the work of the employees who wore such gear. Moreover, consistent with the continuous workday rule, the court concluded that, for those employees required to don and doff unique protective gear, the walking time between the locker room and the production floor also was compensable because it occurs during the workday. The court did not grant recovery for ordinary clothes changing and washing, or for the donning and doffing of hard hats, earplugs, safety glasses, boots, or hairnets.[18]

Burdensome donning and doffing of elaborate protective gear is distinguished from time spent donning and doffing non-unique gear, such as hard hats and safety goggles.

The Ninth Circuit Court of Appeals agreed with the district court that the burdensome donning and doffing of elaborate protective gear ought to be distinguished from the time spent donning and doffing non-unique gear such as hard hats and safety goggles. While the Court of Appeals did not categorically exclude the donning and doffing of non-unique gear from being "principal activities" as defined by the Portal Act, in the context of this case, the time employees spent donning and doffing non-unique protective gear was *de minimis* as a matter of law.[19] In other words, the Court of Appeals left open the possibility that the donning and doffing of non-unique gear could, in a particular case, be compensable (if such donning and doffing took a significant amount of time), even if such activity was not a "principal activity" in this case because it simply was too insignificant to record as a separate activity.

As noted above, the Supreme Court eventually upheld the Ninth Circuit Court of Appeals' decision that the time these meat-processing workers spent walking between the changing and production areas at the beginning and conclusion of each workday was compensable under the FLSA.

***First Circuit in* Tum v. Barber Foods, Inc.** Barber Foods operates a poultry processing plant in Portland, Maine, that employs about 300 production workers. These employees operate six production lines and perform a variety of tasks that require wearing different combinations of protective clothing. They are paid by the hour from the time they punch in to computerized time clocks located at the entrances to the production floor.[20]

The district court for Maine held that "the donning and doffing of clothing and equipment which employees choose to wear or use at their option, is an integral part of the plaintiffs' work [and therefore is] not excluded from compensation under the Portal-to-Portal Act as preliminary or postliminary activities."[21] However, the court rejected the notion that employees must be compensated for their time waiting to obtain their gear because such time "could [not] reasonably be construed to be an integral part of employees' work activities any more than walking to the cage from which hairnets and earplugs are dispensed." Thus, the district court declared that the employer was "entitled to summary judgment on any claims based on time spent walking from the plant entrances to an employee's workstation, locker, time clock, or site where clothing and equipment required to be worn on the job is to be obtained and any claims based on time spent waiting to punch in or out for such clothing or equipment."[22]

The employees appealed the district court's exclusion from FLSA compensation of the time they spent walking to the production floor after donning required safety gear and the time they spent walking from the production floor to the

area where they doff such gear. However, the Court of Appeals rejected this argument, concluding that such walking time was a species of "preliminary" and "postliminary" activity excluded from FLSA coverage by Section 4(a) of the Portal Act.[23]

The Court of Appeals also rejected the argument that waiting time associated with the donning and doffing of clothes was compensable. The court held that such waiting time constituted a "preliminary or postliminary activity," and thus was excluded from FLSA coverage by the Portal Act.[24]

Walking time. The Supreme Court explicitly addressed the question, raised by both the First and Ninth Circuit Court of Appeals cases, of whether post-donning and pre-doffing walking between an employee's changing area and his or her workstation was compensable under the FLSA. In so doing, it had to resolve a potentially thorny conflict between two well-established wage and hour rules.

As noted above, in the Portal Act, Congress explicitly excluded from FLSA coverage all employee time spent "*walking*, riding or traveling *to and from the actual place of performance of the principal activity or activities* which such employee is employed to perform."[25] Moreover, the Portal Act also excludes all "activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."[26] The Portal Act thus would seem to exclude post-donning walking as an activity "preliminary" to the principal activity and pre-doffing walking as an activity "postliminary" to the principal activity.

On the other hand, the Supreme Court in *Steiner* a half-century ago concluded that the donning of essential safety gear is compensable under the FLSA, *even if it takes place prior to the start of an employee's shift*, because it is an "integral and indispensable part of the principal activities for which covered workmen are employed."[27] Thus, under *Steiner*, anything that is an "integral and indispensable part" of an employee's "principal activities" is itself a "principal activity" and must be compensated as if it is part of the workday.

The *Alvarez* court reconciles the Portal Act's exclusion of "preliminary" or "postliminary" activities with *Steiner*'s inclusion of "integral and indispensable" activities that occur before an employee's principal tasks by framing its opinion around the continuous workday rule adopted by the Department of Labor in its interpretative regulations of the Portal Act. According to this rule, any employee activity performed between the first and last principal activity of the day is deemed a part of the workday, and must be compensated under the FLSA. The key, then, is to identify the first and last principal activity of the day.

The Alvarez *court points to DOL regulations that describe the workday as* 'rougly *the period 'from whistle to whistle.'*

In most situations, the workday is defined by the beginning and ending of an employee's primary productive activity. However, the *Alvarez* court points to Department of Labor regulations that describe the workday as "*roughly* the period 'from whistle to whistle.'"[28] The workday need not necessarily begin precisely with the first productive activity. Indeed, relying on *Steiner*, the court notes that anything "integral and indispensable" to an employee's principal activity is, itself, considered a "principal activity."[29]

In *Steiner*, the Supreme Court had ruled that donning and doffing that is "integral and indispensable" to an employee's principal activity must itself be considered such "principal activities."[30] For purposes of deciding what is "preliminary" or "postliminary" under the Portal Act, therefore, the *locker room* where the food-processing workers donned and doffed their special safety gear — and not the food-processing assembly line — represented the "actual place of performance" of the principal activity for which the employees were hired.

Indeed, the *Alvarez* court declared that donning and doffing constituted the *first and last* principal activities of the day. As such, the compensable workday begins in the locker room when the employees don the required gear, and ends

again in the locker room when they doff the gear. Any activity that occurs between donning (i.e., the start of the workday) and doffing (i.e., the end the workday), such as walking to the workstation after donning, and walking back to the locker room to doff essential work gear, is compensable under the FLSA. Such walking is not "preliminary" or "postliminary" activity but constitutes principal activities that are part of the workday.

The Portal Act's exclusion of the "walking…*to and from the actual place of performance*" excludes from the FLSA an employee's travel time to the place of donning in the morning but does not exclude walking from that place to another area within the plant immediately after the workday has commenced. Such post-donning walking takes place *within the workday* and is akin to the compensable walking between two different positions on an assembly line inside a production facility.[31]

In short, the *Alvarez* court held that any activity "integral and indispensable" to a "principal activity" is itself a "principal activity" under Section 4(a) of the Portal Act, and that during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity (e.g., donning) and before the end of the employee's last principal activity (e.g., doffing) is excluded from the scope of that provision, and as a result is covered by the FLSA.[32]

Waiting time. The court also applied the continuous workday rule to the question of the compensability of time waiting to don and doff required safety gear. Again, any waiting that occurred "within" the workday, that is between the first and last principal activity of the day, was compensable. Therefore, the court found that waiting in line to receive protective gear prior to the actual work shift was excluded from the FLSA as "preliminary," but that time spent waiting to doff that gear at the conclusion of the work shift was compensable (since the workday did not conclude until doffing was complete).[33]

The court, without undertaking a thorough analysis, determined that the workday begins at don and ends at doff, rejecting the employees' contention that their workday actually begins with a wait for the gear they were required to don. The employees in *Barber* argued in vain that waiting to receive essential gear ought to be considered part of the workday because this activity was "integral and indispensable" to donning which, in turn, was deemed a "principal activity" because it was "integral and indispensable" to the principal productive activity for which the employees were hired. However, the court balked at deeming something a "principal activity" that was two steps removed from the productive activity on the assembly line.[34]

Moreover, the court flatly rejected the employees' argument that waiting was factually "integral and indispensable" to their job, noting that while donning of protective gear was "always essential if the worker is to do his job," waiting is *not always necessary* for every situation or employee, and thus cannot be considered "integral and indispensable" in the same sense as donning can.[35] The court explained that the fact that certain preshift activities are *necessary* for employees to engage in their principal activities does not mean that those preshift activities are *integral and indispensable* to a principal activity under *Steiner*. For example, walking from a time clock near the factory gate to a workstation is certainly *necessary* for employees to begin their work, but Congress, in enacting the Portal Act, clearly intended to exclude such walking time from FLSA coverage.[36]

Alvarez says that any waiting that occurred 'within' the workday, that is between the first and last principal activity of the day, was compensible.

The court did not state that waiting to don gear or begin a work shift could never be compensable. The court acknowledged that in certain situations, waiting for work could be an integral part of an employee's principal activities. The court specifically cited a DOL regulation that indicates waiting time is compensable when an employer requires its workers to report to the changing area at a specific time, and the employees are there at that hour ready and willing to work but, for some reason beyond the employees' control,

there is no gear or work available until some time has elapsed.[37] However, in the cases at issue, the court determined that the situation was more akin to time employees must spend waiting to check in or receive their paychecks.[38] Such waiting generally is characterized as "preliminary" activity under the Portal Act, which is not compensable unless the parties have an agreement or there is a custom and practice in place.[39]

Open Questions

While the court's continuous workday rule provides some clarification as to which collateral types of action must be treated as compensable principal activities, it by no means will end litigation on whether particular activities, including walking and waiting, are compensable under the FLSA under particular circumstances. The determination of what is or is not "integral and indispensable" to a principal work activity remains fact-specific. Nor does the continuous workday rule explain when inactivity truly constitutes a non-compensable work break.

The *Alvarez* decision does not make absolutely clear whether the court considers the donning and doffing of non-unique protective gear as integral and indispensable to employees' principal activities. The opinion throughout is careful to speak of donning and doffing of special protective gear (e.g., chain-metal aprons, etc.) in analyzing what may be considered an "integral and indispensable" activity. It avoids a close examination of the specific types of gear that must be donned and doffed under the *Steiner* case for it to be deemed a principal activity. The implication seems to be that the donning and doffing of non-unique, general clothing gear is not "integral and indispensable" to an employee's principal activities. Donning and doffing such clothing, and walking and waiting to do so, therefore may not be covered as work time under the FLSA. However, the court did not explicitly say so, nor is it necessarily clear what makes gear sufficiently "unique" to be within FLSA coverage. Therefore, because the court's decision focused exclusively on protective gear, application of the ruling to other uniforms or equipment that many public employees may be required to don remains unclear.

On the other hand, the court did not explicitly reject the Ninth Circuit Court of Appeals' suggestion that while the donning and doffing of non-unique protective gear could potentially be deemed a "principal activity," in many cases (such as in *Alvarez*) the facts would show that donning and doffing standard types of gear or clothing (hard hats, gloves, hairnets, safety glasses, earplugs, etc.) simply was not cumbersome or time-consuming enough to merit consideration; time to don such apparel would be *de minimis*, or of no significance, under the law.

The Ninth Circuit has explained that three factors are relevant to whether otherwise compensable working time should be considered *de minimis* and therefore not compensable: (1) the practical and administrative difficulty of recording additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis.[40]

In fact, the *Alvarez* opinion leaves the future of the "*de minimis*" rule under the FLSA open to question. Before this decision, if a task was *de minimis*, the employee did not have to be compensated since it was so small that it was difficult to quantify.[41] However, as recording technology gets proficient enough to accurately record such time without undue administrative burden, the *de minimis* rule may become less relevant.[42] This may be especially true because in *Alvarez*, the court left open the possibility that small time-segments could be aggregated to survive a *de minimis* finding. In other words, while an activity such as donning and post-donning walking may be *de minimis* if looked at individually, such activities may become compensable if considered in the aggregate. This could prove costly for employers.

Alvarez *left open the possibility that small time-segments could be aggregated to survive a* de minimus *finding.*

The continuous workday rule, at least rhetorically and at least for most traditional employees who work a traditional work shift, offers a clear demarcation for the start and end of a workday. However, the court did not signal how it might address less-traditional work shifts, or how far the start and end of a workday may be extended by the performance of various "integral and indispensable activities." For instance, with the advance of technology, employers increasingly expect their employees to check their email and voice mail or daily assignments, or report in to supervisors, before such employees even leave their homes; they may then call in on their cell phones while driving to work and/or pick up tools or supplies while on their way to work. It would seem that such "checking in" or similar activities, would constitute the "first principal activity" of the day under the *Alvarez* continuous-day rule. This, in turn, would mean that these tasks as well as all subsequent time, including an employee's commute, is compensable under the FLSA. However, this would expose employers to exactly the type of open-ended and potentially expansive liability the Portal Act was designed to avoid by excluding travel time. It is not yet clear how this court would avoid such a result, and whether the court would be willing to revisit *Steiner* and its "integral and indispensable" rule.

Public sector employers must, on a case-by-case basis, determine whether they have employees who perform certain pre- or post-shift activities integral to their primary work.

Impact on the Public Sector

The potential financial and legal ramifications of the *Alvarez* decision are significant when considered in the aggregate. Indeed, an employer's routine failure to properly record and compensate an employee's seemingly trifling waiting and walking time may, when the number of affected employees and the length of time involved are taken into consideration, constitute a massive potential liability under the FLSA. However, while the reach of the decision extends beyond the meat and poultry industries specifically addressed by the court, *it is unlikely that* Alvarez *will have a significant effect on public sector employers*.

The impact of the decision will be felt most directly by employers who require their employees to don unique, protective gear because of internal policies or state or federal regulations; such employers likely will have to compensate their employees for the time they spend on donning and doffing such special gear at the beginning and conclusion of each day. The decision also will affect employers who require their employees to "clock in" and then walk to their work stations; these employers likely will have to compensate these employees for their walking time.

With very few exceptions, public sector employees are not required to be at the work site prior to the scheduled start of their work shift to perform mandatory pre-shift activities. Public sector employees in large part perform all their activities *during* their scheduled work shift, not before. Therefore, the Supreme Court's ruling that certain pre-shift activities, such as the donning of protective gear, may constitute the beginning of the compensated workday will have little impact on most public sector employers.

Nevertheless, public sector employers must, on a case-by-case basis, determine whether they have any employees who do perform certain pre-shift or post-shift activities integral and indispensable to their primary work activity. Under the *Alvarez* ruling, such activities are not only considered principal work activities that must be compensated under the FLSA but also mark the beginning and end of the continuous workday. Any employee activity, including waiting or walking, that occurs within this "continuous workday" must be compensated.

In its comprehensive set of interpretive bulletins, the Department of Labor states that "[w]ork not requested but suffered or permitted is work time."[43] Thus, if an employer

allows an employee to perform activities integral and indispensable to his or her main activity before the start or after the conclusion of the employee's scheduled work shift, such time will be considered "hours worked," even if the employer is not specifically aware of the work being performed, and even if the work is carried out before or after normal working hours.[44]

While most public sector employees do not perform integral and indispensable activities prior to their official shift, certain public employees may be required to put on special gear before they are able to perform the principal tasks for which they are hired.

Fire protection employees are required to don special gear to fight fires. However, because of the unique nature of their 24-hour shifts, throughout which fire fighters remain on call, this activity usually will take place while the employees already are on duty. Thus, unless a fire department specifically requires its fire protection employees to put on their gear before their 24-hour shift begins, this issue generally will not arise.

Police officers similarly may be required to don a special uniform and firearm prior to their shift. Although the law is not entirely clear on this, the history of FLSA jurisprudence as well as the language and logic of the Supreme Court's *Alvarez* decision suggest that the Supreme Court would be unlikely to find the donning of non-unique gear, such as a basic police uniform, to be sufficiently integral and indispensable to a police officer's principal duties to be compensable under the FLSA. Instead, such donning likely would be deemed "preliminary" to the principal work activity of the officer. Moreover, the donning of a police officer uniform likely would be deemed *de minimis* by law.

SWAT team members may be required to don special protective body armor before their scheduled shift begins. Here, too, the law is not clear. However, a close reading of *Alvarez* suggests that the Supreme Court might consider the donning of such specialized gear, just like the specialized gear of food-processing workers, to be sufficiently integral and indispensable to the SWAT team member's principal duties to be compensable under the FLSA.

Certain public works employees, solid and liquid waste employees, special district employees (mosquito abatement specialists, etc.), and other public employees also may be required to don elaborate protective gear to perform their principal duties. Employers will have to determine in each case whether these employees put on their gear prior to their scheduled shift and, if so, whether donning this gear is sufficiently integral and indispensable to their principal work to be compensable under the FLSA.

The court expressed its desire to avoid a rule that favored open-ended and potentially expansive liability.

The court specifically emphasized that its FLSA inclusion of walking time *once the workday already has begun* is designed to cover only relatively small segments of time (generally consuming less time than the donning and doffing activities that precede and follow the walking).[45] The court expressed its desire to avoid a rule that favored open-ended and potentially expansive liability (for instance, by allowing workers' commuting time to be compensable). The court therefore specifically reaffirmed that employers are responsible only for activities encompassed by "the workday," and are not responsible for "preliminary" time an employee spends reaching the work area from the proverbial factory gate.

Some Suggestions

In light of this decision, employers face various practical and logistical challenges. They should review employee work activities to identify employees that don specialized protective gear integral and indispensable to a principal work activity prior to beginning their main daily tasks. The employer then should implement procedures to ensure compliance. Supervisors should be trained in the proper recording of such time. Employees also should be notified through written policies of the employer's wage and hour procedures, including the methods for addressing any employee complaints regarding miscalculation of hours.

Employers must be careful to properly record all the activities employees perform that are a principal activity or integral and indispensable to it. Given the uncertainty over the continued applicability of the *de minimis* rule, employees may wish to review whether activities previously considered *de minimis* would remain legally insignificant even if aggregated with associated activities, such as waiting or walking.

To make sure they capture all the time from the first principal activity of the day, employers may wish to move their time clocks from the production floor to the locker room. Alternatively, employers that currently require employees to don special gear at a location far removed from the place where the employees actually perform their principal functions may consider whether they can find a closer location to hand out and require their employees to change into such gear. Employers should make sure that employees wait until just before the start of the work shift to don their gear. In this way, the walking and waiting time can be reduced to a minimum.

Similarly, to avoid having to compensate employees for waiting idly in line to doff their gear, employers should make sure they have a system, including adequate space and locker facilities, that allows employees to quickly and efficiently doff their gear at the end of the day.

Conclusion

In *IBP, Inc. v. Alvarez*, the first Supreme Court opinion issued under the stewardship of new Chief Justice John G. Roberts, Jr., the court ruled that a food-processing employee's day begins with donning and ends with doffing of special protective gear. Adopting the continuous workday rule, the court held that for these employees, activities performed by them before donning or after doffing this gear takes place outside the covered workday and is therefore not compensable under the FLSA. In contrast, any employee activity that takes place between the employee's don and doff *is* a part of the continuous workday, and is compensable under the FLSA.

While the decision provides important guidance to employers and instruction regarding the compensability of hours spent by employees on an employer's premises, the decision will have little impact on public sector employers. Employers must make sure to record and compensate the time spent by employees walking between their changing and work stations, and any time they are forced to wait to doff their gear after they conclude their principal work. However, employers still do not need to compensate their employees for time waiting to receive their gear (unless the employer specifically requires them to be there at a certain time to receive this gear). ❋

1 *IBP, Inc. v. Alvarez* (2005) 126 S.Ct. 514; the FLSA, 29 USC Secs. 201 et seq.).
2 *Barrentine v. Arkansas-Best Freight System, Inc.* (1981) 450 U.S. 728, 739.
3 29 USC Sec. 207.
4 *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590.
5 *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 690-691 (time necessarily spent by employees walking from time clocks near the factory entrance gate to their workstations deemed part of the workweek).
6 29 USC Secs. 252 et seq.
7 29 USC Sec. 254(a).
8 29 CFR Sec. 790.6(a).
9 29 CFR Sec. 790.6(b).
10 350 U.S. 247, 248.
11 *Id.* at 249.
12 *Id.* at 252-253.
13 *Id.* at 256.
14 339 F.3d 894 (9th Cir., 2003).
15 360 F.3d 274 (1st Cir., 2004).
16 *Alvarez*, *supra.*, 126 S.Ct. at 521-522.
17 *Id.* at 522.
18 *Ibid.*
19 *Id.* at 522-523.
20 *Id.* at 525.
21 *Id.* at 526.
22 *Ibid.*
23 *Id.* at 526-527.
24 *Id.* at 527.
25 29 USC Sec. 254(a) (emphasis added).
26 *Ibid.*

27 *Steiner, supra.,* 350 U.S. at 252-253.

28 See CRF Sec. 790.6(a); *Alvarez*, *supra.*, 126 S.Ct. at 525.

29 *Alvarez*, *supra.*, 126 S.Ct. at 523 (citing *Steiner*, 350 U.S. at 253).

30 *Steiner*, 350 U.S. at 252-253.

31 *Alvarez*, *supra.*, 126 S.Ct. at 524; see 29 CFR Sec. 790.7(c).

32 *Id.* at 525.

33 *Id.* at 527.

34 *Id.* at 528.

35 *Id.* at 527.

36 *Ibid.*

37 29 CFR Sec. 790.7(h); *Alvarez*, *supra.* 126 S.Ct. at 527-528.

38 *Alvarez*, *supra.* 126 S.Ct. at 528.

39 See CFR Sec. 790.7(g).

40 *Lindow v. U.S.* (9th Cir., 1984) 738 F.2d 1057, 1062-63 (noting the significant administrative difficulty involved in recording the overtime and the widespread irregularity among employees in performing compensable work, the court held that employees who worked an average of 7-8 minutes prior to their shifts were not entitled to extra compensation).

41 The interpretative bulletins provide some flexibility in recording insubstantial time. In recording working time under the act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes, may be disregarded. 29 CFR Sec. 785.47.

42 At least one court has suggested that the amount of time considered *de minimis* may depend on the sophistication of the employer's timekeeping system. *Saunders v. John Morrell & Co.* (D.Iowa 1991) 1 Wage & Hour Cas. 2d (BNA) 879.

43 29 CFR Sec. 785.11.

44 See 29 CFR Sec. 785.11. Employees may work before or after their shifts to catch up on their workload. An employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe an employee is continuing to work, and such time is deemed compensable working time under the FLSA.

45 *Alvarez*, *supra.*, 126 S.Ct. at 524.

CAPS Contract Not Strong Enough to Fend Off Alternate Retirement Program

Katherine Thomson, CPER Associate Editor

The court's opinion raises a host of questions. What are the standards for allowing PERB to intervene in court to assert its jurisdiction? Should PERB have jurisdiction over a constitutional impairment of contract dispute between the state and a state employees' union? How strong does contract language have to be to surmount the public employer's sovereign legislative power?

The Court of Appeal set high hurdles for both the California Association of Professional Scientists and the Public Employment Relations Board when CAPS challenged the alternate retirement program that applies to state employees hired after August 11, 2004. CAPS thought that retirement benefits language in its collective bargaining contract with the state would prevent implementation of the program for new hires in bargaining unit 10. PERB insisted that the dispute was within its exclusive initial jurisdiction. But the court was reluctant to constrain the state's "sovereign right to change the character of pension rights for future employees," and, with little analysis, did not allow PERB to intervene in the case, *California Association of Professional Scientists v. Schwarzenegger* (3-6-06) C049928 (3d Dist.), ___ Cal.App.4th ___, 2006 DJDAR 2727. The court's sovereign rights analysis potentially will affect construction of labor contracts outside of state employment, as it could be invoked by any legislative body, not just the state legislature.

Retirement Terms of Contract

Article 8 of CAPS' contract addresses retirement benefits for employees in bargaining unit 10. Retirement law for state employees provides for two tiers of benefits; the first tier has greater benefits, but the second tier does not require employee contributions. The CAPS contract contains a provision that states:

> Pursuant to Government Code [Sec.] 21070.5, new employees who meet the criteria for CalPERS membership would be enrolled in the First Tier plan and have the right to be covered under the Second Tier plan within 180 days of the date of their appointment. If a new employee does not make an election for Second Tier coverage during this period, he/she shall remain in the First Tier plan.

New Program for New Hires

In the summer of 2004, the governor hashed out a new program with the California State Employees Association and legislators. The governor wanted to rein in the state's skyrocketing costs for retirement contributions. The deal with CSEA, which represents more state employees than any other union, resulted in an alternate retirement program that delayed state contributions for new employees. (See story in *CPER* No. 167, pp. 56-57.)

