contents

Features

Recent Developments

Public Schools

Local Government

contents

Recent Developments

continued

State Employment

Higher Education

Discrimination

contents

Recent Developments

continued

General

Public Sector Arbitration

Departments

letter from the editor

Dear *CPER* Readers:

Yes, the rain finally has stopped and the sun has reappeared at last. Here at CPER, surrounded by the U.C. Berkeley campus community, it is hard not to notice the coming of summer. Students are stuffing belongings into their parents' cars, there are a few more parking spaces in the lot across the street, and young men and women in caps and gowns can be seen walking through the campus. Among our staff, vacation plans are taking shape, our kids are signed up for summer camp, and the idea of spending some "down time" is starting to seem like a possibility.

But before *you* pack *your* bags and head for the hills, we've put together a June issue that deserves your full attention. I wouldn't want you to miss the companion articles by Darrell Murray and Peter Saltzman. These management and union representatives share their success at addressing one of the most troubling problems facing the public sector — the soaring cost of retiree health care benefits. Murray and Saltzman each offer some encouraging news by retelling the story of how they arrived at a mutually beneficial solution.

This issue also offers up other news deserving of your attention. One theme running through the public schools and local government sectors concerns the exodus of many seasoned employees who are approaching retirement age. Pay hikes are a focal point for some state government employees, and in higher education, concerns over retirement plans at the Los Alamos lab have surfaced.

Two important cases are analyzed in the Discrimination section. And the General section examines an instructive decision overturning the NLRB in an "inability to pay" case.

So, before you depart for your summer vacation, make sure you spend some time with *CPER*. Of course, you can always take us along to the beach!

Sincerely,

Carol Vendrillo

Carol Vendrillo
CPER Director and Editor

Successful BART Negotiations Over Retiree Health Benefits ...According to the Union

Peter W. Saltzman

Peter Saltzman *is a partner at Leonard Carder, LLP, a firm representing public and private sector labor unions. He specializes in employee benefits and represented the Amalgamated Transit Workers, Local 1555, in the 2005 negotiations with the Bay Area Rapid Transit District.*

With the issuance of the Governmental Accounting Standards Board (GASB) Statement No. 45 in August 2004, retiree health benefits have moved to center stage in public sector collective bargaining. GASB 45 establishes accounting standards for liabilities related to public sector health and "other post-employment benefits" (OPEB).[1] For most public sector employers, it will become effective for fiscal year 2008.

The 2005 negotiations between the Bay Area Rapid Transit District and Amalgamated Transit Union Local 1555 and Service Employees International Union Local 790 were among the first in the country in which the long-term funding of OPEB liabilities was addressed and resolved. Adopting a different approach, the Peralta Community College District and Peralta Federation of Teachers also have reached agreement on funding OPEB liabilities. In sharp contrast to the experience with analogous private sector accounting rules issued in 1990, these early public sector responses suggest that GASB 45 may prove to be a catalyst for progress on one of the most intractable problems in labor relations today.

The Economic Climate

It is no exaggeration to say that employee health benefits have become the scourge of collective bargaining in the private and public sectors alike. Runaway medical costs have forced union and management negotiators to expend disproportionate resources to shore up sagging health plans, precluding progress on many other pressing needs. Over the past decade, health care costs, particularly retiree health care costs, have increased by over three times the general rate of inflation.[2] Low Medicare reimbursement rates, uncontrolled prescription drug costs, soaring professional fees, accelerating retirement rates, and longer expected life spans all contribute to the problem.

Employer premiums have risen even faster than the overall rate of medical inflation, as the medical industry shifts costs not paid by the Medicare and Medicaid programs. Although medical costs have abated somewhat since 2004, actuaries for the Department of Health and Human Services project national average health care costs to increase by 7.2 percent a year through 2013, with significantly higher-than-average rates in California.[3] In all regions, unsurprisingly, pre-Medicare retirees are the highest-cost population.

Although public and private sector employers face the same market conditions when purchasing health care coverage for employees, their responses to these economic pressures have been markedly different. High retiree health costs have resulted in the elimination of approximately half of all private sector retiree health benefits over the past 15 years.[4] One of the well-known ironies of the Employee Retirement Income Security Act of 1976 is that it left one of the key components of retirement income security — health benefit coverage — without the vesting and funding protections afforded pension benefits. Subject to ERISA's preemptive power, but lacking these protections, retiree health benefits in the private sector have long been at risk.[5] Political constraints and higher union density in the public sector, together with the due process and contract clauses of most state constitutions, have proved more effective than ERISA in protecting retiree health benefit promises made to employees.

National average health care costs are projected to increase by 7.2 percent a year through 2013, with significantly higher-than-average rates in California.

One of the ostensible triggers leading to the sharp decline in private sector retiree health benefit coverage was the issuance in 1990 of Financial Accounting Standards Board (FASB) Statement No. 106, which for the first time required that liabilities for post-retirement benefits other than pensions be evaluated and reported on corporate financial statements.[6] Actuarial valuations of retiree health liabilities under FASB 106, as under GASB 45 14 years later, are based on the same kinds of actuarial methods and assumptions used to value pension liabilities.[7] Surprisingly, however, OPEB liabilities typically exceed the duration of pension liabilities, due principally to the compounding effect of health care cost trends and increasing utilization at older ages. Even more than with pensions, unfunded actuarial accrued OPEB liabilities are highly sensitive to the actuarial assumptions used, as well as to (usually implicit) assumptions regarding the economic and political climate governing the provision of health care.[8]

As a result of these peculiarities, valuations of retiree health liabilities have high shock value, notwithstanding the fact that neither FASB 106 nor GASB 45 can or do impose any requirement that employers prefund their health plans. In the years following the issuance of FASB 106, many non-union employers reduced or eliminated retiree health coverage altogether, claiming that the liabilities which they were required to report would keep investors away and sink stock prices. In fact, however, there were no investment downgrades related to FASB 106 in the years immediately after it went into effect, and investment analysts have rarely, if ever, suggested that changes in investment ratings are due to OPEB liabilities.

Notwithstanding the fact that investors largely ignored FASB 106, many agencies such as BART that rely on the bond market (and thus bond ratings) to fund public works have expressed similar concerns about GASB 45. As a result, public sector bargaining parties have begun to explore long-term funding options to reduce OPEB liabilities.

The BART Negotiations

ATU Local 1555, SEIU Local 790, and BART met from March through July 2005, much of that time in negotiations over health benefits for active employees and retirees. In the end, they reached the following agreement on health benefits:

- to maintain all benefits for active and retired employees, including full family coverage and choice of medical plans offered through CalPERS;
- to limit employee and retiree copays alike to $75 a month, effective January 1, 2006, with annual 3 percent increases thereafter, and, under certain conditions to permit the diversion of up to 1.627 percent of payroll that would otherwise have gone to employees' Money Purchase Plan accounts beginning in 2013;
- for BART to fully fund a Retiree Health Benefit Trust within 30 years, with trust assets exclusively and irrevocably dedicated to the provision of health benefits for BART retirees; and
- to establish a Trust Review committee with union participation.

I will summarize the BART negotiations under four slogans that, I believe, best explain their success.

Focus on funding solutions, not benefit reductions. At the outset of the negotiations, BART insisted that its top priority was to reduce its unfunded actuarial accrued OPEB liability, which it valued at approximately $267 million.[9] Initially, BART proposed to pay the full "actuarial required contribution" (ARC) each year of the contract.[10] Under that plan, the district would have incurred an operating deficit of approximately $100 million over a proposed four-year contract term. BART initially proposed, in effect, to balance this projected deficit on the backs of employees through wage freezes, 10-fold increases in employee health contributions, changes in eligibility rules for health care coverage, and other takeaways. Of course, these proposals — and the premises they were based on — were unacceptable to the unions.

It soon became clear, however, that BART negotiators were more interested in finding a long-term solution to funding OPEB liabilities than achieving any particular benefit reductions. Recognizing this flexibility, the unions embarked on an analysis of the available funding options, retaining their own actuarial consultant to study different funding schedules and more modest increases in employee contributions. In this manner, the parties were able to move away from fundamentally opposing views on benefit reductions to a more constructive debate on long-term funding of OPEB liabilities.

BART negotiators were more interested in finding a long-term solution to funding OPEB liabilities than achieving any particular benefit reductions.

Out-of-the-gate proposals to cut benefits do not foster common ground; discussions of how to fund existing benefit programs, on the other hand — even if they ultimately result in some benefit modifications — provide a context in which both sides can find common ground and engage in productive negotiations.

Commit to the use of a dedicated trust to fund retiree health benefits. The unions insisted that an irrevocable and jointly administered trust be used as the vehicle for any long-term OPEB funding plan. Concerned that the district had largely failed to prefund retiree health benefits for the past 11 years despite a prior agreement to do so, the unions were unwilling to agree to divert substantial capital to retiree health benefits unless the funds were secured in an irrevocable trust whose assets were exclusively dedicated for that purpose. Indeed, GASB 45 looks favorably on employers who have "irrevocably transferred assets to a trust or equivalent arrangement, in which plan assets are dedicated to providing benefits to retirees and their beneficiaries in accordance with the terms of the plan and are legally protected from creditors of the employer(s) or plan administrator."[11]

During the course of bargaining, the unions learned that in 2004, BART already had established a Retiree Health Benefit Trust in which it had placed $33 million in "demutualization" funds to offset its retiree health liability.[12] While the Trust was not dedicated exclusively to the provision of retiree health benefits, BART eventually agreed to amend the Declaration of Trust to do so. Although BART did not agree to permit joint administration of the trust, it did ultimately agree to union participation in a Trust Review

Committee.[13] Without these assurances that the negotiated funding for retiree health benefits would be held in a dedicated trust open to review by the unions, agreement on long-term funding of OPEB liabilities would not have been possible.

Ensure equal access to actuarial data and work product. The unions believed that the OPEB liabilities calculated by BART's actuary were overstated. In order to evaluate those liabilities and the assumptions they were based on, and to study alternative funding scenarios, the unions' actuarial consultants would have to acquire access to the underlying data and run expensive computer simulations of their own. Therefore, the unions requested that BART direct its consultants to perform computer runs according to specifications submitted by the unions' consultants.

To their credit, the BART negotiators welcomed this proposal, and agreed to pay its consultant for the additional work. This unusual arrangement provided the unions with an indispensable tool in developing funding proposals, and was critical to the success of the negotiations.

The unions believed that adoption of a specific funding schedule intermediate between 'pay as you go' and full ARC funding would be looked upon favorably by the rating agencies.

Adopt a long-term, full-funding goal with short-term flexibility. Ultimately, the parties had to agree on what constituted a sound OPEB funding plan. Both separately and together, they reviewed literally dozens of 30-year cash flow projections under a variety of actuarial assumptions, showing how the trust could be expected to perform under different funding and payment scenarios.

With the assistance of their consultants, the unions argued that immediate ARC funding was neither necessary nor desirable. GASB 45 encourages some degree of prefunding but does not require the full ARC to be contributed each year. Adoption of a specific funding schedule intermediate between "pay as you go" and full ARC funding, the unions believed, would be looked upon favorably by the rating agencies, particularly in an area like health care, which is fraught with economic, political, and actuarial uncertainty. On the other hand, rating agencies may not look favorably on entities that devote too large a proportion of available funds to retiree health benefits, removing resources from wages and other essential requirements. Eventually, BART agreed with this view, although it insisted that its contributions must "ramp up" to the full ARC within an eight-year period.[14]

At this point, with both sides close to agreement on an appropriate funding vehicle and funding philosophy, the unions offered moderate increases in employee copays and the diversion of certain funds that would otherwise flow to their Money Purchase Plan accounts commencing in 2013. This modest increase in employee contributions enabled the actuaries to fine tune the cash flow projections to the satisfaction of all, and agreement was finally reached on the long-term funding of OPEB liabilities. As a result, the $100 million, four-year operating deficit that had formed the basis for BART's initial contract proposals was reduced by approximately half, enabling the parties to reach an acceptable resolution of other economic items and, ultimately, the entire contract.

The Peralta Community College District OPEB Bond Issue

At about the same time that the BART negotiations were proceeding, a different approach to funding OPEB liabilities was jointly developed by the Peralta Community College District and the Peralta Federation of Teachers. Having evaluated their OPEB liabilities at $153 million, the PCCD obtained judicial validation to issue a 40-year, $153 million "OPEB bond," the first and still the only of its kind in the country. The bond was issued in December 2005 and was quickly oversubscribed. The proceeds from the bond issue were invested through a trust dedicated exclusively to the provision of retiree benefits. Retiree health care costs are paid out of the trust; debt service on the bond is paid out of the district's general fund. The trust investments are projected to produce in excess of the combined annual retiree health payments plus debt service. After reviewing the arrangement, Standard & Poors gave the PCCD an AA rating.[15]

Conclusion

Although the majority of public agencies in California and other states have not yet evaluated their OPEB liabilities or addressed the funding issues raised by GASB 45, the 2005 BART negotiations and the PCCD experience suggest that collective bargaining over the long-term funding of OPEB liabilities can provide an impetus to increase the long-term stability and security of public sector retiree health benefits. ❋

1 Governmental Accounting Standards Board Statement No. 45, *Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions*, http://www.gasb.org/.

2 Centers for Medicare and Medicaid Services, *National Health Care Expenditures Projections 2003-2013*, http://www.cms.hhs.gov/NationalHealthExpendData/.

3 *Id.*

4 See, e.g., California Legislative Analyst's Office, *Retiree Health Care: A Growing Cost for Government* (February 2006); TIAA-CREF Institute, Financing Retiree Health Care (July 2005); Mercer Human Resources Consulting, 2004 and 2005 Trends in Employer-Sponsored Health Plans.

5 In recent years, federal courts have exacerbated the problem in a series of decisions culminating in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998). In *Sprague*, the Sixth Circuit upheld General Motors' decision to eliminate health coverage for some 84,000 retirees. The Supreme Court declined to review the case.

6 Financial Accounting Standards Board Statement No. 106, *Employers Accounting for Postretirement Benefits Other than Pension*, http://www.fasb.org/.

7 In certain ways, GASB 45 is more flexible than FASB 106. For example, unlike FASB No. 106, it permits retiree health accruals to be based on a level percentage of payroll, which results in lower accruals.

8 Jeffrey Petertil, *Measuring Terminable Postretirement Obligations*, Society of Actuaries (2004).

9 Using what they believed to be more realistic assumptions, the unions valued the unfunded liability at approximately $222 million.

10 As with pension funding, actuarial funding under GASB 45 consists of a "normal cost" — the cost of current year accruals — plus amortized costs to defray past unfunded liabilities.

11 GASB Statement No. 45, par. 13(g).

12 Demutualization funds are assets derived from insurance investment policies that are converted to stock when an insurance company demutualizes. Under authority of Secs. 53620-53622 of the Government Code, local agency funds designated for the payment of employee retiree health benefits are not subject to the investment restrictions on other surplus funds, and thus BART was able to invest the assets in the trust more aggressively.

13 The unions pointed out that California Attorney General Opinion 91-205 provides that an agency and union may jointly administer a trust established under Sec. 53206 of the Government Code, but BART and its attorneys were not willing to agree to do so.

14 It is interesting to note that the specific funding model adopted by the parties (30 year full funding with an initial ramp-up) has begun to attract the attention of other public sector entities and their advisors. See, e.g., LAO Report, *supra* fn. 4 ("we recommend that the state ramp up to an increased level of contributions over a period of several years. The near-term target should be the state's normal cost level under GASB 45.")

15 As with the BART model (cf. fn. 14), other entities are now looking at the PCCD bond issue with interest.

Successful BART Negotiations Over Retiree Health Benefits ...According to Management

Darrell Murray

For years, countless public agencies have offered retiree medical insurance without any thought about tomorrow's costs and how they would be met. In the current economic climate, however, all that has changed. As "baby boomers" have started to retire, liabilities have grown so large that the issue of retiree medical insurance is now front and center. Like Social Security funding and tax cuts, the way this benefit is funded sets up a generational tension between the current needs of younger workers and the retirement needs of older employees.

The history between BART and its unions suggested that resolving a problem of this magnitude would be impossible. But in mid-2005, elected officials, unions, managers, and employees of the San Francisco Bay Area Rapid Transit District mastered the technically complex choices surrounding retiree medical insurance and overcame entrenched patterns of prior dealing, ultimately building a productive relationship. Even more surprising, they were among the first in the nation to tackle the retiree health insurance funding problem following adoption of the Government Accounting Standards Board's Statement No. 45. The GASB (pronounced "gaz-bee") standard radically changed the way agencies such as BART can analyze and report retiree medical insurance liabilities.

Darrell Murray *recently became a consultant on the staff of IEDA, a labor relations consulting firm, in Emeryville. Until last month, he served as manager of the San Francisco Bay Area Rapid Transit District Labor Relations Department and was the district's chief negotiator in 2005 negotiations with SEIU Local 790 and ATU Local 155.*

The Original Bargain

In the early 1990s, BART sought to escape a comparatively rich medical benefit program for active employees. The transit agency did not pay for retiree coverage at that time. Ultimately, BART and its unions agreed to drop the existing medical plan and, instead, obtain coverage through the California Public Employees' Retirement System. The deal included phased-in retiree participation in the same CalPERS plan.

After seven years, BART's contribution on behalf of retirees and their dependents was equal to that for active employees and their families — the full premium less a $25-a-month employee and retiree contribution. The parties specifically disavowed any intent to grant employees or retirees a "vested" entitlement to the retiree insurance benefit; i.e. one that was permanent and immune from elimination or reduction.[1]

Before the district and unions agreed to adopt retiree insurance benefits, BART's budget staff performed a cost analysis which took into account that many long-term employees soon were likely to retire. Concerned by this potential "bubble" and its impact on the pay-as-you-go cost for retiree medical insurance,[2] the district's Operating Budget Department hired an actuarial firm to study and project those potential costs. Considering the possible number of retirees, the actuaries concluded that BART faced an accrued unfunded actuarial liability potentially approaching $121 million.[3]

Although before the 2000 study, BART had begun to set aside funds as a reserve to pay for retiree medical insurance benefits, the actuarial figures set off alarm bells. The several million dollars the agency was setting aside in each year would not begin to address the true cost of the benefits. As a result, BART entered 2001 contract negotiations looking for a solution to this problem.

In 2000, a study concluded that BART faced an accrued unfunded actuarial liability potentially approaching $121 million.

Good Times and Long-Term Problems

As contract negotiations got underway, the Bay Area economy was riding on the crest of the "dot com" wave. BART ridership was at an all-time high. Sales taxes were pouring in. Stock market indexes were at record levels. Double-digit rates of return on investments were routine and, as a result, CalPERS-managed employer retirement accounts were deemed "super funded."[4]

BART was one of many employers that "picked up" (i.e., paid) the employee's 7-percent CalPERS contribution. These payments came from BART's current operating budget. Under CalPERS' rules, a super-funded employer who picked up its employees' 7-percent contribution could opt to have it paid out of the super-funded portion of its CalPERS employer account assets rather than from its operating budget. In effect, this would make 7 percent of pay available to the employer's operating budget. Over time, if CalPERS' rate of return on investments slowed, the employer would exhaust the super-funded portion of its account and have to resume paying the employee contribution out of its operating budget.[5] Thus, the additional money available to the employer was a one-time-only asset — ideal for financing the unfunded post-employment medical benefit obligations.

During 2001 bargaining, BART unions proposed that the agency stop paying the employee CalPERS contribution out of its operating budget and, instead, pay the 7 percent into employee supplemental pension accounts.[6] BART countered that the parties should commit the money to a retiree medical insurance trust to help defray the future cost of those benefits. The unions balked, asserting that retiree medical insurance was a commitment BART had made years before and that BART should pay for the benefit independent of any further employee contribution. It was BART's problem.

In the end, BART and its unions agreed to direct half of the 7 percent employee pick-up savings to employees. BART retained the other half for its operating budget. Thus, the parties lost a comparatively painless opportunity to add nearly $35 million to the BART retiree insurance funding reserve.

In early-September 2001, one week after the parties reached their deal, terrorists flew jets into the World Trade Center and the Pentagon. By November, the downward economic spiral was well under way. BART's original plan to place its half of the retained employee CalPERS contribution in a reserve for retiree insurance was dashed by more-immediate fiscal needs. The good times were over. BART was no closer to solving the retiree medical insurance problem. In fact, the solution was drifting further away.

The Growing Problem

About a year after the conclusion of 2001 negotiations, mid-level BART managers began to work on a strategy to squarely address the problem.[7] Consequently, BART arranged for William M. Mercer Human Resource Consulting, Inc., to prepare an updated actuarial study using key assumptions prepared by the mid-management group.

Managers warned Mercer that if the assumptions were seen as results-oriented (i.e., designed to produce a worse picture than actually existed), BART's unions would not take the report seriously. Consequently, to the extent possible, Mercer was directed to employ those assumptions for pension purposes used by CalPERS. Deviations were to occur only when indisputable BART data supported different assumptions. Managers also asked Mercer to test the "sensitivity" of certain alternate assumptions that were somewhat more conservative (and sometimes more realistic).[8]

In '04, an actuarial study projected BART liability for retiree medical insurance as between $262 million and $621 million.

In January 2004, Mercer delivered its June 30, 2003, plan valuation.[9] The study contained bad news. Due to rapid acceleration of medical insurance premiums and the lack of contributions to a reserve, Mercer projected BART liability for retiree medical insurance as likely to be between $262 million and $621 million. At the high end, the projections reflected BART's actual rate of return on its general fund assets. At the low end, it reflected what CalPERS assumed it could earn if given a freer hand to invest in stocks, bonds, and other forms of investments. To eliminate its unfunded liability within 30 years, BART would have had to regularly put between 14.57 percent and 30.22 percent of pay into a reserve.[10] Unfortunately, for the second consecutive year, BART faced a budget deficit and was unable to immediately address the problem.

BART managers took the study to General Manager Tom Margo, and from there to the board of directors. Shortly afterward, BART provided the study to its unions. This was the first major effort to educate parties about the growing magnitude of the funding problem.