The alternate retirement program, enacted as S.B. 1105, provides that miscellaneous employees first hired by the state after the effective date of the law do not accrue service credits or make employee contributions to the Public Employees Retirement System for the first 24 months of employment. Instead, they contribute to a defined contribution plan. After two years, they may transfer their accumulated contributions and receive service credit in PERS. If the employee chooses to enter PERS, the state must make its contributions for the first two years retroactively. The bill amended Sec. 21070.5 to add that a new employee subject to the alternate retirement program became entitled to elect between first-tier and second-tier benefits during the 180-day period beginning 24 months after his or her appointment.

CAPS filed a petition for writ of mandate and complaint for declaratory relief in the trial court. Counsel for CAPS, Gerald James, knew that legal precedent preventing impairment of vested retirement rights would not apply to the new legislation because the new program affected only new employees who had not earned any pension rights before the legislation was enacted. Instead, he cast his challenge as an unconstitutional impairment of the collective bargaining agreement between CAPS and the state. Both the federal and state Constitutions contain a clause prohibiting state legislation from impairing contracts.

Counsel for CAPS cast his challenge as an unconstitutional impairment of the collective bargaining agreement between CAPS and the state.

PERB Jurisdiction Denied

CAPS and several other unions also had filed unfair practice charges, however, alleging that the state had unilaterally changed the retirement program without notice or an opportunity to bargain. Those charges have been placed in abeyance pending disposition of the matter in court. PERB attempted to intervene in the court proceedings, contending it had exclusive initial jurisdiction over all matters that allege arguable violations of the Dills Act. CAPS and the governor opposed PERB's intervention. The trial court denied the application to intervene under the standards of Code of Civil Procedure Sec. 387 because it found PERB did "not have a sufficiently direct interest in the case to warrant intervention," that PERB's intervention would "enlarge the issues" in the case, and that its interest did not outweigh the opposition of the parties.

The Court of Appeal employed a very deferential "abuse of discretion" standard when it reviewed the lower court's intervention decision. It recognized PERB's interest in protecting its own exclusive initial jurisdiction over alleged violations of the Dills Act. Government Code Sec. 3514.5 provides, "The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of [the Dills Act], shall be a matter within the exclusive jurisdiction of the board." However, the court rejected PERB's claim of interest because CAPS' court papers had not alleged an unlawful unilateral change in negotiable matters.

The court did not discuss *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 58 CPER 15, or *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 41 CPER 2, when determining whether the Dills Act gave PERB initial exclusive jurisdiction over the matter. Skimming over the question of whether the underlying conduct challenged by CAPS arguably could be an unfair practice, it declared that "the gravamen of CAPS's complaint

is that SB No. 1105…impermissibly conflicts with the terms of the agreement and therefore violates the state and federal constitutional prohibitions against impairing the obligations of contract." The court asserted the issue of unconstitutional impairment of contract was a judicial issue not within the exclusive jurisdiction of PERB, citing *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, CPER SRS No. 8, which involved a state law that impaired a county's salary agreements, not, as here, a state law that allegedly impairs its own agreement with a union. The court barely addressed factors considered in *El Rancho* when, without examining the elements of CAPS' claims, it concluded:

> Even if we assume for the sake of argument that the state had an obligation…to give CAPS notice and an opportunity to request collective bargaining before enacting the new, alternate retirement program, and failed to fulfill that obligation, that would not transform this case into an unfair labor practice case. The constitutional issue CAPS seeks to litigate here is separate and distinct from any issue of whether the state violated its collective bargaining obligations….

PERB has not yet petitioned the Supreme Court for review of the case. If it does, the Supreme Court will have an opportunity to instruct how closely a court should examine a party's claims when determining under *El Rancho* whether the underlying controversy is essentially the same as the conduct that would be at issue in the unfair practice proceeding before PERB. This case also raises difficult questions about one of the factors considered in *San Diego Teachers* for deciding whether a party should have exhausted administrative remedies — whether PERB has the power to furnish relief equivalent to the remedy a court could order. Here, a court finding that the new retirement law was invalid as applied to unit 10 employees could have resulted in an order forbidding placement of unit 10 employees in the alternate program. The high court also could examine whether, even if PERB's remedial powers are not equivalent, the board should resolve issues within its jurisdiction and expertise before a case is allowed to proceed to the courts. Such a review could render a discussion of the constitutional issues unnecessary, but also could delay resolution of the dispute if the parties resorted to the courts to challenge PERB's decisions.

Contract Toothless

Turning to the constitutional contract question, the court observed that this case did not invoke the line of precedent protecting pension rights of current employees from legislative impairment since the new program applied only to employees hired after the date of the law's enactment. The court did not evaluate CAPS' theory that a law could unconstitutionally impair a collective bargaining contract that secured pension rights for future employees. Instead, it found that the state did not promise CAPS not to change the retirement rights of future employees.

The court found no language in the contract that 'clearly abdicates the legislative power to make changes in the pension system for prospective employees.'

The court did not engage in ordinary contract construction. It examined the contract language through a prism of sovereign legislative power. "A promise not to change the character of a pension program as to new employees is a fundamental constraint on the freedom of action of the Legislature," the court began, quoting *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 93 CPER 9. "Accordingly, we will not interpret a collective bargaining agreement as containing such a promise unless we have no other reasonable choice."

The court found no language in the contract that "clearly abdicates the legislative power to make changes in the pension system for prospective employees." It rejected CAPS' argument that the language regarding new employees would be useless if it did not constitute a promise not to change

their pension rights. While it disagreed with the trial court's conclusion that the clause merely was a restatement of existing law, it found the intent of the language was not to prevent changes to retirement benefits for new employees. The court deduced instead that the parties had included the language regarding new employee election to first-tier benefits because the 1999 legislation allowing new employees to elect between first-tier and second-tier benefits did not automatically apply to employees in state bargaining units "unless and until incorporated in a memorandum of understanding…applicable to that unit."

The court reasoned, therefore, that the bargaining agreement gave employees in unit 10 retirement benefit rights that vested in the same way as other pension rights — upon acceptance of employment. Because there was nothing in the agreement that foreclosed the legislature from enacting changes in retirement law for prospective employees, the court held S.B. 1105 did not impair any vested contractual rights.

Sovereign Power

Under this court's sovereign rights approach, general contract language regarding pension rights likely would not be construed to constrain a public employer's ability to change benefits for prospective employees. Only language that clearly prohibits pension rights changes for prospective employees would have a chance of forestalling an employer's governing body from changing retirement rights for new employees.

The authority the court cited for this approach is weak. The *Claypool* court cited no authority for its statement regarding freedom of action of the legislature. Although the current court also cited a United States Supreme Court case involving contracts affecting an Indian tribe's sovereign power to tax, *Merrion v. Jicarilla Apache Tribe* (1982) 455 U.S. 130, the context of that case is far removed from contracts the state enters as an employer subject to state collective bargaining laws.

However, the basic principle that one legislature cannot bind future legislatures is grounded in Supreme Court precedent such as *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 25 CPER 49. Because that case involved salaries promised to school employees before they had the right to enter binding collective bargaining agreements under the Educational Employment Relations Act, further analysis might be appropriate under current laws. Invocation of sovereign legislative rights to defeat promises of future compensation in multi-year collective bargaining agreements exposes a tension between the legislature's powers and its decision to enact public sector labor laws allowing for binding contracts. The Supreme Court may address some of the issues as CAPS has decided to petition the court for review of the decision. ❋

Recent Developments

Local Government

Board Defines Revocation in Card Check Case

In a recen t ly issued decision, the Public Employment Relations Board was forced to weigh in on a case involving the card check procedures that are permitted under the Meyers-Milias-Brown Act. The dispute involved a bid by SEIU Local 399 to represent employees at the Antelope Valley Health Care District.

The case dates back to November 2003, when SEIU competed in an election with the Caregivers and Healthcare Employees Union to represent a bargaining unit of district employees. Of the 899 valid ballots cast, neither of the two organizations received a majority vote. Over 25 percent of the employees who voted marked their ballot "neither," signifying that they wanted no official bargaining representative.

Under district policy, this result would have prompted a run-off election. However, the two organizations elected to end their competition. A month later, SEIU asked that the matter of representation be resolved by a card check. Initially, the district took the position that there still should be a runoff election between SEIU and the "no union" option. SEIU objected but continued to collect authorization cards. A small group of employees also began to collect "no union" cards.

When the district became aware of these developments in January 2004, it sent an email advising employees what they could do to revoke an authorization card they already had signed. The district instructed that a prior card could be revoked by sending a signed and dated letter to SEIU expressly stating that the employee was revoking the prior authorization card. The email made reference to the "no union" cards that were being circulated, informing employees that they could "put their position on record" by signing one of these cards, but that the cards were not being circulated by the hospital.

In March 2004, SEIU formally requested recognition as the exclusive representative on the basis of a card check authorized by MMBA Sec. 3507.1(c). The process was administered by a mediator from the State Mediation and Conciliation Service. The parties were able to agree that the authorization cards collected by SEIU would remain valid for a one-year period running from March 8, 2003, to March 8, 2004.

The parties could not agree on whether or how employees could revoke an authorization card previously signed. Despite this disagreement, the mediator conducted a card check. Of the 1,100 names on the eligibility list, a total of 569 had submitted valid cards authorizing SEIU to serve as their exclusive representative. Five employees submitted valid revocation cards pursuant to the district's email instructions, and a total of 280 valid "no union" cards were counted. In addition, 84 "no union" cards were received from individuals who previously had signed cards in support of SEIU. This latter group was the focus of the controversy.

The parties could not agree on whether or how to revoke an authorization card previously signed.

SMCS did not rule on the legal effect of the revocation letters or the "no union" cards and therefore did not verify the majority status of SEIU. The district board of directors voted not to recognize the union as the exclusive representative, deciding that the 84 "no union" cards that matched up with SEIU cards validly had revoked those cards and thereby deprived SEIU of a majority showing.

The union filed a charge with PERB asking that it act to ensure stable employer-employee relations in the district. The statute authorizes SMCS to verify the exclusive or majority sta-

tus of the employee organization, but SMCS only provided the parties with a tally and thereby had relinquished its responsibility to resolve the matter.

An administrative law judge found the district had improperly withheld recognition from SEIU. He ruled that the 84 "no union" cards were invalid revocations because they did not comply with the instructions the district had supplied to employees in its email message. That decision was affirmed by the board.

Statutory Backdrop

Section 3507.1(c) of the MMBA expressly requires a public agency to grant exclusive or majority recognition to an employee organization based on authorization cards showing that a majority of employees in an appropriate bargaining unit desire such representation. Section 3507(c) mandates that "no public agency shall unreasonably withhold recognition of employee organizations." The issue, concluded the board, was whether the district unreasonably withheld recognition of SEIU by subtracting the 84 "no union" cards from the total of 569 valid SEIU cards and, on that basis, deciding that the union lacked majority support.

In its exceptions to the ALJ proposed decision, the district argued that, even if the 84 cards did not validly revoke employees' prior authorization of SEIU as the representative, the "no union" documents executed by the 84 employees created "reasonable doubt" as to whether SEIU had obtained majority status. In support of its assertion, the district pointed to the legislative history of A.B. 1281, the bill that added the card check procedure to the statute.

But the board rejected the district's argument and, in agreement with SEIU, concluded that because the language of the statute is clear and unambiguous, it is unnecessary to examine legislative history.

The board relied on several prior decisions, including *North Orange County Regional Occupational Program* (1990) PERB No. 857, 87X CPER 17, which held that, where no ambiguity exists, the intent of the legislature in enacting a law "is to be gleaned from the words of the statute itself, according to the usual and ordinary import of the language employed."

Drawing an analogy to the reasoning in *North Orange*, the board observed that under HEERA, an employer may refuse to grant a request for recognition if it "reasonably doubts that the employee organization has majority support or reasonably doubts the appropriateness of the requested unit." In contrast, noted the board, there is no similar provision in the MMBA. Nor does EERA allow an employer to withhold recognition based on "reasonable doubt" as to majority status, and that statute never has been construed to authorize that exception. Thus, the board found that the MMBA enunciates a clear requirement that the employer "must grant recognition upon a showing of majority support."

The board then addressed what constitutes "proof of support." It first cited PERB Reg. 61021(a), which states that proof of support "shall clearly demonstrate that the employee desires to be represented by the employee organization for the purpose of meeting and conferring on wages, hours, and other terms and conditions of employment." Building on that, the board reasoned that a revocation of an authorization card or other proof of support "should meet the same requirements in order to determine employee intent." "We therefore recognize," said the board, "the right to revoke authorization cards or other proof of support so long as the employee clearly demonstrates the desire NOT to be represented by the employee organization for the purposes of meeting and conferring on wages, hours, and other terms and conditions of employment."

The MMBA requires the employer to grant recognition upon a showing of majority support.

Reviewing the nature of the cards submitted, the board focused on whether the employees who signed the "no union" slips clearly intended to revoke the SEIU authorization cards they

previously had signed. The board concluded that since the slips did not include any specific statement of intent to revoke the card, they did not constitute a valid revocation of the authorization card.

The board also emphasized that in the January email, the district instructed employees that, to properly revoke the cards, they should send a written notice to SEIU expressing their intent to rescind the previously signed cards and signaling their intent to no longer be represented by SEIU. By the district's own conduct, said the board, it appears not to believe the slips were a valid revocation.

The slips did not include any specific statement of intent to revoke the card.

Based on this characterization, the board concluded that the number of "no union" slips should not have been deducted from the tally of SEIU authorization cards and, therefore, that the district unreasonably withheld recognition of SEIU by treating the "no union "slips as revoking the SEIU authorization cards where the slips did not show the signers' specific intent to revoke the cards. (*SEIU Loc. 399 v. Antelope Valley Health Care Dist.* [2-10-06] PERB No. 1816-M.) ✱

Los Angeles Wrestles With Release of Information Tied to Peace Officer Records

What sort of information associated with a law enforcement officer's disciplinary action or with accusations of potential misconduct may be kept confidential and what must be disclosed in response to a request under California's Public Records Act? Cases currently pending before the California Supreme Court likely will shed some light on this cloudy area of the law. But in the meantime, in two separate arenas arising in Los Angeles, the issue has been at the center of controversy.

In January, the Los Angeles County Civil Service Commission was asked to seal from public investigation all internal affairs records of deputy sheriffs and other law enforcement officers. Included in the broad request were records concerning a deputy accused of dishonesty, use of excessive force, and other acts of misconduct. The deputy had been suspended for 25 days following a brawl in a bar in 2001. He appealed the disciplinary action to the commission. The record concerning the deputy's case surfaced when the department forwarded it to the commission in conjunction with the deputy's appeal.

The attorney representing the deputy asked the commission to keep confidential *all* internal affairs records filed with the commission. But news organizations argued that county employees who appeal their disciplinary actions to the commission give up their right to maintain the privacy of documents submitted on appeal. Community activists charged that there must be transparency concerning the disciplinary proceedings of law enforcement personnel. The commission sought and obtained a legal opinion from the county counsel, who concluded that the civil service records maintained by the commission are not personnel records shielded from disclosure because the records generated by the commission are not created by the employing agency.

Community activists sought transparency concerning the disciplinary proceedings.

Superior Court Judge Dzintra Janavs ordered the commission to temporarily seal the records involving four cases where the commission had overruled the discipline ordered by the sheriff's department. However, she denied the request of the Association for Los Angeles Deputy Sheriffs to seal all law enforcement records involving appeals pending before the commission. The association argued that since in-

ternal affairs documents are considered to be confidential, these same documents that routinely are introduced as part of the proceedings before the commission also should be kept from public view.

In February, Superior Court Judge David Yaffe declined to expand the ruling of Janavs to the records of all deputies whose cases were on appeal before the commission. Yaffe did not specifically define what he believed to be encompassed by the term "personnel record" deemed to be confidential by statute.

In the meantime, the Los Angeles Police Commission did an about-face and decided it would no longer release the names of police officers in reports evaluating shooting incidents and other use of force. A confidential legal opinion rendered by City Attorney Rocky Delgadillo argued that the identities of officers in the shooting reports are personnel information that must be kept secret. But the city attorney opinion also stressed the uncertain and conflicting state of the law. Some opponents of the commission's action — which first was ushered in at a secret meeting in December — charged that since no court has ruled that the release of officers' names is prohibited, there is no reason to block the release of a matter of public concern in order to immunize officers from scrutiny.

In the end, the commission voted to overturn its past practice at the request of the Los Angeles Police Protective League. The commission held meetings in February to discuss the new rule. But, while facing criticism by State Senator Gloria Romero (D-Los Angeles), who offered to author a bill to clarify the commission's right to disclose officers' names in shooting evaluation reports, the commission opted to withhold the names of officers from the use-of-force summaries it posts online.

The city attorney's opinion also stressed the uncertain and conflicting state of the law.

These conflicts pose broad questions of public policy and arise at a time when the state of the law in this area is unclear.

In 1990, the Second District Court of Appeal ruled in *Bradshaw v. City of Los Angeles*, 221 Cal. App.3d 908, 86 CPER 12, that the city did not violate a police officer's statutory or constitutional rights to have his personnel records remain confidential when the city disclosed the findings and conclusions of a board of rights hearing to the press. The California Supreme Court declined to review the *Bradshaw* ruling.

Two appellate court decisions following *Bradshaw* reached a contrary conclusion. In *City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 111 CPER 27, and *City of Hemet v. Superior Court* (1995) Cal.App.4th 1411, 114 CPER 20, the courts read Penal

Code Sec. 832.7 more broadly to convey confidentiality protections for peace officers' personnel records regardless of the context in which the documents are sought. In these cases, the courts upheld the municipalities' refusals to hand over personnel records pursuant to Public Records Act requests.

The commission opted to withhold names from use-of-force summaries online.

More recently, in *San Diego Peace Officers v. Civil Service Commission* (2002) 104 Cal.App.4th 275, the Fourth District Court of Appeal sided with *Richmond* and *Hemet*, ruling that a public entity may not release the personnel records of a law enforcement officer at a public disciplinary appeal hearing because an officer's personnel records are confidential and cannot be made public if the officer objects.

In *The Copley Press v. Superior Court* (2004) 122 Cal.App.4th 489, 168 CPER 42, the Fourth District narrowly interpreted *San Diego*, and concluded that the county civil service commission was not required to deny public access to a peace officer's disciplinary appeal. In *Copley Press*, the court concluded that the Public Records Act does not exempt from disclosure information relating to a disciplinary appeal derived from sources other than a peace officer's personnel file. The Penal Code "does not cloak information in those records with the mantle of absolute privilege," said the *Copley Press* court. This case currently is pending before the Supreme Court.

In yet another ruling, the Third District Court of Appeal ruled in *California Commission of Peace Officer Standards and Training v. Superior Court* (2005) 128 Cal.App.4th 281, 172 CPER 52, that information obtained from peace officer personnel records conveyed to the Commission on Peace Officer Standards and Training is exempt from disclosure under the Public Records Act. The court reasoned that the *Los Angeles Times* could not compel disclosure of peace officers' names and appointment or termination dates because the information, while not maintained in a personnel file or by an employing agency, was information obtained from the peace officers' personnel files. Like *Copley Press*, this case also is awaiting Supreme Court review.

The opinions provided by the Supreme Court will be welcome news to civil service commissions and other interested parties like those in Los Angeles who are facing these difficult issues without adequate guidance from the courts. ✱

Contra Costa Nurses Poised to Strike

Registered nurses who provide health services at the county hospital, clinics, and jails in Contra Costa County have become frustrated with the course of contract talks and have voted to hold a two-day strike. The prior agreement between California Nurses Association and the county expired September 30, 2005. They have been at the bargaining table for six months.

While the county also is in the midst of tough bargaining with other unions representing its employees, the situation with the nurses union is particularly difficult because of the nationwide nursing shortage and state-imposed nurse-to-patient ratios.

The union, which represents the 450-member county bargaining unit, charges that the severe shortage of nursing staff has a negative impact on their working conditions. Long hours and mandatory overtime have made the work more difficult. The union reports that the county hospital has many open nursing positions frozen and is relying on more expensive temporary nurses. And, CNA claims that a third of the county nurses are planning to retire in the next three to five years. Because of this, CNA argues that providing its members with enhanced wages and benefits must be made a priority in order to put some teeth into efforts to recruit and retain much needed qualified staff.

According to the union, the critical nursing shortage sets this group apart from other county employees. For this reason, the union sees the most recent wage proposal as inadequate. In contrast to public sector jobs, salaries for county nurses fall short. In addition, the parties are at loggerheads over retirement benefits. The county's latest offer would require new nurses to work 15 years in order to qualify for health benefits after they retire. Now, Contra Costa employees with 10 years experience on the job receive lifetime health benefits at age 50. Under the most popular plan, the county pays 98 percent of the premiums and requires no co-pay for most services.

For its part, the county asserts that nurses — like other county employees — are deserving of a wage increase, but it has an obligation to curtail spending and balance its budget. The county acknowledges it has a problem finding experienced nurses to hire. But, it points to the huge tab it is facing to fund pension obligations for county employees. The county administrator recently announced that unless spending is brought in line with revenues, the county faces a downgrade in its credit rating.

While management negotiators are hopeful that an accord can be reached before the scheduled strike date, they are making plans to limit the impact of the job action by reassigning medical staff and closing some facilities that cannot be run without the registered nurses. ✻

No Workers' Comp Coverage for Injury Suffered During 'Pickup' Basketball Game

A police officer for the City of Stockton who injured his leg while off duty, during a "pickup" game of basketball, was not entitled to workers' compensation benefits, ruled the Third District Court of Appeal. In a two-to-one decision, the Workers' Compensation Appeals Board had ruled that the injury arose out of, and occurred in the course of, the officer's employment because the officer reasonably believed his participation in cardiovascular activities like basketball was expected by his employer. But the appellate court annulled the award of workers' compensation benefits, finding instead that the recreational activity was neither a reasonable expectancy of, nor expressly or impliedly required by, his employment.

The case involved the workers' compensation claim of Stockton police officer Sean Jenneiahn. The police department has a regulation mandating that officers maintain good physical condition. However, after an officer is hired, the department does not require any physical fitness tests. According to the record, no officer ever has been

fired or disciplined for not being physically fit.

Officer Jenneiahn was unaware of the department regulation. He recalled that the employment application said an officer must be physically fit to perform the job. Some of his training officers advised him to stay in shape, and he believed that officers should remain physically fit. He did so by jogging, engaging in cardiovascular workouts, and playing basketball and softball.

The basketball game was not an employer-sponsored event.

Officers were not given time to work out while on duty. However, the department maintained a gym and workout facility, and made it available to officers. Jenneiahn did not use this facility; he preferred to work out elsewhere when not on duty.

While off duty, Jenneiahn broke his leg while playing in a basketball game at a facility owned and operated by the Stockton Police Officers Association, not by the city. SPOA members can use the facility whenever they want as part of their union dues.

The basketball game in which Jenneiahn was involved when he suffered his injury was not an employer-sponsored event. It was a pickup game — he went to the facility and joined in a game with others who were there at the time.

Labor Code Sec. 3600 provides generally that an injury is covered by the workers' compensation system when, at the time of the injury, "the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment," and "the injury is proximately caused by the employment." A subdivision to that section added by the legislature in 1978 sets forth a limitation. To be compensable, the injury must be one that "does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment."

That provision subsequently was interpreted by the court "to draw a brighter line delimiting compensability by replacing the general foreseeability test with one of 'reasonable expectancy' of employment, a test that is met when the employee subjectively believes his or her participation in the activity is expected by the employer, and the belief is objectionably reasonable."

In applying the "reasonable test," the Court of Appeal instructed that the first consideration is whether the employee subjectively believes the participation in the activity was expected by the employer. This is a question of fact, said the court.

Next, the court said, the question is whether the employee's belief is objectively reasonable. This is a question of law. "In considering these issues," said the court, "we must focus our attention on the specific activity in which the employee was involved when the injury occurred." "Unless courts require a substantial nexus between an employer's expectations or requirements and the specific off-duty activity in which the employee was engaged, the scope of coverage becomes virtually limitless and contrary to the legislative intent…."

The employer must convey that participation in a particular activity is expected.

The court further instructed that general assertions that it would benefit the employer for the employee to stay in good shape — or even that the employer expects the employee to do so — are not sufficient to require workers' compensation for injuries suffered during any recreational activity in which the employee elects to participate.

The touchstone, said the court, is whether there is specific conduct of the employer that reasonably would convey to the employee that participation in a particular activity is expected.

Applying these guidelines, the Court of Appeal first concluded that the evidence did not support a finding that Jenneiahn subjectively believed that the police department expected him to engage in an occasional pickup game of basketball. He was aware of advice from training officers to stay in shape and knew he had to do so to perform his job. But, he knew he did not have to take any physical fitness training or exam and was not aware of any officer having been disciplined for poor fitness.

In addition, the court noted that Officer Jenneiahn did not incorporate pickup basketball games into his training regimen. He played only about once a month and believed that basketball was not necessary to stay fit; he relied on running and other activities to do so.

In sum, concluded the court, "the evidence does not establish that Officer Jenneiahn believed that his employer expected him to participate in the game of pickup basketball. The record establishes only his belief that it was a good idea for a police officer to stay in good physical condition, and his leap to a conclusion that any physical activity in which an officer chooses to engage must be covered by workers' compensation. Such a belief is far too broad and inconsistent with the legislative intent…."

Even if there were evidence that Jenneiahn subjectively believed the city expected him to play in a pickup game of basketball, the court continued, this belief was not objectively reasonable. "The game had no connection whatsoever to the employer," the court remarked, and was conducted in a private facility over which the employer had no control. It was not a scheduled game, and the employer did not sponsor, encourage, or condone the activity.

Although the city expects its officers to maintain sufficient general physical fitness necessary to perform their duties, said the court, "it did not subject officers to any form of physical fitness testing, let alone testing on the skill utilized in playing basketball."

On this record, concluded the court, "it is readily apparent that playing in the off-duty pickup game of basketball was a wholly voluntary choice by Officer Jenneiahn. His employer did not exert any form of pressure to make his choice less than voluntary. The general, and reasonable, expectation that a police officer will maintain sufficient physical fitness to perform his or her duties is not a sufficient basis to extend workers' compensation coverage to any and all off-duty recreational or athletic activities in which an officer voluntarily chooses to participate." (*City of Stockton v. Workers' Compensation Appeals Board* [1-27-06] No. C050085 [3d Dist.] 135 Cal.App.4th 1513, 2006 DJDAR 1158.) ✻

Playing in the off-duty pickup game was a wholly voluntary choice.

Public Schools

PERB Finds Teachers Union Waived Right to Bargain No-Strike Clause

The Public Employment Relations Board has ruled in *Santee Teachers Assn. v. Santee Elementary School Dist.* that the union waived its right to bargain over a policy enacted by the school board prohibiting certain concerted activities, including any strike, walk-out, slowdown, or "other such strike-related type activities." PERB also found, however, that the district violated the Educational Employment Relations Act by refusing the union's demand to bargain over the impact of the policy. Further, PERB ruled that the district unlawfully interfered with unit employees' protected rights by including the above-quoted language in the policy and by adding language in the administrative regulation implementing the policy that threatened loss of payroll deduction privileges for any employee engaging in the prohibited activities.

Factual Background

The union and the district have had a long history of collective bargaining, going back to 1977. Since their most recent agreement expired on June 30, 2000, however, the parties' cooperative relationship began to disintegrate. The parties held several unproductive negotiating sessions, and the district declared impasse on November 30, 2000.

The district superintendent drafted a new board policy in late 2000, which included the following language:

> Any strike, walk-out, slowdown, or other such strike-related type activities by employees of the District could materially disrupt the operation of the schools of the District and prevent the continuous education of the children attending District schools. Therefore, the Governing Board shall view any strike, walk-out, slowdown of mandatory or discretionary duties, or other such strike-related type of activity by employees of the school District as a prohibited act.

Board bylaws require that any proposed policy be given two readings prior to adoption. At the first reading on December 5, 2000, the union president, Lynn Beerle, questioned the need for the policy and expressed concern that, if adopted, "It may have lasting effects on the relationship between the teachers and the administration."

After the meeting, Beerle sought the advice of union consultant Marilyn Sanderson. Sanderson did not recommend that the union take any action because she believed the policy guaranteed the union the opportunity to bargain any impact after the board adopted it, and after a strike declaration, neither of which had yet occurred.

The second reading of the policy occurred at a board meeting on December 19. Beerle again attended and spoke against the proposed policy and a proposed administrative regulation implementing the policy attached to the meeting agenda. She did not make any request to bargain concerning the policy or the regulation. At that meeting, the board adopted the policy but held the regulation for further review.

The school board policy prohibited any strike, walk-out, slowdown, or 'other such strike-related type activities.'

In a letter dated January 10, 2001, the union demanded to bargain the impact of the policy. The district responded on January 19, stating, "The Board has already taken formal action on this policy. Given the current climate and concerted actions of STA, we would be adversely impacted by initiating negotiations….STA's January 10, 2001 demand to bargain is therefore untimely."

The union filed an unfair practice charge on February 13, alleging that the district's unilateral adoption of the new policy and its refusal to bargain the impact of the policy violated EERA.

On January 24, 2002, the union filed an amended charge and a motion to amend the complaint, adding the allegation that the district unlawfully adopted the administrative regulation implementing the policy, which changed several provisions of the expired collective bargaining agreement.

A union may waive the right to bargain a contractual matter within the scope of representation.

The union claimed it first learned of the adoption of the administrative regulation at an informal PERB settlement conference held December 13, 2001. The district contended the regulation was adopted on December 19, 2000, and that the amended charge was time-barred as it was filed more than six months after the complained-of event.

An evidentiary hearing was held before an administrative law judge who found the allegations regarding the regulation were part of the district's same course of conduct, were fully litigated, and therefore related back to the date of filing of the original charge and were not time-barred. She also found the union waived its right to bargain the adoption of the policy, but that the district unilaterally adopted the administrative regulation without honoring the union's demand to bargain the impact of the policy. Further, the ALJ found the district's adoption of the policy language prohibiting "other such strike-related activities," and the threatened "loss of payroll deduction privileges" contained in the regulation, constituted unalleged violations of EERA.

Both the union and the district filed exceptions to the ALJ's proposed decision.

The Decision

PERB affirmed the administrative law judge's decision in substantial part, but disagreed with some aspects of her conclusions.

The board found the ALJ's analysis of the timeliness of the amended charge to be unecessary. "Because the [administrative regulation] defines the impact of the [board policy] on unit employees, STA's demand to bargain the impact of the [board policy] on January 10, 2001, was a demand to bargain the [administrative regulation]," said the board. "Since the original complaint is sufficient on its face, the issue relating to timeliness of the amended complaint is moot and requires no further discussion."

The policy. The board agreed with the ALJ's finding that the union waived its right to negotiate over the policy. A union may waive the right to bargain a contractual matter within the scope of representation, instructed the board, citing *San Mateo CCD* (1979) No. 94, 42 CPER 43. However, any such waiver must be evidenced by "clear and unmistakable language or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer." Inaction on the part of the exclusive representative may constitute waiver, but only where the evidence demonstrates "an intentional relinquishment of the union's right to bargain," said the board, citing *Los Angeles CCD* (1982) No. 252, 55 CPER 71, and *San Francisco CCD* (1979) No. 105, 43 CPER 54.

'Protests over an employer's contemplated unilateral action is not the same as a demand to bargain.'

In this case, the board found the union did not demand to bargain concerning the policy prior to its implementation. It pointed to Beerle's testimony acknowledging that she did not demand to bargain because she thought she would be given an opportunity to bargain based on the past practice of raising these issues with the joint employer-employee relations committee. Her comments at the December meetings that the relationship between the

teachers and the district would be damaged by the adoption of the policy were not enough. "Protests over an employer's contemplated unilateral action is not the same as a demand to bargain," said the board, citing *Delano Joint Union HSD* (1983) No. 307, 58 CPER 60.

The board concluded the union had adequate notice of the proposed policy and, "after serious discussion as to the consequences of such a demand," decided not to demand bargaining, thereby waiving its right to do so.

The board rejected the union's argument that adoption of the policy was unlawful because the district had not raised it at the bargaining table. The union reasoned that there can be no waiver during negotiations for a successor to an expired agreement when the parties are at impasse. "A unilateral change at expiration of a contract may be lawful if the employees' exclusive representative expressly waived its right to negotiate the subject of the change," said the board, quoting from *California State Employees Assn. v. PERB* (1996) 51 Cal.App. 4th 923, 122 CPER 55.

The administrative regulation. The board vacated the ALJ's finding that the district unilaterally adopted the regulation without giving the union notice and an opportunity to be heard. It based this on its conclusion that amending the complaint to add a separate unilateral change allegation regarding the regulation was unnecessary. But it agreed with the ALJ's finding that the district violated EERA when it refused the union's demand to bargain over the impact of the board policy.

"An employer is obligated to provide the exclusive representative with notice and an opportunity to negotiate over the *effects* of its decision that have an impact upon matters within scope," said the board, quoting from *Oakland USD* (1985) No. 540, 67X CPER 13. In this case, the union demanded to bargain the impact of the policy in a timely manner, and the district refused.

The district violated EERA when it refused the union's demand to bargain over the impact of the board policy.

The district argued that the union may not wait for implementation of the policy to demand bargaining on its impact. The board disagreed, finding the district's reliance on *Victor Valley Union HSD* (1986) No. 565, 69 CPER 43, misplaced. "*Victor Valley* involved negotiation over a change in terms and conditions of employment, not over the impacts of the change," instructed the board. In contrast, in *Oakland*, the employer's decision to lay off employees took place two months before its implementation, providing ample opportunity for good faith negotiations to take place prior to implementation. Here, the policy was approved on December 19, 2000, but there was no effective date stated in the policy. Further, there was no strike or threat of strike, and thus there was no opportunity for implementation of the policy.

Even if the policy had become effective on the date it was adopted, explained the board, it provided for the superintendent to develop a written plan to "delineate actions to be taken in the event of a strike or threatened strike." That plan is the administrative regulation, said the board:

> Contrary to the District's contention, the [board policy] says nothing about bargaining the effects of the [board policy], particularly impacts as detailed as those found in the [administrative regulation]. Instead, the [board policy] merely provides that to the extent the policy modifies existing contractual provisions with employee organizations, employee organizations shall be provided an opportunity to demand to bargain the modifications prior to their effective date. The [board policy] itself does not indicate what provisions of the expired collective bargaining agreement (CBA) would be modified.

Interference. The board also agreed with the ALJ's finding that some provisions of the policy and regulation interfered with employees' protected rights. Though these violations were not alleged by the union in its charge, "PERB has held that an Unalleged violation may be found by the trial judge provided it is intimately related to the

subject matter of the complaint, part of the respondent's same course of conduct, and was fully litigated at the hearing, with respondent having the opportunity to examine and cross-examine witnesses," instructed the board, citing *Tahoe-Truckee USD* (1988) No. 668, 78 CPER 74.

The union first raised the issue in its opening statement at the hearing. The district made no response then, and did not dispute the propriety of the unalleged violations on appeal, rather arguing that it did not interfere with employees' protected rights. "The District apparently believes the interference allegations were fully and fairly litigated at hearing and now has waived the ability to argue otherwise," concluded the board.

The phrase 'or other such strike-related type activites' interfered with employees' rights.

The focus of the inference claim was language contained in the policy prohibiting "any strike, walk-out, slowdown, or other such strike-related type activities by employees of the District…." EERA Sec. 3543(a) guarantees employees the right to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Section 3543.5(a) makes it unlawful for employers to "impose or threaten to impose reprisals on employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter." The standard for unlawful interference is whether the charging party can establish that "the respondent's conduct tends to or does result in some harm to employee rights granted under EERA," instructed the board.

The board agreed with the ALJ's conclusion that the phrase "or other such strike-related type activities" interfered with employees' rights "because of its ambiguity, the possibility of a broad interpretation in the future, and its resulting chilling effect on employees' protected rights. Thus, a broad interpretation of the [board policy] may effectively restrain employees from engaging in protected conduct, such as the 'work to rule' program, rallies, leafleting, and peaceful picketing." It was not persuaded by the district's argument that specific language in the policy prohibiting interference ameliorated its prohibition of protected activities.

The board also agreed with the ALJ that employees were deprived of their payroll deduction privileges, a right protected by Sec. 3543.1, by language of the regulation declaring: "An employee withholding services may be subject to the loss of payroll deduction privileges." It rejected the district's argument that a statement contained in the regulation providing that the district "shall not…interfere" with the exercise of employees' rights mitigated the impact of the interference, finding that it did not clearly disclaim the unlawful portions of the regulation.

The union urged the board to find a right to strike under EERA by overturning its decision in *Compton USD* (1987) No. IR-50, 72X CPER 16, and to find that both the policy and the regulation interfered with this right. The board declined to do so, holding that the union had failed to provide the district with adequate notice or the right to defend this assertion and thus did not meet the requirements for an unalleged violation. Further, the union waived its right to negotiate the policy, including its no-strike clause. "Thus, the Board need not consider whether the District has interfered with the right to strike or whether the right to strike is protected under EERA."

Employees were deprived of their payroll deduction privileges.

Remedy. The board ordered that the district rescind the offending language in its policy and the entire regulation. (*Santee Teachers Assn. v. Santee Elementary School Dist.* [2-22-06] PERB No. 1822.) ✱

NEA and AFL-CIO Partnership Benefits Both Organizations

The National Education Association, the largest independent union representing teachers, with 2.8 million members, has agreed that its local chapters will be allowed to join the AFL-CIO. Previously, most of the 13,250 locals were prohibited from joining the organization.

The two teachers unions can work together but without merging.

The partnership was finalized at the winter AFL-CIO executive council meetings in February. NEA President Reg Weaver said that the common goal of striving to improve the lives of working families was the most important cornerstone of the partnership. "What we have here is an opportunity to strengthen education, to strengthen community, and to strengthen the collective ability to get the job done," he said.

The American Federation of Teachers, another teachers union with 1.3 million members, has long been part of the AFL-CIO. Three NEA statewide organizations already are members of the AFL-CIO because of local mergers with the AFT. NEA operations in New York State are expected to join the AFL-CIO by fall.

The AFT and the NEA attempted a merger in 1998, but only 42 percent of NEA members favored that move. Had the merger gone through, the NEA would have become part of the AFL-CIO. Now, with the new agreement, the two teachers unions can work together within the AFL-CIO, but without merging.

The California Teachers Association has no immediate plans to join the AFL-CIO's state labor federation, according to its president, Barbara Kerr, but local chapters might join with regional councils. In California, about 335,000 public school employees belong to NEA affiliates, while approximately 65,000 belong to AFT affiliates. CTA worked closely with the AFL-CIO and other unions to defeat Governor Schwarzenegger's ballot measures in last November's special election.

Membership in the AFL-CIO declined by about 40 percent last summer when four large unions, the Service Employees International Union, the Teamsters, the United Food and Commercial Workers, and Unite Here, withdrew from the organization. The partnership with NEA could mean an influx of new members, giving the AFL-CIO a much-needed boost. The AFL-CIO's local labor councils are instrumental in coordinating "get out the vote" drives that could help teachers' locals elect labor-friendly school boards. ✻

Charter Schools Attempt to Avoid PERB Jurisdiction in Representation Cases

Two different charter school organizations, faced with organizing drives to unionize teachers and other certified employees at their campuses, have filed petitions with the National Labor Relations Board, claiming they are covered by the National Labor Relations Act rather than by California's Educational Employment Relations Act administered by the Public Employment Relations Board. In one case, involving the Los Angeles Leadership Academy, the NLRB dismissed the petition, finding that the school did not come under its jurisdiction. The other case, brought by Leadership Public Schools, is pending before the NLRB.

A review of the two statutory frameworks reveals the charter schools' motivation for seeking to be covered by the NLRA rather than EERA concerning union representation petitions. An employer has a greater opportunity to influence the outcome of an orga-

nizing drive under the applicable provisions of the NLRA than it does under EERA. Under EERA Sec. 3544, when a union files a request with a public school employer, claiming that it has signed up the majority of the employees of a specific unit, the school must recognize it as the exclusive representative if the union is able to provide proof of its majority support claim. The only bases on which the union's request can be challenged is that the public school employer doubts the appropriateness of the unit or if another union challenges the appropriateness of the unit, or, if another union submits a competing claim of representation. A request for representation also can be denied if there is a contract with another employee organization currently in effect or the employer has recognized another union as the exclusive representative of any employee included in the proposed unit within the last 12 months.

PERB and the union argued that the academy is a political subdivision of the state.

Under the NLRA, however, if the employer refuses to recognize a union as the exclusive representative of the unit, the NLRB conducts an investigation and, if it determines that it "has reasonable cause to believe that a question of representation affecting commerce exists," it conducts a hearing on the matter at which both the employer and the union have the right to call, examine, and cross-examine witnesses, and introduce documents. If the board determines, on the basis of evidence introduced at the hearing, that a question concerning representation exists, it then orders an election where each employee of the unit votes whether to be represented by the union or another competing union or against representation. (See 29 USC Sec. 159 and NLRB Rules and Regulations Secs.102.60–102.72.)

Los Angeles Leadership Academy

The California Teachers Association/National Education Association filed a representation petition with PERB seeking to represent a unit of teachers and other certified employees at the Los Angeles Leadership Academy, a charter school. The academy filed a petition with the NLRB, claiming that it is a private employer covered by the NLRA, not EERA, and that PERB has no jurisdiction to determine the representation issue. PERB's motion to intervene in the proceeding was granted. PERB and the union argued that the academy is exempt from coverage under the NLRA because it is a political subdivision of the State of California.

A hearing was held before a board hearing officer. The regional director reviewed the evidence and ruled in favor of the union and PERB. In coming to the conclusion that the academy was not covered by the NLRA, the R.D. applied the United States Supreme Court's test developed in *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee* (1971) 402 U.S. 600. That case held that an entity is a political subdivision and thus exempt from the NLRA if it is either (1) created directly by the state so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. The R.D. found that the academy met both prongs of the *Hawkins* test.

In coming to his conclusion the R.D. applied the U.S. Supreme Court's test in Hawkins.

In accord with several NLRB decisions, the R.D. looked to the state's enabling legislation and its intent to determine whether an employer is exempt from the act. In this case, the California legislature passed the Charter Schools Act of 1992 to permit the establishment of charter schools in order to improve the public school system. "The CSA serves as a roadmap for charter schools, for it reflects the state's intent, provides for public funding, and

Pocket Guide to K-12 Certificated Employee Classification and Dismissal

By Dale Brodsky

For K-12 employees, their union representatives, and public school employers, including governing board members, human resources personnel, administrators, and their legal representatives.

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

The guide covers dismissal, suspension, leaves of absence, layoffs, pre-hearing and hearing procedures, the Commission on Professional Competence, the Commission on Teacher Credentialing, the credential revocation process...and more.

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government oversight," noted the R.D. He found that "the California legislature unequivocally declared its intent that 'Charter schools are part of the Public School System, as defined in Article 9 of the California Constitution.'"

Under the Charter Schools Act, in order to operate a charter school, its developers must submit a petition for approval to a chartering authority, here the Los Angeles Unified School District. While the charter petition was still pending, the academy incorporated as a nonprofit public benefit organization under 26 USCA 501(c)(3). The R.D. rejected the academy's argument that, because it incorporated prior to the approval of its charter, it is a private employer covered by the NLRA:

> In the instant case, although the Academy incorporated before its charter was approved, the record demonstrates that it incorporated with the intent to operate as a "public school," pursuant to the CSA. Simply stated, the Academy did not and could not exist as a "public school" or as a "charter school" before its petition was approved by LAUSD. Under California law, it is clear that this is the only way to establish a public charter school. Moreover, the state has the authority to revoke or not renew the Academy's charter. While the Academy's founders decided to form a non-profit public benefit corporation before LAUSD approved its petition, they did so pursuant to CSA Section 47604(a). In its articles of incorporation, the Academy declared that its specific purpose was "to organize and operate the Los Angeles Leadership Academy, a public school." Pursuant to this specific declaration, the Internal Revenue Service granted the Academy tax exempt status as a 501(c)(3) organization. Mr. Lowenstein [the founder] acknowledged that the Academy needed LAUSD to approve its charter in order to operate. Moreover, such approval was necessary for the Academy to receive significant government funding.

The legislature unequivocally declared its intent that charter schools are part of the public school system.

The academy's charter provides that it "shall be deemed the exclusive public school employer of the employees of the L.A. Leadership Academy for collective bargaining purposes under the Educational Employment Relations Act," found the R.D. Further, the academy receives the vast majority of its funding from the state's general fund, just like a public school district.

Other facts cited by the R.D. in support of his finding were that, unlike teachers in private schools, the academy's teachers must possess a valid California credential; the teachers who come from traditional schools retain their seniority and return rights; teachers and other staff members are entitled to due process rights; and academy teachers are eligible to participate in the California State Teachers Retirement Fund, created by the legislature for public school teachers.

Turning to the second prong of the *Hawkins* test, the R.D. found that "California's enabling legislation, the Academy's charter, and its reporting requirements dictate a finding that individuals responsible to public officials administer the Academy." Section 47615(a) of the Charter Schools Act states that "charter schools are under the jurisdiction of the Public School System and the exclusive control of the officers of the public schools...," he noted. Further, it provides that charter schools are under the exclusive control of public school officers "with regard to the appropriation of public moneys." The R.D. also found the academy's financial records and budget are subject to strict control and oversight by LAUSD and "while the Academy has a board of directors that makes governance decisions, the Academy is not excused from many regulations and reporting requirements that apply to all public schools." For instance, he said,

'The Academy is not excused from many regulations that apply to all public schools.'

its students are monitored by the same testing and reporting requirements that apply to public schools; it is subject to the federal "No Child Left Behind" act because it receives Title I funds; and it agreed to "be a public school for purposes of special education" and to provide disabled children the same services as similarly situated children "who attend another public school."

The R.D. concluded that the academy is a political subdivision of the state of California and not an employer within the meaning of the NLRA, stating:

> I have based my determination on both prongs of the *Hawkins* test, having found each one equally compelling in and of itself. As such, I find that the Academy, a public charter school, is strictly a creature of state statute so as to constitute an administrative arm of the government, and would not exist as a public charter school but for the state's enabling legislation. So too and alternatively, the record amply demonstrates that the Academy is administered by individuals who are responsible to public officials or to the general electorate.

The academy has filed a request for review of the decision with the NLRB in Washington, D.C.

Leadership Public Schools

The California Federation of Teachers initiated a petition for recognition with PERB, seeking to represent teachers employed by Leadership Public Schools at its Richmond campus. LPS, a charter school with several campuses in Northern California, filed a petition with the NLRB, alleging that it fell within the jurisdiction of the NLRA rather than EERA. PERB filed a motion to intervene in the case and a motion to dismiss the petition, both of which have been challenged by LPS.

In the challenge to PERB's petition and motion, LPS' attorney, Jeffrey Sloan, wrote, "Notwithstanding the efforts of the California Legislature to render charter schools subject to public schools' collective bargaining, LPS' status as a private sector 501(c)(3) corporation makes it clearly subject to the National Labor Relations Act." He argued that PERB's motion should be denied because only a "person" within the meaning of NLRB Rules and Regulations Sec. 102.65(b) can intervene, and "those regulations have always been interpreted to refer to *a labor organization*." Sloan also claims that *Hawkins* "requires a rigorous factual analysis of each case" and PERB knows nothing about the facts in this case.

His third argument is that analysis of the NLRB's jurisdiction is to be based on federal law, not state law, rendering the legal opinion of PERB's general counsel on the issue irrelevant. "The Union is in as good a position as PERB to make legal argument — particularly since the PERB General Counsel's comprehensive 'request for intervention' has already given the Union its arguments," he wrote. In addition, he contends that no weight should be given to the opinion of PERB's general counsel as his "solitary interest in this case is to enforce the California Legislature's efforts to transmute a private not-for-profit corporation into a public sector employer." The general counsel's "attempted intervention in this case and attempt to secure a dismissal favoring CFT is squarely at odds not only with PERB's duty to maintain neutrality, but also with PERB's precedent."