Between February 2003 and January 2004, as BART's managers were working with Mercer to develop the 2003 valuation, the Government Accounting Standards Board[11] solicited comments[12] on two proposed GASB statements. These statements included a requirement that public agencies analyze and report unfunded retiree medical insurance liabilities (along with other post-employment-benefit liabilities) using a GASB-prescribed methodology. Most importantly, GASB recommended that agencies use a 30-year period to measure the amount of annual contributions needed to eliminate (i.e., "amortize") any unfunded liability.[13] The proposed standards require the entity to either fund those liabilities or report the unfunded annual portion, including the unfunded portion from prior years, on the organization's financial statement.

The proposed GASB standards seriously concerned entities such as BART that rely on bonds to finance capital projects.[14] A large unfunded liability displayed on its financial statement could adversely affect BART's bond rating — driving up the interest rate it would have to pay on its bonds. BART management notified elected officials and unions of this development and its implications.

With the Mercer valuation and GASB statements influencing its thinking, BART management believed it needed a way to invest reserves in a broader array of investments than was permitted for general BART assets. After discussion and research within the organization, legal staff prepared an irrevocable trust agreement for board adoption. At the same time, the Controller-Treasurer's Office developed a revised investment policy that would allow the trustee to invest trust funds in a manner that would significantly improve BART's rate of return. The BART board adopted the trust and revised its investment policy effective May 18, 2004.

Meanwhile, management instructed Mercer to prepare an updated June 30, 2004, retiree medical insurance actuarial valuation. This took into account the proposed GASB standards as well as BART's trust and investment policy. This time, management was able to test the effects of a 6.75 percent rate of return on trust assets.[15] The July 2004 valuation was somewhat less discouraging than that of 2003. With a 6.75 percent rate of return, Mercer estimated that BART's unfunded liability for retiree medical was approximately $284 million. BART would have to regularly place 13.64 percent of pay into the trust to retire the unfunded liability in 30 years.

By fall 2004, as 2005 negotiations loomed, BART had educated key agency decisionmakers concerning the retiree insurance dilemma. It also made an important decision with respect to the GASB statements. From BART's standpoint, the most important concern was to ensure that retiree medical insurance benefit commitments and funding balanced over the long term. This would shelter retired BART employees from unpleasant surprises. By defining the problem this way, rather than as a GASB compliance issue, BART kept its financial ability to deliver benefits at the center of the discussion. It also placed BART on the side of retirees.

BART recognized that its unions faced a "Hobson's choice." Union membership had an interest in secure retiree insurance funding. But they also had an interest in higher wages and expanded benefits. Faced with these conflicting pressures, BART anticipated the unions would argue that if GASB did not *legally* require funding, there was no need to fund retiree medical insurance reserves to the levels required to meet the GASB 30-year goal for eliminating unfunded liability.[16]

BART kept benefit security at the forefront of discussions, and the unions ultimately accepted this view. But, before doing so, the unions had to come to terms with reality: regardless of whether the original funding responsibility for retiree medical insurance had been BART's, the problem now was too large for the agency to handle alone. Consequently, while GASB standards were a significant part of the dialogue throughout negotiations, the parties' mutual interest in a fiscally sound retiree medical insurance funding system was the primary reason for the eventual agreement.

In this economic climate, the unions faced conflicting pressures: secure retiree insurance funding versus higher wages and expanded benefits.

As negotiations approached, BART asked Mercer to perform several additional studies related to retiree medical insurance. Three examined several options for rebalancing funding and benefits. One study, which included radical increases in employee contributions, would have nearly eliminated the unfunded liability. A second, much-more-modest option would have reduced unfunded liability by approximately 10 percent. A third option fell between the two extremes. BART shared these studies with its unions in advance of negotiations to continue the educational process and provide a context in which BART could engage the unions on the retiree insurance issue.

BART asked Mercer to study alternative methods for calculating unfunded liability under GASB's rules, and management shared the results with the unions so they could review them before negotiations. The study showed that an "open 30" amortization method ultimately would cost significantly more than the "closed 30" method.[17] This result was important because the rolling 30-year amortization method spreads costs over a longer period, taking fewer dollars off the table in the near term. BART anticipated that the unions might want to use this method to relieve pressure on scarce dollars. This would permit wage and benefit improvements, but at the expense of retiree medical funding.

Given the volatility of retiree medical expense projections, and the risk that the unfunded liability posed to both retirees and BART's bond rating, BART was unenthusiastic about the open-30 methodology.[18]

The Bargaining Climate

In 2001 negotiations, BART's unions benefited from the vast wealth generated by the "dot com" boom and its effect on BART's financial picture. Back then, labor's gain was BART's pain; however, the shoe was on the other foot in 2005.

By the time BART and its unions began contract negotiations in March 2005, the district was in the midst of a third consecutive year of deficits. Since July 2002, it had cut over 500 positions from its budget. Despite fare increases and new parking charges, it projected a $100 million deficit over the next four years. Most of this deficit represented the cost of funding retiree medical insurance on a 30-year closed amortization schedule — something GASB was making an issue throughout the public sector. Thus, funding retiree insurance appeared to mean there was little room for wage improvements or other benefit increases during that four-year period.

During this time, nearly every jurisdiction in the state, including the State of California, had faced similar problems.

This was a picture familiar to the public and to elected officials outside of BART. Nearly every jurisdiction in the state, including the State of California, had faced similar problems and was far from an optimal climate in which to push hard for new benefits or large wage demands.

In addition, unions, including those at BART, faced major problems at the state level. The fall 2005 ballot included a proposition that would have struck at the heart of the union pocketbook by requiring annual individual employee authorizations for dues deduction. Public employee pensions became a target of those seeking reforms that would reduce the financial burden on state and local governments. Overall, BART felt 2005 was the time to press the retiree medical funding issue.

March 28 to July 6, 2005

Bargaining between BART, SEIU Local 790, and ATU Local 1555 began on March 28, 2005.[19] During the early days of negotiations, the two unions argued that BART was responsible for the retiree insurance funding problem and should not ask employees to bail it out. However, as the weeks wore on, the dialogue deepened considerably.[20]

SEIU and ATU confirmed what BART had anticipated: they faced competing internal interests.[21] On one hand, senior union members desired retiree insurance security. On the other, less-senior employees were more strongly interested in wages and other immediate economic improvements. BART acknowledged this problem and disclosed its own conflicting interests. The agency wanted to solve the retiree insurance funding problem; however, it faced a tightening labor market as "baby boomers" retired. BART knew it had to be competitive in terms of wages and other benefits, but its commitment to fund retiree insurance meant fewer dollars would be available to pay attractive salaries and other benefits. Ultimately, however, BART concluded the retiree insurance funding problem was growing so rapidly it had to be addressed. Failure to act would threaten the sustainability of those benefits.[22]

In late May, SEIU and ATU hired Rael and Letson as their actuarial consultants. Rael and Letson worked at the direction of union leadership[23] to produce a proposal for retiree insurance funding.[24] Specifically, the unions proposed that BART make substantial payments into the retiree health benefit insurance trust, in addition to its pay-as-you-go costs. In exchange, employees and retirees would increase their contribution to $75 a month in the first year, with a 3 percent escalator each ensuing year.

BART viewed the unions' proposal as a serious attempt to grapple with the problems facing the parties. By lowering BART's payments in the earlier years to an amount below the annual required contribution (ARC), the union plan left room to pay for modest wage increases.[25] It also would provide greater support for BART's retiree medical insurance benefit. However, the proposal amounted to a deferral of costs that would drive the ARC higher in later years than it would have with full funding of the ARC from the outset of the contract. The unions' proposal also embodied a projection of future health insurance costs that BART felt was overly optimistic. Finally, it left a substantial unfunded liability after 30 years. BART was concerned that the financial community might not respond favorably to a plan with these features.

Yet BART saw that the unions were attempting to develop a mutually acceptable balance of short- and long-term interests. Consequently, BART advised the unions that it would consider their proposal, but requested that they find a way to assure BART that the approach would not harm the agency's bond rating.[26] The unions responded by providing the district with an analysis performed by Jeffrey Petertil, the only individual to serve on both the GASB and the Financial Accounting Standards Board post-employment benefit task forces. Petertil, an actuary with over 30 years experience, informed BART that the unions' suggested approach would be viewed favorably with bond rating agencies as "a sound OPEB funding plan."[27] BART's controller-treasurer also shared the opinion of a bond rating agency, Fitch Ratings, concerning the credit implications of GASB Statement 45. Most relevant to BART, the Fitch authors wrote:

> For issuers choosing to ramp up annual contributions to reach full funding of actuarially determined levels, Fitch recognizes that a rising OPEB obligation in the short term may be a by-product. Such an increase, taken in the context of a sound OPEB funding plan, will not by itself affect credit ratings.[28]

BART saw the unions attempting to develop a mutually acceptable balance of short- and long-term interests.

These authorities gave BART a degree of comfort that a "ramp up" might provide an acceptable way to reduce short-term bargaining constraints without endangering the agency's bond rating. However, Mercer's actuaries cautioned that if BART did too little to fund retiree health benefits, other GASB rules could operate to reduce the rate of return that BART could assume it would earn on its investments, thus significantly driving up unfunded liability projections and potentially affecting bond rating. So while BART was prepared to defer full ARC funding for a limited time, Mercer insisted that BART achieve full ARC funding levels within a relatively short period and that its plan extinguish the unfunded liability within 30 years. Moreover, BART sought to offset savings that would help pay for the increased overall costs associated with deferring full ARC funding.[29]

Balance Achieved

Ultimately, the parties reached a settlement on all disputed issues including retiree insurance funding, wages, and certain technology-related provisions that would help the district fund near-term wage improvements. On retiree health insurance, the unions agreed that employee and retiree contributions would increase January 1, 2006, by $50 a month to a total of $75, plus a 3 percent escalator in each successive year. The settlement included the unions' "ramp up," but it was limited to eight years. This meant that by July 1, 2013, the district would begin paying the full ARC. Before then, BART would continue paying its annual pay-as-you-go cost for retiree medical insurance and make an additional contribution each year to the trust. BART agreed it would not pay benefits out of the trust until July 1, 2013; thereafter, it would begin paying the full ARC into the trust. This ensured that funds placed in the trust before July 1, 2013, would generate significant investment earnings.

To compensate BART for the cost of the ramp up, the unions put forth a proposal that related to a deal made by the parties over a decade earlier. At that time, BART agreed to adopt the "2 percent at 55" retirement formula for its employees. However, to help offset the unfunded liability that this change in pension formulas involved, the parties agreed that the district would retain a 1.627 percent payment that it had historically paid into employee supplemental pension accounts. Fortuitously, the parties agreed that this would terminate and the district would resume paying the 1.627 percent supplemental pension payment into employee accounts on July 1, 2012 — one year before the end of the ramp-up period negotiated in 2005.

Given that employees currently were not receiving the 1.627 percent contribution to their supplemental pension accounts, the union proposed, and the parties agreed, that the district would again retain the 1.627 percent supplemental pension contribution beginning July 1, 2013.[30] This was to apply against the difference between a contractually identified "baseline ARC" and the ARC recalculated to account for the cost of the ramp up. This commitment would end when BART fully discharged its unfunded liability (June 30, 2034). At that time, BART would resume its 1.627 percent contribution to employee supplemental pension accounts.

The fact that retiree insurance was complex helped keep the dialogue at the bargaining table where the technical expertise existed.

The parties also agreed on several trust amendments. Most important was one that strictly confined use of trust assets to payment of retiree heath benefits and trust administrative costs. This ensured that the funds set aside could not be redirected to pay other BART obligations. At the eleventh hour, with a looming strike deadline, the unions also proposed language that the district felt might undermine the "no-vesting" agreement they adopted many years earlier. The district rejected that language, explaining that while secure funding of benefits served the goal of preservation, neither side could predict the future with sufficient accuracy to say that adjustments in the funding system or benefits would not be periodically required. The parties agreed to create an ongoing joint trust review committee to give employees and their unions a way to monitor the assets.[31]

Finally, throughout negotiations, the parties discussed the possibility of adopting a leaner program of retiree health benefits for new hires to help reduce unfunded liability and lessen financial pressures. However, because BART is a CalPERS medical plan participant, its choices are limited to a lone option described in state law.[32] The parties discussed this plan, which vests an employee with a percentage of the employer's retiree insurance benefit contribution that increases with years of service, however, SEIU and ATU were concerned this would amount to "two-tiered" benefits. Second, the vesting schedule would leave an employee who terminates with less than 10 years of service with no benefit, as opposed to the current plan that allows a retiree with five years of service to receive the full BART contribution.

Consequently, the parties agreed to defer further discussion of a new plan, but will meet during the life of the new agreement to explore workable options. The agreement provides that the parties will jointly approach the legislature to ask for enactment of any necessary enabling legislation.

Points for Success

Many stars aligned to promote the success of BART's 2005 negotiations. As noted earlier, the anemic Bay Area economy shifted the balance of bargaining power in 2005. Both sides were motivated to negotiate.

Another major contributor to successful negotiations was BART's ability to produce a consistent message both inside and outside of negotiations. In past negotiations, BART had expressed its positions through a variety of forums, intentionally and otherwise. At times, those messages conflicted; the unions could not distinguish which message represented the agency's true point of view. Consequently, the unions spent considerable time away from the bargaining table with various managers and elected officials searching for the best available terms. In 2005, BART was able to offer consistent messages. The fact that retiree insurance was a complex subject matter involving large liabilities helped keep the dialogue at the bargaining table where the technical expertise existed to address the issues.

Technical expertise on both sides of the bargaining table was itself a major factor in bringing about a successful negotiation. Actuaries, lawyers, budget planners, and skilled negotiators all played instrumental roles in handling the tangle of issues and interests. Without their capacity to translate the arcane concepts of actuarial studies, trust management, and long-term cash flows to the bargaining teams, a meaningful discussion — much less a constructive mutual agreement — would not have been feasible.

Using creative problem solving, both the unions and the district explored a wide range of options involved in the settlement equation. Experts from both parties spent a good deal of time "thinking out loud" together, particularly as it became apparent that the sides shared a significant degree of common objectives.

BART's early efforts to educate itself and its unions about the nature and magnitude of the retiree insurance problem also helped move discussions in a constructive direction, as did efforts made by both sides to produce and present data that would have credibility with the other party. Also early on, BART gained credance with its initial decision not to eliminate its retiree insurance benefits or convert coverage to a defined contribution plan. The unions undoubtedly were concerned that major reductions in public employee retirement benefits then surfacing in the statewide political discourse might show up at the BART bargaining table.

Experts from both sides spent time 'thinking out loud,' particularly as it became apparent that they had common objectives.

Against this backdrop, BART extolled the need for a "real" solution, devoid of "smoke and mirrors," one that would secure retiree medical insurance benefits and safeguard the futures of BART employees and retirees. Although fiscal integrity was a stated goal at both state and local levels, the connection the district drew between finances and employee interests was one readily understood by the unions and their constituents.

In the end, self-interest drove much of what took place in the 2005 negotiations and led to ratification of the settlement. BART was interested in solving a financial problem that jeopardized its fiscal future. The employees' bargaining team was interested in securing medical insurance by making sure adequate funding was provided well in advance of when it was needed.

Lasting Change?

Will the BART retiree insurance plan stand the test of time? There is reason to wonder. In 1989, Multnomah County, Oregon, adopted a similar funding system (without a trust) designed to address that jurisdiction's unfunded retiree insurance liability. In less than 10 years, the liability was extinguished. However, when difficult financial times hit, the county stopped adding funds to the system. The system once again has an unfunded liability.

The same could happen to BART's system. BART, however, now must deal with GASB Statement 45. Tinkering with the new system in a way that shows reduced funding commitment always will present potential peril to BART's bond rating. Also, BART's funding streams are laid out in five collective bargaining agreements, whereas Multnomah County's funding was handled by ordinances that could be modified by the county alone. Consequently, where spikes in costs or revenues may cause adjustments in contribution levels or benefits, BART's system seems comparatively secure.

Only time will tell whether the successful pattern of dealing between the parties that occurred in 2005 will carry over into the future. The historic balance of power may reassert itself, and the spirit of bilateralism may recede into the mists. However, 2005 showed that genuine efforts to meet the interests of the other side, as well as their own, could produce solid solutions to tough problems. The entire Bay Area stands to gain if BART and its unions learned that lesson well. ❋

1 The pertinent language from the SEIU Local 790 and ATU Local 1555 agreements (Sec. 5.2) reads: "The District reserves the right to terminate or change any part or all of the health benefits program at any time with respect to active or retired employees, however, any such action will be taken only after the District has satisfied its obligations under the applicable Collective Bargaining Agreements. The District's contractual obligation to provide health benefits coverage to retired employees shall terminate upon expiration of this Agreement. By providing benefits to retirees, the parties do not intend to vest retirees with such benefits."

2 "Pay as you go" refers to a funding method under which the bill for retiree medical insurance comes entirely out of current revenues. There are no accumulated reserves to pay some or all of those bills. This approach reflects the traditional view that government exists in perpetuity and cannot go out of business. However, as experiences in New York City, Orange County (California), and other stressed agencies have shown, governments can become insolvent and unable to pay their bills.

3 *Retiree Medical Insurance Program for the San Francisco Bay Area Rapid Transit District: Actuarial Valuation as of January 1, 2000,* by Robert T. McCrory, FSA, and Mark T. Ruloff, ASA, pp.33-34. In simple terms, "accrued unfunded liability" is the amount of money an employer would need to have on hand today that, in combination with funding already set aside and interest earnings on those funds, would adequately fund all benefits that employees had already earned by virtue of their prior service with the employer. The study included a range of possible liabilities that extended from $70 million to $121 million. Critical assumptions the actuaries applied in developing alternative projections included the period of time that medical inflation would exceed general inflation (10, 20, or 30 years) and rate of return on insurance reserve assets (5.5 percent to 8.25 percent).

4 CalPERS pension funding relies on two contributions: the employee contribution of 7 percent of pay and an employer contribution that varies depending on the funding status of the employer's pension obligations. "Super funded" meant that, in theory, the employer had sufficient assets in its *employer* account to pay all of its retirement obligations for employees — past, present, and future — without making further *employer* contributions. The earnings on the fund would by themselves suffice to, in essence, substitute for further employer contributions. However, this depended on employee contributions continuing.

5 BART resumed making payments out of its operating budget in FY 2005.

6 BART provides employees with a IRC Sec. 401(a) Money Purchase Pension Plan that was instituted in the 1980s as a compensatory benefit when BART left the Old Age and Survivors Disability Income (OASDI) portion of the Social Security System.

7 BART's retiree medical insurance plan was a "defined benefit" plan. Such plans provide employees with an array of benefits regardless of cost. In contast, defined contribution plans provide only what the money set aside will buy. Projections of retiree medical insurance costs in a defined-benefit context thus are quite volatile because the rates of return on investment and medical inflation tend to vary greatly over time.

8 At the time of this discussion, CalPERS assumed an 8.25 percent rate of return on plan assets. BART could earn only approximately 3.5 percent on its investments at that time. Thus, use of the CalPERS assumption created an artificially optimistic picture.

9 *Postretirement Health and Life Insurance Benefits Program: Actuarial Valuation Report as of June 30, 2003,* by Julie Mark, FSA, and Moe Tun, FSA, Mercer Human Resource Consulting, Inc. January 20, 2004.

10 *Id.* at pp. 20 and 29.

11 GASB is the public sector counterpart of the Financial Accounting Standards Board (FASB). A main function of these bodies is to ensure that the accounting practices of organizations who sell financial instruments (e.g., bonds or stocks) to the public present the organization's financial condition with sufficient accuracy so that potential investors can fairly assess the degree of risk involved in the investment — and demand a corresponding return (e.g., interest rate) on the investment.

12 Termed an "exposure draft," it is a solicitation for comments from interested parties on a proposed accounting standard. It contains the text of the proposed standard and the rationale behind it. The board considers these comments before adopting a final standard.

13 BART and its unions eventually adopted the "closed 30" methodology in which funding needs are calculated with a 30-year amortization period that has a single date that remains unchanged. The funding requirements then are calculated each succeeding year with one less year remaining in the amortization period. In contrast, the "open 30" method allows calculation of a new 30-year amortization period each year.

14 BART's physical plant has an approximate book value of $14 billion. Bonds have been used to repair aging fare-collection equipment and seismic retrofitting, to name a few.

15 This number was slightly lower than the CalPERS rate of return assumption. However, it was twice as high as BART's pre-existing actual rate of return on its general funds.

Management felt that 6.75 percent was appropriate given the absence of a trust track record to support a more aggressive assumption.

16 The unions in fact made this argument at various times throughout the pre-negotiation period and during negotiations.

17 See description at note 13.

18 The volatility that worried the district is easily seen by comparing the $70 to $120 million liability estimates in January 2000 with the much-higher estimates just three years later, following a comparatively brief period of rapid premium escalation.

19 Bargaining at BART involves five bargaining agents: SEIU Local 790 represents most maintenance and clerical workers; ATU Local 1555 represents train operators and station agents; AFSCME represents first-line supervisors and some professional employees; BART Police Officers Association represents police officers; and the BART Police Management Association represent police managers. As a practical matter, the economic parameters for settlement tend to be set by the agreements reached between the district, SEIU, and ATU. These two unions bargain jointly with BART on "general" provisions and on wages. They each bargain separate "supplemental" provisions for their respective contracts.

20 The quality of dialogue improved after BART asked a state mediator, Micki Callahan, to join negotiations. Mediation allowed BART and the unions to test possible ideas without risk that they would compromise their "official" public position. Parties frequently hold fast to official positions on proposals on which they are willing to compromise or that they are willing to drop until they see a clear path to settlement on terms they believe are acceptable. This allows either side to hold on to issues they can use to organize their sides for a contest of wills (i.e., a strike) if a settlement proves elusive. The party giving its ideas to a mediator who then refers to them as a "mediator proposal" accomplishes the exploration of ideas without risk of compromising the party's official position.