The NLRB had not yet heard the matter as of press time. ✱

New Contract for West Contra Costa Teachers

The West Contra Costa School Board has approved a three-year contract with the United Teachers of Richmond. Union members already had voted in favor of the pact. The contract runs from July 1, 2005, to June 30, 2008, and ends nine months of negotiations. The bargaining saga included several meetings with a state mediator. Either side may reopen negotiations each year to bargain salary increases.

Under the new contract, the union's 1,860 members will receive a 3 percent, mid-year pay raise effective January 1, 2006, but the rules changed for who can receive lifetime retirement benefits. Teachers hired on or after July 1 must remain employed by the district

for a minimum of 10 years before becoming eligible for lifetime benefits. Under the old contract, which expired June 30, 2005, teachers with five years credit in the State Teachers Retirement System qualified to receive lifetime benefits, regardless of which district the teacher had worked for before coming to West Contra Costa. The district had racked up nearly $1 billion in liability for retirement benefits in the last four decades. It is anticipated that, under the new rules, the district will save $251,000 in 2006-07, and an additional $250,000 the following year.

Union leaders were pleased with the agreement. "The UTA membership was determined to maintain a fully paid health program, and we did that in this agreement," said Jeff Cloutier, executive director of the union. "The UTR membership also was determined to maintain a paid retiree benefit, and we did that," he said. ✻

Higher Education

CSU Cannot Bargain Limits on Arbitrators' Authority in Tenure Cases

A 2002 change in a supersession law protects faculty at the California State University from restrictions on the scope of an arbitrator's authority in tenure and reappointment cases, according to the Public Employment Relations Board. In a decision that presents an anomaly in the terrain of tenure law, PERB held that the change in the Higher Education Employer-Employee Relations Act established a minimum right to a "final" arbitration decision that CSU and the California Faculty Association could not waive in collective bargaining. Because that minimum right was not negotiable and would be undermined by restrictions on an arbitrator's remedial authority, CSU's insistence to impasse on limiting arbitral authority impermissibly interfered with employee rights under HEERA. It also constituted a refusal to participate in good faith in the impasse procedure.

Pre-HEERA Arbitration Right

The legislature provided academic employees with grievance and arbitration rights in the Education Code in 1976. Section 89542.5 requires CSU to have a grievance and arbitration procedure for allegations that an employee "was directly wronged in connection with the rights accruing to his or her job classification, benefits, working conditions, appointment, reappointment, tenure, promotion, reassignment, or the like."

The statute requires a hearing by a faculty committee, which makes a recommendation on the grievance to the college president. If the president's decision disagrees with the faculty committee's decision, "the matter shall go before an arbitrator whose decision shall be final."

CSU issued an executive order implementing Sec. 89542.5. The order limited the president's authority to reject the committee's recommendation. But if the president and the committee disagreed, the matter could be submitted to an arbitrator for a review and decision based on the record. If the arbitrator deemed the president's disagreement unjustified, the arbitrator was required to adopt the committee's recommendation. If found justified, the president's decision was to be adopted. If the arbitrator found substantially prejudicial procedural errors at the committee level, the arbitrator could adopt the president's decision or resubmit the matter to the committee. The arbitrator's decision was final, as long as it was "consonant" with CSU policies or state and federal laws.

Prior Agreements

When HEERA was enacted in 1979, it provided that, when a collective bargaining agreement conflicted with Ed. Code Sec. 89542.5, the agreement would control. HEERA also excluded from the scope of bargaining the "criteria and standards to be used for the appointment, promotion, evaluation, and tenure of academic employees, which shall be the joint responsibility of the academic senate and the trustees."

HEERA provided that when a collective bargaining agreement conflicted with Ed. Code Sec. 89542.5, the agreement would control.

While CSU and CFA have not negotiated criteria and standards for tenure, retention, and promotion, disputes arising from these decisions are resolved through the grievance and arbitration procedure of the memorandum of understanding. MOUs between the parties have contained various restrictions on the authority of the arbitrator.

One MOU limited the arbitrator's ability to overturn a decision on appointment, reappointment, promotion, or tenure for procedural errors unless there was clear and convincing evidence of a prejudicial error. It prescribed that the normal remedy for procedural errors was remand to the level where the error was made. The MOU allowed the arbitrator to grant appointment, reappointment, promotion, or tenure only in "extreme cases" where it could be stated "with certainty" that the decision would have been favorable but for the fact the decision was not based on reasoned judgment, and only where there was no other practicable remedy.

The MOU allowed the arbitrator to grant tenure only in 'extreme cases.'

Change in Supersession Law

In late 2001, S.B. 1212 became effective. It added Government Code Sec. 3572.5(b)(1), which provides that, except for a clause concerning payment of the arbitrator, Sec. 89542.5 "provides a minimum level of benefits or rights, and is superseded by a memorandum of understanding only if the relevant terms of the memorandum of understanding provide more than the minimum level of benefits or rights set forth in that section."

S.B. 1212 became effective while CFA and CSU were negotiating for a successor agreement. The parties disagreed whether S.B. 1212 allowed restrictions on an arbitrator's authority. As CSU insisted on maintaining contractual limitations on arbitral authority, CFA requested an impasse determination and filed an unfair practice charge.

CFA contended that CSU did not participate in good faith in impasse procedures because finality of the arbitrator's decision is non-negotiable under S.B. 1212. It argued that restricting the arbitrator's remedial authority would render the statutory right to a final arbitration decision meaningless if the arbitrator could not remedy a wrong.

CSU asserted that S.B. 1212 did not expand any rights. It argued that Sec. 89542.5 requires only a skeletal framework of a grievance procedure. If the legislature had intended to prescribe a minimum scope of the arbitrator's authority, it would have done so, it contended. CSU also argued that the legislature must have been aware of the limitations on arbitral remedial authority in the executive order that preceded Sec. 89542.5 and in the parties' MOUs, and would have clarified the statutory provisions if it had not intended to allow restrictions on the arbitrator.

Finality of Arbitration Mandatory

The board found it clear from the language and legislative history that S.B. 1212 "established that a heightened standard of review cannot be imposed on the arbitrator by the parties in their collective bargaining agreement or memorandum of understanding." It adopted the decision of Administrative Law Judge Fred D'Orazio that the minimum statutory arbitration rights were not subject to negotiations.

The ALJ examined whether Sec. 89542.5 rights were non-negotiable under the standard set out in *San Mateo City School Dist. v. Public Employment Relations Board* (1983) 33 Cal. 3d 850, CPER SRS 23, which stated, "Unless the statutory language clearly evidences an intent to set an inflexible standard or insure immutable provisions, the negotiability of a proposal should not be precluded." The ALJ found that the plain language of Sec. 89542.5(a)(4) — "the matter shall go before an arbitrator whose decision shall be final" — together with the language in Gov. Code Sec. 3572.5(b)(1) gives an academic employee at CSU a minimum right to a final decision by an arbitrator on the merits of a grievance.

The parties disagreed whether S.B. 1212 allowed restrictions on an arbitrator's authority.

The ALJ pointed out that the legislature would have incorporated pro-

cedural terms from the MOU if it had intended to establish them as the minimum guarantee. He found that limitations on an arbitrator's authority created a lesser right than the right to a "final decision." Arbitral authority otherwise could be restricted to the extent that the right to a final decision would be rendered illusory. He observed, "[I]f an arbitrator's authority can be final and binding while at the same time limited in scope or remedy, SB 1212 would have been an idle legislative act." If restrictions on arbitral authority were subject to negotiation, the right to a final decision could be "replaced, set aside or annulled by an agreement," which is impermissible when an Education Code section is preemptive. Based on the plain language of the statutes, he concluded that insistence to impasse on arbitral restrictions was unlawful.

The ALJ's review of the legislative history of S.B. 1212 led to the same conclusion. The analyses in legislative committees referred to setting a floor of rights that could not be reduced through collective bargaining. The analyses in both houses of the legislature contained the sponsor's assertion that Ed. Code Sec. 89542.5 rights should not be the subject of collective bargaining. One Senate analysis quoted CFA's supporting argument for the bill:

> Recent collective bargaining disputes with the CSU have included the administration's desire to reduce — and even eliminate — faculty due process rights.... The CSU should not be allowed to propose conditions that diminish statutory due process rights, or place faculty in a position where equitable compensation and working conditions would have to be compromised at the expense of these academic protections.

In a speech on the Senate floor, Gloria Romero, the bill's sponsor, referred to CSU's proposal to remove arbitration rights in the area of tenure. The ALJ noted that the legislature did not focus on preserving any terms of prior executive orders or MOUs, only on setting the basic rights of Sec. 89542.5 as a floor.

CSU's academic employees have more recourse to remedies through arbitration than any other faculty.

CSU argued that the legislature would have pointed out that it was not adopting the MOU's limits on arbitral authority in its analyses of S.B. 1212 if it had intended arbitrators to have unfettered authority. The ALJ rejected this contention. He pointed out that the legislature could have amended that section if it intended to allow restrictions on arbitral authority. "It may not be presumed that the Legislature, in enacting an entirely new statute with an entirely new concept of supersession, intended to incorporate CSU's administrative interpretation of Education Code section 89542.5."

Tenure Arbitration Anomaly

By finding the scope of arbitral authority non-negotiable, PERB's decision essentially removes impediments to an award of tenure for CSU faculty members. This places CSU's academic employees in the position of having more recourse to remedies through arbitration than any other faculty. The legislature does not regulate appeal processes for tenure decisions at the University of California. The Supreme Court has found the Education Code preempts collective bargaining agreements that provide for procedural rights and arbitration of non-renewal decisions in the schools. In the community colleges, the Education Code clearly restricts the arbitrator's grounds for decision and prohibits an arbitrator from granting tenure to an instructor.

An opportunity to award tenure would not arise unless either the CSU faculty committee or president sides with the faculty member seeking tenure. However rare, this result gives U.C., community colleges, and schools more control than CSU over tenure decisions. CSU is considering asking for a stay while it petitions the Court of Appeal for review of the decision. If unsuccessful in the courts, it may well be that CSU will be able to convince the legislature to correct this anomalous result. (*California Faculty Assn. v. Trustees of the California State University* [2-23-06] PERB No. 1823-H.)

U.C. Adopts New Family-Friendly Policies for Faculty

Studies and statistics say it over and over — academia has been slow to increase the number of women in its ranks. In light of evidence that family responsibilities play a major role in whether women ever obtain a tenured faculty position, the University of California amended its academic personnel policies in February to provide more flexibility for faculty members with young children and to reduce the negative effect of child-rearing on advancement. The university hopes the policies will give it an edge over its competitors in attracting and retaining top candidates.

Proportion Grows Slowly

In 1989, women constituted 16 percent of the full-time tenured or tenure-track faculty at U.C. By 2005, the percentage had risen to 27.3 percent, even though women have comprised at least 40 percent of Ph.D. recipients nationwide for the last 15 years. It takes time, of course, to alter the proportions of the faculty, as the number of new hires each year is small compared to the thousands of existing professors. But a low percentage of women among new hires at U.C. explains why the overall makeup of the faculty has changed so slowly.

According to a 2001 report of the Bureau of State Audits, U.C. has never hired women faculty at rates that match the qualified labor pool. (See report summary in *CPER* No. 148, pp. 45-47.) In 1990-91, when women received 42 percent of doctorates awarded to U.S. citizens and permanent residents nationwide, only 29 percent of faculty hires were female. By 1993-94, that number had climbed to 36 percent. After affirmative action was prohibited by Proposition 209, the proportion of women among new hires fell to 24 percent in 1999-2000, although women were receiving 47 percent of Ph.D.s nationwide.

U.C. has never hired women faculty at rates that match the qualified labor pool.

Several faculty members, including U.C. Davis law professor and *CPER* advisor Martha West, brought the issue to the attention of State Senator Jackie Speier, who requested the state auditor's report and held legislative hearings. As noted in "Unprecedented Urgency: Gender Discrimination in Faculty Hiring at the University of California," a report by West and three colleagues, renewed focus has had results. By 2003, the percentage of women had risen again to 36 percent of new hires. Still, this rate was low when compared to the 44 percent of Ph.D.s U.C. awarded to women in 2003-04, and the 51 percent of doctorates earned by women nationwide.

U.C. is not alone among highly respected universities in being slow to close the gender gap. In 2001-02, when women constituted 24 percent of U.C. faculty, that percentage was slightly above the average for eight comparable institutions. Stanford employed 21 percent women faculty, while women made up 29 percent of professors at the University of Michigan in Ann Arbor.

Discrimination and Discouragement

At the U.C. Berkeley campus, Angelica Stacy, associate vice provost for faculty equity, began working in 2001 to increase the diversity of faculty applicants. She questioned whether unconscious biases were affecting faculty hires. "Data from the Office of the President, for instance, have shown that the U.C. system hires men from a much broader range of schools and we hire women from a much narrower range of schools," Stacy told the *Berkeleyan* at the time. "This begs the question of why we're taking women only from the very top schools and giving men more leeway."

But there also was evidence that the applicant pool at Berkeley contained fewer women than expected. Looking at Ph.D.s from only the top schools, from which the Berkeley campus was likely to hire, Stacy found that in 2000, 40 percent of this potential applicant

pool was female and 60 percent was male. But women constituted only 30 percent of the applicants for U.C. Berkeley tenured or tenure-track positions while 70 percent of actual applicants were men.

Some studies suggest that the demands of academia discourage women from applying for tenure-track positions. Mary Ann Mason, dean of Graduate Education at U.C. Berkeley, conducted a survey of 800 post-doctoral fellows at Berkeley in 2000. She found that 59 percent of women with children were considering leaving academia, most of them because of their children.

Only one-third of the women who take a tenure-track job before having children ever become parents.

Women with children are underrepresented in colleges and universities nationwide. Mason headed another study with national data that found women who had babies within the first five years after receiving their Ph.D.s were less likely than men to obtain tenure at a four-year institution within 10 to 12 years of their doctorate. While over 70 percent of men who became parents within the first five years obtained tenure within 10 to 12 years after receiving their Ph.D.s, just over 50 percent of the women achieved tenure in that period of time.

Having a ladder-rank position tended to reduce women's likelihood of becoming mothers. Mason found that only one-third of the women who take a tenure-track job before having children ever become parents. Women on the track have fewer children than men at the same point in their careers, except during the sixth and seventh years in employment — the point at which most assistant professors must achieve tenure or leave their position. As a result, 12 years after receiving their doctorate, 74 percent of male faculty have children while only 55 percent of women professors are mothers.

Theorizing that U.C. could attract and retain more excellent scholars if it offered family-friendly policies, the Berkeley campus began to study the campus climate for faculty with family. A 2002 survey found that Berkeley faculty did not know very much about policies that U.C. had initiated in 1988 to assist professors with young families. Nearly a third did not know about a policy that allows a new parent to exclude up to a year when meeting the eight-year deadline for earning tenured status. Fewer knew of a policy that allowed new parents to reduce their normal teaching loads.

Many of those who knew about the policies revealed that they had not used them because they feared that taking time off would be viewed negatively and affect their careers. Ironically, a greater percentage of women than men who decided not to use the policies anticipated a negative department reaction. Some faculty reported that, since there were no extra funds to use to cover for those on leave or teaching lighter loads, departments regarded the policies as a burden on their finances. These fears are not unfounded. The Equal Employment Opportunity Commission recently found reasonable cause to credit the allegations of a political science professor at U.C. Santa Barbara who alleged her department became critical of her work only after she took off time to have children.

Only 25 percent of the faculty knew about the four main family accommodation policies.

The survey indicated that tension between work and family particularly affected women. They, more than men, reported having fewer children than desired because of career concerns and slowing down at work to be a better parent. Women with children reported logging 100 hours per week in work, household, and caregiving duties, while fathers reported spending only 85 hours per week on these activities.

Stacy and Dean then expanded the survey and administered it to all U.C.

faculty, with similar results. Only 25 percent of the faculty knew about the four main family accommodation policies.

One impediment to taking time off was removed in 2003. Then-President Atkinson mandated that campuses fund family-related leaves so that departments are not disadvantaged by use of the policies. Campuses also cover expenses resulting from modified-duties status, during which a professor can teach fewer classes for a term without a pay reduction.

New Provisions

The new policy describes all of the family accommodations in one section to make it easy for faculty members to understand what is available and how the university's leave policies interact with state and federal law. In addition to the childbearing leave provided by law, faculty may take up to one year of unpaid parental leave. The one-year period includes the 12-week leave to which an employee may be entitled under state and federal family leave laws.

If the faculty member does not take a full year of parental leave, he or she may choose active-service/modified-duties status. Under this option, a professor has been allowed to teach fewer classes for a term without a pay reduction. The new policy allows a birth mother to use a total of two terms for child-bearing leave and active-service/modified-duties status. It also clarifies that the parent is not required to offset the lighter teaching load by teaching more than a full load in another term.

Whether or not the faculty member takes any family leave or modified-duty status, he or she may "stop" the tenure clock during the probationary period. An assistant professor normally must earn tenure within eight years. The provision allows a parent to stop the clock for a year for each birth or adoption of a child under five, to a maximum of two years. Periods of child-bearing and parental leave are automatically excluded from calculations of the tenure deadline.

The new policy gives guidelines for granting requests for flexible and temporary part-time positions.

In addition to these accommodations, which have existed to some degree since 1988, a department may grant an employee's request for part-time appointments to accommodate family needs. While professors previously could obtain permanent part-time appointments, the new policy contains guidelines for granting requests for flexible and temporary part-time positions. It also provides that a department may extend the period of review for merit-pay increases or promotions for those on temporary part-time status.

The policy makes clear that decisions on compensation and advancement should not arbitrarily affect faculty who choose to take child-bearing and parental leaves, to stop the clock, or to defer merit increases or other personnel evaluations.

When it reviewed the proposed policies last summer, the Academic Council, a representative body of the Academic Senate, lauded the "language of entitlement" that the new provisions use. However, cautioned council chair George Blumenthal in a letter to the administration, the availability of appropriate, affordable childcare on campuses is an ongoing problem. He continued, "[T]hese revisions should not be interpreted as the final solution to the problems faced by child-rearing faculty." ✻

State Employment

Union Agitation Stops CASE Retirement Opt-Out

A perceived threat to the Public Employees Retirement System prodded state employee unions to protest a clause in the state's tentative agreement with the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment that would have allowed unit members to opt out of the retirement system. As a result, the Department of Personnel Administration agreed to delete the opt-out program from the tentative agreement.

Other unions objected that the CASE agreement set a dangerous precedent.

CASE members ratified the tentative agreement last November. (See story in *CPER* No. 175, pp. 50-53.) In the original contract a member who opted out of a PERS retirement could cease making contributions and receive a stipend. The opt-out provision could have saved the state money because the stipend, about 5 percent of salary, would have been lower than the retirement contribution the state would have been required to make on behalf of the employee. The state's contribution rate rises and falls with the health of the pension fund. The rate, which was near zero for employees in the miscellaneous category in the late 1990s, currently is about 16 percent of salary.

But other unions objected that the CASE agreement set a dangerous precedent. The governor has been trying to scale back retirement benefits and has succeeded in scoring incremental concessions from one union at a time. If DPA extracted the same concession from other unions, contributions to the system would decrease, potentially jeopardizing funding for pension payments.

CASE had difficulty finding support for the bill that serves as the vehicle for legislative ratification of the agreement. Although Assembly Speaker Fabian Nunez was willing to carry the bill, other legislators privately told CASE lobbyists of their funding concerns. A spokesperson for CASE told *CPER* he was unaware of other unions lobbying against the agreement. However, the California State Employees Association and the California Association of Professional Scientists announced to their members that they and others in a labor coalition had succeeded in fixing a dangerous provision through outside intervention. CSEA Vice President Donna Snodgrass spoke against the opt-out at a CalPERS meeting.

As a result, CASE asked DPA to revisit the issue. DPA spokesperson Lynelle Jolley told *CPER* that the administration was concerned that other aspects of the deal would unravel. "From DPA's point of view, the opt-out provision was not critical. The potential monetary savings were speculative because we did not know how many employees would opt out. And we wanted to save the three-year average final compensation calculation clause for new employees." Current employees' pension benefits are calculated using the highest average compensation

CSEA Vice President Donna Snodgrass spoke against the opt-out at a CalPERS meeting.

earnable in a 12-month period, which allows an employee who receives a promotion to retire with a substantial pension boost after only a year of contributions at the higher pay rate. In the tentative pact, CASE agreed to expand the final compensation period to three years, a definition that was used until 2000.

As stated in their letter of agreement, "In the interest of promoting and maintaining harmonious labor relations," the parties deleted the opt-out clause. The MOU bill went to print in mid-March. ✻

CSEA Seeks to Revoke SEIU Local 1000's Charter

As the California State Employees Association celebrates its 75th anniversary, it continues its struggle with the affiliate that represents state civil service workers, Service Employees International Union, Local 1000. An arbitration to resolve each party's obligations to the other decided some issues, but left others open to additional discussions. And CSEA has notified Local 1000 that it intends to revoke the affiliate's hard-won charter and return the organization to the status of a division of CSEA. CSEA is the umbrella group for four affiliates that represent 30,000 state retirees, 17,000 employees at California State University, and 6,000 state supervisors and managers, as well as 87,000 rank-and-file state workers.

Battle for Money and Staff

After a decade of internal wrangling, the Civil Service Division of CSEA finally was granted a charter as an affiliate of CSEA in January 2004. (See story in *CPER* No. 163, pp. 61-64.) Charter status allowed the Union of California State Workers, SEIU Local 1000, to be named as the exclusive bargaining representative on the certifications of nine state employee bargaining units. It also gave Local 1000 the power to collect dues and control its own assets. As an affiliate, Local 1000 elects a majority of the delegates to CSEA's council, which sets CSEA's budget.

As all the former divisions became affiliates, CSEA found itself struggling to define its role in employee representation. It has legal, communications, lobbying, and accounting staff that perform functions for a single affiliate at certain times and for all affiliates at others. Its service agreements with the affiliates require the affiliates to pay both the direct costs and a share of indirect expenses. But Local 1000 has claimed a right to its own staff, is conducting its own lobbying campaigns, and has refused since mid-2005 to make full payments to CSEA. In particular, Local 1000, the largest affiliate, objects to having to pay a large share of indirect costs.

In January, an arbitrator interpreting CSEA's bylaws and the parties' service agreement decided that Local 1000 was bound to pay most of the indirect costs that CSEA had charged to the union. An exception was for the cost of a communications employee who wrote articles in CSEA's *Unity* newslet-

ter that were critical of the local union's officers. One newsletter insinuated that Local 1000's president's "hand-picked" election committee had cheated in the local's election of officers. On the other hand, the arbitrator also decided that Local 1000 had properly asserted control over some dues earmarked for political action, but not voluntary contributions for CSEA's political action fund, CMAC.

CSEA improperly refused to assign several lawyers to Local 1000.

The arbitrator sided in part with Local 1000 in disputes over assignment of staff to the local. He found that the bylaws and service agreement mandated that CSEA provide requested direct-cost staff to the affiliate if the assignment does not reduce CSEA's staff below levels needed for servicing other affiliates and performing CSEA's duties. In particular, the arbitrator found that CSEA improperly refused to assign several lawyers to Local 1000.

CSEA, however, continues to have exclusive responsibility for personnel management under the bylaws. Therefore, the arbitrator found, Local 1000 could not force CSEA to leave the position of general manager vacant.

The arbitrator found that the parties had acted in good faith in reaching their positions. He left calculation of excludable costs and some staffing issues to the parties to resolve, while retaining jurisdiction over the matter. However, CSEA President J.J. Jelincic told *CPER* the parties have been unable to arrange a meeting in the two months since the arbitration award was delivered. The arbitrator has scheduled another hearing to decide several of the issues.

Move to Revoke Charter

The simmering pot of issues that led to the arbitration also led to a request for charter revocation, which was filed in February 2005 by a Local 1000 member. Because the complaint alleged grounds for cancelation of the charter, CSEA bylaws required an investigation. Findings were delayed by concerns that the dispute over the disposition of political action committee funds would give ammunition to the supporters of Proposition 75, the union dues initiative. But, after the investigation was concluded and the arbitrator's decision was received, the CSEA board of directors was ready to act. In February, the board charged Local 1000 with engaging in conduct that "materially and adversely affects the reputation or effectiveness of the Association or subjects it to an unreasonable risk of liability," a ground for charter cancelation under CSEA's bylaws.