21 BART proposed during negotiations that all five BART bargaining agents meet jointly to discuss retiree medical insurance since, as a practical matter, a common solution was necessary for any approach to have administrative practicality. The two major unions rejected this proposal. Consequently, the district held several separate briefings with the other three unions in an effort to keep them updated on the negotiations and to determine whether any significant opposition was developing as solutions began to take form. Fortunately, AFSCME, BPOA, and BPMA were supportive of efforts to solve the retiree health insurance funding problem and offered constructive suggestions rather than opposition.

22 The Mercer actuaries had projected in 2003 that if the district did not begin retiring the unfunded liability on a 30-year schedule by 2004, its "pay as you go" costs would rise to nearly $90 million by 2017 — an unsustainable expense.

23 Chief among these were Peter Saltzman, an attorney with Leonard, Carder, LLP, who represented ATU, and Larry Hendel, negotiation staff supervisor for SEIU Local 790.

24 Before this work began, BART agreed it would not accept or seek data from Mercer that would disclose the nature of the union's work product until that product was introduced into negotiations.

25 The annual required contribution or "ARC" is the percentage of base pay that an employer would have to pay toward retiree insurance each year to extinguish all unfunded liabilities within the 30-year amortization period. After the unfunded liability is extinguished, the ARC drops to a level referred to as the "normal cost" of the benefit; i.e., the amount necessary to pay for benefits accrued based on future service. In BART's case, the 2004 estimate of BART's ARC was approximately 14 percent of pay. Its actuaries projected that in fiscal year 2034, this would drop to BART's normal ongoing cost of approximately 8 to 9 percent of pay.

26 BART management previously had considered a gradual stepping up of its contributions to a full ARC level as a way to accommodate the competing interests, but felt that it should not broach this approach until it saw the unions engage the retiree insurance funding issue in a serious way. In addition, because GASB Statement 45 was not published until June, that body had not produced an implementation guide that could help assure BART that a ramp up was viable. In August 2005, after negotiations concluded, GASB published an implementation guide for Statement 45.

27 Petertil reviewed a funding scenario developed by Rael and Letson known as "Scenario 4" that was very similar but not identical to the unions' proposal.

28 Lacey, Doppelt, Laskey and Litvack of Fitch Ratings, *The Not So Golden Years: Credit Implications of GASB 45*, June 22, 2005, p.2.

29 The wage increases granted in negotiations were possible only because of BART's cash-flow structure. By late in negotiations, the parties had made headway on other cost-saving measures that helped clear the way for modest wage increases beginning in the second year of the contract. The ramp up also contributed to the ability to grant wage increases in the near term. However, that did not provide for their long-term cost. Fortunately, BART knew that it would shed certain fixed-duration expenses beginning at the time near term "savings" from the ramp up began to dissipate. This reduction in other

expenses would thus offset the long-term costs of the wage increases.

30 In its opening positions in early April 2005, BART made approximately 200 proposals, explaining to the unions that by opening all economic aspects of the agreement it was maximizing the parties' options for dealing with the difficult economic environment. One of those proposals the parties did not discuss at any length included allowing BART's continued retention of the supplemental pension contribution as a way of offsetting the general cost of the retiree insurance plan. This idea proved a comparatively painless way to offset significant cash flow impacts arising from the ramp up.

31 Under applicable state law, only the BART board or a BART officer can manage investment of BART's Retiree Health Benefit Trust assets. In 2004, the board designated its controller-treasurer as the trustee who carries out this function. The law thus indirectly limits the role of the trust review committee. This stands in contrast to many Taft-Hartley trusts in which the parties jointly manage not only plan assets and investments, but plan design as well.

32 See Gov. Code Sec. 22893.

Peoples Closes a Loophole in University Internships

Dale Brodsky

***Dale L. Brodsky** is a partner at the union-side labor law firm of Beeson Tayer & Bodine in Oakland. A large portion of her practice is representing public school teachers as a Group Legal Services provider for the California Teachers Association.*

Although probably of interest only to education law geeks, the recent case of *Peoples v. San Diego Unified School Dist.*[1] cleared up at least one question about "university interns" that previously had been the source of some confusion. In *Peoples*, the court concluded that service under a university internship credential counts toward attainment of permanent status if the employee completes one more year of service under a preliminary or clear credential.

Since 2001, when the First District Court of Appeal decided *Welch v. Oakland Unified School Dist.*,[2] practitioners in this area of law have adjusted to the idea that district interns are probationary certificated employees who must be afforded all the rights to which other probationary employees are entitled. In *Welch*, the issue was whether a school district could summarily dismiss two district interns during the school year without providing them notice and an opportunity for a hearing. Defending its summary dismissals, Oakland Unified argued that the teachers actually were "university interns" and therefore had fewer rights under Education Code Sec. 44466 than district interns governed by Sec. 44885.5.

The court rejected this argument, in large part because Oakland had accepted money from the state under the district intern statutes and, therefore, could not ingenuously claim the teachers were not district interns. And, since district interns must be classified as probationary employees under Sec. 44885.5(a), they are protected from summary dismissal by Sec. 44948.3. The court affirmed a writ of mandate compelling Oakland to properly classify and reinstate the dismissed teachers.[3] But *Welch* left an open question as to rights that must be afforded to university interns, which *Peoples* now has resolved.

Initially, *Peoples* was not certified for publication. But, Fern Steiner, of San Diego's Tosdal, Smith, Steiner & Wax, requested publication "because there was no case law giving guidance on the university issue, other than extrapolating from

Welch, which was not a university intern case." The district's in-house counsel agreed that publication would serve that purpose and approved Steiner's representation to the appellate court that "the District supports publication of the decision in this matter to provide school districts guidance on the classification of teachers serving under a university intern credential."

University Intern Statute Is Clear On Its Face

Demetria Peoples was an elementary school teacher who had begun her employment with the district as a pre-intern during the 1999-2000 school year. She then entered a university intern program authorized under the Teacher Internship Act of 1967,[4] and taught under a university internship credential during the 2000-01, 2001-02, and 2002-03 school years. In June 2003, she obtained her preliminary multiple subjects credential, which the court correctly referred to as a "clear credential." During the 2003-04 school year, she taught under the preliminary credential.

On May 27, 2004, Peoples received a non-reelection notice under Sec. 44929.21(b), which permits a district to non-reelect probationary certificated employees any time before March 15 of their second year of probationary employment. Peoples claimed the district's non-reelection notice was untimely because it was issued after March 15 of her second year of probationary employment. The trial court concluded that the district's notice was untimely because Peoples was a second-year probationary teacher under Sec. 44929.21(b). The district was ordered to reinstate her with backpay and benefits. The Court of Appeal affirmed the judgment but with a different rationale.

In the appellate court, Peoples contended that she was entitled to permanent status for two reasons. First, because she had served the requisite two probationary years, the district was required under Sec. 44929.21(b) to notify her by March 15 of her second year if it was going to non-reelect her for the next year. And, second, under Sec. 44466, a teacher is entitled to tenure if after completing a university internship program, she is employed for at least one complete school year and then is reelected the next year. The district, on the other hand, apparently attempted to counter only Peoples' first argument that, because there is no express statutory authority for classifying a university intern as a probationary employee, Peoples' employment under a university internship credential did not count toward Sec. 44929.21(b)'s two-year service requirement.

Service as a university intern, like that of a district intern, is measured in relation to the same two-year period to which all other probationary employees are subject.

In upholding Peoples' right to reinstatement as a permanent teacher, the Fourth District Court of Appeal avoided deciding whether she was a probationary employee. Framing the issue differently, the court posited that "[t]he crucial question in this case is not Peoples's status during her employment under the internship credential, but how (and whether) that prior employment counts in reaching the consecutive two-year requirement for purpose of obtaining tenure and triggering the March 15 notice." As such, the court held that because Peoples taught under a university intern credential in 2002-03 and under a clear credential in 2003-04, the district was required by Sec. 44466 to give her a non-reelection notice by March 15, 2004, if it did not intend to reemploy her in the following school year.

Decision Resolves Most Disparities

While advocates for teachers would have welcomed a ruling explicitly holding that university interns are probationary employees, the court's distinction, for the most part, has little significance in practice. For even though it did not hold that university interns are probationary employees, the court concluded that Sec. 44929.21(b) is triggered by Sec. 44466. "Under this provision, the final year of employment under a university internship credential counts for one year toward tenure for purposes of applying section 44929.21, subdivision (b) if the teacher is employed during the next consecutive year under a clear credential. (Sec. 44466)." Thus, service as a university intern, like that of a district intern, is measured in relation to the same two-year period to which all other probationary employees are subject.

In addition, it is now well established that even holders of provisional credentials, i.e., emergency permits, are entitled to probationary status as the "default category."[5] There is no rational basis for treating university interns less favorably, especially since emergency permit holders had only to pass CBEST in order to serve as classroom teachers, while university interns must be enrolled in a university's teaching training program. And, more importantly, just as the court in *Motevalli* recognized that "provisional" does not constitute a classification under the Education Code, neither does "university internship." Holders of both types of credentials, therefore, are probationary employees by default.

The only area where university interns still may lag behind all other probationary employees is in the event of a layoff. Inexplicably, in Sec. 44464, the legislature excludes them from the procedural layoff rights provided under Sec. 44949 (although the legislature did not exclude them from substantive reemployment rights accorded on the basis of seniority as set forth in Sec. 44957).

In layoff proceedings over the past several years, the disparity in treatment has surfaced when university interns have been barred from the hearing process, even though district interns were allowed to participate. And, teachers' advocates have had limited success in persuading administrative law judges to follow an uncodified portion of a 1997 amendment to Sec. 44466 which emphasizes the legislature's intent "to achieve consistency between the requirements for the attainment of permanent status by district interns and university interns." However, in *Peoples*, the Court of Appeal relied on that very same uncodified portion to bolster the teacher's claim. The court's willingness to do so should give ALJs assurance that they, too, may look to the uncodified portion of the statute to uphold claims by university interns that they are entitled to the same procedural layoff rights as are afforded to district interns. ❋

1 (2006) 138 Cal.App.4th 463, 2006 WL 750137, 2006 DJDAR 4243.

2 (2001) 91 Cal.App.4th 1421, 150 CPER 40.

3 *Id. at* 1429-1432.

4 Ed. Code Secs. 44450 et seq.

5 *Motevalli v. Los Angeles Unified School Dist.* (2004) 122 Cal.App.4th 97, 109, 168 CPER 28; see also, *California Teachers Assn. v. Governing Board of Golden Valley Unified School Dist.* (2002) 98 Cal.App.4th 369, 155 CPER 40.

Recent Developments

Public Schools

Strikes Narrowly Averted on Both Sides of S.F. Bay

Children in both San Francisco and Oakland striving for perfect attendance this year will be able to reach their goals after strikes in both school districts were narrowly averted. In both cases, agreements were reached after the teachers unions had already voted to strike. In San Francisco, teachers were set to walk out in less than a week.

In Oakland, the agreement came just hours before a one-day strike was scheduled to begin. (For more information on the events leading up to the strike votes, see *CPER* No. 176, pp. 26-28.)

Officials of the two unions, the United Educators of San Francisco and the Oakland Education Association, had been coordinating their efforts in recent weeks, working toward concurrent strikes. They commented publicly on the likelihood that such an event would certainly make a bigger impact. "When San Francisco and Oakland are both struggling together," said Dennis Kelly, president of UESF, "it makes it clear that it isn't just a simple matter of somebody being greedy or somebody being off the beat entirely, but that this is a common problem that is shared by these two large urban districts." Coordinated strikes would have limited the ability of the two districts to secure enough replacement teachers. Both districts already had authorized the hiring of non-credentialed temporary teachers in the event of a strike.

The tentative agreement between the San Francisco Unified School District and UESF was reached in the early morning hours of April 11. The 6,000 members of UESF had been working without a contract since June 20, 2004, and last had a raise in the 2002-03 school year. Members voted to strike on March 29, and could have walked out as early as April 17.

In Oakland, the 3,100 members of OEA, which represents teachers, nurses, counselors, librarians, and other employees of the Oakland Unified School District, also had been working without a contract for the last two years. The union held a strike vote at the end of March, and 76 percent voted in favor of strike authorization. Negotiations had resumed the week prior to the vote, after a six-week standoff. When negotiations stalled again, the union called for a one-day strike to be held April 20 if a settlement were not reached by that date. Other school workers planned to honor the picket lines. The district declared a state of emergency for April 20, and asked parents not to send their children to school for safety reasons. The parties came to a tentative agreement at 9 p.m. on April 19.

Under the new San Francisco contract, which UESF members approved overwhelmingly and which has been ratified by the Board of Education, teachers will receive a total of 8.5 percent in raises over the next two years, with part of that coming as retroactive pay. The average teacher will receive at least $1,000 in a lump-sum backpay check. Seventy-seven of the district's 1,800 paraprofessionals, or aides, who did not have retirement health care under the previous contract will get it under the new contract. In return, all aides in the district will take longer to vest in the retirement health plan. Currently, they vest after five years. Starting in 2008, they will vest after seven. Aides hired on or after July 1 of this year will vest after 10 years. The union also got a number of health and safety provisions it sought, including the district's commitment to put working phone lines and first-aid kits in all classrooms. The district also agreed to improved language aimed at controlling rodents in schools.

In San Francisco, teachers will receive an 8.5 percent raise over the next two years.

The Oakland contract includes a 6.25 percent raise, spread out over three years. Teachers will receive a 2 percent raise retroactive to July 2005, a 2.5 percent increase in the 2006-07 school year, and the rest in the final year of the contract. The first 4 percent of the increase is the restoration of a pay cut the union agreed to two years ago. Teachers will contribute a half-percent of their salary toward paying health care premiums in the second year of the contract; previously, no contribution was required. On the final day of the third year of the contract, employees will begin to pay 4 percent of total health care premiums, up to $700 each. Ben Visnick, president of OEA, said that union negotiators basically "sacrificed" the union's salary demands to ensure that they would have low monthly health care premiums. "This is a glass half-full contract, not half-empty," he said.

San Francisco is hoping to pass a parcel tax to pay the increase.

OEA members voted 931 to 639 to approve the contract; though before the vote, approval was not guaranteed. The OEA executive board had deadlocked over whether to sign the agreement. Union representatives had voted it down by 55 to 46. Opponents of the contract argued that they will be paying the cost of their raise in higher health insurance premiums. They also pointed to the increase in the number of students per counselor from 500 to 700 and to the fact that they are not protected from transfers to less-desirable schools if their site is closed or redesigned. Those in favor believed that the terms were the best they could get given the financial condition of the district, which went bankrupt three years ago. Supporters also did not want to go back to the bargaining table after two years of negotiations and wanted to avoid a strike.

Officials in both districts expressed concern over how they are going to pay for the salary increases. San Francisco is hoping to pass a parcel tax in the next election with union support to pay the $19.8 million increase tagged to improved salaries and benefits. The school board voted to divert $2.28 million earmarked for student services to help pay for the increases. These monies are part of Proposition H funds that voters passed to help pay for arts, music, sports, libraries, and other educational programs. The possibility of job cuts and school closures remains on the table. ✱

Governor Makes Nice With Teachers — Returns School Funds

Governor Schwarzenegger, whose agenda suffered a staggering defeat in last year's election as a result of a concerted campaign led largely by California teachers, has agreed to repay funds guaranteed to the schools under Proposition 98, which mandates minimum school funding. By doing so, he clearly hopes to prevent the strong coalition of teachers, nurses, firefighters, and others who fought him in last November's special election from organizing against him in his upcoming reelection campaign.

Schwarzenegger made a political enemy of the education lobby when he reneged on a promise to restore $2.2 billion he had withheld from the schools in 2004. That year, he convinced education officials to suspend Proposition 98 and, in exchange, made a commitment to restore the funds in the next year's budget. But, when the time came in 2005, he refused to include the repayment. Using ads that chastised the governor for "breaking your promise," the teachers unions and other public employee groups joined together to defeat initiatives backed by Schwarzenegger in last November's election. One of the thwarted propositions would have allowed the governor to ignore Proposition 98. (For a complete background on the battle between Schwarzenegger and education groups, see *CPER* No. 170, pp. 35-39; No. 173, pp. 26-27; and No. 175, pp. 30-31.)

Opening a second front in the war, the Education Coalition — an umbrella group of organizations representing teachers, administrators, school board members, parents, and others — joined by State Superintendent of Schools Jack O'Connell, filed a lawsuit against Schwarzenegger last summer, challenging the cuts in school funding.

The governor, realizing there will be an unexpected windfall of more than $5 billion in surplus revenues this year, decided to call a truce. He offered CTA president Barbara Kerr an olive branch, and a series of meetings ensued. Schwarzenegger started the negotiations with an offer of between $2 billion and $3 billion, but the teachers union, using state-mandated calculations, pegged the amount owed at approximately twice that. The teachers won. The final deal struck calls for the state to pay a total of $5.7 billion: $2.8 billion over the next two fiscal years to cover Prop. 98 obligations, and $2.9 billion over seven years to repay the 2004 debt. The governor also agreed to the teachers' demand that much of the money be spent on lower-income schools. CTA declined the governor's invitation to jointly announce the agreement, depriving him of a photo opportunity that he could use in his reelection campaign.

But even without the photo op, it is generally recognized that the governor will benefit greatly from the deal. It deflates union opposition and undercuts the criticisms of his Democratic opponents in the upcoming election, most notably Controller Steve Westly and Treasurer Phil Angelides, both of whom have made education funding a defining issue of their campaigns. In addition, the agreement will settle the lawsuit.

"This move takes all the oxygen out of the education fight that's existed over the past two years," said Kevin Gordon, a lobbyist for school districts. "But, educators care more about getting the money than engaging in a political fight." CTA spokesperson Sandra Jackson said, "We think it is great news for our students and our schools, news we've been waiting to hear for two years." "We've had the message out for two years about the governor's broken promises, and with the additional revenues, the governor saw an opportunity to do what was right by the kids," she said. ❁

The deal deflates union opposition and undercuts the criticisms of Democratic opponents.

The Looming Teacher Shortage — Can It Be Averted?

About one-third of the state's teaching force, a total of 97,000 teachers, is expected to retire in the next 10 years, according to state schools Superintendent Jack O'Connell. But California needs to do more than just recruit and retain teachers; it needs to put many more quality teachers in low-performing schools. A significant amount of the state's current teachers do not meet federal requirements for the No Child Left Behind Act, which mandates a "highly qualified" teacher in every classroom in low-income districts by September. It is anticipated that up to 20,000 underqualified teachers still will be in the classroom in 2014.

Retirement is not the sole cause of the upcoming teacher shortage. Increased federal and state academic requirements coupled with low pay make the field increasingly unattractive to students. A starting teacher in California makes around $40,000, despite needing a bachelor's degree and credentials to get hired. A year-long study

About one-third of the state's teaching force is expected to retire in the next 10 years.

commissioned by the Center for the Future of Teaching and Learning at the University of California-Santa Cruz found that the number of applicants for teacher-credentialing programs fell by 4 percent in 2003, and by 8 percent in 2004. Many students who must begin paying their loans upon graduation cannot afford to become teachers. This situation will only get worse when the interest rate on federally backed college loans rises to 6.8 percent on July 1. At that point, nearly a quarter of college students graduating from public universities nationwide and more than a third from private schools will be saddled with "unmanageable debt," according to a recent study issued by the Washington-based Public Interest Research Group."Unmanageable debt" is defined as one requiring a graduate to spend more than 20 percent of his or her discretionary income on loan repayment.

The report summarizing the findings of the U.C.-Santa Cruz study recommended a number of steps the legislature and districts can take to address this situation. Suggestions include reestablishment of programs that pay tuition and living expenses of prospective teachers willing to commit to work in low-test-score districts, the reinstatement of incentives to draw experienced teachers to high-need schools, changes to transfer and hiring practices, and the extension of mentoring for intern and new teachers.

Superintendent O'Connell also put forth a number of proposals in his third annual State of Education address earlier this year. He urged legislation providing $53 million for teacher coaches in the most challenging schools, and the reinstatement of regional teacher recruitment centers. He also proposed that Department of Education employees serve as "brokers of expertise" by researching and tracking innovative practices at local schools, and sharing them with districts throughout the state. And, he recommended the establishment of partnerships between businesses, communities, and schools, modeled after San Bernardino's Alliance for Education, a group of more than 1,200 participants from business, labor, local government, and faith-based organizations, who work together with local schools.

Two Democratic senators have taken up the challenge by introducing legislation.

Two Democratic senators have taken up the challenge by introducing legislation incorporating some of these proposals. S.B. 1124, authored by Senator Tom Torlakson (D-Antioch), seeks to put more quality teachers in low-performing schools. The bill would allow a retired teacher to earn more than the current salary cap without reducing the teacher's retirement allowance if he or she agrees to serve as a mentor in a high-priority school. It would excuse those teachers who pass the state basic-skills proficiency test or those who possess a credential earned prior to the enactment of the statute making the test a requirement. It would enhance the Governor's Fellowship Program that provides a stipend of $20,000 each to graduates who agree to teach in high-priority schools for four consecutive years. And, it would establish the California Teacher Cadet Program to expose students to teaching careers. S.B. 1209, authored by Senator Jack Scott (D-Pasadena), is aimed at reducing barriers for teachers trained in other states, consolidating the numerous test requirements for teacher candidates, strengthening preparation and mentoring programs, improving district practices for teacher recruitment and hiring, and alleviating the shortage of teachers in particular subject areas.

On the local level, one district has come up with an innovative way to increase teachers' salaries that could work for other districts in the state. The Fountain Valley School District has dropped out of a state program that provides schools with money for construction or renovations, allowing it to maintain control over money realized from the sale of schools closed because of declining enrollment. The sale of two such schools recently brought in $58 million. If the district had remained in the state School Facilities Program, and if the state had allowed it to keep the money, it would have had to spend the funds on a one-time facility project. Instead, the district has elected to use the money for a 7.25 percent salary increase, retroactive to July, and an additional 2 percent above the county average for each of the next four years.

Administrator's Right to Faculty Position Not Absolute

Section 87458 of the Education Code affords a community college administrator the right to become a first-year probationary faculty member. However, this right is not absolute, according to the California Court of Appeal. The college is not required to appoint a former administrator where there is no position available to which he may be appointed.

Factual Background

In early 2003, Ohlone Community College decided that, due to budget constraints, it would not fill two full-time faculty positions in the business division for the 2003-04 academic year. The positions had been vacated by retiring professors. The college also decided to lay off certain administrative employees including the dean of the division, Steven Wong.

Wong did not challenge the decision but requested appointment as a first-year probationary faculty member for the next semester under Sec. 87458. The request was denied on various grounds, including that there was no available position to which the college could appoint him.

Wong filed a writ of mandate in superior court seeking to compel his appointment. The trial court found Wong was not entitled to appointment to the position under Sec. 87458 because the college established that there were no available positions. Wong appealed.

Not every statute that uses the word 'shall' is obligatory.

Court of Appeal Decision

The relevant provisions of Sec. 87458 provide that "a person employed in an administrative position that is not part of the classified service, who has not previously acquired tenured status as a faculty member in the same district…shall have the right to become a first-year probationary faculty member once his or her administrative assignment expires or is terminated," if certain statutory conditions are met.

The appellate court rejected Wong's interpretation of the phrase "shall have the right to become" as absolute, i.e., that an appointment must be made if a qualified administrator requests it. The court, while conceding that the Education Code defines the word "shall" as "mandatory," noted that the definition governs only if "the provisions or the context within the statute does not require a different interpretation." Quoting from the Supreme Court's opinion in *Morris v. County of Marin* (1977) 18 Cal.3d 901, the appeals court stated, "not every statute which uses the word 'shall' is obligatory rather than permissive. Although statutory language is, of course, a most important guide in determining legislative intent, there are unquestionably instances in which other factors will indicate that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion."

Wong ignored that part of the statute which conditions the appointment on the governing board making "a determination," by applying a new or existing statutory procedure, said the court. "The statutory reference to the governing board's determination strongly suggests that the Legislature did not intend to foreclose the college's exercise of discretion in deciding whether to deny or grant an appointment under section 87458."

"In construing a statute, a court may consider the consequences that would follow from a particular construction and will not readily imply an unreasonable legislative purpose….A practical construction is preferred," said the court, quoting from *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 115 CPER 62. The court found that Wong's interpretation could not meet this standard:

> If section 87458 were interpreted as Wong argues, it would require a college to either create or keep open a position to which a terminated administrator could "retreat" regardless of the college's need for that faculty position or the availability of funds. We conclude that such an interpretation would not be reasonable, and we decline to so read the statute.

The court also rejected Wong's contention that the college changed its staffing decisions specifically to deny him an appointment, finding that, "it is within a college's discretion to reduce its class offerings and staff to address budgetary restraints." Similarly, it found no support for Wong's argument that the college was required to discharge adjunct professors so that money would be available to fund a full-time faculty position for a terminated administrator under Sec. 87458. (*Wong v. Ohlone College* [3-28-06] 137 Cal.App. 4th 1379, 2006 DJDAR 3711.) ❁

Part-Time Community College Teachers Want Own Union

Part-time teachers at Grossmont and Cuyamaca Community Colleges, located in El Cajon, are attempting to break away from United Faculty and form a separate union to be affiliated with the Community Colleges Association. CCA has 42 chapters in the state and is part of the California Teachers Association.

Organizers of the breakaway attempt complain that United Faculty focuses mainly on the district's full-time instructors and neglects the needs of its nearly 1,000 part-timers. Unlike full-time instructors, part-time instructors at the two colleges are paid hourly and have no health coverage.

A petition signed by 450 part-time instructors was filed March 30 with the Public Employment Relations Board to begin the process of forming the new union. But PERB dismissed the petition because it was filed six minutes too late. The group filed an appeal with the help of Rosalind Wolf, counsel for the California Teachers Association, asking that PERB excuse the late filing for good cause because of bad traffic and confusion regarding the impact and timing of the Cesar Chavez holiday.

The move to form a new union comes at a time when United Faculty and the district are negotiating salary for the current school year. The union is seeking a 5 percent pay increase for all its members and extra pay, a health care plan, and other benefits for part-time instructors, said Zoe Close, the union's president. Close argues that it is not in the best interests of the part-timers to split off. "It's far better to have the whole community of faculty represented in one bargaining unit," she said. She claimed United Faculty has campaigned for years for better working conditions for part-time instructors, but that the district has refused to go along with the union's proposals. Close called the severance petition part of a hostile takeover attempt by the California Teachers Association.

> *Part-time instructors are paid hourly and have no health coverage.*

If the instructors' appeal fails, the group can file a petition again after the current labor contract between United Faculty and the district expires on June 30, said Wolf. The signatures collected for the petition are valid for a year. If, however, a new contract is negotiated prior to the expiration date, the group would have to wait until the expiration of that contract to refile. David Milroy, a part-time instructor at Grossmont, and one of the main organizers, said his group has continued to collect signatures since filing the petition and now has 600. ❁

Local Government

Police Officer Permitted Court Review of Belated Acceptance of Employment Offer

A ruling by the Court of Appeal upholding the conditions placed on a police officer's right to reinstatement following denial of a disability retirement application did not foreclose a second petition seeking court review of the officer's belated acceptance of the conditional offer to return to work. The two petitions involved different rights, ruled the Third District Court of Appeal, and the denial of the first did not bar the officer from bringing the second.

The two petitions focus on different underlying evidence.

The ruling impacts the employment status of Adrianne Pitts who, for two years, was on leave without pay from her position as a police officer for the City of Sacramento. In December 2002, she was informed that she was ineligible for disability retirement. She then requested that she be permitted to return to active-duty status as a police officer. In February 2003, the police department informed Pitts she would need to satisfy several conditions in order to return to her former position. Pitts refused to accept those conditions and filed a writ of mandamus asking that she be returned to work unconditionally. In July 2004, the trial court denied Pitts' petition and, in an unpublished opinion, the Court of Appeal affirmed that judgment.

After the hearing on the petition for writ of mandamus, Pitts' attorney asserted in a letter to the city that Pitts would agree to the terms of the city's conditional offer of employment conveyed in February 2003. However, Police Chief Albert Najera notified Pitts that her refusal to accept the conditions in the February offer amounted to a failure to return to work, and he refused to reinstate her to her former position.

Pitts then filed a second petition for writ of mandamus directing that the city reinstate her. The city argued that the prior writ proceeding involved the same primary right as asserted in the second petition, and the trial court agreed. However, the Court of Appeal concluded that the lower court had taken "too liberal a view of the primary right involved."

Because a single cause of action cannot be the basis for more than one lawsuit, the court instructed, a second action will be barred by a showing that the same parties and cause of action are involved, "and that *the same evidence* would support the judgment in each case." Here, said the appellate court, the two petitions filed by Pitts focus on different underlying evidence and, therefore, the adverse ruling on the first petition did not preclude her from maintaining the second.

The court explained that in the first ruling, it held that the police department could impose any condition on Pitts' return to active duty in order to evaluate her fitness for duty as long as those conditions did not attempt to redetermine the binding ruling of the hearing officer, who found her shoulder injury was not disabling. The sole focus of the court's earlier ruling was the extent of the city's duty in making the offer following rejection of the disability retirement application. Therefore, the court clarified, the primary right at issue was the nature of the conditions the city and the department could properly impose on the offer it extended to her. "Once we concluded that [Pitts] could not demand an unconditional reinstatement to her active

The city and the department had the duty to offer to return Pitts to active-duty status.

status, there was nothing further to decide under the prior petition."

By contrast, in the present case, the court noted, the primary right involved is the duty, if any, of the city and the department to respond to her belated acceptance of the February 2003 offer after litigation over its legality.

The court concluded that the city and the department had the separate duties of offering to return Pitts to active-duty status after the denial of her disability retirement (which they did not breach according to the first determination of the court) and the alleged duty to give effect to her belated acceptance of their February 2003 offer (which they may or may not have breached). The court cautioned that, ultimately, Pitts may not be entitled to judgment in her favor. "But she is entitled to a judgment on the merits of her claims based on an exploration of all the pertinent facts." (*Pitts v. City of Sacramento* [4-19-02] No. C049385 [3d Dist.] 138 Cal.App.4th 853, 2006 DJDAR 4579.)

Judge Extends LAPD Consent Decree for Three Years

Federal District Court Judge Gary Feess has extended the consent decree entered into by the Los Angeles Police Department and the U.S. Department of Justice. Against the urgings of both the city and the federal prosecutors, the judge ordered that the consent decree in its entirety will continue in effect for three more years.

The settlement agreement was reached between the city and the department in 2001, in response to a lawsuit alleging that the police department had engaged in a pattern and practice of police misconduct and civil rights abuses. The consent decree is a detailed document, over 90 pages in length, that imposes a multitude of corrective actions designed to address and remedy the conditions that led to the department's problems.

The decree was set to expire on June 15, but in March, Judge Feess showed his hand that that was not to be. Nor was he sympathetic to the city's request that the scope of the agreement be narrowed. He was particularly concerned about one aspect of the decree yet to be implemented by the city. It calls for the creation of a computerized system to track officers' use of force, the receipt of citizens' complaints, and

The city has yet to implement certain provisions of the consent decree.

other factors. Called the TEAMS II program, the record-keeping provision is supposed to serve as an early-warning system to help identify "problem" officers.

The city also has yet to implement a provision of the consent decree requiring officers who handle cash and drugs to periodically disclose financial information to their supervisors as a way of discovering illegal profiteering and other misconduct. The Police Protective League is opposed to the provision, which it argues is overly burdensome. Instead, the League was willing to have random sting operations directed at officers affected by the disclosure requirements.

Judge Feess signaled his intent to deny the city's motion to alter the terms of the decree, and he set a deadline of May 1 by which it should show cause why the decree should not be extended. When the judge next considered the motion, the city and the U.S. Department of Justice had joined forces, asking Feess to eliminate those parts of the consent decree with which the city already had complied and to extend the remaining portions for a two-year period. A coalition of civil rights groups, including the American Civil Liberties Union, opposed any narrowing of the settlement agreement. They, too, proposed a two-year extension.

But at the May 15 hearing, Judge Feess surprisingly ordered that the entire consent decree would remain in effect for an additional three years. He took note of the police department's failure to implement the TEAMS II component, labeling it an essential part of the goal to eradicate the civil rights abuses that prompted the lawsuit in the first place. Feess said, "I do not believe in my working life there will be any other case important as this case in the department or in our city." ❁

Police Protective League, City of L.A. Reach Accord on Three-Year Pact

The Los Angeles Police Protective League and the City of Los Angeles have reached agreement on a new three-year contract that will provide salary increases totaling over 10 percent to the 9,200-member police force. The successor agreement is an effort to address the serious recruitment and retention difficulties facing the police department. The pact also is intended to set the tone of negotiations with other groups currently at the bargaining table with the city.

In April, Mayor Antonio Villaraigosa met with the city's Executive Employee Relations Committee to finalize the terms of the city's offer to the League. The deal — reportedly approved by 70 percent of the union membership — calls for a 3 percent increase this July 1, a 3.5 percent increase on July 1, 2007, and an increase of 3.75 percent in the third year.

Police Chief William Bratton called the wage hike a "deserved pay raise," and he is hopeful that the deal might make a little easier his job of recruiting and keeping much needed officers.

One problem facing Bratton is the loss of officers to other police departments. Because of the high cost of living in the City of Los Angeles and because of long commutes from neighboring communities, officers are leaving the Los Angeles force and taking up police work elsewhere. Since 1996, the LAPD has required new officers to pledge to stay with the force for five years. In order to protect its investment, the city is requiring officers who fail to remain with the LAPD to repay part or all of the cost of their training. The city asserts that it costs $60,000 to train each officer.

Officers are leaving the L.A. force and taking up police work elsewhere.

Based on the signed agreements, the city has initiated lawsuits against over 50 former LAPD officers who have left within five years of graduating from the police academy. Some Southern California cities that have benefited by hiring the trained officers view the contracts as overreaching and have hinted that they might challenge their legality.

Another factor adding to the department's staffing difficulties is the impending departure of seasoned veterans forced out under the Deferred Retirement Option Program. DROP, as it is known, was enacted four years ago. It allows an officer with at least 30 years of service to continue to work and collect his or her full salary, and to receive pension benefits for a period of five years. These pension funds are put into a holding account. At the end of five years, the officer receives five years worth of pension benefits and also is entitled to five years worth of COLA increases accrued while on duty. Those boosts are taken into account when future pension benefits are calculated. As the five-year term of the DROP plan comes to a conclusion, the LAPD will be forced to do without many experienced officers.

Some cities have benefited by hiring L.A.'s trained officers.

Whether the recently agreed-upon salary increases will be enough to help fill in behind the departing sworn workforce remains to be seen. However, the agreement with the League may defuse other groups from seeking a more lucrative wage package. The Engineers and Architects Association, for example, has been pressing the city to match the generous salary increases it afforded to employees of the Department of Water and Power represented by the International Brotherhood of Electrical Workers, Local 18. Under the terms of that five-year contract, employees will see wage increases of at least 16 percent and as much as 31 percent, depending on the rate of inflation. (See *CPER* No. 174, pp. 37-38, for a description of the process that led to the IBEW accord.) Some observers believe the agreement reached with the Police Protective League will put a stop to, or at least diminish, the pressure campaign being waged by groups like EAA who are using the IBEW contract as a benchmark. ❁

State Employment

Lawsuit Brings Huge Pay Hike to Juvenile Justice Teachers

Prison Law Office litigation again has prodded the state to boost pay for employees at the California Department of Corrections and Rehabilitation. As a result of a settlement between the department and the Prison Law Office, the state agreed with Service Employees International Union, Local 1000, that about 350 teachers in the Division of Juvenile Justice will receive salaries comparable to teachers who work for the county offices of education near their facilities. For teachers at the highest level, pay could rise nearly 40 percent. Experts had found that the education program was understaffed due to non-competitive salaries. For similar reasons, pay boosts went to medical staff in the adult corrections system last December, when a federal judge ordered CDCR to pay higher salaries to address high vacancy rates that undermined prisoners' medical care. (See story in *CPER* No. 176, pp. 40-42.)

Inadequate Education

In 2003, the Prison Law Office filed a lawsuit challenging use of force, poor medical care, inadequate rehabilitation, and many other practices of the entity then known as the California Youth Authority. The plaintiff, a taxpayer whose nephew was a CYA ward, alleged that wards did not receive adequate access to education. She claimed CYA did not provide the 240 minutes of daily instruction required by the Education Code, did not offer the classes that wards needed to graduate from high school, and did not address the needs of special education students. She laid much of the blame on too few teaching staff, particularly special education teachers.

Experts agreed. During the litigation, CYA allowed experts to review conditions at its facilities. The education program review released in December 2003 praised the teaching staff and their program — as it existed on paper. The curriculum guides, class offerings, and policies and procedures were found exemplary in some cases. But, in practice, wards were not receiving adequate instruction because of teacher vacancies, which the experts attributed to low pay. Because of inadequate staffing, there were not teachers for all required academic areas at all facilities. Classes were cancelled when teachers were sick or on vacation. CYA policy required a 15 to 1 student-teacher ratio for regular classes and a 12 to 1 ratio for special education classes, but these ratios were not achieved. Teachers were giving instruction outside of the areas authorized by their credentials.

Several of the recommendations in the report involved changes to pay and benefits. The experts suggested implementing a competitive salary schedule in order to recruit and retain enough teachers. They also recommended use of an academic calendar to minimize class cancellations.

Wards were not receiving adequate instruction because of teacher vacancies, which the experts attributed to low pay.

Remedial Plan

In November 2004, the state entered into a consent decree that required it to develop remedial plans in each area of deficiency the experts had identified. The Education Remedial Plan, approved by the court in March 2005, included several mandates within the scope of bargaining for the teachers' union. The plan directed that juvenile justice teachers' total compensation be based on the total compensation paid to teachers by the County Office of

Education in the locality of the teachers' institution. Teachers that work for counties usually teach in schools connected to juvenile halls. The plan also required development of an academic calendar that would contain two 90-day semesters, a 30-day summer session, and 10 staff development days.

In May 2005, CYA notified the teachers' representative, SEIU Local 1000, that it was establishing new pay scales and calendars. The union says CYA tried to dictate the terms despite language in the remedial plan which advised that compensation and calendars should be implemented in compliance with the Dills Act. The teachers were not opposed to the higher pay and a new calendar — they had long complained that they worked 60 days more a year than public school teachers for 30 percent less pay. But CYA's idea was to compensate them only for the elimination of all vacation, holidays, and leave, and not boost their overall compensation. The Department of Personnel Administration became involved in the negotiations in July.

Teachers no longer will accrue vacation leave or receive paid time off for holidays.

Raises and a New Calendar

As required by the remedial plan, the agreement pegs a DJJ teacher's pay to the salaries of employees of the county offices of education near the employee's facility. Annual salaries begin at about $50,000 for a 220-day work year for a teacher with a bachelor's degree and credential. Teachers in the Los Angeles area with 25 years of service, a professional credential, and 36 units of education beyond the master's degree can earn nearly $98,000. The prior top salary was $68,000. The parties agreed that the department can pay a higher differential in hard-to-fill classifications.

The new calendar, effective in August, establishes a 220-day academic year in line with the remedial plan. Teachers also may choose to teach an additional 22-day summer session. Because of December, March, and summer breaks built into the calendar, teachers no longer will accrue vacation leave or receive paid time off for holidays. Nor will they accrue educational leave. They will, however, gain three personal necessity leave days annually.

To avoid burnout, teachers may request leave during the 30-day summer session but will not receive pay unless they use accrued vacation or other paid leave. The department is able to hire public school teachers to fill in for permanent employees during the summer.

Accrued educational leave can be used for educational activities during the 30-day summer sessions. Vacation leave on the books may be used prior to July 31. After that, the leave can be used only for Family and Medical Leave Act absences and in exceptional circumstances approved by the supervisor.

Once ratified by unit members and approved by the legislature, the salaries are retroactive to April 1. The parties hope the higher pay will address the 30 percent vacancy rate, especially as many seasoned teachers are eligible for retirement this year.

Successor Negotiations

The agreement affects only about 350 of the 2,000 teachers and librarians that SEIU Local 1000 represents. The rest of the unit, who work in

The rest of the unit will have to wait for a raise.

schools for the blind and deaf, in the adult corrections system, in mental health centers, and for other state agencies, will have to wait for a raise. The parties have been negotiating off and on for a successor to the agreement that expired in July 2003. Because the unit did not agree to the same deal as the other units that delayed a 5 percent raise for increased personal leave days and health care contributions in 2003, teachers received the 5 percent raise that summer. Negotiations ceased in October 2003, when Governor Schwarzenegger was elected. In July 2004, the union was able to extract a 2 percent raise for the educators along with a 5 percent raise for state nurses, in a political deal agreeing to the alternate retirement system for new hires. (See story in *CPER* No. 167, pp. 56-57.)

Although unit 3 had been bargaining separately from other units that SEIU Local 1000 represents, it is back at the master table now that the others have returned to negotiations for a successor agreement. DPA began negotiations last year with takeaway demands that the union claimed added up to a 14 percent pay cut. Furloughs and overtime pay eligibility changes are off the table, but DPA still is demanding increased employee health care and pension contributions, and elimination of a paid holiday. As of press time, DPA had not offered any raises to any of the other units represented by Local 1000. ❁

Retired Firefighter Managers Get Pensions Higher Than Their Salaries

While the state deliberated whether firefighter supervisors and managers would be eligible for the lucrative "3 percent at 50" formula available to the rank-and-file, several management employees retired with pensions higher than their salaries. The super-sized benefits quickly convinced the Department of Personnel Administration that it would be appropriate to grant firefighter management employees the enhanced retirement formula.

Several years ago, the unions representing state firefighters and correctional officers separately negotiated a formula that would allow them to retire at 50 years of age with benefits equal to 3 percent of their highest annual salary multiplied by their years of service. That formula, which was applied to past and future service, became effective on January 1 for non-supervisory employees in the two units. DPA initially decided not to make supervisors and managers eligible for the same formula. It took until March for DPA to grant correctional supervisors and managers that benefit. (See story in *CPER* No. 177, pp. 55-56.)

But DPA did not automatically extend the same benefit formula to firefighter supervisors and managers. The department's position was that only the past rank-and-file service of management employees would be subject to the "3 percent at 50" formula. The California Public Employees Retirement System then determined that the statutes that cap firefighters' pensions at 90 percent of final compensation would not prevent higher pensions if the retiring employee had earned benefits under two different formulas. Weeks went by before DPA came under fire from the *Sacramento Bee* because several management employees who previously had held rank-and-file firefighter positions retired with oversized pensions. A benefit amount using their managerial years of service under the "3 percent at 55" formula was added to another benefit amount for their service in non-supervisory positions. CalPERS maintained that the 90 percent cap applied to each amount separately, not to the total benefit.

CalPERS has not yet decided whether it will demand repayment.

"It was an unintended consequence of the initial decision," DPA spokesperson Lynelle Jolley told *CPER*. DPA had been considering whether equity and a need to attract employees to supervisory positions warranted awarding the enhanced benefit to managerial employees. "We were concerned that the different formula was a disincentive for employees to apply for promotions." But once the 90 percent cap became an issue, "methodical determination took a backseat. DPA decided that, since it probably would end up granting the enhanced formula eventually, it shouldn't wait," Jolley explained.

About 15 firefighter managers and supervisors retired with benefits higher than their salaries, costing about $23,000 more than the state would have had to pay if their total benefits had been capped at 90 percent of salary, according to CalPERS spokesperson Patricia Macht. No correctional supervisors or managers received pay greater than the salary cap because CalPERS held their pension benefit determinations when it found out DPA was reconsidering the eligibility for corrections managers. The future pension payments of the firefighters whose pensions were calculated under both formulas will be capped. But CalPERS has not yet decided whether it will demand repayment of the excessive benefits already received. ❁

Efforts Renewed to Stop Contracting Out at SPB

Contracting out state employees' jobs was not part of former-Governor Gray Davis' agenda. As he headed for the recall election during a budget crisis that threatened state jobs, unions representing 11 of the 21 state bargaining units gained language which promised to let them work with the administration to identify contracts that cost the state more than accomplishing the work with state employees. But a lawsuit and changes in the Department of Personnel Administration under Governor Schwarzenegger have frustrated union efforts to terminate expensive contracts through joint labor-management committees. Labor organizations are back to challenging contracts before the State Personnel Board. And at the bargaining table, DPA is proposing that the contracting-out provisions be deleted from collective bargaining agreements.