Some of CSEA's complaints relate to matters decided in the arbitration. Local 1000 still owes CSEA at least $785,419 under the service agreement, according to CSEA. It also owes CSEA funds that it diverted from CSEA's political action committee account.

CSEA alleges that Local 1000 demanded CSEA rehire a manager whom CSEA fired for physically and verbally abusive conduct. When CSEA refused,

CSEA complains that Local 1000 has publicized its position that CSEA does not speak for state employees.

Local 1000 hired the manager itself, creating its own payroll. In addition, CSEA charges that the local has refused to rehire a staff member who was previously laid off with recall rights, resulting in an arbitration with the union that represents CSEA's employees. And Local 1000 has signed employment contracts with individuals without CSEA review, says CSEA, despite the arbitrator's decision.

Another area of contention goes to the heart of CSEA's role in representing state employees. CSEA complains that Local 1000 asserts it is "indepen-

dent from," rather than affiliated with, CSEA. According to CSEA, the local has endorsed candidates for public office without working with the association's governmental affairs committee. Local 1000 has publicized its position that CSEA does not speak for state employees in legislative matters. And, CSEA claims, the local's actions have interfered with CSEA's effectiveness in working with labor groups and others, such as the California Families Against Privatizing Retirement. CSEA is miffed that Local 1000 claimed complete responsibility for scuttling a provision in a tentative agreement between the state and the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment that would have allowed employees to opt out of the Public Employees Retirement System. (See story on pp. 52-53.) Local 1000's president did not return *CPER*'s call soliciting his response to the allegations.

At the time *CPER* went to press, Local 1000 had not yet requested a hearing to contest the cancelation of its charter. It had informed CSEA of its demand to arbitrate whether CSEA could enforce the charter cancelation provisions of CSEA's bylaws. Internecine battles threaten to overshadow CSEA's yearlong 75th anniversary celebration. ✱

On Second Thought, Correctional Supervisors Snag 3 Percent at 50 Retirement Formula

The governor was going to exact a price if correctional supervisors and managers wanted the same enhanced retirement formula as rank-and-file officers. But Acting Secretary of the California Department of Corrections and Rehabilitation Jeanne Woodford convinced him that staffing needs in the department favored granting the enhanced benefits without having to make higher contributions. Now the governor is under pressure to grant the same benefits to supervisors and managers of firefighters in the California Department of Forestry and Fire Protection.

Progeny of S.B. 400

In 2000, the state workforce became entitled to enhanced retirement formulas under S.B. 400 (Ortiz, D-Sacramento). Correctional officers and firefighters, who had been eligible for a 2 percent retirement formula at age 55, became eligible for a 3 percent formula. The formula for state highway patrol officers and local police officers, who were eligible to retire at 50, was changed from 2 percent to 3 percent. At that time, pension funds were flush and the state had a surplus.

When negotiations began for new contracts with the California Correctional Peace Officers Association the next year, the union demanded similar pay and benefits as the highway patrol officers had. They argued that the corrections department was competing in the same labor market as police employers. Former Governor Davis' administration could see state revenues falling, so it agreed to implement the 3 percent formula at the minimum retirement age of 50 in exchange for a two-year delay in salary increases and a January 2006 effective date for the enhanced retirement formula. CDFF negotiated the same formula for its members when it agreed to delay a portion of its pay increase in 2003.

Staffing needs favored granting the enhanced benefits.

But, although both organizations represent supervisors, they can only request, not bargain to impasse over, their compensation. As the effective date for the new formula approached, CCPOA asked for assurances that the supervisors would be able to retire under the same formula as rank-and-file officers. Representatives of the Department of Personnel Administration responded generally that supervisors usually receive the same pay increases and benefits as their subordinates.

The Surprise

On January 12, David Gilb, DPA's chief of labor relations, announced that the "3 percent at 50" formula would be applied to past and future service credit only for rank-and-file and confidential employees in the peace officer/ firefighter retirement category. Supervisors and managers would not be covered. If they still were affiliated with bargaining unit 8 firefighters or unit 6 correctional officers, their past service in the unit, but not current service, would be used to calculate benefits under the new formula.

DPA promised to sponsor legislation to make supervisors and managers eligible for the enhanced formula, but at a price. DPA proposed increasing their contribution rates from 8 percent of payroll to 10 percent unless they opted to remain in the 3 percent at 55 program.

CCPOA urged its members to contact the governor to protest. "Only in the state of California can you promote and lose benefits," its website observed disparagingly.

The Switch

In early March, CDCR told CCPOA that supervisors and managers would receive the benefit after all. According to DPA spokesperson Lynelle Jolley, Acting Secretary Woodford persuaded the governor that the department must pass on the enhanced formulas in order to attract and retain applicants for promotion. The department had been in favor of extending the benefits to supervisors for months, according to J.P. Tremblay, a spokesperson for CDCR. Vacancy rates in supervisory and managerial positions are running about 10 percent.

Jolley informed *CPER* that firefighter supervisors still are not covered by the 3 percent at 50 formula. But CDFF is putting pressure on the governor to grant the same benefits to the supervisory firefighters it represents. Vacancy rates in supervisory positions within the California Department of Forestry and Fire Protection are approaching 40 percent, according to the union. CDFF complains that battalion chiefs who are promoted lose at least $20,000 annually. They also will be entitled to a lesser retirement benefit unless Governor Schwarzenegger changes his mind.

Vacancy rates in supervisory positions within CDFF are approaching 40 percent.

AFSCME Decertification Vote to be Counted

The American Federation of State, County and Municipal Employees may not be representing state-employed health and social service professionals by mid-month. The Public Employment Relations Board is conducting a decertification election that will conclude on April 13. An independent union, the United Health and Social Services Professionals, is seeking to represent the 4,000 psychologists, physical therapists, pharmacists, social workers, and other health and social services professionals in bargaining unit 19.

United Professionals' theme is local control.

The current leadership of AFSCME Local 2620 paints the organizers of the United Professionals as disgruntled former leaders who lost elections last fall. Only one of the former leaders, Nancy Swindell, won a seat on the union's executive committee. Now president of the union, Swindell was northern executive vice-president last term. Swindell was in frequent conflict with the former leadership, who accused her of undermining union representatives both in their interactions with the state employer and with unit members.

United Professionals, however, is basing its campaign on complaints about the $1.9 million in dues and fees that the international arm of AFSCME and the regional council collect annually. Of that amount, United Professionals claims only $620,000 is spent on Local 2620's expenses. United Professionals proposes reducing dues by 20 percent and hiring its own business agents and lobbyist with the amount in excess of $620,000 that the local AFCSME would have to send away.

The theme of local control is echoed in a letter of support from the Coalition of University Employees, which has represented clerical workers at the University of California since it decertified AFSCME in 1997. Happy with their decision, three CUE representatives explained, "We have been able to hire lawyers, a lobbyist in Sacramento, and expert consultants when we need them."

Ironically, the new leadership has similar ideas. They have hired a professional lobbying firm and are using eight new staff assigned from Council 57, including a chief negotiator who will be involved in bargaining that begins this spring. Local 2620 explained in its February newsletter, "This is a great example of how our per capita money comes back to us tenfold. Along with the assignment of staff comes the financial support from both the Council and the International to help us get back on our feet."

AFSCME is stressing that the United Professionals have no office space, no constitution, no bylaws, and no articles of incorporation. CUE's letter of support asserts, "Before we won our election, there were those among us who doubted. They said, 'CUE doesn't have the budget, or the money or the union professionals to match a giant like AFSCME.' We're happy to report that history has proven them wrong."

Discrimination

Supreme Court Says Use of Term 'Boy' Can Evidence Discrimination

In *Ash v. Tyson Foods, Inc.*, the United States Supreme Court unanimously overturned the Eleventh Circuit Court of Appeals' finding that the use of the term "boy" by a white supervisor referring to an African-American male cannot be considered evidence of discrimination unless modified by a racial classification. The Supreme Court also found the appellate court erred in its articulation of the standard for determining whether evidence concerning disparate job qualifications demonstrates that the employer's stated reason for its promotional decision is pretextual.

The opinion that modifiers or qualifications are necessary is erroneous.

Anthony Ash and John Hithon, both African-American, had worked for Tyson for 15 and 13 years respectively. They each applied for promotion to the position of shift manager but were passed over in favor of a white male with less than two years' experience. Ash and Hithon filed suit alleging racial discrimination under Title VII and other anti-discrimination statutes. At trial, they introduced evidence that the plant manager, who made the hiring decision, had referred to each of them as "boy" on some occasions. They also introduced evidence showing that they were better qualified for the position than the employee who was promoted.

The jury found in favor of Ash and Hithon, and awarded each $1.75 million in damages. The trial court granted the employer's motion to set aside the verdict and ordered new trials for both plaintiffs. The Eleventh Circuit, agreeing with the trial court, found the evidence insufficient to show unlawful discrimination as to Ash. As to Hilton, however, it found there was enough evidence to present the case to the jury but not enough to support the amount of the award. It found the trial court had not abused its discretion by ordering a new trial.

The Supreme Court determined that, though the circuit court "may be correct in the final analysis," it erred in two respects. First, the lower court held that "while the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, the use of 'boy' alone is not evidence of discrimination." The Supreme Court disagreed, stating:

> Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous.

Qualifications evidence may suffice to show pretext.

The circuit court's second error was in the way it articulated the standard for determining whether the asserted nondiscriminatory reasons for Tyson's hiring decisions were pretextual. The Court of Appeals found that Ash and Hithon's evidence that they were better qualified for the position than the white employee was insufficient to prove pretext, stating, "pretext can be established through comparing qualifications only when the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." The Supreme Court disapproved, finding "the visual image of

words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications."

Under its own decisions, noted the court, "qualifications evidence may suffice, at least in some circumstances, to show pretext," citing *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 82 CPER 14; *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248; and *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 143 CPER 50. It also pointed to a number of other federal court decisions in which various other standards have been articulated, including holding that qualifications evidence standing alone may be sufficient to show pretext. The court was not inclined to go further, however, stating:

> This is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications. Today's decision, furthermore, should not be read to hold that petitioners' evidence necessarily showed pretext. The District Court concluded otherwise. It suffices to say here that some formulation other than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results.

(*Ash v. Tyson Foods, Inc* [2-1-06] Supreme Ct. 05-379, 546 U.S. ____, 2006 DJDAR 2024.) ✻

Opinion Amended But No En Banc Rehearing in *Hardage*

The Ninth Circuit Court of Appeals panel has amended its opinion in *Hardage v. CBS Broadcasting, Inc.*, for the second time, but the case will not be reconsidered by a panel of 11 Ninth Circuit judges. (For a complete discussion of the decision as originally amended, see *CPER* 176, pp. 58-61.)

The new amendment is the majority's latest attempt to bolster its holding that the employer had no duty to investigate a complaint of sexual harassment where the complainant failed to report specific details concerning the harassment and said he wanted to handle the situation himself. The majority amended its opinion by adding a new paragraph following its statement that, "Considering the 'overall picture,' CBS's response was both prompt and reasonable as a matter of law."

> There may be circumstances where an employer's "remedial obligation kicks in" [*Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522] regardless of the employee's stated wishes. In other words, the mere fact that the employee tells the employer not to take any remedial action may not al-

> ways relieve that employer of the obligation to do so….Here, however, it is uncontested that Hardage did not want [representative of human resources department] Falcone to take further action, and that Hardage's wishes were not insincere or uninformed. Moreover, Hardage did not disclose to Falcone the details of the harassment, so Falcone had no way to know of its severity.

Hardage had asked that the Ninth Circuit rehear the case en banc. However, of the three panel members, only Judge Richard A. Paez, who dissented from the original decision, voted to do so, and no other judge of the court requested a vote on Hardage's motion. (*Hardage v. CBS Broadcasting, Inc.* [9th Cir. 11-1-05, amended 1-6-06, second amendment 2-8-06] No. 03-35906, 427 F.3d 1177, amended and superseded on rehearing [9th Cir. 1-6-06] 433 F.3d 672, amended and superseded [9th Cir. 2-8-06] 436 F.3d 1050.) ✱

No Duty to Accommodate Where It Would Require Creation of New Position

An employer's duty to provide reasonable accommodation to disabled employees under California's Fair Employment and Housing Act does not require the employer to make a temporary position permanent, held the Second Circuit Court of Appeal in *Raine v. City of Burbank*. In so holding, the court adopted the reasoning of federal Circuit Courts of Appeal addressing a similar issue under the Americans With Disabilities Act.

Factual Background

Mark Raine was employed as a police officer for the Burbank Police Department for 21 years, from 1981 to 2002. For the first 14 years, he worked as a uniformed patrol officer. In 1995, he suffered a knee injury while on duty. The city reassigned him to a temporary light-duty position at the front desk to accommodate him while his injury healed. He remained in that position for six years, until 2002, when Raine's doctor advised the department that his injury was permanent and that he could no longer perform the essential functions demanded of a patrol officer. The department conducted a job analysis, with input from Raine and his supervisor, as part of the interactive process mandated by the FEHA to determine whether a reasonable accommodation was available. The department advised Raine that it had no available position for a sworn police officer with his qualifications and limitations. Raine took a disability retirement. He sued the city, alleging, in part, disability discrimination and failure to accommodate. The trial court dismissed his case.

Court of Appeal Decision

Raine appealed, alleging that a permanent assignment to the front desk was a reasonable accommodation. The Court of Appeal rejected his argument, agreeing with the trial court that the city was not required to create, in essence, a new sworn-officer position just for Raine.

The court acknowledged that the issue was one of first impression. "Although California law is emphatic that an employer has no affirmative duty to create a new position to accommodate a disabled employee, no California court has yet addressed whether an employer is obligated under FEHA to make a temporary position available indefinitely once the employee's temporary disability becomes permanent." However, noted the court, the federal Courts of Appeals have decided the issue, including the Ninth Circuit in a decision interpreting the FEHA. In *Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, an employer temporarily accommodated an injured delivery truck driver by allowing him to make special deliveries that did not in-

The city was not required to create a new sworn-officer position just for Raine.

It takes time and experience to understand the nuances of labor relations. Here's a start...

Pocket Guide to the Basics of Labor Relations

By Rhonda Albey

- Why we have public sector unions
- State laws that regulate labor relations
- The language of labor relations
- What is in the typical contract
- How to negotiate and administer labor agreements
- How to handle grievances
- What to do in arbitration and unfair practice hearings
- How to handle agency shop arrangements
- How to cope with extraordinary situations (including downsizing and/or restructuring, work actions, and organizing drives)

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volve heavy lifting. When it became clear that the driver's injuries were permanent, the employer offered to transfer him to another position. The driver rejected the accommodation and quit, alleging that the employer should have made the temporary special-delivery assignment permanent. The Ninth Circuit held that, though the employer was obligated to transfer the employee to an existing vacant position under the FEHA, it was not required to create a new position of "special delivery driver" to accommodate the driver's disability.

FEHA does not require the employer to create a new position to accommodate an employee.

Examination of a number of other federal court decisions involving the ADA's reasonable accommodation requirement, on which the FEHA's accommodation requirements are modeled, did not provide support for Raine's position, concluded the Court of Appeal. The federal courts have "held not only that an employer is not required to create light-duty positions for purposes of accommodating a disabled employee unable to perform the essential functions of the position for which he or she was hired, but also that an employer who has created such a temporary assignment has no duty to transform that accommodation into a permanent position once it is informed the employee's disability has become permanent."

The court determined that every federal Court of Appeals to consider the issue has agreed with the reasoning of the Seventh Circuit in *Watson v. Lithonia Lighting* (7th Cir. 2002) 304 F.3d. 749:

> The ADA does not require an employer that sets aside a pool of positions for recovering employees to make those positions available indefinitely to an employee whose recovery has run its course without restoring that worker to her original healthy state. A person is "otherwise qualified" within the meaning of the ADA only if she can perform one of the regular jobs (with or without an accommodation)." Watson cannot perform any assembly-line job….What she wants is a different job, comprising a subset of the assembly-line tasks…. The ADA does not require employers to create new positions….

The court applied the same reasoning to the case before it. "Like the ADA, FEHA does not require the employer to create a new position to accommodate an employee, at least when the employer does not regularly offer such assistance to disabled employees," it held.

Raine also argued that, having shown he was a disabled person who was able to perform the essential duties of the position to which he was assigned, it was the city's burden to show that converting the temporary assignment into a permanent position would pose an undue hardship. The court flatly rejected this argument. "The question presented…is not whether assigning Raine to the front desk on a permanent basis imposes an undue hardship, but whether the accommodation requested is reasonable and thus required in the first place," said the court.

Nor was it persuaded by Raine's argument that the accommodation sought was not the creation of a new job, but the restructuring of the existing front-desk position. "Raine does not seek the restructuring of either his existing patrol officer position or the civilian front-desk position, but the *reclassification* of the front-desk position from a civilian position to a sworn-officer position," said the court. "The City was not required to reclassify (and thus substantially alter) the front-desk job to accommodate Raine."

Employers who create temporary positions will be dissuaded from doing so if they can be forced to maintain them indefinitely.

Finally, Raine argued that his efforts to remain employed rather than take disability retirement are laudable and consistent with the purpose of the FEHA of enabling disabled employees to continue working. The court's response revealed the public policy goal underlying its decision: "The City correctly observes that employers who create light-duty or temporary positions for the purpose of accommodating temporarily disabled employees will be dissuaded from doing so if they can be forced to maintain those newly created light-duty positions indefinitely."

(*Raine v. City of Burbank* [1-25-06] No. B180615, 135 Cal.App.4th 1215, 2006 DJDAR 984.) ✻

Fired Pregnant Employee Allowed to Take Her Discrimination Claim to Trial

A pregnant employee made a sufficient showing to proceed to trial on her claim that she was terminated because of her pregnancy in violation of the California Fair Employment and Housing Act, held the Second District Court of Appeal in *Kelly v. Stamps.com Inc.* The employee demonstrated that the company's stated reasons for her termination were pretextual, even though the employer had laid off many other employees at the same time for legitimate business reasons.

Factual Background

Stamps.com, which sold postage and related services on the Internet, hired Megan Kelly as vice president of direct marketing in 1999. In the same year, the company lost over 93 percent of its stock value. In September 2000, Kelly informed her employer she was pregnant and would be taking maternity leave in April. In October, the company laid off 240 of its 540 employees. Kelly was retained and received stock options and a cash retention bonus to be paid in two future installments provided she remained on the job. In the same month, the company hired a new CEO, Bruce Coleman, and a "turnaround" specialist, Kathleen Brush.

In order to further reduce costs, the company laid off an additional 150 employees in early February 2001, and consolidated its three separate business units into one. At Coleman's instruction, Brush evaluated the marketing staff and recommended that Kelly should not be retained. In her opinion, Kelly was not qualified for the position of vice president of marketing after the restructuring, was not appropriate for the position of director of a general team, and was of "limited motivation." Kelly was terminated on February 6, 2001. Brush then assumed supervision of the sales and marketing group, and took Kelly's old title of vice president of marketing.

Kelly filed suit against the company, alleging unlawful termination on account of pregnancy in violation of the FEHA. The company asked the court to dismiss the case, arguing that Kelly was terminated as part of a reduction in force incident to a reorganization of the business, and that Kelly could not show this reason was a pretext for pregnancy discrimination. The trial court agreed and dismissed the case. Kelly appealed.

Court of Appeal Decision

The court summed up the question it faced:

> The basis for defendant's motion was that plaintiff was terminated for legitimate nondiscriminatory business reasons, namely defendant's economically induced restructuring and reduction in force in February 2001. From the evidence defendant initially presented, this explanation may be deemed a legitimate, nondiscriminatory reason, sufficient to shift to plaintiff the burden of showing a triable issue of its falsity, with respect to her, and ultimately of discriminatory motive instead. Whether plaintiff satisfied this burden remains the principal issue.

The court carefully examined Kelly's evidence of pretext. Coleman had told Kenneth McBride, the chief financial officer, that he believed Kelly had "checked out," referring to what he believed to be her poor attendance and "attitude." Kelly's immediate supervisor, Doug Walner, gave her a very favorable evaluation in October 2000, in which he described her as "indispensable" to the company's business needs. Walner also testified that Coleman had asked him to prepare a list of employees in his unit who should be retained, and he included Kelly on the list. Walner told Coleman that Kelly was the only person capable of managing the group after the reorganization. When Coleman commented that Kelly had "checked out" and made intonations about her being pregnant, "saying she had mentally checked out, and questioning whether she was really doing her job," Walner told Coleman that was not true.

There is no doubt that Coleman's manifest attitude toward plaintiff's retention was bluntly negative.

Ian Siegel, a member of the company's senior management team, also testified that Coleman had asked him about who was the strongest in the marketing group. Siegel, who interacted with the group daily, replied, "You absolutely have to start with Megan, she is the heart and soul of the team." He couldn't imagine it functioning without her. "Megan has checked out," Coleman replied. When Siegel disagreed, Coleman repeated the comment that she had "checked out," saying it "in a definitive, end-of-conversation type of way." In addition, Siegel testified that Brush took over all of the duties of Kelly's position after she left.

The court also considered evidence that, on the day before she was terminated, Kelly told Mike Zuercher, house counsel, that she was afraid she would be laid off because she had heard that Coleman said she had "checked out." She said she could not help but believe "he thinks I am checked out because I'm pregnant and I am going to go off on maternity leave." Zuercher told Kelly he would share her concerns with Coleman and then, later that day, told her he had done so.

At a meeting between Coleman and Kelly after her termination, Kelly asked why she had been laid off when she was at the top of Walner's list of employees who should have been retained. Coleman said that she was not on Walner's list. He also told her that he had eliminated her position.

Kelly also produced evidence that, had she remained employed, she would have received maternity leave benefits including insured disability leave at two-thirds salary for six weeks, followed by company paid leave for six more weeks. She also would have received her retention bonus.

The Court of Appeal concluded that this evidence presented a triable issue that the reason or reasons the company gave for terminating Kelly were false. "First, plaintiff was let go despite a record of excellence in her executive responsibilities," said the court, referring to the testimony of Walner and

Siegel. "Second, when these executives were asked by Coleman who should be retained in marketing, they both proferred plaintiff…." "Third," noted the court, "Coleman dismissed this advice, with the preemptory expression that plaintiff had 'checked out.'" The appellate court disagreed with the trial court's finding that Coleman's reaction and terminology were "unamenable to signifying discriminatory animus," explaining:

> Indeed, in at least one instance when he used the phrase concerning plaintiff, Coleman also referred in some fashion to her pregnancy. Moreover, even if the language be deemed nondiscriminatory in isolation, there is no doubt that Coleman's manifest attitude toward plaintiff's retention was bluntly negative, in vivid contrast to the views and assessments of those executives who worked with her.

The court pointed to evidence that Coleman lied to Kelly when he told her she had not been on Walner's retention list. "As is the case with evidence of false reasons," said the court, "a finding that Coleman was knowingly untruthful here could give rise to an inference that 'the employer was dissembling to cover up a discriminatory purpose,'" citing *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133. It also found there was a triable issue as to whether Kelly's position in fact had been eliminated.

The content and circumstances of Brush's evaluation of Kelly also lent support to Kelly's claims of false reasons and of discriminatory purpose, concluded the court. The negative content conflicted with the opinions of those managers who were more familiar with Kelly's performance. More troubling was evidence pointing to the possibility the evaluation was prepared just hours after Kelly met with Zuercher. "In short, within a day, plaintiff complained of possible discrimination, Coleman was notified, Brush sent her evaluation of plaintiff to top management, and plaintiff was discharged." From this, it could be inferred "that the evaluation was either prepared or at least transmitted the night before the layoffs in an effort to preempt or rebut plaintiff's incipient claim of discriminatory discharge," said the court.

Coleman's statements regarding Kelly having 'checked out' were direct evidence of illegal motive.

In addition to showing to a substantial degree that the employer's stated reason for terminating Kelly was false, the same facts were "evidence of pregnancy-discriminatory motive" on the part of the employer, found the court. It concluded that Coleman's statements regarding Kelly having "checked out" were direct evidence of illegal motive.