Joint Committees

Local 2620 of the American Federation of State, County and Municipal Employees greatly expanded the contracting-out provisions of its memorandum of understanding in 2003. In return for a delay of a scheduled 5 percent pay increase during the budget crisis, AFSCME gained higher employer-paid health benefit and pension contributions for employees in bargaining unit 19. It also got DPA to recognize the high cost of contracting out services that state employees normally perform.

The existing MOU calls for state agencies to provide the union with requests for proposals and invitations for bids for personal service contracts that involve work usually performed by bargaining unit employees. And, the MOU established a labor-management committee to review the contracts and other documents, guage whether proposed service agreements would cost more than using unit employees, and determine whether the services could be performed appropriately by state employees. The committee was to decide which contracts it could terminate in accordance with state and federal laws and regulations. It also was called on to recommend how the savings from termination of contracts should be used. The MOU authorized the use of those funds for alleviating layoffs, hiring contract employees as new employees, and increasing recruitment efforts, including recruitment and retention incentives.

Similar contract language was incorporated into the MOUs of 10 other bargaining units. Full implementation of the provisions, however, was doomed.

One MOU that set up a contracting-out committee was reached with the Professional Engineers in California Government, which represents architects and engineers whose work can be contracted out without restriction under Article XXII of the state Constitution. The Consulting Engineers and Land Surveyors of California, an organization that represents private firms, sued to stop the committee meetings. DPA responded by refusing to meet with any of the bargaining unit committees. (See story in *CPER* No. 166, pp. 34-37.) In the fall of 2004, however, DPA participated in joint committee meetings after it determined the court's reasoning for invalidating the contracting-out provisions of PECG's MOU did not apply to other bargaining units.

The committee would recommend how the savings from termination of contracts should be used.

John Faull, chair of AFSCME's contracting-out committee, told *CPER* that meetings occurred for about a year, albeit with frequent changes in DPA representatives. He asserts the union identified psychologists' contracts that should be terminated, but the cost savings realized by ending the contracts were illusory. "We were told the money was like a drop of water on a hot August sidewalk," he related. According to Faull, representatives from DPA and the California Department of Corrections and Rehabilitation told the union last October that the money which had

afscme defeats decertification attempt

On April 13, the Public Employment Relations Board announced that bargaining unit 19 members preferred the American Federation of State, County and Municipal Employees, Local 2620, over a challenger, United Health and Social Services Professionals. United Professionals was composed largely of former AFSCME leaders who were voted out of office last fall. (See story in *CPER* No. 177, p. 57.) In a unit of 4,000 psychologists, physical therapists, social workers, and other health and social services professionals, AFSCME won 1,346 votes and United Professionals garnered 840 votes.

The election spawned a legal skirmish. AFSCME obtained a court order temporarily restraining United Professionals from using confidential information that Local 2620 claims was stolen from its database. United Professionals asserted it contacted unit employees with information that PERB gave the organization during the election campaign. In a later hearing, the judge found that AFSCME had not produced sufficient evidence that its trade secrets were stolen.

been budgeted for psychologists' contracts already had been raided. At that point, AFSCME decided the committee path was at a dead end.

DPA spokesperson Lynelle Jolley acknowledges that several unions became frustrated with the process because it was cumbersome. With respect to the disappearing funds, she explained, "concerns on that issue are something we will address in negotiations in June. There is little that we can do about the situation except work it out at the bargaining table." A call to the CDCR communications office was not returned.

DPA has proposed to CAPS that the MOU's contracting-out provisions be dropped entirely.

It is too soon to know what DPA's proposals to AFSCME will be, but it has proposed to the California Association of Professional Scientists that the MOU's contracting-out provisions be dropped entirely. CAPS' staff director and chief negotiator, Chris Voight, told *CPER* the union is not inclined to give away its contractual right to copies of requests for proposals and invitations for bids. "That right has been very helpful because we know before contracts are let and then can challenge them at the SPB," said Voight.

CAPS and the other unions with similar rights have been busy filing challenges to personal services contracts with the SPB. AFSCME stopped a contract for dietician services and has pending litigation against 14 contracts for psychologists' services. CAPS persuaded the SPB that there was no justification for contracting out environmental scientist duties at the Los Angeles Regional Water Quality Board. Service Employees International Union Local 1000, CSEA, successfully challenged janitorial services contracts at a Franchise Tax Board office. In the works are challenges to a Caltrans contract for custodial services, an Air Resources Board contract for hearing transcribers, and outsourcing of over 900 security guards statewide. ❁

Higher Education

Unions Accustomed to U.C.'s Lack of Transparency

The barrage of reports detailing unauthorized and hidden compensation of executive and senior management employees of the University of California echoes the experiences of unions representing U.C. workers. The April 13 report of the Task Force on Compensation, Accountability and Transparency revealed disclosure failures and untimely responses to public requests for information about compensation for senior managers and faculty. Labor organizations — which have long complained that funds earmarked by the legislature for salary increases are diverted for unknown purposes — claim U.C. withholds financial information relevant to compensation, which is needed for collective bargaining. U.C. President Dynes announced last month that reforms are on the way. Jelger Kalmijn, president of the University Professional and Technical Employees, says that pressure from the legislature and the recent public outcry over the university's secretive deals with executives have led to slightly greater willingness to open the books.

Disclosure Failures

After the *San Francisco Chronicle* ran a series of articles last fall charging that U.C. had handed out millions of dollars in extra compensation to employees, the president of the U.C. Board of Regents, Gerald Parsky, appointed a nine-member task force to review disclosure and compensation policies and practices for faculty and senior management employees, and to recommend reforms. The task force found that the university is in a period of intense competition for faculty and managers, and frequently had disregarded its compensation policies and failed to disclose some forms of compensation to the regents, as required by the regents' Principles for Review of Executive Compensation. It attributed the policy breaches to a variety of causes. Policies are confusing and overlapping. There is no system to ensure reporting of total compensation, and in fact, no agreement on the meaning of "total compensation," the task force found. U.C. has not clearly delineated who is authorized to make different kinds of compensation decisions or who is responsible for reporting them to the regents, the legislature, or the public.

U.C.'s systems are 'inadequate and unable to provide full and timely compensation information.'

In one section of the report, the task force found that U.C.'s systems are "inadequate and unable to provide full and timely compensation information." The Office of the President and each campus, medical center, and laboratory have incompatible human resources information systems. "This makes it difficult, time-consuming, and expensive — if not impossible — to provide clear, consistent, and accurate systemwide data," the task force explained. Coding of different types of compensation varies from one facility to another, and much of the information relevant to salary history and compliance with compensation policies is not available except from paper files. As the task force noted, "It can take weeks or months to respond to even the most basic public information requests."

In response to the task force report, President Dynes pledged to implement numerous recommendations to increase the transparency of, and accountability for, compensation decisions. In addition to reviewing policies for consistency and clarity, his office began working on a template for reporting compensation decisions to the regents in a way that clearly discloses any exceptions to policy. It also initiated a new website for compensation reports and

policies. Dynes appointed an interim Public Information Practices Coordinator to respond to public information requests. He also announced that he had committed funding to a new information system that would begin in October to collect compensation information for senior management employees.

Unions Frustrated

A leader of the union representing the university's 15,500 clerical workers is not enthusiastic about the planned reforms. "What I notice is that they're going to spend money on a computer system rather than employees," lamented Amatullah Alaji-Sabrie, a negotiator and executive board member of the Coalition of University Employees. She acknowledged, however, that CUE has been frustrated with the university's information systems. Not only do the different campuses have different payroll systems, she complained, but the university cannot tell from one database the sources of funds for an employee's salary. Since CUE's clerical unit members are funded from different sources, the union has been stymied in its efforts to verify that money earmarked by the legislature actually is used for salaries of clerical workers whose positions are funded with state money.

UPTE, which represents technical workers, health care professionals, and researchers, has been claiming for years that U.C. pockets money it saves on salaries when a senior employee leaves and is replaced by a lesser-paid employee. In some public sector workplaces, turnover savings are used to pay periodic step increases, but employees represented by UPTE have not received regular step increases in years. UPTE president Kalmijn asserts that U.C. resisted discussing calculations of turnover savings with the union.

Under pressure from the legislature to account for the low pay of its rank-and-file employees, the university agreed to provide compensation information to the legislature. Language in the Supplemental Report of the 2004 Budget Act required U.C. to submit a report by February 2005, showing the cost of a 1 percent pay increase for various categories of employees. The university was directed to include "sufficient detail to show the 1 percent calculation algorithm including…the effect of savings due to turnover and vacant positions in each category."

U.C. asserted that it could not compute the exact fiscal impact of employee turnover.

The report was late. After being scolded by Senator Jackie Speier in an October hearing of the Senate Subcommittee on Higher Education, the university did respond to a legislative request for information on turnover savings last November. But U.C. asserted in its letter to Senator Speier that it could not compute the exact fiscal impact of employee turnover "because doing so would require tracking differences between the budgeted salaries for exiting employees and their replacements on a person by person basis for each individual position. Unlike the State of California, the University does not use position control (the process of tracking positions, headcount and/or FTE for the purposes of budgetary control...) for each FTE."

U.C. did provide aggregate payroll data for employees in 15 bargaining units for three fiscal years and computed the change in average base earnings per full-time equivalent employee from 2002-03 to 2004-05. There were no state-funded general salary increases during the period. The university acknowledged that it could not tell from the data what salary costs might be saved due to employee turnover. Changes in average base earnings could be attributed to a number of factors, it explained, such as "promotions, reclassifications, equity adjustments, reorganizations…hiring into new programs or for new facilities, and closing or phasing out of existing programs."

Joint Compensation Committees

The unions may see more data soon. Both UPTE and CUE recently negotiated contracts that establish labor-management compensation committees to track money earmarked for unit salaries. The university agreed to meet with CUE to account for the funding set aside for equity increases for library assistants. CUE anticipated that some money would be left over on some campuses after the equity increases are applied, and it secured an agreement to bargain the distribution of the remaining funds. The parties also will meet quarterly to discuss salary surveys, compensation methodologies, additional funding for staff salaries, and the specific means of reaching the regents' recently announced goal to bring all employees' salaries to market rate in 10 years.

UPTE and U.C. signed a side letter in January that set up a compensation evaluation committee. The parties will agree on standards for analyzing and reporting unit salary data systemwide, calculate differences between the amount agreed on for salary increases during the term of the 2005-08 collective bargaining agreement and the actual payouts, and estimate the value of turnover savings or costs. ❁

Los Alamos Lab Employees Sue Over Retirement Plan

Employees at the Los Alamos National Laboratory will not be University of California employees beginning this month, and their retirement benefits plan is changing as a result. The Department of Energy, which owns the lab, required the new laboratory manager to offer substantially equivalent total compensation as well as a new pension plan for employees who transfer to the new entity, Los Alamos National Security, LLC. DOE found that the salary and benefits package offered to transferring employees by LANS is substantially equivalent to the total compensation paid by U.C. prior to the transition. But the University Professional and Technical Employees, which is a non-exclusive representative of the lab workers, believes the new pension plan is inferior and sued the U.C. regents and LANS for breach of fiduciary duty. Meanwhile, employees at Lawrence Livermore National Laboratory are trying to head off a similar scenario when U.C.'s contract to manage that lab expires next year. (See story on p. 51.)

New Management Contract

In December, DOE awarded the contract to manage the Los Alamos lab to LANS, an entity formed by U.C. and its bidding partners, Bechtel National, BWX Technologies, and Washington Group International. U.C. has managed the lab for decades without competing for the contract, but Congress put the contract up for bid after a series of security and safety lapses under the university's watch, topped off by U.C.'s termination of two whistleblowers in 2002. (See story in *CPER* No. 159, pp. 40-44.) To attract other bidders, DOE raised the fee the new contractor could earn to an amount seven times higher than it paid U.C. to run the lab. U.C. teamed up with the experienced defense industry firms to compete with a joint bid by the University of Texas and Lockheed Martin.

Employees at the lab have been worried about the management change for several years. The value of U.C.'s employer-paid benefits was 20 percent higher than the highest-paying comparable employer, and employees wanted to remain in U.C.'s rich pension plan. DOE, however, required a separate retirement plan for employees even if U.C. continued to manage the lab. (See story in *CPER* No. 172, pp. 67-69.)

The contract contains two clauses pertinent to employee compensation. On one hand, LANS must provide employees who transferred from U.C. with total compensation that is substantially equivalent to their U.C. pay and benefits. The contract specifically requires that LANS maintain the base salaries of transferring employees, provide a substantially equivalent pension and other benefits, and use the same age factors as the University of California Retirement Plan. These compensation requirements for transferring employees do not apply to employees with vested pensions who transferred to LANS but chose to stay in UCRP as inactive members.

On the other hand, the contract requires that transferring employees be placed into a separate pension plan.

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)

LANS must preserve accrued benefits and recognize service credit under UCRP. But employees were concerned about rolling over their benefits to the new plan because it will have fewer assets and participants, and does not offer all the same options and benefits as UCRP. If a transferring employee chose to take inactive status and not roll over vested U.C. retirement benefits into the LANS plan, the employee had to be placed into a "market-driven plan."

The market-driven plan, which LANS refers to as "Pension Plan 2," is for new employees, inactive vested transferring employees, and employees who chose to retire under the UCRP and are rehired by LANS. While the DOE contract did not specify that it be a defined contribution plan, LANS is offering only a 401(k) plan with employer and employee contributions. For inactive vested transferring employees, the contract requires that the employee's eligibility and vesting for the new plan, but not the benefit amount, be determined based on LANL service. The employee will not continue to accrue UCRP credits but could collect benefits from UCRP upon retirement on or after age 50.

The U.C. regents unexpectedly voted to 'spin off' liabilities and assets for retired members.

Retiree Spin-off

In January, the U.C. regents unexpectedly voted to "spin off" liabilities and assets for active, inactive, and retired members who were employed at the Los Alamos lab. These funds will go into a separate U.C.-sponsored plan that would use the same retirement benefit formulas as UCRP and continue to be managed by the Office of the Treasurer. Lab employees and Senators Domenici and Bingaman from New Mexico were alarmed. The senators pointed out that the lab's pension asset base was found to be underfunded as of July 2005. As UPTE observed in an April e-bulletin, it is not clear how the spun-off fund will remain viable once employee contributions cease this month.

Administrator Linton Brooks of DOE's National Nuclear Security Administration expressed his surprise in a February letter to U.C. President Robert Dynes. "I want to stress…that our expectation has been that University of California Retirement Plan (UCRP) would retain vested members who earned service credit at LANL under your contract with DOE/NNSA, and that UC and DOE/NNSA would negotiate an asset transfer to reflect the valuation of the vested benefits of employees who choose to transfer to the [LANS] defined benefit plan….That continues to be our preferred option," he wrote.

Reading between the lines, the move appears to be about money. In a meeting with the assembly of the academic senate on April 12, Dynes informed the faculty that the university will be negotiating with DOE concerning "the options and ongoing financial obligations" to lab retirees and inactive plan members, and "to clarify the DOE's long-term ongoing financial obligations to the retirees and inactive members…. so that neither the University nor the DOE experiences any financial gain or loss."

Those who chose to retire from U.C. were not guaranteed employment at LANS.

Lawsuit

On March 15, lab employees were given LANS employment offer packages that notified them they would be separated from U.C. on May 31. Each employee was required to decide whether he or she wished to transfer to LANS or retire from U.C., and whether, if vested in UCRP, the employee wished to transfer to the LANS pension plan or remain as an inactive member of UCRP. Inactive, vested transferring employees were allowed to participate in only the LANS 401(k) plan for new employees. Those who chose to retire from U.C. were not guaranteed employment at LANS, unlike transferring employees. The employment offer expired on May 15, the date on which employees had to inform LANS of their employment and benefits decisions.

In April, UPTE filed a class-action lawsuit charging that U.C. and LANS had breached their fiduciary duties to lab employees and retirees under Article XVI, Section 17, of the California Constitution, which imposes on the U.C. Regents and their agents the duty "to act solely in the interests of and for the exclusive purposes of providing benefits" to participants and beneficiaries of UCRP. The union contends the regents breached the duty by forcing employees to choose between their jobs and their vested UCRP pensions, coercing them to roll over their retirement benefits into an inferior plan by placing them into a 401(k) plan if they were to become inactive in the UCRP, planning to spin off retirees into a less-viable plan, and giving employees incomplete information for decision-making.

Substantial Equivalence Determination

The LANS plan already has survived one round of criticism. During the transition period before LANS took over this month, LANS submitted its plans to the DOE for approval. On March 8, Edwin Wilmot, the DOE/NNSA contracting officer, issued his determination that LANS' proposed compensation package was substantially equivalent to pay and benefits provided by U.C. He explained:

> Because the statutory requirements that apply to benefit plans sponsored by state government institutions are different from those that apply to benefit plans sponsored by private institutions, the benefit plan offered by LANS…cannot be identical to the benefit plan offered by the University of California, particularly as to pensions.

Therefore, he looked at whether employees would receive significantly more or less in aggregate value of salary and benefits than they did from U.C. Wilmot rejected union and employee contentions that the proposed LANS retirement plan was inferior to UCRP. In response to fears that a private pension plan was riskier than UCRP, Wilmot pointed out that DOE would reimburse LANS for its contributions.

Several complaints dealt with aspects of UCRP that would be changed because of legal restrictions of the Internal Revenue Service or the Employment Retirement Income Security Act. For example, UCRP's calculations for a lump-sum distribution of benefits at retirement would be 20 to 40 percent lower than the figure allowed under ERISA. Because compliance with ERISA would result in substantially greater compensation, the contracting officer found that elimination of the lump-sum benefit ensured benefit equivalency.

The greater amounts that U.C. employees can contribute to tax-deferred accounts compared to amounts the IRS allows for private employees also was not a factor in Wilmot's substantial equivalency determination. He reasoned that providing an additional contribution to make up for the taxed amounts would result in greater compensation than U.C. provides and might well violate other IRS rules.

The contracting officer found that elimination of the lump-sum benefit ensured benefit equivalency.

UCRP provides the same survivor benefits to domestic partners as it does to a spouse upon the retiree's death. But, because ERISA does not define a domestic partner as a spouse and requires spousal consent to name another beneficiary for survivor benefits, Wilmot found that "the LANS plan cannot provide the same survivor benefit to a domestic partner; i.e., a qualified joint and survivor annuity." This did not affect his substantial equivalency determination, however, since other annuity options are available for those who wish to name a domestic partner as a beneficiary.

ERISA also does not allow a pension plan to pay the survivor continuance benefit (equal to 25 percent of the retiree's benefit) after the retiree's death. ERISA requires, instead, that a married retiree receive a 50 percent joint and survivor annuity, unless the spouse waives the benefit. To make the LANS plan equivalent on this point, Wilmot decided to increase the annuities by 2.4 percent.

Many lab employees chose not to contribute to Social Security accounts, but became private employees subject to Social Security taxes once they transferred to LANS. Older employees may not work for LANS long enough to qualify for Social Security benefits. At the same time, UCRP provides smaller pensions to employees who contribute to Social Security. To address this problem, Wilmot decided that the pension benefit for those without social security will not be reduced for transferring employees who begin to pay social security taxes this month, and LANS will refund their Social Security taxes over time.

Last Weeks

The last weeks under U.C. management were hectic. In addition to making employment decisions, employees were asked to provide self-assessments by May 5 for interim performance reviews, designed to capture accurate employee performance records before reorganization and retirement of large numbers of personnel. Even by May 9, more than a third of the 9,500 employees had not yet turned in their responses to the employment offer packages due May 15.

The local UPTE union is pushing for exclusive representation. Its organizing drive stresses that LANS employees are "at-will," and can be terminated without justification. The future health of the pension plan is uncertain. The union is vying for a "seat at the table" to determine employees' futures. ✱

Livermore Lab Employees Anxious

The University of California's contract to manage the Lawrence Livermore National Laboratory expires on September 30, 2007. After seeing what happened to the pension benefits of Los Alamos National Laboratory employees during the transition to a new contractor, LLNL employees are worried about their employment security and retirement benefits. The University Professional and Technical Employees, CWA, campaigned to delay the LLNL bidding process until completion of a performance assessment at the Los Alamos lab. UPTE wants the Department of Energy to prohibit at-will employment at the Livermore lab. The union also urged Congress to direct DOE to make the pension requirements of its request for proposals to manage the Livermore lab different than for Los Alamos. But in April, DOE announced a new policy to reimburse contractors only for "market-based" pension and medical plan costs. And in May, DOE issued a draft request for proposals for the Livermore lab that was nearly identical to the provisions on employee compensation in the Los Alamos contract.

Pleas to Congress

In March, UPTE recommended that Congress halt the bidding process for the Livermore lab until it had time to compare the Los Alamos lab's performance under U.C. management to the lab's performance under its new contractor, LANS. The union suggested Congress look at gauges of workforce quality and retention, such as the number of graduates from top universities, number of scholarly articles and awards, the average age and years of service at retirement, and numbers of staff terminations, grievances, and lawsuits.

UPTE contends there is no need for a separate site-specific pension plan.

UPTE demanded a complaint process with binding arbitration, and the preservation of public employee due process and union representation rights, including rights under the Higher Education Employer-Employee Relations Act. "This is a big issue because the mission of the lab is good science in the national interest," according to Jeff Colvin, representative of UPTE's Livermore lab affiliate, the Society of Professionals, Scientists and Engineers. "Good science requires the encouragement of open discussion and dissension. If employees do not have due process protections for their jobs, they will be even less inclined to speak out."

For new contractor employees, DOE will reimburse the costs for market-based defined contribution plans.