> Under the circumstances, that plaintiff was about seven months pregnant and was expected to take her allotted three months pregnancy leave, Coleman's "checked out" comments could reasonably be understood as referring to some combination of plaintiff's commitment to take the leave, and a temporary diversion of her attention attendant to her condition. In other words, Coleman could be seen as saying that plaintiff's pregnancy and upcoming leave disqualified her for retention. And of course, Walner testified that Coleman directly connected his "checked out" remarks to plaintiff's pregnancy.

The case was sent back to the lower court for trial. (*Kelly v. Stamps.com Inc.* [12-21-05, modified 1-20-06] No. B171369, 135 Cal.App.4th 1088, 2006 DJDAR 852.)

Discrimination Case Involving Warden's Affairs With Coworkers Can Proceed to Trial

Two women employed by the California Department of Corrections who alleged adverse job actions and harassment by a prison warden and his lover in violation of the Fair Employment and Housing Act can proceed to trial, according to the Third District Court of Appeal in an unpublished decision. The

case had been sent back to the Court of Appeal for reconsideration after the California Supreme Court ruled that an employee may establish sexual harassment in violation of the FEHA "by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile environment." (For a complete discussion of the Supreme Court decision in *Miller v. Department of Corrections* (2005) 36 Cal. 4th 446, see *CPER* No. 174, pp. 61-67.)

The Court of Appeal determined the two employees alleged sufficient evidence of retaliation for reporting a hostile work environment to present their claims to a jury. It rejected the employer's contention that the entire basis for one employee's claim was a time-barred failure to promote. Onerous job duties, demeaning comments in public, and undermining their work also constituted adverse job actions and were enough to present a claim of continuing harassment, said the court. (*Miller v. Department of Corrections* [1-19-06] C040262 [3d Dist.] unpublished opinion.)

Public Sector Arbitration

Temporary Transfer of Difficult Employee Becomes Permanent

All it takes is one bad apple to ruin the bunch, or at least disrupt an otherwise harmonious workgroup. What can an employer do when that happens? What protection is there for the employees whose work environment is ruined? The Metropolitan Water District found the solution to this problem in a long-term, temporary transfer, and, according to Arbitrator R. Douglas Collins, the agreement allowed them to do that.

Problems began in 2002, when the grievant, a maintenance mechanic, moved from his work with other electricians to a conveyance and distribution team, which included employees from a variety of trades. In his new assignment, the grievant refused to perform any non-electrical work assigned by his supervisor or to assist coworkers with their non-electrical work. While he never refused a direct order and was never disciplined for insubordination or failure to complete his work, his behavior caused problems. In addition to work-performance issues, coworkers felt threatened by the grievant when he used a hammer to break holes in walls and kept a journal, which they thought contained documentation about them. For his part, the grievant felt his coworkers continually violated rules for which they were not held accountable.

In 2004, the grievant brought his concerns to the manager, who instructed Human Resources to investigate. Among the charges in his complaint, the grievant alleged that a coworker had physically threatened him after he reported that employees were resting during work time and after he bullied other employees.

The union and district agreed to temporarily assign the grievant to a different work location during the investigation. The parties agreed the assignment would be a "temporary work location" as defined by their agreement, and the grievant would be allowed to use a company vehicle to commute and would be compensated for the additional travel time. The transfer was to end on June 30, 2004. Because the investigation had not been concluded when the grievant returned to his former work location on June 30, the parties agreed to extend the temporary assignment until July 20.

Upset at learning that the grievant would be returning, a coworker, with whom the grievant had clashed, sent an email on behalf of his 12-person team, advising the manager that they felt the grievant had created a stressful work environment. They requested that he be transferred permanently.

The grievant attempted to return to his prior work assignment on July 20, but was turned away by his supervisor. The grievant agreed at that time to continue his temporary transfer at another location, with the understanding he would be returned to his permanent assignment when the investigation was completed.

However, when the grievant reported to his jobsite, he was informed it was a permanent assignment. The union filed a grievance on his behalf, asserting that the transfer violated the agreement and that the district was retaliating against him for engaging in protected activity.

Coworkers requested that the grievant be transferred permanently.

On May 19, 2005, the district finally completed its investigation and issued its findings. The report stated that the investigation had not revealed evidence of any wrongdoing. It also observed that the grievant remained dissatisfied with his work environment and that his coworkers continued to believe the work environment was better before the grievant joined them.

At the time of the arbitration hearing, the grievant still was using a dis-

trict vehicle and being compensated two-hours pay for his commute time.

In addition to arguing that the transfer was disciplinary and retaliatory in nature, the union contended that the transfer violated a 1997 grievance settlement, in which the division agreed to follow seniority when transferring employees to an open work assignment. The union also pointed to the district's recent practice of transferring employees by seniority and charged that the transfer violated the parties' July 8, 2004, agreement, which promised that the grievant would return to his permanent assignment after July 20.

The district responded that under the party's current memorandum of understanding, it has the option of assigning employees to regular work locations at its discretion. The only restriction concerns circumstances where the new commute is longer. Since the district provided the grievant with a vehicle and compensated him for the additional commute time, there was no violation of the agreement.

Collins began by observing that the 1997 grievance settlement agreement was silent as to whether it applied beyond the situation at issue; it stated only that it resolved that grievance, and there was no reference to the parties' MOU or identification of any binding practice. Collins concluded that the settlement was intended only to resolve that issue and not to apply to future involuntary transfers. Therefore, it was not applicable to this case. He also found it persuasive that the parties modified the involuntary transfer section of their MOU in 2000, without reference to, or incorporation of, this settlement agreement.

Collins then analyzed the union's argument that the transfer violated the district's general practice of transferring by seniority. Collins pointed to the clear and unambiguous language of the agreement that allowed the district to transfer employees without considering seniority. Citing the principle that past practice cannot alter clear and unambiguous contract language, Collins reasoned that the district retained its right to transfer employees without regard to seniority.

Past practice cannot alter clear and unambiguous contract language.

Collins observed that the parties' July 8 agreement obligated the district to return the grievant to his regular assignment on July 21, and he noted that it did, albeit for only a few hours. He acknowledged that the district's actions would have been considered a breach of fair dealing in most circumstances. However, he found that since the district had a legitimate business reason for transferring the grievant, it was justified in not keeping him there longer.

Lastly, Collins analyzed the district's reasons for transferring the grievant. The record showed that the grievant was a difficult employee whose actions invited discipline. But, Collins pointed out, using transfer as a disciplinary tool would have been improper, and he noted that the district never had actually disciplined him for misconduct. While all of the grievant's allegations turned out to be unfounded, Collins found it persuasive that the coworkers unanimously took what he considered the highly unusual step of submitting a written petition asking for the grievant's removal. He also expressed concern about the near-physical confrontation that had occurred between the grievant and his coworker.

Collins concluded that management had only three options for dealing with the situation. It could return the grievant and transfer the other employees, return the grievant and hope nothing detrimental occurred, or it could transfer the grievant. Collins reasoned that it would have been foolish for the district not to take some action and that the last option clearly was the least-disruptive and most-reasonable choice. Accordingly, he found the district had legitimate business reasons for transferring the grievant. Collins found the district's actions were consistent with the parties' agreement, commenting that it had gone above and beyond what was required, especially given the grievant appeared responsible for the problems. (*Employee Association of the Metropolitan Water Dist., American Federation of State, County & Municipal Employees, Loc. 1902, AFL-CIO, and Metropolitan Water District of Southern California* [1-21-06] 13 pp. *Representatives:* Bernard Rohrbacher, Esq. (Rothner, Segall & Greenstone), for the union; Nate J. Kowalksi and Joanna L. Blake, Esq. (Atkinson, Andelson, Loya, Ruud & Romo), for the district. *Arbitrator:* R. Douglas Collins.) ✱

Arbitration Log

- **Teaching Assignment**
- **Contract Interpretation**

Citrus Community College Dist. and Citrus College Faculty Assn. on behalf of [the grievant] (1-31-05; 15 pp.) *Representatives:* Glenn Rothner, Esq. (Rothner, Segall & Greenstone), for the union; Mary L. Dowell, Esq. (Liebert Cassidy Whitmore), for the district. *Arbitrator:* Joseph F. Gentile.

Issue: Did the district violate the agreement or the board of trustees policy and regulations by denying the grievant the opportunity to teach two sections of English 101 during the 2002 summer session?

Union's position: (1) The grievant is a full-time instructor in the district's English department.

(2) During the 2001 summer session, the grievant taught two separate sections of English 101 as a "distance education" class. Distance education classes involved teaching the classes on-line, using computer interaction and email.

(3) In 2002, the grievant requested the same teaching schedule for the following summer.

(4) The district initially decided to only offer one distance learning class. However, when enrollment grew, the district split the class into three sections. The grievant was assigned two of the sections and provided rosters for his two classes.

(5) On May 17, the district informed the grievant that he would not be allowed to teach two sections of English 101. This decision was a change in policy in violation of the agreement.

District's position: (1) The district's policy always has been not to allow distance education courses taught by the same instructor to be split into two separate sections. The only exception to this was the grievant's 2001 summer session schedule.

(2) After Human Resources became aware of the grievant's anticipated summer 2002 teaching schedule, he promptly was informed that he could teach only one English 101 class.

(3) The district offered the grievant several options, which he declined. He could have taught an English 103 distance learning class or an additional English 101 class in a traditional classroom, or he could have taught the distance learning class as a large class for extra pay.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The agreement is silent on summer session teaching. Therefore, the grievance turned on the interpretation and application of the board of trustees' policy and regulations, which state that the district has responsibility for making the summer session teaching assignments and determining what process will be followed for filling the positions.

(2) While the union contends the district's decision was a change in policy in violation of protections found in the agreement, it is the board policies that apply. The policies clearly give the district the right to determine how classes will be assigned, which is what it did when it decided not to allow sections of the same course to be split into two classes. That was not a "policy change," but an administrative decision within the rights conferred to management by the policy.

(3) The district's action did not conflict with or modify the parties' agreement, which required full-time instructors to be given preference over part-time instructors. It merely was a determination as to what process would

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be followed in filling the teaching positions.

(4) The grievant's 2001 summer session teaching schedule was an exception and not an enforceable established practice.

(Binding Grievance Arbitration)

• Discipline

[Grievant] and Yolo County Sheriff's Dept. (5-31-05; 34 pp.) *Representatives:* Paul Q. Goyette, Esq. (Goyette Associates), for the union; Paul R. Coble, Esq. (Law Offices of Jones & Mayer), for the department. *Arbitrator:* William E. Riker.

Issue: Did the department prove the grievant committed the alleged violations of the department rules and, if so, was termination the appropriate penalty?

Department's position: (1) The grievant was a correctional officer at the county jail since July 1999. He was terminated for use of excessive force against an inmate on three occasions, falsely reporting that force, and lying about it.

(2) On one occasion, when an inmate was outside his cell awaiting transfer to a booking room, the grievant forced him to the floor, threatened to use pepper spray, and hit and kneed the inmate while he placed him in handcuffs. This was the first incident of inappropriate use of force.

(3) The second incident occurred when the grievant and another officer escorted an inmate to the booking room. While transferring the inmate through a number of doors, the grievant again used excessive force, slamming and banging the inmate against doors and/or walls as they walked.

(4) The third incident occurred in the booking room. The inmate was noncompliant when the officers attempted to remove his handcuffs; they forced him to the ground. At that point, the grievant and another officer used excessive force, such as punching and kneeing, to subdue the inmate.

(5) Per department policy, the officers involved wrote incident reports, but none of the reports contained any mention of the use of force. Later, one of the officers told his supervisor that his report did not include everything that occurred. The department initiated an internal affairs investigation.

(6) The department reached its conclusions regarding the actions described through interviews of witnesses (officers and inmates) who had observed the incidents. The witnesses' testimony was materially consistent enough to provide corroboration that excessive force was used. It is understandable that witnesses might have a slightly different account as they were viewing the incidents from different angles or levels of participation. The testimony of the inmates should not be discounted as biased because it was corroborated by officers.

(7) It is clear the grievant used excessive force and lied during the investigation; he continues to lie because he continues to deny his actions.

(8) Termination was the appropriate penalty. The department cannot condone the grievant's actions as they reflect on the entire profession. Courts have long recognized that law enforcement officers must be held to a higher standard and have upheld terminating officers for less serious violations than required for regular employees. Furthermore, the grievant's actions have compromised his ability to serve as a percipient witness in the future.

Union's position: (1) The department failed to meet its burden of proof. The grievant did not strike any blows or use excessive force against the inmate.

(2) The grievant's version of events is backed up by another officer.

(3) The only testimony the county provided not in conflict was that the inmate was noncompliant and combative throughout the whole process.

(4) The testimony of the inmates relied on by the district varied widely and is unreliable, inaccurate, and presented conflicting stories. The inmates should not be considered credible witnesses.

(5) The grievant used the appropriate level of force to control the situation given the combative nature of this inmate. The department authorizes the use of non-lethal force to subdue combative inmates. Consistent with the testimony of a senior trainer on tactical use of force, officers need to use force even in controlling handcuffed inmates. The trainer determined that the grievant was using the appropriate level of force.

(6) There was no physical evidence, such as bruises or scrapes, to show that excessive force was used.

(7) Termination would not have been the appropriate level of discipline, even if the evidence demonstrated that the grievant used excessive force.

Arbitrator's decision: The grievance was upheld.

Arbitrator's reasoning: (1) There are two issues presented: whether or not the grievant used inappropriate force and whether he lied about his actions.

(2) The evidence primarily was circumstantial based on the varied testimony of the witnesses. However, based on the collective testimony, it appears the inmate was exhibiting some form of aggressive behavior and that there were elevated tensions on both sides.

(3) The evidence regarding the incident outside the cell, which was corroborated by both officers and an inmate, shows that a close-quarters violent struggle occurred and that the officers were required to use aggressive action to gain control.

(4) The evidence of excessive force on the walk to booking was based on the witnesses' testimony that they heard loud bangs. This coincided with seeing the inmate pressed up against walls or doors. It was circumstantial and not credible. The grievant persuasively testified the bangs were the result of kicks to open the doors while securing the inmate.

(5) The evidence that the grievant used force in removing the inmate's handcuffs was based on the conflicting testimony provided by the officers. The most persuasive evidence was the lack of injuries.

(6) Based on the testimony of the trainer, the training and policy in place, and the fact the officers were responding to a call in a section of the jail set up for difficult inmates, there is no indication that the officers acted overly aggressively against the inmate; they were, in fact, well within their authority.

(7) Furthermore, based on the grievant's stature and strength, the use of force as described would have resulted in injury or bruising, but none was shown.

(8) The evidence supports the conclusion that the use of force was not excessive, but was appropriate to control an unruly and potentially threatening inmate.

(9) Finally, the evidence shows that the grievant told the same story throughout the investigation and appeal, demonstrating it was his belief of what occurred. The department's conclusion that the grievant lied was based on the internal affairs investigation findings, which were based on conjecture and did not withstand scrutiny. Therefore, the allegation of lying cannot be upheld.

(Binding Grievance Arbitration)

- **Involuntary Transfer**
- **Discipline**

Sunnyvale Education Assn., CTA/NEA, and Sunnyvale School Dist. (6-3-05; 20 pp.) *Representatives:* Bill McMurray, for the union; John R. Yeh, Esq. (Miller, Brown & Dannis), for the district. *Arbitrator:* Paul D. Staudohar (AAA Case No. 74-390-L-00816-04-LYMC).

Relevant Contract Section: Article XI, Section 11.2.2 – Administrator-initiated transfers shall be at the discretion of the Superintendent. The Superintendent, or his designee, in a private conference, shall inform unit members who are administratively transferred of this action as early as possible. These transfers shall be in the best interest of the District's educational program and shall not be punitive nor disciplinary in nature.

Issue: Did the district violate the agreement when it transferred the grievant to a sixth-grade position?

Union's position: (1) The grievant taught in the district for 35 years and never received a negative year-end

evaluation. She taught only primary grades (kindergarten through third grade) for her entire career, with the exception of one year when she taught a combination third- and fourth-grade class.

(2) In 2004, the district placed the grievant on administrative leave pending an investigation. Without completing the investigation, the district transferred the grievant to a sixth-grade teaching position. The district insisted on the transfer even though the grievant's doctor believed the stress associated with the move would be detrimental to her health as a breast cancer survivor.

(3) The transfer violated the agreement regarding administrator-initiated transfers because it was not in the best interest of the school and was punitive or disciplinary in nature. The district also violated the agreement by endangering the grievant's health.

(4) The transfer was not in the best interest of the educational program because the grievant was not qualified for the job. The sixth-grade job description lists advanced training and upper-grade-level teaching experience, neither of which the grievant possessed.

(5) The transfer clearly was punitive in nature. It was triggered by an unsubstantiated complaint that the grievant inappropriately disciplined a student.

(6) The district failed to interview the grievant or her team teacher about the incident. If it had completed the investigation, it would have found that the grievant had not required a student to sit outside the classroom as alleged and that she required students to run only a quarter of a mile, not the four miles the district alleged.

(7) The district should have taken steps to accommodate the grievant once it was informed of her doctor's concern. Kindergarten positions were available. Instead the district forced the grievant to exhaust her sick leave, giving her no choice but to resign.

District's position: (1) It was in the best interest of the program to transfer the grievant. The district had determined that her teaching style would be more effective at the sixth-grade level.

(2) The grievant had a proven pattern of behavior that involved intimidating students and delivering punitive and abusive treatment. The grievant repeatedly had been counseled for her conduct. During the 1997-98 school year, the grievant was counseled for causing a student to wet his pants in class, punishing students who did not complete their homework assignments by sending them to the office instead of to an assembly, and requiring another student to write sentences as punishment. During the 1998-99 school year, she was counseled again for causing a student to wet her pants in class, keeping students in class during lunch, and various other complaints from students and parents about discipline she administered.

(3) The district addressed the grievant's performance issues in the past by reassigning her to a fourth-grade class, but the grievant challenged the transfer.

(4) The grievant was transferred to a kindergarten teaching position, but the incidents continued. She caused another student to wet his pants and required two boys to run laps as punishment for their misbehavior. In 2004, the principal learned the grievant had kept a student after school, after repeatedly being instructed not to, and pinched another student on the neck, had him sit outside the classroom, and then run laps after school. The district placed the grievant on leave pending an investigation.

(5) The district transferred the grievant to a sixth-grade teaching position because it felt that hard and punitive treatment of students would be better suited to teaching a non-primary grade. The assumption was that older children would speak up and not tolerate her actions as the younger children had done.

(6) The district never forced her to accept the position. When informed of the doctor's opinion, the district provided the doctor with a checklist to determine the grievant's ability to perform the job duties. Her doctor did not fill out the checklist, proffering no reason the grievant could not assume the new position. The district gave the grievant an opportunity to submit to an independent medical evaluation to demonstrate that she was unable to perform the job, but she declined to do so. The district also offered her the option of taking a one-year unpaid medical leave, which would have avoided the exhaustion of her sick leave.

(7) The transfer was not disciplinary. The district was prepared to administer discipline when the grievant returned to work, but she resigned and discipline never was administered.

Arbitrator's decision: The grievance was upheld.

Arbitrator's reasoning: (1) The record shows an unusually constant pattern of complaints, leaving little doubt the grievant was a strict disciplinarian. However, the evidence does not indicate the grievant was malicious or hurtful.

(2) While the grievant was repeatedly counseled and admonished, she never was warned that her actions would lead to discipline.

(3) In the last evaluation the grievant received, the only below-satisfactory rating was for her disciplinary system. The evaluation was accompanied by a complimentary one-page narrative.

(4) The grievant's transfer to kindergarten was an effort to put her experience to use in an environment that would reduce her stress and eliminate the discipline concerns. However, when the grievant required two students to run laps for 30 minutes, she was placed on paid administrative leave for the remainder of the school year. This can be viewed as her discipline in the form of a suspension.

(5) The subsequent transfer to sixth-grade was punitive or disciplinary in nature given that the grievant had taught primary grade levels for her entire career and lacked the appropriate background for the new assignment. Although the district did not endanger the grievant by forcing her to transfer, the involuntary transfer was imposed, and it prompted the grievant to resign.

(6) The district did not rebut the testimony of the grievant's doctor that teaching sixth grade would have been unhealthy.

(7) It is clear that the district violated the agreement by implementing a punitive and disciplinary transfer as well as endangering the grievant's health and well-being.

(Binding Grievance Arbitration)

- **Layoff**
- **Contract Interpretation**

Lawrence Berkeley National Laboratory, University of California, and University Professional and Technical Employees, CWA Loc. 9119 (7-25-05; 25 pp.) *Representatives:* Doug Owen, for the union; Bill Elkins and Leslie Cobb, for the laboratory. *Arbitrator:* Bonnie G. Bogue.

Issue: Was the grievant's layoff in accordance with the collective bargaining agreement?

Relevant contract section: Article 16(D)(2)(c) – The University may retain employees irrespective of seniority who possess special knowledge, skills, or abilities which are not possessed by other employees in the same classification in the layoff unit and which are necessary to perform the ongoing functions of the department. If an employee with less seniority is to be retained, the University shall notify the union in advance of the layoff date and in writing of the special knowledge, skills and abilities which support the retention of the less senior employee.

Union's position: (1) The grievant, an electronics engineering technologist, worked at the laboratory as an independent contractor for 15 years before he was hired as a regular employee in 1999. In 2004, the lab eliminated seven of its 13 technologist positions, including the grievant's, for budgetary reasons. The grievant was more senior than the six retained technologists.

(2) The laboratory retained a more-junior employee when the grievant could have performed those duties with just a week of training. It had a responsibility to train senior employees in skills to protect their seniority. Furthermore, they denied the grievant training opportunities he was entitled to under the contract.

(3) The laboratory failed to follow the contractual process for assessing skills. It merely compared the grievant's skills against less-senior employees to determine who had more convenient skills. Management's right to retain employees with unique skills does not entitle it to pick through and determine whose skills are most convenient.

(4) The contract allowed the laboratory to exempt only one employee with a particular skill set and it kept two employees for essentially the same skill set.

Laboratory's position: (1) The laboratory evaluated its needs and determined that, of the three distinct functional groups the technologists represented, it needed to retain employees with two of those skill sets. The decision to retain those skill sets was based on ongoing work requirements. The

grievant did not possess the requisite knowledge, skills, or ability in either of those areas.

(2) The grievance should have been denied under the theory of res judicata and/or collateral estoppel. On June 3, 2005, Arbitrator Cohn decided the same issue between the same parties and found that the contract did not require the laboratory to retain a more-senior employee who met minimum requirements. He found the lab is entitled to determine what qualifications and factors to evaluate, and then to rank and select employees according to their relative skill set. He also found there was no contractual requirement that the laboratory retrain senior employees.

(3) The supervisor's assessment of the grievant's skill set and capabilities was appropriate. The only evidence the union provided to dispute that assessment was the grievant's own opinion, which is biased.

(4) The layoff complied with the parties' agreement.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The issues presented are whether the laboratory was obligated to retrain a more-senior employee, whether the grievant had been denied training opportunities that would have qualified him for the remaining positions, whether the grievant possessed the necessary skill set, and the union's contention that the contract allows the laboratory to retain only one employee out of seniority order within a unit with a particular skill set.

(2) The contract does not state or imply that management must provide retraining to senior employees. As Arbitrator Cohn found, the union was asking the arbitrator to add restrictions to the clear and unambiguous language of the contract, which would exceed the arbitrator's authority. The only alternative to layoff listed in the contract is reassignment to a position for which the employee is qualified, not retraining.

(3) While the union argued that it was abuse of discretion for the laboratory not to provide the grievant with the training he needed during the layoff period, it failed to present evidence that the grievant could have obtained sufficient skills for any of the remaining technologist positions within that time period.

(4) The contract separates out position-related training, which the supervisor leads, and career-related training, which the employee is expected to initiate. Because the skills and knowledge the laboratory decided to retain were not part of the grievant's position, the grievant was expected to initiate the needed training. The grievant did not engage in self-assessment or ask his supervisor for assistance. The only specific example of a denied training request occurred when he was a contractor and not covered by the contract.

(5) Article 16 limits managerial discretion in determining the qualifications of the employees it retains by requiring that it make a good faith, objective skills assessment. The evidence showed that the laboratory thoroughly assessed the employees in the affected classification and compared skill sets in an objective manner. The union failed to demonstrate there was any bias in the process or that management incorrectly assessed how long it would take the grievant to acquire the necessary skills.

(6) The union's contention that Article 16 allows management to retain only one employee with a particular skill set requires adding language to the contract. The contract clearly states that the laboratory may retain "employees," not a single employee, irrespective of seniority, if he or she possesses special skills or knowledge. The union's term "unique skill" is not found in Article 16. The laboratory has complied with the contract as long as the retained individual possesses skills and abilities not possessed by a more-senior employee. Therefore, there was no contractual violation in retaining two junior employees who held the same skill set because it was not a skill set the grievant possessed.

(7) Under the contract, management may determine whether a layoff is necessary and what qualifications are required of its employees. Despite the union's contention that there was sufficient work in the grievant's area of expertise, the employer properly determined there was no work in that area.

(Binding Grievance Arbitration)

- **Compensation — Longevity Pay**
- **Contract Interpretation**

Alpine County and Operating Engineers Loc. Union No. 3. (11-05; 35 pp.) *Representatives:* Matthew Gauger, Esq. (Weinberg, Roger &

Rosenfeld), and Kurt Benfield, for the union; Carmen Plaza de Jennings, Esq. (Curiale, Dellaverson, Hirschfeld & Kraemer), for the county. *Arbitrator:* Christopher D. Burdick.

Relevant Contract Language: Section 14.4 – Longevity Step Increase. Effective the date of this agreement, a five percent (5%) longevity increase shall be granted to an employee who has completed five years of continuous service with the County and every five (5) years thereafter. Longevity pay increases shall be based upon continuous service with the County in an allocated position and shall be calculated from the date an employee attains permanent status (anniversary date). Said increase shall become effective the first day of the biweekly period following completion of the required period of service.

Issue: Did the county misinterpret and misapply the longevity step-increase section of the agreement?

Union's position: (1) The union became the recognized employee organization for the county's miscellaneous bargaining unit and deputy sheriffs unit in 2002. One of the union's goals was to change the existing longevity-pay provisions, which required employees to be at the top step to receive these increases because it penalized employees who changed position through promotion or reclassification. The parties agreed the old provision was unfair and the new provision would be applied retroactively.

(2) The parties negotiated new language and provisions for the longevity step increase that replaced the previous agreement. The agreement now clearly states that the county is required to pay a 5 percent bonus for each five years of service, including service rendered prior to the effective date of the MOU.

(3) The county has violated the agreement by refusing to apply the longevity increases retroactively.

County's position: (1) The contract clearly states that the longevity increases shall be applied from the effective date of the agreement.

(2) The union's interpretation would convey a benefit through arbitration that is not in the plain language of the agreement, an interpretation that was rejected by the county at the bargaining table.

(3) The county consistently informed the union during contract negotiations that it would not apply the longevity provision retroactively because the additional associated cost was unacceptable and exceeded its approval from the board.

(4) The county consistently informed the union during contract negotiations that it intended to keep the language in step with the other contract it administers, in which the longevity increase was not applied retroactively. That language was adopted in the parties' agreements and the union never objected to the "effective the date of this agreement" language, which meant that the provision would be applied going forward, not retroactively.

Arbitrator's decision: The grievance was upheld.

Arbitrator's reasoning: (1) The union bears the burden of proving the county breached the agreement.

(2) The purpose of longevity pay is to retain current employees and attract prospective employees. Both parties agree that the old plan failed to meet these objectives and that it was their intent to create a plan that did. However, they failed to agree on the application of the new language and, after ratification, the county began to implement an inconsistent mix of the old and new plan.

(3) There was no reference to the old longevity plan or its provisions in the new agreement. From the new language, one would assume the parties intended to reward employees with long tenure and not require any of the credit years to be earned after the agreement went into effect. However, the parties disagree on that interpretation and the contract language is ambiguous. Therefore, the bargaining history and other contract interpretation principles must be used.

(4) The bargaining history consists entirely of testimony from the county negotiators. The evidence supports that the county informed the union twice that it lacked authority to "go retroactive" and that only service accrued after ratification would be counted towards the plan. However, that language was not included in the county's negotiation notes, which the parties agreed would be the official record. Nor did the county include it in its proposed language, which was adopted.

(5) The union negotiator testified that he believed he had convinced the county to apply the increase retroactively. However, there was evidence the union knew the same language only had been applied prospectively in the other contract. As a whole, the bargaining history was "too uncertain to sway the matter one way or the other."

(6) Under well-established rules of contract interpretation, if one interpretation leads to "harsh, absurd, or nonsensical" results, it should be abandoned in favor of an interpretation that leads to consistent, just, and reasonable results. Here, the county's interpretation would force employees with more than five years of longevity, but not at the top step, to forfeit substantial time and money; it would reward less-senior employees while punishing those with more years of service. This is the opposite of what longevity pay is designed to accomplish.

(7) Ambiguous language must be construed against the drafter, in this case, the county. The county's assertion that there was a "meeting of the minds" regarding retroactivity is founded on mere "table talk." It has no support in the negotiation notes or the language of the agreements.

(8) The county argues that if there was no reasonable basis for choosing between the two interpretations, the language should be voided. However, there is no precedent for a key financial provision of a public sector agreement being voided because of a disagreement over interpretation.

(Binding Grievance Arbitration)

Public Employment Relations Board

Orders & Decisions

Summarized below are all decisions issued by PERB in cases appealed from proposed decisions of administrative law judges and other board agents. ALJ decisions that become final because no exceptions are filed are not included, as they have no precedent value. Cases are arranged by statute – the Dills Act, EERA, HEERA, 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

Unfair Practice Rulings

ALJ has inherent authority to dismiss case for failure to prosecute: State of California (Dept. of Corrections).

(*Horspool v. State of California [Dept. of Corrections]*, No. 1806-S, 1-5-06; 10 pp. dec. By Member Neuwald, with Members Whitehead and McKeag.)

Holding: The ALJ's sua sponte dismissal of a complaint was upheld because the party failed to demonstrate due diligence in pursuing the appeal or good cause for why the appeal was not timely filed.

Case summary: In September 2001, the charging party filed an unfair practice charge against the department, alleging it retaliated against him for his protected activity. The board agent issued a complaint concerning an aspect of the charging party's charge, and a notice of partial dismissal and deferral to arbitration as to the other claims. On November 18, 2002, the charging party appealed the partial dismissal to the board.

The formal hearing on the complaint was scheduled for February 2003. However, it was placed in abeyance pending a decision on the charging party's prior unfair practice charge. The board issued the decision on his prior charge on July 25. On August 13, the board dismissed his appeal of the second charge as improper and mailed proof of service to his home address. The letter was never returned. The charging party did not take any action regarding either charge.

During 2003 and 2004, the administrative law judge made several unsuccessful attempts to contact the charging party regarding the hearing that had been placed in abeyance. The ALJ finally sent the charging party a letter requesting that he demonstrate good cause for his delay in prosecuting the matter. The charging party replied two days later saying that he had not received a copy of the board's decision dismissing the appeal or a definitive response from the union regarding his request to arbitrate his grievances, and that he was temporarily totally disabled. The ALJ then dismissed the charging party's complaint for lack of prosecution, and the charging party filed an exception to the dismissal.

The board determined that the ALJ had authority to dismiss the complaint sua sponte, or on his own motion, for failure to prosecute. A prior PERB regulation that authorized automatic dismissal of complaints where the party failed to request a hearing within six months of the issuance of a complaint had been repealed in 1989. However, in *Los Angeles USD* (1984) No. 464, 64X CPER 13, the board recognized the inherent right of the ALJ to control the proceedings before him or her. Furthermore, the courts had recognized that a plaintiff has the responsibility to exercise due

diligence to prosecute his case. The board concluded that the charging party had the obligation to exercise due diligence in prosecuting his claim and the ALJ had the discretionary authority to dismiss the complaint sua sponte for failure to do so.

The board then concluded that the charging party had failed to exercise due diligence. The board observed that the charging party had requested that the charge be placed in abeyance but had failed to take any action regarding the charge between the time of the proposed decision in June 2003 and the time of the ALJ's letter in December 2004. The board determined that failure to take action for 18 months was not due diligence and, therefore, the ALJ had the discretion to dismiss the complaint absent a demonstration of good cause.

The board found the charging party failed to demonstrate good cause. His medical condition, which had been an issue since 2000, had not prevented him from pursuing multiple grievances and charges. It also noted that the charging party should have made more of an effort to get a response from the union regarding his grievances or, at the very least, kept the ALJ informed of the status. Lastly, the board concluded that the dismissal was properly served, noting that the charging party had received previous correspondence mailed to his home address and had failed to provide any evidence that the dismissal was not received. Furthermore, he should have taken action to determine the status of his appeal.

The board affirmed the ALJ's dismissal.

Internal union activities do not violate act unless they affect the employer-employee relationship: CDF Firefighters.

(*Pittman v. CDF Firefighters*, No. 1814-S, 2-7-06; 2 pp. + 12 pp. G.C. dec. By Member Whitehead, with Chairperson Duncan and Member McKeag.)

Holding: The charge was dismissed for failure to demonstrate any violations of the Dills Act.

Case summary: The charging party, who had been an employee of the California Department of Forestry and Fire Protection since 1975, was terminated on January 17, 2000, and reinstated by the State Personnel Board on December 18, 2001. There were issues with restarting the charging party's union dues deduction, which culminated in the president of CDF Firefighters emailing the state on August 1, 2002, to correct the problem. The charging party filed an internal union complaint against the union president, citing 13 allegations of misconduct. The chairperson of the hearing committee assigned to review his complaint dismissed six of the allegations as untimely. Disputes between the charging party and the union leadership continued. A union complaint was filed against the charging party and others. In January 2003, the union's executive board placed the charging party's region in trusteeship and removed the charging party and others from their union offices. That same month, the hearing committee notified the charging party that it had found he had pursued charges against the president without reasonable basis, in bad faith, and/or with improper malice, which was prohibited by the union handbook. It gave him an opportunity to respond. He also was notified that charges had been filed against him for improper use of union assets in pursuing a charge against the president as well as for secretly taping a meeting.

On January 24, 2003, the charging party filed an unfair practice charge against the union, alleging that it discriminated against him and failed to follow its internal bylaws in violation of the Dills Act. The specific allegations were that the president interfered with his right to pay dues, violated the act by canceling his membership during his termination appeal, interfered with his pursuit of charges and retaliated against him for filing an unfair practice charge, and inappropriately removed him as chapter director.

In his review of the charge, the general counsel noted that in order to prove charges of discrimination by a union, the charging party must demonstrate that the internal union conduct had an impact on the employer-employee relationship. The general counsel found the charging party failed to demonstrate that any of his internal union activities or the alleged adverse actions by the union had an impact on his relationship with the state.

The G.C. limited his analysis to allegations that the union interfered with the charging party's membership dues which took place during the six-month statute of limitations. The G.C. noted that the email demonstrated that the president was trying to fix the membership problems rather than interfere with the charging party's right to pay dues and found there was no violation. The G.C. dismissed the allegation that the committee proceedings were unfair, finding that the committee appeared prepared to hear the charging party's presentation and the charging party failed to provide information demonstrating why the procedure was unfair.

The G.C. dismissed the allegation that the union inappropriately removed the charging party from his position as director because the allegation did not fall within the proscription of Sec. 3515.5. Application of that section requires that the member be suspended or expelled from the union.

The G.C. found no basis for a violation of Sec. 3515.5 for the suspension or expulsion of the charging party because there was no proof that the committees applied the union's rules unreasonably in imposing the punishment. Lastly, the G.C. noted that filing an internal complaint against a union officer is not considered protected activity under the Dills Act. The G.C. dismissed the charge.

The charging party appealed the dismissal. After reviewing the record, the board adopted the G.C.'s decision as a decision of the board itself and dismissed the charge without leave to amend.

Party failed to support allegations that union acted inappropriately: CDF Firefighters.

(*Pittman v. CDF Firefighters*, No. 1815-S, 2-7-06; 2 pp. + 18 pp. G.C. dec. By Member Whitehead, with Chairperson Duncan and Member McKeag.)

Holding: The charge was dismissed for failure to demonstrate any violations of the Dills Act.

Case summary: On January 24, 2003, the charging party filed an unfair practice charge against the union, alleging that it had violated Secs. 3515.5 and 3519(b) of the Dills Act by imposing an illegal trusteeship, allowing internal union charges to be filed against him, ignoring the facts presented in committee and imposing inappropriate penalties, filing false police reports, and submitting a report by an individual rather than the entire committee.

The general counsel noted that to prove charges of discrimination by a union, the charging party must demonstrate that the internal union conduct had an impact on the employer-employee relationship. The G.C. stated the charging party failed to demonstrate that any of his internal union activities or any of the union actions he cited had an impact on his relationship with the state. The G.C. discounted statements made by the charging party that the union will create a hostile work environment in the future which will prevent him from performing his duties as unsubstantiated speculation.

The G.C. reviewed the actions and specific findings of the hearing committees, and found that the information presented failed to describe why the procedure or application of penalties was unreasonable. The evidence indicated that the party was allowed to present his case and there was no proof that the committees made their decisions on anything other than the evidence presented. And while there was evidence the investigative committee deviated from the rules in accepting a report from an individual rather than the entire investigative committee, there was no evidence that the committee relied on that information. As for the penalties, the G.C. noted that trusteeship did not cause the charging party to be suspended or expelled from membership and did not meet the test for Sec. 3515.5 as laid out in *CSEA (Barker & Osuna)* (2003) No. 1551-S, 164 CPER 101. Furthermore, the G.C. held it was not patently unreasonable for a union to expel and fine members who violate rules and require it to incur expenses.

Lastly, the G.C. considered the charging party's allegation, raised in his amended charge for the first time, that the union allowed a managerial employee to serve as a union delegate in violation of Sec. 3518.7. The G.C. noted that the evidence showed the employee was selected, but never served, as a delegate and therefore did not appear to significantly jeopardize the arrangement envisioned by the Dills Act. Accordingly, the G.C dismissed the charges.

The charging party appealed the dismissal. After reviewing the record, the board adopted the G.C.'s decision as the decision of the board itself and dismissed the charge without leave to amend.

EERA Cases

Unfair Practice Rulings

Reprimand, leave of absence, and medical examination not retaliation: Compton USD.

(*Abner v. Compton Unified School Dist.*, No. 1805-E, 1-5-06; 3 pp. + 8 pp. R.A. dec. By Member Neuwald, with Chairperson Duncan and Member Whitehead.)

Holding: The unfair practice charge was dismissed because the party failed to demonstrate a nexus between the protected activity and the adverse action.

Case summary: The charging party is employed by the district as a special education resource specialist teacher. In 2004, she filed two grievances; one concerned her performance evaluation and the other the district's removal of an aide from her classroom. In 2005, the charging party complained to the district superintendent about the improper use of instructional assistants and filed a formal complaint with the district, alleging it had created a hostile work environment. In April 2005, at a district meeting, the charging party allegedly yelled at and threatened to sue the principal, and verbally attacked other employees. The district issued the charging party a reprimand that same day and, two days later, placed her on paid administrative leave while it investigated allegations of inappropriate behavior. In June, the district expressed concern about the charging party's ability to safely perform her job and requested that she submit to a medical examination. On June 24, 2005, the charging party filed an unfair practice charge alleging that the district retaliated against her for participation in protected activities.

The regional attorney found that while the charging party had engaged in protected activities, she failed to demonstrate that the district was motivated by those activities when it issued the reprimand, placed her on leave, or requested that she submit to a medical exam. The R.A. noted that although the adverse actions occurred close in time to when she filed her complaints, the charging party failed to show the adverse action occurred because of the protected activity.

On appeal, the charging party asked the board to take notice of a court order that was submitted after the filing deadline. The board found the charging party had demonstrated good cause to submit the document because it was not available prior to the appeals filing deadline, and it considered the new evidence. However, the board found that even with the new evidence, the charging party failed to support a prima facie case of retaliation. The board dismissed the charge without leave to amend.

Union waived right to bargain board policy but not its impact: Santee ESD.

(*Santee Teachers Assn. v. Santee Elementary School Dist.*, No. 1822, 2-22-06; 18 pp. + 38 pp. ALJ dec. By Member Whitehead, with Chairperson Duncan and Member Shek.)

Holding: The union waived its right to bargain a new board policy but not its impact; the district failed to bargain in good faith regarding the impact of the policy and also interfered with the right to engage in union activities. (See Public Schools section in this issue of *CPER* for complete coverage.)

HEERA Cases

Unfair Practice Rulings

Unfair practice charge untimely: U.C.

(*Rock v. Regents of the University of California,* No. 1804-H, 1-4-06; 2 pp. + 9 pp. R.A. dec. By Member Whitehead, with Members Shek and McKeag.)

Holding: The unfair practice charge was dismissed as untimely.

Case summary: The charging party was hired as an administrative assistant II at U.C. Irvine in August 2000. In 2002, the charging party requested his position be reclassi-

fied as an administrative specialist after his job duties were modified to include graduation support. The university denied the request, and the charging party filed a grievance. The university denied the grievance, which the charging party eventually withdrew in 2003. In 2004, the charging party resigned from his employment at the university. At this time, new deans were appointed to the school and a major office restructuring followed. A non-union assistant administrative analyst position was added to support the deans, the charging party's former position was eliminated, and his prior duties were either reassigned or eliminated. The union filed a grievance on the charging party's behalf, which the university denied, stating the contract did not allow grievances to be filed by former employees. The charging party filed an unfair practice charge on February 17, 2005, alleging that the university failed to reclassify his position because of his protected activity, which included participation in a variety of union activities.

The regional director noted that the denial of the reclassification request and the subsequent grievance action occurred in 2002 and 2003, well outside of the six-month statute of limitations period under HEERA. As the creation of the new position did not restart the statute of limitation, the charge was untimely. The R.D. observed that even if the charge had been timely filed, the charging party failed to state a prima facie case. While the charging party showed that he exercised protected rights under HEERA and that the university had at least some knowledge of those activities, he failed to demonstrate that he suffered any adverse action because of those activities. The R.D. rejected the charging party's allegation of constructive discharge absent any information supporting that claim.

The board adopted the decision of the R.D. as a decision of the board itself and dismissed the charge without leave to amend.

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

(*Baratelli v. UPTE, CWA Loc. 9119*, No. 1810-H, 1-18-06; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Crisosto v. UPTE, CWA Local 9119*, No. 1811-H, 1-18-06; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Bailey v. UPTE, CWA Local 9119*, No. 1812-H, 1-18-06; 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 *CPER* No. 176, pp. 71-72.)

Party has standing to object to agency fees only if he has paid them: CSEA.

(*Sarca v. CSEA*, No. 1813-H, 1-27-06; 3 pp. + 9 pp. R.A. dec. + 8 pp. ALJ dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: The charge was dismissed because the charging party had the opportunity to object and participate in the agency fee arbitration when he was a fee payer; he did not have standing to object to the agency fees when the union declined to accept them.

Case summary: The charging party is employed by the university and represented by CSEA. The charging party filed timely objections to the association's agency fee calculations for the 2003-04 year. In October 2003, the association notified the charging party that it would not collect agency fees from him for 2003-04 and, therefore, he had no right to participate in an agency fee hearing. The association returned the charging party's fees for July through September and cancelled his payroll deduction.

The charging party asserted he had a right to participate in the arbitration convened to assess the propriety of the fee calculation, and he attended the arbitration as a representative of another agency fee objector. He made an opening statement, questioned witnesses, and submitted evidence.

The arbitrator issued his decision in February 2004, in which he addressed the objections raised by the charging party but found no violation.

In July, the charging party filed an objection to the association's calculation of the agency fees for 2004-05. In

September, the association returned the charging party's check for the July and August fees and notified him that it did not wish to collect fair share fees from him. The charging party did not have an opportunity to contest the fee calculation for 2004-05 before an arbitrator.

The charging party filed an unfair practice charge alleging that CSEA incorrectly calculated the agency fees for the fiscal years 2003-04 and 2004-05, and denied him a fair arbitration hearing to challenge the calculations.

The board agent noted an agency fee payer does not have standing to participate in agency fee arbitration proceedings when his fees have been refunded because there is no possibility that the employee's fees will be misspent. The B.A. observed that even though the charging party was exempt from paying agency fees and therefore had no standing to challenge the calculation, he was permitted to participate in the 2003-04 arbitration. Therefore, the B.A. found there was no violation when his fees later were accepted by the association because he had been allowed to participate in the arbitration. The B.A. determined that since the charging party failed to provide evidence that the proceedings were unfair or irregular or repugnant to HEERA, the board would defer to the arbitrator's decision.

The B.A. issued a partial dismissal letter for the charges discussed above, and the general counsel issued a complaint asserting the allegation that the union denied the charging party the right to challenge the agency fees for 2004-05. The complaint went to hearing before an administrative judge at the same time.

The ALJ found that the charging party had no standing to object to the fee because the association never accepted fees from him for 2004-05 and made clear to him that it did not intend to collect any fees. With regard to the fees calculated for 2004-05, the ALJ concluded that the charging party lacked standing to make any challenge to the agency fees and that HEERA did not give employees the right to challenge a union's accounting practice in unfair practice proceedings. The charging party appealed the dismissal.

The board rejected the charging party's argument that because "surplus" is listed as an association asset at the end of the year, that amount should be returned to the fee payers to avoid inappropriate use. The board noted that this contention and others were presented to an arbitrator, who conducted a fair and regular proceeding; the arbitrator found them to be without merit. Accordingly, finding no evidence that the arbitration proceedings were not fair and regular or that the decision was repugnant to HEERA, the board adopted the board agent's dismissal and the ALJ's proposed decision as decisions of the board itself and dismissed the charge and complaint without leave to amend.

Formal audit not required for *Hudson* notices: UPTE, CWA Loc. 9119.

(*Nickols et al. v. UPTE, CWA Loc. 9119,* No. 1817-H, 2-16-06; 6 pp. + 9 pp. R.A. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Hawley et al. v. UPTE, CWA Loc. 9119,* No. 1818-H, 2-16-06; 4 pp. + 7 pp. R.A. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Jimenez-Newby v. UPTE, CWA Loc. 9119,* No. 1819-H, 2-16-06; 4 pp. + 7 pp. R.A. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Yaron v. UPTE, CWA Loc. 9119,* No. 1820-H, 2-16-06; 4 pp. + 7 pp. R.A. dec. By Chairperson Duncan, with Members Shek and McKeag.)

(*Ball v. UPTE, CWA Loc. 9119,* No. 1821-H, 2-16-06; 4 pp. + 7 pp. R.A. dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: The board affirmed the partial dismissal of the charges because unions are required only to have their expenses verified by an outside party, not to have a formal audit completed.

Case summary: The charging parties were UPTE agency fee payers. The parties had agency fees deducted from their paychecks in July, August, and September 2004, but the union did not send them *Hudson* notices until September 2004. The *Hudson* notices contained a list of chargeable and nonchargeable expenses, which had been verified by an independent auditor. The independent auditor did not vouch for the chargeable and nonchargeable determinations.

The charging parties filed unfair practice charges that alleged the union had unlawfully collected agency fees prior to providing a *Hudson* notice to nonmembers, had unlawfully benefited from an "interest free loan" between the time the fees were collected and refunded, had unlawfully retained those fees in violation of the First Amendment, and had supplied defective *Hudson* notices.

The R.A. dismissed the allegation that the *Hudson* notices were defective. A complaint was issued for the remaining allegations.

They appealed the dismissal of the charge. The charging parties contended that the chargeable and nonchargeable expenses listed by the union should have been further scrutinized. The board noted that the issue here is similar to *San Ramon Valley Education Assn. CTA/NEA (Abbot and Cameron)* (1990) No. 802, 84X CPER 20, in which the issue was whether the union had provided adequate financial information under the *Hudson* criteria; the board held that an auditor's review of expenditures was sufficient. The board noted that was exactly what the union had provided in this case. The board discounted the charging parties' assertion that the union must perform a formal audit. The board stated that the court found in *Harik v. CTA* (2003) 326 F.3d 1042, 160 CPER 34, that the only requirement is a statement of the union's chargeable and nonchargeable expenses with independent verification from someone outside the union that the charges were incurred. The board explained that if an agency fee payer has questions about the credibility of the amounts, they can file an objection and request an arbitration hearing on the matter. The board affirmed the partial dismissal of the unfair practice charges.