The union is also very concerned about retirement benefits for Livermore lab employees and retirees. The new Los Alamos contract forbids employees' continued participation in the University of California Retirement System, even though U.C. is a partner of LANS. UPTE argued that a plan for Livermore lab employees within a larger corporate or university plan provides more investment opportunities than the separate plans which DOE prescribed for the new Los Alamos contractor. UPTE contends there is no need for a separate site-specific pension plan if DOE requires an "independently auditable paper separation" for identifying government costs.

Market-Based Limitations

But DOE already has the ball rolling in the other direction. In late April, it announced that by March 2007, it no longer will reimburse contractors for retirement contributions for new employees unless they are in a market-based defined contribution plan that does not cost, and is not valued at, more than 5 percent higher than the average pension plan in the market. DOE's motive is to slow the growth in costs that DOE reimburses contractors for benefits and to improve the predictability of the department's annual reimbursement outlay.

The department will continue reimbursing defined benefit plan contributions for existing employees under current management contracts and existing collective bargaining agreements, but it appears DOE will hold a financial gun to the heads of contractors during future negotiations. "Absent a compelling reason (e.g., required by law) and then only with the written approval of the Secretary of Energy," DOE's notice says, DOE "shall not approve the reimbursement of costs for pension benefits under [future] collective bargaining agreements…unless the negotiated costs are consistent with the requirements of this Notice, applicable law and other DOE directives, and any written guidance by the Contracting Officer pursuant to this Notice."

In addition to Los Alamos, the new policy applies to both the Lawrence Berkeley National Laboratory and the Livermore lab, according to DOE spokesperson Megan Barnett. She emphasized that current contracts and collective bargaining agreements would be honored for existing employees and retirees. Under new collective bargaining agreements, the department will continue to reimburse contractors for the existing benefits of current and retired employees. However, Barnett told *CPER*, "For new contractor employees, the policy generally requires that, after certain dates, DOE will reimburse the costs for market-based defined contribution plans." Similar "market-based" requirements and provisions regarding collective bargaining apply to health benefits for new employees.

The American Academy of Actuaries and several Democratic senators lodged strong protests against DOE's move. DOE cited recent cost volatility and the growth of unfunded liabilities in many contractors' pension plans as the impetus for its action. But Donald Segal, vice president of the Pension Practices Council of the actuary group, asserted in a letter to the Secretary of Energy, "In fact, to provide comparable levels of retirement benefits D[efined] B[enefit] plans are typically much cheaper than D[efined] C[ontribution] plans for the new hires that the new policy would exclude."

CSU and Faculty Settle Summer Employment Dispute

The summer term at many California State University campuses is state-funded, so why was CSU paying professors less to teach summer classes than to teach the same courses during the other terms of the academic year? Unable to get a satisfactory answer, the California Faculty Association filed a grievance in 2002. CFA prevailed in the arbitration of the matter a year later, but it has taken until now to settle the last remaining questions over the arbitration remedy. Although the pact was reached prior to completing negotiations for a successor to the current agreement, the parties opted to implement immediately all provisions relating to the summer term.

CSU could not avoid contractual obligations that were reasonably applicable to the summer term.

Year-Round Operations

In 2000, CSU's Humboldt campus began year-round operations. Its summer term was fully supported by state funds. The following year, several other campuses began using state money to fund summer classes that were the same as ones taught during the rest of the year. But the university and CFA never agreed on the compensation for professors who taught during the summer term. On several campuses, professors were paid at the much lower rate of a lecturer in the non-state-supported extension program.

After an arbitration of the issue of faculty compensation at year-round campuses, the arbitrator, Andrea Knapp, decided that CSU could not avoid contractual obligations that were reasonably applicable to the summer term. In particular, she found that the university could not make money off the summer term by assigning faculty to lower-paid classifications. She also disagreed with CSU that professors who taught in the summer should be paid less for each workload unit than during the school year because the regular-term pay includes compensation for indirect instructional work, such as committee assignments and curriculum development, which often do not continue during the summer. Knapp decided the indirect work should be compensated if performed.

The arbitrator also determined that summer teachers were entitled to accrue benefits and credit for work preferences. She decided faculty should be able to earn and use sick leave. She ruled that lecturers, non-tenure-track teachers who often teach part-time schedules, also must receive summer-teaching service credit toward salary step increases and toward the six years of service that make them eligible for long-term contracts.

The arbitration award cost CSU over $6 million for backpay to faculty who taught during the summer terms in 2001, 2002, and 2003. Faculty did not begin to receive the overdue compensation until 2005, and because the award did not stipulate exactly how to remedy certain contract violations, some aspects of the dispute still were unresolved. For example, the arbitrator left it to the parties to decide how to compensate professors for indirect work. While she determined that summer work should qualify lecturers for health benefits, there were statutory hurdles that prevented lecturer eligibility for the CalPERS health benefit program during the summer.

CFA agreed to allow reduced pay for classes with low enrollment.

Summer 2006 Agreement

The arbitration award technically applied only to the nine campuses that integrated year-round operations into a semester system. However, the new summer employment provisions apply the principles of the arbitration award more broadly. They clarify the rates of pay for all professors who teach state-supported summer classes, whether they teach on a quarter- or a semester-system. To meet some of CSU's cost concerns, CFA agreed to allow reduced pay (at 85 percent of the pay rate) for classes with low enrollment if the professor still chooses to teach the class.

The pay rates for summer sessions do not recognize indirect instructional activities of faculty. Rather than have each professor prove he or she performed indirect work each summer, the parties agreed to pay $150 for each teaching unit a tenured or tenure-track professor is assigned as compensation for indirect instructional work. Lecturers will be compensated if assigned indirect work. The arrangement saves CSU a considerable amount of money, especially compared to the regular pay rates of long-term faculty.

The provisions particularly benefit lecturers who work during the summer.

The gains CFA made in arbitration on the issues of sick leave and service credit for other benefits are contained in the agreement for semester campuses with year-round operations. The provisions particularly benefit lecturers who work during the summer. Lecturers now will earn credit toward the next salary step increase during their summer employment. Under other terms of the current collective bargaining agreement, lecturers' workload is based largely on their workload in prior semesters, and long-term lecturers receive a three-year contract after six years of service. The terms of the new summer agreement specify that summer workload counts in calculations of the next year's workload and toward eligibility for a three-year contract. In addition, the parties agreed to give long-term lecturers preference over short-term lecturers when assigning classes that are available after tenure-track faculty workloads are determined. Existing lecturers have priority for assignment over new hires.

Lecturers with three-year contracts are paid on a 12-month basis and continue to be eligible for the CalPERS health benefit program during breaks between terms if they work at least half-time during the academic year. But lecturers with one-year appointments are not paid after the end of the spring term, and therefore have not qualified for benefits during the summer. The difficulties of providing health benefit coverage for lecturers without three-year appointments were resolved by providing a stipend for purchasing benefits between terms for those lecturers who taught at least half-time during the spring and who continue to teach at least half-time during the summer.

The agreement does not settle all summer employment issues or extend all new terms to future summers. While the parties continue to negotiate for a successor contract, they will discuss several complicated issues, including how to implement leave, service credit, and work preference provisions on campuses that operate on the quarter system.

CFA President John Travis told *CPER* he was hopeful that the agreement on summer employment would provide momentum for successful bargaining on the rest of the contract. "We still have a long way to go on the toughest problems — salary and workload issues." ❁

U.C. Berkeley Picketed After Raising Wages

Howard Dean, Fabian Nunez, and Al Gore all canceled speaking engagements at the Berkeley campus of the University of California in May, rather than cross picket lines set up by local members of the American Federation of State, County and Municipal Employees. Dean, Nunez, and several other Democratic politicians skipped commencement speeches, and Gore cancelled his appearance at a forum on global warming.

AFSCME is protesting the low wages the university pays to the service workers represented by the union. A California Budget Project analysis asserted that in 2003, a family of four living in the area would have needed two parents earning $16.88 an hour to cover basic household expenses. The City of Berkeley has set its living wage standard at $11.04 an hour. AFSCME claims other public sector workers are paid better than the service workers it represents. For example, says the union, custodians with five years of service make $11.54 an hour, while a similar custodian at a nearby community college is making $18.30.

Ironically, Berkeley already boosted wages for its lowest-paid employees in April. On April 21, Berkeley Chancellor Robert Birgeneau announced a higher minimum wage for the campus that he had negotiated with three unions. Instead of the entry-level hourly pay of $9.39, the base wage for 180 food service workers and other employees was raised to $11.25. The move was made in the middle of a three-year collective bargaining contract that established a $9.00 minimum hourly pay for service workers. That provision resulted in raises for nearly 600 employees last October.

Discrimination

Vulgar Language on *Friends* Not Hostile Workplace Sexual Harassment

The California Supreme Court, in a unanimous opinion, has held that a writers' assistant who was required to attend meetings at which writers for the television series *Friends* displayed sexually course and vulgar language and conduct, did not experience hostile workplace sexual harassment within the meaning of California's Fair Employment and Housing Act. In coming to its conclusion, the court relied heavily on two facts: that most of the language was not directed to the complainant or other women in the workplace and that the *Friends* production was "a creative workplace focused on generating scripts for an adult-oriented comedy show featuring sexual themes." Read broadly, the opinion could have implications for all employers in holding that sexually course and vulgar language, standing alone, does not create a hostile work environment. However, the court was careful to emphasize that the context in which the comments and conduct were exhibited was important to its decision.

Factual Background

Amaani Lyle worked on *Friends* for four months, after which she was fired because of problems with her typing and transcription. She then filed suit claiming that three of the male comedy writers used sexually course and vulgar language and conduct, including the recounting of their own sexual experiences, at meetings that she was required to attend, creating a work environment hostile to her because of her sex.

> *Blatant use of obscene language and flagrant discussions about personal sex lives occurred at least four days a week.*

Lyle presented evidence that at these meetings and in the break room and hallways, the writers regularly discussed their preferences in women and sex in general. One talked about his preferences for blond women, big breasts, and "getting right to sex" without foreplay. Another liked young girls and cheerleaders. He had a coloring book showing cheerleaders with their legs spread open on which he would draw breasts and vaginas. He left the book open on his desk or writers' assistants' desks. Writers talked about their sexual fantasies, including having sex with actresses on the show. They discussed anal sex and oral sex, and pantomimed masturbation. Lyle alleged that the "blatant use of obscene language and flagrant discussions about personal sex lives occurred at least four days a week." The writers did not dispute most of this evidence, but claimed they engaged in this conduct to generate material for the show.

The trial court dismissed the case in its entirety. The Court of Appeal reversed part of the trial court's decision, concluding that Lyle's claims of sexual and racial harassment should have been allowed to go to trial. The Supreme Court agreed to review the case, but only as to the following issues: "(1) Can the use of sexually course and vulgar language in the workplace constitute harassment based on sex within the meaning of the FEHA? and (2) Does the imposition of liability under the FEHA for sexual harassment based on such speech infringe on defendants' rights of free speech under the First Amendment to the federal Constitution or the state Constitution?"

Supreme Court Decision

In addressing the first question, the court reiterated the test set out in *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 174 CPER 61: "to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was *severe enough or sufficiently pervasive* to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees *because of their sex*."

The court instructed that, in order to meet the "because of sex" part of the test, a plaintiff must prove *discrimination* because of sex. "It is the disparate treatment of an employee on the basis of sex — not the mere discussion of sex or use of vulgar language — that is the essence of a sexual harassment claim." While "evidence of hostile, sexist statements is relevant to show discrimination on the basis of sex," said the court, "it is not necessarily sufficient, by itself, to establish actionable conduct." The court cited a number of federal cases interpreting Title VII which have held that "a hostile work environment sexual harassment claim is not established where a supervisor or coworker simply uses crude or inappropriate language in front of employees or draws a vulgar picture, without directing sexual innuendos or gender-related language toward a plaintiff or toward women in general."

Evidence of hostile, sexist statements is not necessarily sufficient, by itself, to establish actionable conduct.

Regarding the issue of whether the conduct was sufficiently severe or pervasive to create a hostile work environment, the court, quoting from the United States Supreme Court decision in *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 129 CPER 11, instructed that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." With respect to the pervasiveness of the harassment, "courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial," said the court. "Rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature."

A sexually objectionable environment must be both objectively and subjectively offensive.

The court also emphasized that to violate the FEHA, "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." In addition, in a case of "second-hand" harassment, where no offensive remarks are directed to the complaining employee, the plaintiff "generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it."

Applying these principles to this case, the court found the evidence did not support a finding of hostile work environment. The offensive comments and actions were not directed at the plaintiff or any other female employee, at least to their knowledge. And, considering the totality of the circumstances, including the nature of the writers' work, the actions did not constitute harassment "because of sex," said the court.

> There is no dispute *Friends* was a situation comedy that featured young, sexually active adults and sexual humor geared primarily toward adults. Aired episodes of the show often used sexual and anatomical language, innuendo, wordplay, and physical gestures to create humor concerning sex, including oral sex, anal sex, heterosexual sex, gay sex, "talking dirty" during sex, premature ejaculation, pornography, pedophiles, and "threesomes." The circumstance that this was a creative workplace focused on generating scripts for an adult-oriented comedy show featuring sexual themes is significant in assessing the existence of triable issues of facts regarding whether the writers' sexual antics and coarse sexual talk were aimed at plaintiff or at women in general, whether plaintiff and other women were singled out to see and hear what happened, and whether the conduct was otherwise motivated by plaintiff's gender.

The court also found no evidence that the writers' conduct affected Lyle's work hours or duties and those of her male counterparts in a disparate manner. One could not find that "members of one sex were exposed to disadvantageous terms or conditions of employment to which members of the other sex were not exposed," said the court.

The case of *Ocheltree v. Scollon Productions, Inc.* (4th Cir. 2003) 335 F.3d 325, involving a costume production shop in which men engaged in a daily stream of sexually explicit discussions and conduct, was distinguishable, the court said. There, the court upheld the finding of liability because the men behaved as they did to in order to make the plaintiff uncomfortable and self-conscious as the only woman in the workplace. There was nothing to suggest that that was the case here.

The only facts that seemed to give the court pause were the writers' comments about female cast members. "Unlike the writers' nondirected conduct, these particular comments support at least an inference that certain women working on the production of *Friends* were targeted for personal insult and derogation because of their sex, while the men working there were not," noted the court. Nonetheless, "because the derogatory comments did not involve [Lyle], she was obligated to set forth specific facts from which a reasonable trier of fact could find the conduct 'permeated' her direct workplace environment and was 'pervasive and destructive,'" said the court, citing *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590. She was unable to do this, the court found, because her testimony revealed that she considered the conduct more puerile and annoying than pervasive and destructive, and because the comments were made only occasionally.

The court also was not persuaded by Lyle's claim that the writers used gender-related words such as "bitch" and "cunt" when referring to some women, finding that she failed to report the necessary specifics regarding the context in which the comments were made. The context was important, said the court, because the word bitch "was not a term that was necessarily misogynistic or even unsuitable for broadcast television."

Her testimony revealed that she considered the conduct more puerile and annoying than pervasive and destructive.

Because the court concluded that Lyle did not establish a prima facie case of hostile work environment sexual harassment, the majority declined to take up the free speech issue. Justice Ming Chin filed a concurring opinion in which he argued that the court should have addressed the issue, stating that the case "has very little to do with sexual harassment and very much to do with core First Amendment free speech rights." Justice Chin concluded that the writers'comments were protected by the First Amendment:

> Often, free speech cases involve the very difficult balancing of important competing interests. But here, in the creative context, free speech is critical while the competing interest — protecting employees involved in the creative process against offensive language and conduct *not directed at them* — is, in comparison, minimal. Neither [Lyle] nor anyone else is required to become part of a creative team. But those who choose to join a creative team should not be allowed to complain that some of the creativity was offensive or that behavior not directed at them was unnecessary to the creative process.

(*Lyle v. Warner Brothers Television Productions* [4-20-06] 38 Cal.4th 264, 2006 DJDAR 4691.) ☸

Requirement That Women Wear Makeup Not Discriminatory

An eleven-member "en banc" panel of the Ninth Circuit Court of Appeals has held, by a vote of seven to four, that an employer's requirement that women employees wear makeup did not constitute sex discrimination under Title VII. In doing so, it upheld the rulings of both the trial court and the Ninth Circuit three-judge panel. (For a complete discussion of the original Court of Appeals decision, see *CPER* No. 170, pp. 68-71.) Judge Harry Pregerson and Judge Alex Kozinski wrote strong dissents.

Factual Background

Darlene Jaspersen was a bartender at Harrah's Casino in Reno for almost 20 years and had an exemplary record. In February 2000, Harrah's introduced new appearance standards under what it called the "Personal Best" program. All beverage servers were required to be "well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform." Female beverage servers were required to wear stockings and colored nail polish, and wear their hair "teased, curled, or styled." Male beverage servers were prohibited from wearing makeup or colored nail polish, and were required to maintain short haircuts and neatly trimmed fingernails. Jespersen agreed to adhere to these standards in March 2000.

In April 2000, the standards were amended to require all female beverage servers to wear makeup including at least mascara, blush, face powder, and lipstick. Jespersen refused to comply with the new requirement. Harrah's gave her 30 days to apply for a position that did not require makeup, but she refused and was terminated.

After exhausting her administrative remedies with the Equal Employment Opportunity Commission, Jespersen went to court. At her deposition, she testified that when she wore the required makeup she "felt very degraded and very demeaned." In addition, "it prohibited her from doing her job" because "it affected her self-dignity and took away her credibility as an individual and as a person." The trial court dismissed her case, finding the "Personal Best" policy did not violate Title VII because "(1) it did not discriminate against Jespersen on the basis of 'immutable characteristics' associated with her sex, and (2) it imposed equal burdens on both sexes." Jespersen appealed. The three-judge panel affirmed on different grounds. The majority found that Jespersen failed to show the appearance standard imposed a greater burden on women than men and that *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 81 CPER 72, prohibiting discrimination on the basis of sex stereotyping, did not apply to grooming standards except where the policy amounted to sexual harassment, which was not shown here.

En Banc Decision

The majority found that Jespersen failed to establish that the makeup requirement was either intentionally discriminatory or had a discriminatory effect on the basis of gender. It rejected Jespersen's argument that the makeup requirement itself established a prima facie case of discriminatory intent. It distinguished *Gerdom v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F. 2d 602, in which the court held that imposing weight restrictions on female flight attendants constituted a violation of Title VII. "In contrast," said the court, "this case involves an appearance policy that applied to both male and female bartenders, and was aimed at creating a professional and very similar look for all of them. All bartenders wore the same uniform. The policy only differentiated as to grooming standards."

Grooming standards that appropriately differentiate between the genders are not facially discriminatory.

The majority also distinguished the Ninth Circuit's finding of discrimination in *Frank v. United Airlines* (9th Cir. 2000) 216 F. 3d 845, where the airlines required women to meet the weight standards of a medium body frame; men had to meet those of a large body frame. "On its face," said the court, "the policy embodied a requirement that categorically 'applied less favorably to one gender' and the burdens imposed upon that gender were obvious from the policy itself." The court found that the same was not true of Harrah's policy:

> This case stands in marked contrast, for here we deal with requirements that, on their face, are not more onerous for one gender than the other. Rather, Harrah's "Personal Best" policy contains sex-differentiated requirements regarding each employee's hair, hands, and face. While those individual requirements differ according to gender, none on its face places a greater burden on one gender than the other. Grooming standards that appropriately differentiate between the genders are not facially discriminatory.

The court concluded that Jespersen had not presented any evidence to show that Harrah's policies unreasonably burdened one sex more than the other. It refused to grant Jespersen's request that it take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than for a man to keep his hair short. Those facts, said the court, lacked the "requisite 'high degree of indisputability' generally required for such judicial notice."

The majority also found no support for Jespersen's claims in the Supreme Court's decision in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 81 CPER 72. In that case, a female associate at an accounting firm was told she was too aggressive and that her chances of becoming a partner would improve if she learned to behave more femininely, wore makeup, had her hair styled, and wore jewelry. The Supreme Court held that the employer's discrimination against the associate because of her failure to conform to a traditional, feminine stereotype constituted sex discrimination in violation of Title VII. The Ninth Circuit concluded that the case was distinguishable from Jespersen's, stating:

> The stereotyping in *Price Waterhouse* interfered with [the associate's] ability to perform her work; the advice that she should take "a course at charm school" was intended to discourage her use of the forceful and aggressive techniques that made her successful in the first place. Impermissible sex stereotyping was clear because the very traits that she was asked to hide were the same traits considered praiseworthy in men.
>
> Harrah's Personal Best" policy is very different. The policy does not single out Jespersen. It applies to all of the bartenders, male and female. It requires all of the bartenders to wear exactly the same uniforms while interacting with the public in the context of the entertainment industry. It is for the most part unisex, from the black tie to the nonskid shoes. There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly accepted stereotypical image of what women should wear. The record contains nothing to suggest that the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.

The majority clarified that, while it respects "Jespersen's resolve to be true to herself and to the image that she wishes to project to the world," it could not agree that her objection to the makeup requirement, without more, was sufficient to support a claim of sex stereotyping under Title VII. "If we were to do so," said the court, "we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination."

There is no evidence of a stereotypical motivation on the part of the employer.

The Court of Appeals was careful to leave the door open for future claims. "We emphasize that we do not preclude, as a matter of law, a claim of sex stereotyping on the basis of dress or appearance codes," it said. "Others may well be filed, and any bases for such claims refined as law in this area evolves." It found the record in this case insufficient to support such a claim, however, "as it is limited to the subjective reaction of a single employee, and there is no evidence of a stereotypical motivation on the part of the employer."

The Dissents

Judge Pregerson, joined by Judge Kozinski, Judge Susan P. Graber, and Judge William A. Fletcher, dissented. Though Judge Pregerson agreed with the majority on most issues, he disagreed with its conclusion that there was insufficient evidence to support a claim of sex stereotyping under *Price Waterhouse*. Pregerson pointed to evidence that the policy "imposed a facial uniform (full makeup) on only female bartenders." He noted that the female bartenders were required to meet with professional image consultants who in turn created a "facial template" for each woman.