Supersession language of act prohibits restrictions on arbitrator's authority in tenure cases: CSU.

(*California Faculty Assn. v. Trustees of the California State University*, No. 1823-H, 2-23-06; 4 pp. + 30 pp. ALJ dec. By Chairman Duncan, with Members Whitehead and Shek.)

Holding: Because the supersession language added to HEERA established a minimum right to a final arbitration decision that the parties could not waive in their collective bargaining agreement, the university's insistence to impasse on a limitation on the arbitrator's authority interfered with employee rights and constituted a refusal to participate in the impasse procedures in good faith. (See Higher Education section in this issue for the complete summary of this decision of the board.)

MMBA Cases

Unfair Practice Rulings

Charge dismissed for failure to demonstrate sufficient protected activity: Bay Area Air Quality Management Dist.

(*Mauriello v. Bay Area Air Quality Management Dist.*, No. 1807-M, 1-13-06; 3 pp. + 6 pp. R.A. dec. By Member Shek, with Members Whitehead and Neuwald.)

Holding: The charge was dismissed because the only protected activity was the filing of the grievance at issue in the charge.

Case summary: On January 21, 2004, the charging party initiated a grievance with his supervisor, and on January 27, the supervisor had a phone conversation with the charging party regarding the grievance. On February 23, pursuant to step two of the grievance process, the charging party filed the grievance with the Human Resources Department. Human Resources met with the charging party on March 4 and then, on March 5, dismissed the grievance as untimely. The charging party filed an unfair practice charge alleging that the district violated the MMBA by failing to follow the grievance procedure outlined in the parties' agreement. The charging party also alleged that the district denied his request to facilitate a meeting between himself and his supervisor, and that it colluded with the union to deny him his rights under the agreement.

The board agent concluded that the only violation the charging party could assert was discrimination based on the protected activity of filing the grievance in question. This failed to state a prima facie case. The B.A. further noted that the only evidence the charging party submitted in support of

his allegation of collusion was that the *Skelly* hearing notice was sent to the wrong address. However, the district corrected that error and extended the time line. Therefore, the charging party was unharmed, and the B.A. dismissed the charge.

The charging party appealed the decision, alleging that the district failed to follow proper procedure by not informing him that the January 27 phone meeting with his supervisor was a step-one grievance meeting or that he was entitled to representation.

On appeal, the board agreed that filing the grievance was a protected activity, but that the charging party failed to demonstrate the district interfered with, restrained, or coerced him because he exercised his protected right. As for the new allegations raised in his appeal, the board observed that the telephone conversation was consistent with the parties' agreement. The board held that because the district did not have any responsibility to inform the charging party of his right to representation, and since the charging party did not request representation, the district did not deny his right to representation. Lastly, the board noted the charging party lacked standing to bring any charges alleging the district made a unilateral change.

The board adopted the B.A.'s decision as its own and dismissed the charge.

Unfair practice charge dismissed at charging party's request: County of Madera.

(*SEIU Loc. 535 v. County of Madera,* No. 1809-M, 1-18-06; 2 pp. dec. By Member McKeag, with Chairperson Duncan and Member Whitehead.)

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

Case summary: The association appealed a board agent's dismissal of its unfair practice charge alleging that the county violated the MMBA by engaging in bad faith or surface bargaining. After filing the appeal, the association notified the board that the parties had resolved their dispute and requested the board dismiss the appeal.

The board reviewed the record and found the dismissal to be consistent with the purposes of the MMBA and in the best interest of the parties. The board granted the request and the charges were dismissed.

Representation Rulings

Revocation of authorization card must show intent that union no longer serve as representative: Antelope Valley Health Care Dist.

(*SEIU Loc. 399 v. Antelope Valley Health Care Dist.,* No. 1816-M, 2-10-06; 15 pp. + 12 pp. ALJ dec. By Member Whitehead, with Chairperson Duncan and Member Neuwald.)

Holding: An employer must grant recognition upon a showing of majority support following a card check; revocation of a prior authorization card must show the intent that the union no longer serve as the employee's representative. (See Local Government section in this issue of *CPER* for complete coverage.)

Duty of Fair Representation Rulings

Favorable arbitration award does not imply union acted in violation of DFR: Bay Area Air Quality Management District Employees Assn.

(*Mauriello v. Bay Area Air Quality Management District Employees Assn.,* No. 1808-M, 1-13-06; 3 pp. + 9 pp. R.A. dec. By Member Shek, with Members Whitehead and Neuwald.)

Holding: A favorable arbitration award does not diminish or supplant the union's reasoned decision not to represent the charging party at the *Skelly* hearing or in grievance proceedings.

Case summary: In November 2003, the district began investigating the charging party's use of district email to send information to a former employee and business partner. On November 19, the charging party attended an investigatory meeting, accompanied by two association representatives. The next day, the district placed the charging party on administrative leave and had him escorted from the building. The charging party returned to the building later, de-

leted computer files, and again was escorted from the building. The charging party did not share this information with the association until more than a month later.

On December 12, the charging party attended a special investigatory meeting conducted by the district. He was accompanied by the association's attorney, who had researched the legality of the interview, drafted a document to protect the charging party from criminal prosecution, and requested the district postpone the meeting to ensure the charging party had legal representation. One week later, the charging party received a termination notice from the district. The charging party asked the association for assistance in responding to the charges in the notice and for representation at the *Skelly* meeting. The association informed the charging party that additional money would be needed to provide him with legal representation, and this would have to be approved by the board and the membership. The association advised the charging party that since legal representation was not guaranteed and the timeframe was tight, he should obtain private counsel.

The charging party presented his case for representation to the association board on January 13, 2004. The board voted against representation because of the charging party's unauthorized re-entry into the district building, lack of candor or persuasiveness in explaining his alleged misconduct, and the poor likelihood of success at arbitration. The charging party was permitted to present his case to the association membership on January 20. It voted not to provide representation.

The *Skelly* hearing was conducted on January 21; the charging party also filed a grievance that day. When the charging party was terminated, he filed a second grievance. The association denied the grievant's requests for assistance in both cases. The charging party filed an unfair practice charge alleging the association violated its duty of fair representation by refusing to assist him in his response to the district's discharge, represent him at the *Skelly* meeting, or represent him in the grievances he filed against the district.

The board agent noted that while the MMBA does not impose a statutory duty of fair representation, the courts have held that unions owe a duty of fair representation to its members. The board applies the standard it has developed under other acts, which requires proof of bad faith, discrimination, or arbitrary conduct to demonstrate the union has breached its duty. The B.A. observed that the association intervened with the district on the charging party's behalf several times, provided him with representation and legal assistance at the investigatory meetings, repeatedly advised him of his right to private counsel, and gave him the opportunity to present his case for representation to the board and membership. The B.A. found no evidence to support the charging party's allegations that the association acted arbitrarily, capriciously, or in bad faith when it declined to assist him. The B.A. held that after the association reviewed the initial request for representation, it was not required to provide additional reviews for new grievances on the same issue.

In support of his appeal of the dismissal, the charging party submitted as new evidence the arbitrator's award in his termination grievance, which reinstated him to his former position minus a 60-day suspension without pay. The board accepted the new evidence because it was not available prior to the appeal. However, the board found the favorable award did not affect the association's reason for not representing the charging party or demonstrate that it had acted in an arbitrary, discriminatory, or bad faith manner. Accordingly, the board held the association's conduct did not violate the duty of fair representation. The board dismissed the unfair practice charge without leave to amend.

Activity Reports

ALJ Proposed Decisions (By Region), November 1, 2005-February 28, 2006

Sacramento Regional Office — Final Decisions

Parlier Faculty Assn. v. Parlier Unified School Dist., Case SA-CE-2288-E. ALJ Bernard McMonigle. (Issued 12-21-05; final 1-23-06; HO-U-891-E.) The district unilaterally changed the terms of the collective bargaining agreement when it refused to increase salaries by the "state funded COLA received by the district," as required by the agreement. The plain language of the agreement and the bargaining history show that the term "state funded COLA" encompassed the full statutory COLA calculated pursuant to Ed. Code Sec. 42238.1 for fiscal year 2004-05, and, therefore, employees were entitled to that amount.

California School Employees Assn. and its Merced Chap. No. 274 v. Merced Community College Dist., Case SA-CE-2234-E. ALJ Fred D'Orazio. (Issued 12-23-05; final 1-23-06; HO-U-892-E.) The district did not unilaterally change layoff procedures when it precluded employees from "bumping up" from a 10-month position to a 12-month position in the same classification where the collective bargaining agreement included a layoff procedure that did not define the term "classification" and the district's interpretation of that term as it applied to its actions was consistent with the Ed. Code. The ALJ found the district's action was not inconsistent with "existing laws, contract provisions, policies, or established practices."

California School Employees Assn. and its Merced Chap. No. 274 v. Merced Community College Dist., Case SA-CE-2223-E. ALJ Fred D'Orazio. (Issued 1-27-06; final 2-22-06; HO-U-895-E.) The district did not unilaterally change a collective bargaining provision covering layoff rights for an injured employee where the employee was not formally laid off and thus the layoff article had no application. Nor did the district change contractual industrial leave rights covering injured employees where the district merely disputed that the employee suffered industrial leave and indicated it would not provide such leave until the industrial nature of the injury was determined in the workers' compensation appeal. The district did not abandon the negotiated grievance procedure where it rejected a grievance because the lower steps of the negotiated procedure were not exhausted, and where it disputed that the union and employee were proper "grievants" under the agreement.

Siskiyou County Employees Assn. v. County of Siskiyou, Case SA-CE-315-M. ALJ Christine Bologna. (Issued 1-27-06; final 2-22-06; HO-U-894-M.) The county did not unilaterally change the policy by transferring administrative duties from a union-represented clerk to a confidential secretary where the disputed duties either rarely or never were performed by a clerk, or were performed exclusively or as overlapping duties by an employee not represented by the union.

California State Employees Assn. v. State of California (Dept. of Youth Authority), Case No. SA-CE-1397-S. ALJ Christine Bologna. (Issued 1-20-06; Final 3-2-06; HO-U-896-S.) The state did not retaliate against a union steward for picketing by canceling his union leave where evidence showed that the picketing occurred after the leave was cancelled and the steward had not formally requested leave as required by the collective bargaining agreement.

The state did not interfere with the protected activities of a union negotiating team member when it searched his computer where the collective bargaining agreement limits the use of state equipment and provides that electronic devices are not private, thus foreclosing any reasonable expectation of confidentiality.

The state did not unilaterally change the advance-notice policy for access by union staff to state employees when it announced a five-day notice requirement where five-day notice applied only to large-group informational meetings, not to individual representational meetings, and was consistent with the practice of providing one week or more notice for informational meetings, and, a few months later, the advance notice requirement was reduced to 24-48 hours, with exceptions provided.

The state did not unilaterally change its job steward representation policy where the denial was the result of a misunderstanding, the steward was permitted to represent the employee, and the parties agreed to abide by an earlier PERB decision on the same issue.

San Francisco Regional Office — Final Decisions

San Mateo Elementary Teachers Assn. v. San Mateo-Foster City Unified School Dist., Case SF-CE-2432-E. ALJ Donn Ginoza. (Issued 1-13-06; final 3-2-06; HO-U-897-E.) The district failed to negotiate in good faith when it refused to execute a successor agreement with enhanced benefits for post-65 retirees, where (1) the district implemented a provision at odds with the clear language of the negotiated agreement; (2) the district's interpretation of the proposed agreement was never clearly communicated through language proposed during drafting or otherwise; (3) the association had no way of knowing the district's claimed interpretation; and (4) the district board had given the negotiator explicit authority to enter into the agreement.

Los Angeles Regional Office — Final Decisions

Academic Professionals of California v. Trustees of the California State University, Case LA-CE-858-H. ALJ Fred D'Orazio. (Issued 12-2-05; final 1-20-06; HO-U-890-H.)

The university did not retaliate against the employee or constructively discharge her for protected activity when it relieved her of her normal duties and gave her a lengthy reading assignment on her return from extended leave. The employee had a history of unsatisfactory evaluations and a high error rate, and the purpose of the assignment was to ensure a smooth transition back to work and to update her on recent changes in procedures. In these circumstances, the assignment was not viewed as an "adverse action" under objective criteria and did not establish a basis for a constructive discharge claim.

Delano Elementary Teachers Assn. v. Delano Unified Elementary School Dist., Cases LA-CE-4792-E and LA-CE-4793-E. ALJ Ann Weinman. (Issued 12-19-05; final 1-20-06; HO-U-889-E.) The district unilaterally changed the practice covering use of the email system for association business when it informed the association president that he would not be permitted to use the system during instructional time, where the agreement does not specify when email may be used, and evidence showed voluminous emails were sent during instructional time without disruption, with the employer's knowledge and without the employer's objection. The district superintendent's letter containing an implied threat of discipline if the association president did not comply with the directive was found to constitute retaliation for protected conduct and interference with protected conduct.

American Federation of State, County and Municipal Employees v. City of Torrance, Case LA-CE-207-M. ALJ Donn Ginoza. (Issued 1-26-05; final 2-22-06; HO-U-893-M.) The city did not interfere with a police services officer's exercise of protected activity when a civil service commissioner, during a ballot initiative to align the city's elections with the state primary election, questioned the officer about whether he had obtained email addresses in his official capacity and distributed a mass email about the initiative. Because the ALJ found no evidence that the email addressed employment-related matters or that the officer expressed his support for the union in the email, no protected conduct was implicated. It was found that the commissioner did not act as an agent of the city and instead acted as a private citizen.

Sacramento Regional Office — Decisions Not Final

There were no proposed decisions.

San Francisco Regional Office Decisions — Not Final

There were no proposed decisions.

Los Angeles Regional Office Decisions — Not Final

Trustees of the California State University and California State Employees Assn. and Academic Professionals of California, Cases LA-UM-724-H and LA-UM-725-H; ALJ Thomas Allen. (Issued 11-7-05; exceptions filed 12-16-05.) In consolidated unit modification petitions, library services specialists, who perform the duties of the lead library assistant/supervisory library assistant, were placed in unit 4 because they have a stronger community of interest with employees in that unit compared with employees in unit 7.

California School Employees Assn. and its Chap. 407 v. Desert Community College Dist., Case LA-CE-4715-E. ALJ Ann Weinman. (Issued 11-21-05; exceptions filed 12-16-05.) The district unlawfully interfered with employee and union protected rights to use district facilities for meetings where political issues are discussed where the district in-

formed the association it would not be permitted to conduct a monthly membership meeting in a district meeting room and threatened employees with discipline if they participated in the meeting solely because the agenda indicated that a district board of trustees election would be discussed. The ALJ found that Ed. Code Sec. 7054, which prohibits use of district "funds, services, supplies, or equipment" for political purposes, does not prohibit the association from conducting monthly meetings on school property outside the presence of students, parents, and community members.

Long Beach Community College Police Officers Assn. v. Long Beach Community College Dist., Case LA-CE-4532-E. ALJ Thomas Allen. (Issued 12-13-05; exceptions filed 1-3-06.) Relying on PERB No. 1568 involving the same parties and issues, the ALJ concluded on remand that the district unilaterally subcontracted bargaining unit work without affording the association notice and the opportunity to bargain, despite a management rights clause that provides the district "retains" the right to "contract out work." The management rights clause was found not to constitute a clear and unmistakable waiver of the right to bargain, where the particular type of contracting out at issue is unlike earlier forms of contracting out.

California Teachers Assn. v. Journey Charter School, Case LA-CE-4808-E. ALJ Ann Weinman. (Issued 1-19-05; exceptions filed 2-28-06.) No interference was found in allegedly anti-union statements by the mediator in a charter school dispute where the mediator had no actual or apparent authority to speak on behalf of the charter school and his statements did not tend to coerce or intimidate teachers. However, the ALJ found that the charter school teachers were terminated in retaliation for protected conduct after the teachers played a leading role in sending a letter to parents critical of school management and attempted to involve CTA in the dispute. The ALJ found that the school council had knowledge of the protected conduct, was angry at the teachers because of the letter, believed the letter undermined the efforts of the mediator to resolve the dispute, and wanted control of the council.

Service Employees International Union Loc. 434B v. Personal Assistance Service Council of Los Angeles County, Case LA-CE-182-M. ALJ Thomas Allen. (Issued 2-21-06; exceptions due 3-27-06.) The council did not unlawfully refuse to provide the requested health plan information to the union where the council made a good-faith attempt to get the information from the vendor. The council did not possess the information, promptly requested the information from the vendor, and informed the union that it might take 45 working days to secure the information; the union did not indicate that the need for the information was urgent, and the council honestly believed the vendor was attempting to gather the information.

Report of the Office of the General Counsel

Injunctive Relief Cases

There were no requests for injunctive relief filed between November 1, 2005, and February 28, 2006.

Litigation Activity

Five new litigation cases were opened between November 1, 2005, and February 28, 2006.

Schiavone et al. v. Rio Linda Elverta Community Water Dist., Sacramento County Superior Court, Case No. 05-CS01507 (Case SA-CE-358-M). Issue: Should PERB intervene and assert its preemptive jurisdiction over the conduct alleged in the court complaint? On 12-12-05, the district requested PERB's intervention, and on 12-14-05, PERB filed an ex parte application for leave to file amicus brief. On 12-23-05, PERB filed a supplemental amicus brief. The petitioners' writ of mandate was heard by the court on 12-29-05, wherein the court stayed its decision on the demurrer and on the merits of the petition pending conclusion of PERB processes because the proceedings before PERB may moot the petition before the court. A PERB formal hearing was held on 3-1-06 and 3-2-06.

DiQuisto et al. v. County of Santa Clara et al., Santa Clara County Superior Court, Case No. 1-04-CV-020671 (Cases SF-CE-226, 228, 229-M). Issue: Should PERB intervene and assert its preemptive jurisdiction over the conduct al-

leged in the court complaint? On 1-9-06, the County of Santa Clara requested PERB's intervention and support of the county's motion for judgment on the pleadings that were scheduled to be heard on 2-28-06. Opposition to the county's request for intervention was received from all plaintiffs, and on 2-3-06, the board granted the request for intervention. PERB filed an application for leave to intervene, complaint in intervention and points and authorities on 2-6-06; a petition for joinder on 2-9-06; and a reply in support of the motion for judgment on 2-17-06. The plaintiffs filed memorandums of points and authorities in opposition to PERB's complaint in intervention and opposition to the motion for judgment on the pleadings and an objection to a request for judicial notice on 2-17-06. The motion was heard on 2-28-06 and was continued to 3-16-06.

Los Angeles Leadership Academy and Los Angeles Leadership Academy Community United Union, National Labor Relations Board, Case No. 31-RM-1281 (Case LA-RR-1123-E). Issue: Does the NLRB have jurisdiction over charter schools? On 12-22-05, an EERA representation petition was filed by the L.A. Leadership Academy Community United. On 1-9-06, the academy filed an R.M. petition for a representation election with the NLRB, and on 1-17-06, PERB filed its motion to intervene and dismiss the petition on all parties. An NLRB hearing was held on 1-23-06, and briefs were filed on 2-2-06.

Mitchell v. Public Employment Relations Board, Superior Court of California, County of Los Angeles Central District (-19462-) Case No. LAM 05M21145 (Case LA-LT-00002-X). Issue: Should a duty of fair representation case be filed against PERB in small claims court? On 12-30-05, PERB received a plaintiff's notice and order to go to small claims court on 2-3-06 at 8:30. The case was dismissed on 2-3-06.

Sierra County and Operating Engineers, Loc. No. 3 v. County of Sierra, Sierra County Superior Court, Case No. 6539 (Case SA-CE-369-M). Issue: Should PERB intervene and assert its preemptive jurisdiction over the conduct alleged in the court complaint? On 11-2-05, PERB received a letter requesting intervention in a criminal matter that a respondent filed against the petitioner. On 12-6-05, the petitioner withdrew his request without prejudice (criminal sanctions hearing was scheduled for 1-27-06).

Regulation Adoption and Modification

In December, PERB filed proposed regulation changes, which were adopted at the board meeting on February 9, 2006. The regulations are being finalized and will be submitted to the Office of Administrative Law.

Precedential Decisions of the

Fair Employment and Housing Commission

California Code of Regulations Title 2, Sec. 7435, authorizes the Fair Employment and Housing Commission to designate as precedential, any decision, or part of any decision, that contains a significant legal or policy determination of general application that is likely to recur. Once the commission has done so, the agency may rely on it as precedent and the parties may cite to it in their arguments to the commission and the courts.

One of the commission's decisions designated as precedential is summarized below.

Gender-specific dress code violates the Unruh Civil Rights Act.

(*DFEH v. Marion's Place; Mary Ann Lopez Dewitt dba Marion's Place; Marion Lopez dba Marion's Place*, No. 06-01-p, 02-01-06; 2 pp. + 19 pp. ALJ dec.)

Holding: The establishment's dress code violated the Unruh Civil Rights Act because it impermissibly and arbitrarily discriminated on the basis of sex.

Case summary: This complaint arose from the dress code policy at Marion's Place, a nightclub in Salinas.

Marion's caters predominantly to a Hispanic, seasonal farm worker clientele. In 2000, Marion's began to attract a transgender clientele in addition to its existing customers. In 2001 and 2002, its security staff was required to intervene in a number of altercations between heterosexual and transgender patrons. The owner instituted the following dress code: "Women can wear a dress or pants. Men can wear pants but not dresses or skirts. Tank tops on men are prohibited. Shoes are required."

While male-to-female transgender individuals still were allowed in the club, they were turned away if they were wearing dresses or skirts and the security staff perceived them to be male.

In the past five years, approximately 25 fights have occurred at Marion's and only two or three involved transgender individuals in skirts or dresses. After the dress code was implemented, there were two incidents of transgender individuals wearing pants being physically attacked at the club.

The complainant identifies herself as a male-to-female transgender individual. She was born a biological and anatomical male but considers herself female, although she has not had gender reassignment surgery. The complainant came to America applying for political asylum because of the persecution she faced in Mexico as a transgender person. In 2003, she was issued an employment authorization card by the INS and a California Department of Motor Vehicles identification card. Both cards identify the complainant as female.

In November 2002, the complainant attempted to go to Marion's wearing a skirt and was turned away by security. She was upset and humiliated, and spoke to the owner about the club's policy. The owner reiterated the policy that men had to wear pants, not dresses. The complainant returned to the club three times the following year, wearing pants each time.

On May 5, 2003, the complainant filed a complaint with the Department of Fair Employment and Housing, alleging Marion's denied her full and equal privileges because of the complainant's sex (male) and gender identity

(transgender) in violation of the Fair Employment and Housing Act, incorporating Civil Code Sec. 51. On May 4, 2004, the DFEH issued an accusation against Marion's, alleging that the club denied the complainant full and equal accommodations, advantages, facilities, privileges, and services based on the complainant's actual or perceived sex, gender identity, and sexual orientation in violation of Sec. 51. The accusation alleged that Marion's refused the complainant access unless she adhered to their dress code by wearing pants.

The Unruh Civil Rights Act provides that "all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

The ALJ noted that the act is to be liberally construed in order to effectuate the purpose for which it was enacted and to promote justice. To that end, courts have extended the protection of the statute to categories not enumerated in the statute. The issue in this complaint is not whether transgender individuals were barred from the establishment, but whether the dress code impermissibly barred individuals from admittance. The ALJ noted that dress codes are not per se unlawful, but can violate the act. The ALJ then applied the three-part analysis adopted by the California Supreme Court in *Harris v. Capital Growth Investors XIV* (1992) 52 Cal.3d 1142, and determined that Marion's dress code violated the act because it impermissibly and arbitrarily discriminated on the basis of sex and was not justified by legitimate business reasons.

The ALJ ordered Marion's to cease and desist from imposing its dress code to the extent that it discriminates against individuals based on sex and to pay the complainant $2,500 in emotional distress damages and $116 in lost wages. Marion's also was ordered to develop a written policy prohibiting discrimination and conduct training for all its employees.

The commission adopted the ALJ's opinion in full as a precedential decision.