Pregerson took particular issue with the majority's refusal to consider the makeup requirement on its own terms, stating:

> The fact that a policy contains sex-differentiated requirements that affect people of both genders cannot excuse a particular requirement from scrutiny. By refusing to consider the makeup requirement separately, and instead stressing that the policy contained some gender-neutral requirements…the majority's approach would permit otherwise impermissible gender stereotypes to be neutralized by the presence of a stereotype or burden that affects people of the opposite gender, or by some separate nondiscriminatory requirement that applies to both men and women….But the fact that employees of both genders are subjected to gender specific requirements does not necessarily mean that particular requirements are not motivated by gender stereotyping.

Turning to the makeup requirement, he concluded that "Harrah's regarded women as unable to achieve a neat, attractive, and professional appearance without the facial uniform designed by a consultant and required by Harrah's." "The inescapable message is that women's undoctored faces compare unfavorably to men's, not because of a physical difference between men's and women's faces, but because of a cultural assumption — and gender-based stereotype — that women's faces are incomplete, unattractive, or unprofessional without full makeup," he wrote.

Imagine a rule that all judges wear face powder, blush, mascara and lipstick while on the bench.

Judge Kozinski filed a separate dissent because he believed that Jespersen also presented sufficient evidence to submit the question of disparate burden to the jury. Responding to Jesperson's assertion about the costs and time associated with makeup, he said:

> It is true that Jespersen failed to present evidence about what it costs to buy makeup and how long it takes to apply it. But is there any doubt that putting on makeup costs money and takes time? Harrah's policy requires women to apply face powder, blush, mascara and lipstick. You don't need an expert witness to figure out that such items don't grow on trees.
>
> Nor is there any rational doubt that application of makeup is an intricate and painstaking process that requires considerable time and care. Even those of us who don't wear makeup know how long it can take from the hundreds of hours we've spent over the years frantically tapping our toes and pointing to our wrists.

Judge Kozinski pointed to Jespersen's testimony that she found it burdensome to wear makeup because doing so was inconsistent with her self-image and interfered with her job performance:

> My colleagues dismiss this evidence, apparently on the ground that wearing makeup does not, as a matter of law, constitute a substantial burden.... If you are used to wearing makeup — as most American women are — this may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way.

Kozinski acknowledged that most women raised in the United States use cosmetics but noted that "cultural norms change." For example, today, men wearing body piercings are hardly noticed. "So, too, a large (and perhaps growing) number of women choose to present themselves to the world without makeup, " he said. "I see no justification for forcing them to conform to Harrah's quaint notion of what a 'real woman' looks like." (*Jespersen v. Harrah's Operating Co., Inc.* [9th Cir. 4-14-06} 444 F.3d 1104, 2006 DJDAR 4549.)

General

Ninth Circuit Reverses NLRB, Finds Failure to Back Up 'Inability to Pay' Claim

Reaffirming a fundamental principle of labor law, the Ninth Circuit Court of Appeals determined that an employer who asserts an inability to pay in response to a union's proposal for wage and benefit increases fails to bargain in good faith when it refuses to turn over its financial documents to support its claim. The dispute arose during contract negotiations between the American Polystyrene Corporation and the International Chemical Workers Union Council of the United Food and Commercial Workers International, which represents an eight-person bargaining unit of production and maintenance employees at the company's Torrance manufacturing facility.

The parties met at the bargaining table to negotiate a successor agreement in 2002. The union president, Jeffrey Ferro, proposed an increase in wages and in the company's contributions to employees' 401(k) plans. In reply, the company proposed smaller wage increases, discontinuation of the 401(k) contributions for an unspecified period, and elimination of company-provided meals. When the parties met again to discuss their proposals, Ferro asked if the company's financial picture was so bad that it could not continue to match the 401(k) contributions, provide meals, or grant a meaningful wage increase. Carolyn Tan, the company's general manager, replied that, "things are tough." The union then pressed, "Are you saying that you can't afford the Union's proposals?" Tan replied, "No, I can't. I'd go broke."

The general manager's 'go broke' statement was a simple declaration of the company's financial situation.

In reaction to this remark, the union demanded to review the company's books. However, the company rejected the request, advising the union that it never said it could not afford the proposals. Rather, Tan wrote in a letter to the union that it was necessary for the company to take a more cautious approach, given the uncertain economic times.

At subsequent bargaining sessions, the parties discussed the company's financial condition. Again, the union demanded access to the company's financial records and, again, the company asserted that it never took the position that it could not afford the union's proposals.

The union filed an unfair labor practice charge with the National Labor Relations Board, alleging that the company refused to supply information to the union in violation of Sec. 8(a)(5) of the National Labor Relations Act. Six weeks later, the company notified the union that, due to unimproved sales and rising inventories, it planned to stop production and lay off some of its employees for 90 days. Thirty days later, the company laid off six of the eight bargaining unit members.

An administrative law judge credited the union president's testimony that the company general manager had said the union's demands would cause it to go broke. The ALJ concluded that the company violated the act when it refused to provide the union with information to substantiate a claim that it could not afford to agree to bargaining demands.

The company appealed the ruling to the board, which found that the company's statement that it would "go broke" was not necessarily a claim of inability to pay and that the company's response to the union's request for information unequivocally advised the union that the company's ability to pay was not in question. This clarification, the board held, absolved the company of any duty to provide the requested financial information.

On appeal by the union, the Ninth Circuit relied on the Supreme Court's ruling in *NLRB v. Truitt Manufacturing Co.* (1956) 351 U.S. 149, which announced that if an employer claims an inability to pay for a union's demands, it must provide some proof of its assertion.

The Ninth Circuit first considered whether the essential core of the company's bargaining posture amounted to a claim that it could not pay for the union's proposals. Contrary to the NLRB, the court concluded that while no magic words are required to express an inability to pay, the general manager's "go broke" statement was a simple declaration that its financial situation was the cause of its refusal to agree to the union's proposals.

The company's disavowals were 'a clumsy effort to shed statutory responsibility....'

In addition, when this statement is viewed in light of the company's subsequent actions, the company's position was one of inability to pay. "Each of the Company's communications, whether oral, in writing, or through action, implied that the company was economically incapable of meeting the union's requests," wrote Judge Harry Pregerson for the Ninth Circuit. The court examined the company's bargaining proposal to reduce 401(k) contributions and its decision to lay off most of the unit employees. "The obvious interpretation of the Company's conduct," said the court, "was that its financial health was to blame for its refusal to pay for the Union's proposals. The Company first opened the door to its plea of poverty when Tan first said 'No, I can't. I'd go broke,' and never wavered from that position in its later communications." Finding insufficient evidence to support the board's conclusion that the company did not assert an inability to pay, the court found that under *Truitt*, the company should have provided corroborative evidence in support of its bargaining position.

The court also addressed the rule that a company can shed its obligation to furnish financial information if it truthfully communicates a disavowal of its previous assertions of inability to pay. But, cautioned the court, because companies may be aware of decisions that attach different consequences to inability to pay claims, it would undercut *Truitt* if the court accepted every purported "retraction" by an employer and failed to question whether such statements were honestly made. Despite Tan's statements responding to the union's information request, the Ninth Circuit reasoned that the essential core of the company's bargaining position continued to be that it could not pay for the union's demands.

The court concluded that the company's disavowals were "a clumsy effort to shed statutory responsibility to substantiate a bargaining position" that it could not meet the union's contractual demands. Found the court, the board's decision was not supported by substantial evidence. "Tan's denials that the Company was claiming an inability to pay were not 'honest claims.'" Therefore, the company bargained in bad faith when it asserted an inability to pay, failed to turn over the financial documents requested by the union, and then improperly tried to avoid its duty to disclose. (*International Chemical Workers Union Council of the United Food & Commercial Workers International* [9th Cir. 4-28-06] No. 04-72270 ___F.3d.___, 2006 DJDAR 5133.)

Public Employee's Religious Expression Trumped by County's Compelling Interests

A county social worker was reasonably barred from praying with his clients, displaying religious items on his desk, and using a conference room to conduct prayer meetings with coworkers. Applying the *Pickering* balancing test, the Ninth Circuit Court of Appeals reasoned that the county could not accommodate the employee's religious beliefs without running the risk of appearing to support his religious tenets. The court concluded that the county had "successfully navigated between the Scylla of not respecting its employee's right to the free exercise of his religion and the Charybdis of violating the Establishment Clause of the First Amendment by appearing to endorse religion."

Factual Summary

Daniel Berry is an evangelical Christian employed by the Tehama County Department of Social Services. His job duties involve assisting unemployed and underemployed clients in their transition out of welfare programs. The department advised Berry that he was prohibited from talking about religion during interviews with his clients. He also was prohibited from conducting prayer meetings with his coworkers in a conference room at the county facility. In addition, Berry was informed by his supervisor that he could not display religious items in his cubicle. In December 2001, when he displayed a Bible and a sign reading "Happy Birthday Jesus," he received a letter of reprimand informing him that he could not display religious items that were visible to his clients.

Berry complied with this directive but filed charges with the Equal Employment Opportunity Commission. He received a right-to-sue letter and filed a lawsuit in federal court seeking a judicial declaration that the department was required by the First Amendment to accommodate his religious beliefs by allowing him to share his religious views with clients who initiate the discussion or are open and receptive to such discussions, to use the conference room for voluntary monthly group prayer meetings, and to display religious objects in his cubicle.

The district court dismissed the case, and Berry appealed.

The Pickering *balancing test applies regardless of the reason an employee believes his or her speech is constitutionally protected.*

Legal Analysis

The starting point of the Ninth Circuit's analysis was the balancing test set out in *Pickering v. Board of Education* (1968) 391 U.S. 563, and recently clarified in *City of San Diego v. Roe* (2004) 543 U.S. 77, 165 CPER 56. The test requires a court evaluating restraints on a public employee's speech to balance the interest of the employee as a citizen in commenting on matters of public concern and the interest of the state as an employer in promoting the efficiency of the public services it performs through its employees.

The court turned aside Berry's contention that his speech was constitutionally protected as religious speech rather than as comments on matters of public concern, concluding that "the *Pickering* balancing test applies regardless of the reason an employee believes his or her speech is constitutionally protected."

Speech restrictions were reasonable to avoid a violation of the Establishment Clause.

No Praying With Clients

The court determined that the department's restriction on Berry's speech with clients was reasonable in order to avoid a violation of the Establishment Clause by appearing to endorse its employee's religious expression. Citing several Supreme Court decisions, the Ninth Circuit reiterated that avoiding an Establishment Clause violation can be a compelling state interest, justifying an abridgment of otherwise protected free speech or content-based discrimination. In this case, the court explained, the department's clients seek assistance from Berry as an agent of the county and they may be motivated to ingratiate themselves with him. Any discussion of his religion runs a real danger of entangling the department with religion and exposing the department to adverse legal consequences.

No Display of Religious Items

Again relying on the *Pickering* balancing test, the court found the display of religious items in his cubicle — where clients have access — reasonably could be interpreted as government endorsement of religion. Berry is permitted to keep a Bible in his desk drawer and read it when he does not have a client with him, said the court. But displaying a Bible "implicitly endorses a religious message and it is precisely that message which the Department reasonably seeks to avoid."

Use of Conference Room Barred

The court rejected Berry's claim that the conference room in which he wished to conduct his prayer meetings was a location intended by the county to be a forum for the public expression of ideas and opinions. The record revealed only that the conference room had been used for business-related social functions, like birthday parties and baby showers, not for public discourse. Berry was denied use of the conference room because he sought to use it for a non-business-related activity, the court concluded, not because that activity happened to be religious.

Discrimination Claim

Berry also argued he was the victim of religious discrimination prohibited by Title VII. The court concluded that Berry established a prima facie case by showing that he is an evangelical Christian who believes in sharing his faith with others and was reprimanded for communicating with clients about religion. The burden then shifted to the department to show that it undertook good faith efforts to accommodate Berry's religious practices or that it could not do so without undue hardship.

Without defining the outer limits of undue hardship, the court concluded

It would be an undue hardship to rebut the suggestion of religious sponsorship.

that the department clearly demonstrated it could not accommodate Berry's desire to discuss religion with his clients or his preference for displaying religious items in his cubicle. Allowing Berry to discuss religion with clients would run the risk of violating the Establishment Clause, said the court, and is an undue hardship. Similarly, it would be an undue hardship to require the department to rebut the suggestion of religious sponsorship that would arise by allowing the display of religious items in his cubicle.

The Ninth Circuit also rejected Berry's contention that he suffered disparate treatment when he was denied use of the conference room to conduct his prayer meetings. The court found that Berry did not establish he was treated differently than similarly situated employees. Moreover, said the court, the department presented a legitimate nondiscriminatory reason for not allowing Berry to use the conference room — it wanted to retain the space for business-related purposes so as not to convert it to a public forum.

The court also looked favorably on the department's argument that opening the conference room to religious meetings by all employees would be an undue hardship. "The prospect of cacophony that might result from allowing all who sought to participate in a nonpublic forum might well force the closure of the forum." "We do not read the applicable Supreme Court decisions as requiring that the Department choose either to allow Mr. Berry to hold prayer meetings or to discontinue allowing business-related social functions in the conference room."

The Ninth Circuit summed up:

> Public employers such as the Department face the difficult task of charting a course between infringing on employees' rights to the free exercise of their religions under the First Amendment and violating the Establishment Clause of the First Amendment by appearing to endorse their employees' religious expressions. The *Pickering* balancing test resolves these sometime conflicting constitutional rights by recognizing the legitimacy of the interests asserted by both sides. It provides a chart by which a public employer may navigate a safe course. We hold that the department did so.

(*Berry v. Department of Social Services, Tehama County* [9th Cir. 5-1-06] 04-15566, ___F.3d___, 2006 DJDAR 5245.) ❁

Public Sector Arbitration

Teachers Can Wear Buttons That Are Organizational, Not Political

Beauty is in the eye of the beholder. The Supreme Court knows pornography when it sees it. And in this case, arbitrator John F. Wormuth had to decide whether a union button that reads "Students Our Special Interest – CTA/NEA" is political or not. The parties agreed that buttons of a political nature could be prohibited, but they could not agree whether this particular button fell within that category.

The button was emblazoned with the association's initials.

In 2005, the California Teachers Association organized a statewide political and organizing campaign aimed at defeating the governor's proposed measures directed at public education. The South Bay Teachers Association participated in this campaign, and received the political and organization material CTA distributed statewide. The material, aimed at raising leadership and teacher awareness about the proposed measures, included the button described above.

On May 10, district elementary school teachers began wearing the buttons while on duty. They wore them for three days without causing any disruption. On May 12, the union chairperson presented the CTA materials and the button to the board of trustees. The following day, the superintendent issued a memorandum requesting that certified employees refrain from wearing the button during paid hours of service, as it was political and prohibited under their agreement. No one was disciplined as a result of wearing the button.

The union filed a grievance arguing that the district violated the collective bargaining agreement when the superintendent directed teachers to stop wearing the button. It argued the button was not prohibited political speech as determined by the district, but permitted organizational information because it clearly was emblazoned with the association's initials. The button did not endorse or support a political cause, candidate for public office, or ballot proposition, nor did it compel action by the reader. The message on the button was neutral, intended to organize and rally CTA members against the threat to their security.

The union asserted that nothing in the parties' agreement prohibits teachers from wearing union buttons. The only restriction would be if a teacher were using "his/her position to persuade or influence pupils with her/his own personal, political, and/or religious views." There was no showing that any teacher discussed the buttons during class time or used them to improperly influence pupils. The district should not have prohibited the teachers from wearing the buttons.

The district contended the button clearly was political in nature and, as it was duty-bound to prevent improper dissemination of political material in the classroom, it was required to prohibit the wearing of the buttons during paid hours of service. The district concluded the button was political based on its dissemination to the board at the May 12 meeting. The union presented the board with the button and informational material entitled "Campaign 2005 – Students are Our Special Interest."

No teacher discussed the buttons during class time.

The district argued that a plain reading of the union material revealed it as a request for the board to participate in the statewide union campaign and take a stand against the proposed ballot measures. The button clearly was part of this request for political action and was designed to persuade the general public to defeat the ballot measure. The district argued that the button was an integral part of the political campaign and therefore could not, and should not, be viewed as protected union communication.

Wormuth observed that in *East Whittier Education Assn. v. East Whittier School Dist.* (2004) PERB No. 1727, 172 CPER 33, the board upheld public employees' rights to wear union buttons in the instructional setting absent a showing of special circumstances. The parties' agreement included a definition of special circumstances by which to measure any controversy. Therefore, if a union button were found to be political in nature, the district would be justified in prohibiting its wearing. However, Wormuth warned that allowing the district to ban a union button just because it was similar to a political message would give the district control over the union's organizing message.

The parties' agreement included a definition by which to measure controversy.

Wormuth said it is the message of the button, not whether it is similar to political material, that determines whether it is political. He noted that while the style of the button was unique to the campaign literature, the letters "CTA/NEA" are well-known and recognized initials in the public schools and, as such, have a common acceptance and understanding. He determined the button was distinguishable from the literature because of its language and symbols. The literature was composed of a button emboldened with the word "vote" and contained a different message, "Students *are* Our Special Interest." The button's message, Wormuth noted, clearly was neutral and did not compel the reader to take any action.

Wormuth found the district banned the buttons out of an abundance of caution and for no other reason. There was no evidence that the teachers discussed the subject matter of the button with their pupils or that the button disrupted the instructional program in any way. While the district decided that the button gave the impression of being linked to the campaign literature, that clearly was not the case. (*South Bay Union School Dist. and South Bay Teachers Association Section of the South Bay/Eureka Teachers Assn., CTA-NEA* [1-2-06] 14 pp. *Representatives:* Randall Perry, for the union; Stephen L. Hartsell, Esq., for the district. *Arbitrator:* John F. Wormuth, CSMCS Case No. ARB-04-3206.) ❁

Arbitration Log

• Contract
• Transfer
• Mileage Reimbursement

San Luis Obispo Community College Dist. and Cuesta College Classified United Employees, AFT, Loc. 4606. (2-27-05; 12 pp.) *Representatives:* Thomas M. Sharpe, Esq., (Bennett & Sharpe) for the union; Warren S. Kinsler, Esq., (Atkinson, Andelson, Loya, Ruud & Romo) for the district. *Arbitrator:* Joseph F. Gentile (CSMCS Case No. ARB-04-2486).

Issue: Was the grievance timely? If so, was the grievant involuntarily transferred and therefore entitled to mileage reimbursement under the contract?

Union's position: (1) The grievant was a custodian for the district. The district involuntarily transferred him to a new work location, effective February 1, 2004. Since it was an involuntary transfer, the grievant was entitled to mileage reimbursement.

(2) The grievant did not become aware until April 21, 2004, during a conversation with a supervisor, that the district did not intend to reimburse him for his mileage. He promptly filed a grievance. The district received and processed the grievance.

(3) The district's claim that the grievance was untimely must fail because the grievant filed the grievance as soon as he became aware of the district's position. The district waived its right to argue untimeliness when it failed to raise the defense at the previous grievance steps.

District's position: (1) The grievant had work performance problems and interpersonal difficulties with his supervisor at his previous location. The district offered the grievant the opportunity to transfer to another school in order to alleviate these issues. The grievant chose to accept the assignment, and on September 28, 2003, signed paperwork confirming his acceptance. Since the transfer was voluntary, the grievant was not entitled to mileage.

(2) The assignment clearly was voluntary because the grievant would have had to complete additional paperwork for an involuntary transfer.

(3) Furthermore, the grievance was untimely because the grievant knew or should have known of this issue in September when he was notified of the transfer or in February when he reported to the new work location.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The grievance is considered timely because the district failed to make any comment regarding timeliness in its level-one or level-two responses and because the district representative who heard the grievance at the second level admitted the focus was on whether or not the transfer was voluntary, not timeliness.

(2) The word "involuntary" is taken to mean "done contrary to or without choice." While the grievant may have felt some pressure to relocate given the problems in his current assignment, the evidence indicates the transfer was offered to the grievant, not imposed on him. The testimony of the supervisor who made the offer and stated that it was well-received by the grievant was more persuasive than that of the grievant. Therefore, it is determined that the transfer was voluntary and no mileage reimbursement is warranted.

(Binding Grievance Arbitration)

• Discipline

Los Angeles County Metropolitan Transportation Authority and Amalgamated Transit Union, AFL-CIO, Loc. 1277. (9-30-05; 24 pp.) *Representatives:* William Flynn, Esq.

(Neyhart, Anderson, Freitas, Flynn & Grosboll) for the union; Ronald W. Stamm, Esq., for the authority. *Board of Arbitration:* Bonnie G. Bogue, neutral arbitrator; Neil Silver, for the union; JoAnn Diaz, for the authority.

Issue: Was the grievant's termination for proper cause under the collective bargaining agreement?

Authority's position: (1) The grievant, a lead mechanic, knowingly used his position to defraud an automotive dealership and obtain parts the authority was not entitled to receive. The scheme involved another employee who provided VIN numbers for out-of-warranty vehicles to the dealer, where the records were changed to indicate the vehicle was within warranty in order to obtain parts. The grievant accepted parts without documentation, was aware that the other employee had provided the dealer with the information, and was aware that the dealer's work orders contained incorrect information.

(2) The grievant had an obligation to bring this information to the attention of his supervisor. By not doing so, the grievant furthered the fraud and tarnished the authority's reputation.

(3) The grievant's motivation in this scheme was to increase his overtime opportunities by shifting labor costs from the dealer to the authority. This was demonstrated by his repeated requests for overtime.

(4) The grievant pled guilty to a misdemeanor charge of receiving stolen property.

Union's position: (1) The authority's decision to terminate the grievant for theft lacked just and proper cause. It failed to prove the grievant knew of the scheme or intended to commit any wrong.

(2) The authority was required to prove by clear and convincing evidence that the grievant was guilty of the charges. Because the acts amounted to a felony under the penal code, the district could not rely on his nolo contendre plea to a misdemeanor as an admission of the charge.

(3) The grievant assumed that the parts were provided by the dealer under the "good will" process, in which dealers at their discretion provide warranty service to out-of-warranty vehicles. The grievant had been told by at least two of his supervisors and other mechanics that "good-willing" was proper. The grievant had a reasonable belief that the dealer was "good-willing" because the fuel pumps were failing at a great rate; the grievant assumed the dealer was providing the pumps in advance and the information was being recorded after they were placed in the vehicles.

(4) The grievant tried to inform his supervisors about the other employee's action with the VIN numbers as soon as he became aware of it.

(5) The grievant had nothing to gain from this scheme.

Board of arbitration's decision: The grievance was sustained.

Board's reasoning: (1) Termination was based on the authority's conclusion that the grievant was in collusion with the other employee's fraudulent scheme, was aware the authority had improperly received three fuel pumps, and that, despite his awareness, he did nothing to stop or report the scheme. The authority must show it had proper cause on all counts to uphold the termination.

(2) The grievant was unaware the other employee was involved in a fraudulent scheme and believed that anyone in the shop could obtain VIN numbers from the authority's computer system. Therefore, the evidence failed to show the grievant was in collusion with the other employee or had any advance knowledge he was obtaining VIN numbers off the tracking system to give to the dealer.

(3) The grievant knew the fuel pumps were not properly obtained. However, the only evidence that the grievant might have been aware they were obtained through the employee's fraudulent actions was from a witness interviewed during the authority's investigation. However, during the arbitration, that witness testified that his answers may have been colored by the investigation process. He said the grievant had no reason to believe the other employee was committing a fraud. Furthermore, the evidence supported the explanation of "good-willing." Therefore, there was no support for the charge that the grievant knew or had reason to know a fraud was occurring.

(4) As the record does not show the grievant was aware of the fraudulent circumstances under which the pumps were obtained, he could not be held responsible for not reporting it.

(5) Although the grievant admittedly was aware of questionable transactions and failed to follow established work procedures, the grievant's actions did not amount to intentional dishonesty or gross misconduct, particularly because there is no evidence that he benefited from the scheme. While his action did amount to conduct unbecoming an employee, that did not rise to the level of termination.

(Binding Grievance Arbitration)

- **Contract**
- **Accommodation**

County of Solano and Solano Association of Government Employees, SEIU Loc. 1280. (10-05; 18 pp.) *Representatives:* Vincent Harrington, Esq. (Weinberg, Roger & Rosenfeld) for the union; Azniv Darbinian, Esq., for the county. *Arbitrator:* Katherine J. Thomson.

Issue: Did the county violate the agreement by terminating the grievant for medical reasons?

Union's position: (1) In May 2003, the grievant, a legal procedures clerk, aggravated a workers' compensation knee injury from previous employment. The grievant was on and off work over a period of months, until the county refused to accommodate her restrictions. The county never let the grievant return to work, failed to conduct an interactive discussion with her to determine if she could perform her work with accommodation, and failed to place her in a position for which she was qualified.

(2) The grievant initially was off work for only two days in May, returning until July 1, when her doctor put her off duty for two months because of the injury. The grievant returned to work in September 2003, but after three days at work her knee swelled. Her doctor then placed her on half-time for four weeks, with no other restrictions.

(3) On September 15, after accommodating her for over a week, the county informed the grievant that it would not accommodate her modified hours, and it forced her to leave work immediately. The county gave no reason why it could no longer accommodate her; there had been no change in her status since returning to work, and the grievant had not asked for additional accommodation or complained about pain or discomfort. The county did not provide support for its argument that the grievant was a danger to herself and others.

(4) While she was off work, the grievant met with the county's Americans With Disabilities Act representative and made a reasonable accommodation request for an adjustable chair and two footrests. She had requested the footrests in June 2001, but had received only one. Nothing came of the last request because the county never allowed her to return to work.

(5) When she tried to return to work in October with a doctor's release, the grievant was informed by her supervisor that she was no longer in her clerk position. There was no explanation and no reason for the county to remove her from the position.

(6) When the county finally completed a job analysis in October and sent it to the grievant's doctor to evaluate, it was for the wrong position. The grievant testified the job analysis reflected the duties of a previous clerk assignment she had held. Her current position did not involve as much pulling and delivering of files as her previous position, so the county should not have relied on that job analysis.

(7) However, since the county took the doctor's restriction of no pulling and delivering files to mean she could not perform the essential functions of the job, it was required to have an interactive discussion with the grievant to determine if she could perform her position with accommodation. The meeting between the grievant and the county

on November 21 did not constitute an interactive discussion. The district refused to explain why the grievant had been removed from her position, saying only that she could no longer work in that department because of her restrictions. The county did not ask the grievant if she could perform the position with accommodation, and there was no discussion about whether she could be accommodated. The county merely informed the grievant that it would look at other positions for her.

(8) The county failed to conduct a sufficient job search for the grievant; its actions were limited to mailing the grievant one list of vacant positions in late December. The grievant applied for the office assistant positions for which she was qualified, but the county never followed through. As a disabled individual, the grievant should have been placed in a vacant position ahead of other applicants. Instead, just a week after she submitted her application, and without her doctor's input, the county notified the grievant that it could not accommodate her. Then, on January 26, 2004, without conducting any further search, the county terminated the grievant.

(9) The parties' agreement incorporates state and federal law, thereby requiring the county to comply with the disability laws. The county clearly failed to do so. The grievant was a qualified individual with a disability, since her major life activities of extended walking and standing were limited. Therefore, the county was required to accommodate her or establish that the grievant could not perform, with or without accommodation, the essential duties of positions for which she was qualified. The county failed to establish that she could not perform a job and failed to provide reasonable accommodation. It already had shown it could accommodate her in her position by allowing her to work part-time. Even if it could not accommodate her there, it could have reassigned her to one of the vacant positions for which she was qualified. The county failed to demonstrate why she would not be qualified for, or could not be accommodated in, one of those positions.

(10) The parties' agreement also prohibits the county from terminating an employee for medical reasons unless it is legally privileged to do so. This termination was arbitrary and clearly without legal justification, violating this section of the agreement.

(11) The county's claim that the grievant agreed to be terminated is false and controverted by the filing of this grievance.

County's position: (1) The county did not violate state or federal discrimination laws or the parties' agreement. It tried to assist the grievant in performing her position; once it realized the grievant could not perform in that position, even with accommodation, it tried to locate another position she could perform with or without accommodation.

(2) The county accommodated the grievant after her injury until it became concerned that she posed a threat to her safety and that of others, when several employees witnessed the grievant walking slowly down the hallway using the wall for support. Since it was not proven that she could work safely, she was put off work.

(3) The grievant and her doctor concurred that the grievant could not perform her position. Once the grievant's doctor reviewed the job analysis and determined that she could not return to her position, the county engaged in the interactive process with the grievant. There was no appropriate accommodation the county could offer the grievant in her current position. Her doctor's restrictions completely precluded her from pulling and delivering files, and as she was the only clerk in the particular position, there was no one else to whom the work could be assigned. Furthermore, the employer has no obligation to reallocate the essential functions of a position to accommodate an individual.

(4) Even if the grievant could perform the essential functions, the Labor Code requires that injured employees be placed in positions that are expected to last 12 months, and there was no guarantee of sufficient funding for this position.

(5) The county sought other employment for the grievant when it was determined that she could not return to her job. Unfortunately, the only position the grievant qualified for and was interested in did not meet her restrictions and was later eliminated.

(6) The Department of Fair Employment and Housing determined the grievant's complaint based on the same allegation had no merit.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) The district failed to provide sufficient justification for sending the grievant home on September 15. She was adequately performing her job, had not complained about pain, was not questioned to determine if she was in pain, and was working within the restrictions prescribed by her physician. The county provided no reason it could not continue to accommodate the temporary schedule, nor did it indicate that restrictions played into its decision. It was not until November 12 that the county obtained any medical information that would indicate the grievant might be precluded from performing her job.

(2) There is no dispute that the grievant is restricted from pulling and delivering files. The county has determined this is a disability and argues that she could not perform the essential functions of the position.

(3) In order to establish that the function of pulling and delivering files was an essential function of the job under the FEHA, the county must demonstrate that it is the reason the job exists, that there are a limited number of employees available among whom the function can be distributed, or that it is a highly specialized function. It cannot be argued that the function is the reason the job exists, since the job description scarcely mentions it, and it clearly is not a highly specialized function. The county argues that since the work is performed frequently it cannot be assigned to other employees. While the grievant said the job analysis did not describe her current position, she did not provide an alternate number for the 20 percent of the workday the county claimed was spent pulling and delivering files. While the evidence is somewhat lacking, it appears that pulling and delivering files may not have been a marginal function.

(4) Even if it were an essential function of the position, the county could not just put the grievant off work. It was required to have an interactive discussion to determine if she could perform the position with accommodation. That would have involved soliciting suggestions from the doctor and employee, which the county failed to do. While there is conflicting testimony about what occurred at the November 21 meeting, no one suggested that accommodations of any kind had been discussed. Therefore, it did not constitute a meaningful interactive process.

(5) The county also failed to provide evidence that it fulfilled its obligation to determine if the grievant could be reassigned to a vacant position. The county did not provide any evidence to indicate that the grievant could not perform the available office assistant position, which remained open long after the grievant was terminated. The county did not try to determine if the grievant was interested in, or qualified for, any other positions. Just days after the grievant's office assistant application was certified, the county notified her that it could not accommodate her, which indicates the county was not serious about the process.

(6) While the company was justified in putting the grievant off work after it received the medical information in November, it was not justified in terminating her. The company is ordered to reinstate the grievant, and if her medical restrictions preclude her from performing the essential functions of the job, the county must engage in the interactive process required by the ADA.

(Binding Grievance Arbitration)

• Discipline

Friedman and Trustees of the University of California, San Francisco. (12-05; 15 pp.) *Representatives:* Gregg M. Adam, Esq. (Carroll, Burdick & McDonough) for the complainant; Jesse S. Drucker, Esq., for the university. *Hearing Officer:* William E. Riker, AAA Case No. 74 390 L 00601 05.

Issue: Was the complainant disciplined according to personnel policies?

University's position: (1) On August 4, 2004, the complainant, the commander of the third watch, was notified by dispatch at approximately 3 p.m. that employee assistance was requesting a welfare check on an employee who had not been at work for 10 days and was possibly suicidal. He then assigned the matter to an officer but failed to notify the officer that the employee was potentially suicidal. The officer did not learn of the urgency of the situation until dispatch later informed him of the suicide concerns and that the employee may have possessed a firearm. Fortunately, the officer responded immediately after learning that information and was able to take the employee safely into custody, place the employee under psychiatric observation, and recover the firearm.

(2) The complainant is responsible for giving direction to the officers in his command. As a result of his mishandling of the situation, an hour and 42 minutes elapsed from the time dispatch received the call to the time officers arrived at the employee's residence.

(3) Had the complainant acted properly, he would have given different orders to the officer. The complainant made a mistake that resulted in the late response to an urgent, high profile call. This resulted in criticism of the university's police department.

(4) The district properly disciplined the complainant with loss of a day's pay for failing to properly assess the urgency of the telephone call and not assigning an officer to immediately respond.

Union's position: (1) The complainant conceded he made a mistake when he failed to follow up with the dispatcher. However, the discipline was unjust and did not comport with due process requirements.

(2) The complainant was never informed that the employee had a firearm, and the mention of suicide was missed because the complainant was in a briefing with the police chief when dispatch called.

(3) The complainant is not completely responsible for the delay in response, but is the only employee being disciplined. The second watch commander had been notified of the call by dispatch and "brushed it off" to the third watch, even though he was given all the details, including the gun, had at least three officers available, and was aware that the third watch was currently in briefing. Furthermore, the second watch commander delayed release of the responding officer by keeping him to discuss matters unrelated to the call.

(4) The university failed to follow the discipline procedure. This was the complainant's first offense, and he should have received a written warning. In order to justify this level of discipline, the university issued him a written warning for his failure to attend a mandatory meeting that occurred well after the incident.

Arbitrator's decision: The appeal was denied.

Arbitrator's reasoning: (1) The complainant should have listened more clearly to dispatch, prioritized the call appropriately, and passed the critical information on to the officer so he could handle the call appropriately. If the complainant had assigned the call according to operating procedure, it would have been promptly handled.

(2) While the evidence shows that the second watch commander also was involved in the delayed response, he left the employ of the university shortly after the incident. Therefore, failure to discipline him cannot mitigate the discipline in this case nor excuse the complainant's actions.

(3) The complainant has been in law enforcement for more than 35 years and should be aware of what is expected, including the need for rapid response in urgent situations. The chief's briefing cannot excuse the complainant's action because the meeting lasted only a few minutes after the call from dispatch. The recorded message shows the dispatcher clearly communicated the urgency of the matter.

(4) While progressive discipline is designed to increase in severity as the penalty for subsequent actions, it is not so rigid as to prohibit the employer from implementing a harsher penalty when the situation requires it, such as here. Given the seriousness of this offense and the complainant's experience, the one-day loss of pay was the appropriate penalty.

(Administrative Appeal)

- **Contract**
- **Pay Rate**

United Educators of San Francisco and San Francisco Unified School Dist. (12-12-05; 9 pp.) *Representatives:* Stewart Weinberg, Esq., (Weinberg, Roger & Rosenfeld) for the union; Namita S. Brown, Esq., (Lozano Smith) for the district. *Arbitrator:* C. Allen Pool (AAA Case No. 74 390 00281 05 LYMC).

Issue: Was the grievant placed at the appropriate salary steps for the 2002-03 and 2003-04 school years?

Union's position: (1) The grievant had been a licensed nurse since 1974. Prior to accepting a job with the district, she worked for 20 years as a nurse at Seton Medical Center, 15 of those years as a senior administrator. In 2002, the grievant was looking for a career change and accepted a position as school nurse with the district. The district failed to appropriately credit her service when she was hired. Instead of placing her at step 12 on the salary schedule as was appropriate given her 20 years of experience, they placed her at step 8.

(2) The grievant did not become aware of this mistake until she contacted the union in January 2004, after seeing a note regarding nurses' salaries in the union newsletter. When she learned she should have been placed at step 12, she contacted the district on several occasions to correct the mistake. After much effort on her part and the union's, the district finally placed her at the appropriate step effective the beginning of the 2004-05 school year, but it refused to make her change retroactive.

(3) The grievant is entitled to back pay for the 2002-03 and 2003-04 years.

District's position: (1) The district correctly placed the grievant at step 8 when she was hired in August 2002. It is the employee's responsibility to provide documentation to receive credit for service or education. The grievant was given all the paperwork she needed when she was hired and was responsible for bringing the district the documentation it needed to place her at the appropriate step.

(2) The contract clearly states that transcripts and other documentation of credit must be received no later than December 1 of the year the change of classification is to be made. As the grievant did not provide the district with documentation of her employment history as a nurse until July 2004, she is entitled only to have her pay changed going forward.

(3) Not only the language of the agreement, but also the district's past practice bar the grievant from being entitled to back pay.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) The agreement does not bar backpay, and past practice is not the appropriate standard in this case.

(2) The district gave false information both during the grievant's interview and when she contacted them again a year-and-a-half later about her pay step. The grievant accepted in good faith what the district told her. As she had spent her entire working career in a private hospital, she had no idea how to deal with a public school district.

(3) While the district contends it has no obligation to ask for the appropriate documentation, it cannot consciously avoid its responsibility. The district became aware of her extensive nursing experience during the interview and then verified her employment history with her previous employer. Instead of fairly notifying the grievant that she was entitled to year-for-year credit for her service as a nurse, she was given a confusing packet of material that was suited for newly hired teachers. Nowhere did it reference newly hired nurses. The grievant had no way of knowing that nurses and teachers were paid on the same salary schedule. If the district had modified the packet, replacing the word teachers with nurses, there would be no grievance because the grievant would have had the information she needed.

(4) The duty of good faith and fair dealing is the appropriate standard. The district failed to act in good faith toward the grievant or treat her fairly. The district must make the grievant whole for the lost income.

(Binding Grievance Arbitration)

Resources

Ushering in a New EERA

Are you up-to-date with the nuances of EERA? CPER has just published the 7th edition of the *Pocket Guide to the Educational Employment Relations Act*. This edition is packed with five years of new legal developments and brings readers current with reinstatement of the doctrine of equitable tolling, PERB's return to its pre-*Lake Elsinore* arbitration deferral policy, clarification of the rules regarding the establishment of a prima facie case, and pertinent case law.

This concise Pocket Guide contains summaries of all the major decisions of the Public Employment Relations Board and the courts that interpret and apply the law. Designed for day-to-day use by labor and management in California's public schools and community colleges, the Guide also includes the history and complete text of the act, and a summary of PERB regulations. Arranged by topic, the EERA Pocket Guide covers arbitration of grievances, discrimination, scope of bargaining, protected activity, strikes and job actions, unilateral action, and more.

Pocket Guide to the Educational Employment Relations Act, 7th edition, By Bonnie G. Bogue, Carol Vendrillo, David J. Bowen and Eric Borgerson (2006) 152 pp. California Public Employee Relations, http://cper.berkeley.edu/. Softcover, $15.

Workers' Right Rediscovered

Charles Morris, a renowned labor law scholar and preeminent authority on the National Labor Relations Act, uncovers a long-forgotten feature of that act and offers a new approach to the revitalization of the American labor movement and the institution of collective bargaining. He demonstrates that in private-sector nonunion workplaces, the act guarantees employees a viable right to engage in collective bargaining through a minority union on a members-only basis.

Morris' underlying thesis is based on a meticulous analysis of statutory and decisional law, and exhaustive historical research. Morris recounts the little-known history of union organizing and bargaining through members-only minority unions that prevailed widely both before and after passage of the 1935 Wagner Act. He explains how vintage language in the statute continues to protect minority-union bargaining today and how those rights are also guaranteed under the First Amendment and by international law to which the United States is a committed party. In addition, the book supplies detailed guidelines illustrating how this rediscovered workers' right could stimulate the development of new procedures for union organizing and bargaining, and how management likely will respond to such efforts.

The book, which is accessible to general readers as well as specialists, is a tool for labor union officials and organizers, human resource professionals in management, attorneys practicing in the field of labor and employment law, teachers and students of labor law and industrial relations, and concerned workers and managers who desire to understand the law that governs their relationship.

The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace, by Charles J. Morris (2004) 328 pp. Cornell University Press, http://www.cornellpress.cornell.edu/. Hardcover, $34.

Toward Further Discussion of Workers' Rights

Another new book examines the current state of workers' freedom to form unions and bargain collectively. The Introduction states, "Taken together, the essays that make up this volume demonstrate that, on the 70th anniversary of the signing of the National Labor Relations Act, on July 5, 1935, our system of laws designed to facilitate worker self-organization and access to collective bargaining is badly broken….[The articles] begin to add up the costs to society of the suppression of our right to a voice at work, and they point toward what it will take to revive worker choice and worker voice. In the end, it will doubtless require major statutory reform to allow workers to organize relatively freely again."

The editors voice their hope that these essays by an influential group of researchers will contribute to the discussion of workers' rights in the U.S., that the articles will serve as catalysts to a significant new wave of research on how workers win collective bargaining and the role it can play in creating a society of workplace democracy, social justice, and broadly shared prosperity. Among the papers are "An Introduction to the Current State of Workers' Rights," "A Logical Extreme: Proposing Human Rights as the Foundation for Workers' Rights in the United States," "Collective Bargaining Rights in the Public Sector: Promises and Reality," "Significant Victories: An Analysis of Union First Contracts," "Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements," "Supreme Court Supervisory Status Decisions: The Impact on the Organizing of Nurses," "Law and Collective Bargaining Power: An Experiment to Test Labor Law Reform Proposals," and "No More Business as Usual: Using Pension Activism to Protect Workers' Rights."

Justice on the Job: Perspectives on the Erosion of Collective Bargaining in the United States, edited by Richard N. Block, Sheldon Friedman, Michelle Kaminski, Andy Leven (2006) 355 pp. W.E. Upjohn Institute, http://www.upjohninst.org/. Hardcover, $54; softcover $22.

Just the Facts

Have you ever needed to know the grand total of all the revenue in a particular school district? How much the district spends on the direct instruction of students? Its average teacher's salary compared to the statewide average?

Ed-Data recently debuted a new, easy-to-understand set of reports for all California school districts and county offices of education. Beginning with the 2003-04 school year, these reports tap into the full financial reporting capability of California's Standardized Account Code Structure.

This first release provides new perspectives on 2003-04 data (2004-05 will be released soon). The financial information long available on Ed-Data has been expanded and enhanced to reflect restricted and unrestricted revenues and expenditures. The new All Funds tab goes beyond the General Fund to give a full picture of each district, including capital projects. Another tab focuses on General Fund expenditures by activity, such as instruction or specific pupil services. To help interpret the data, individual items have explanatory links to the California School Accounting Manual.

A tab to the new, robust "Compare District Finances" option allows comparison of selected districts based on a number of criteria, such as revenue limits and beginning teacher salaries. The site also includes an updated comparison of California to other states, a glossary with quick access to helpful definitions, and direct links to many California Department of Education web pages and other interesting sites about K-12 education.

Ed-Data (Education Data Partnership): Fiscal, Demographic and Performance Data on California's K-12 Schools, http://www.ed-data.k12.ca.us/.

The Latest Views of Arbitrators

This second edition on arbitration from the Bureau of National Affairs provides updates on ethics in arbitration, application of external law, and drug abuse and violence in the workplace, along with a discussion of the issues surrounding use of the parol evidence rule. Citations to court and arbitration decisions have been updated, as have references to secondary authorities. A comprehensive index has been added for easy reference.

As in the first edition, BNA's volume gives a concise overview of the leading arbitral principles developed over 50 years by the National Academy of Arbitrators. In this collection by members of the NAA, 16 master arbitrators explain the profession's most widely accepted arbitral principles. The book's format helps arbitrators discern the key elements of each topic, compare divergent opinions, and locate appropriate references from relevant arbitration awards and treatises.

The Common Law of the Workplace: The Views of Arbitrators, 2nd edition, edited by Theodore J. St. Antoine (2005) 454 pp. BNA Books, http://www.bna.com/bnabooks/. Hardcover, $125.

A Look at Race and the Labor Movement

Maneuvering across a wide span of time and a broad array of issues, Paul Moreno brings clarity to the question of the importance of race in unions. He weaves together labor policy and African-American history into a cogent, persuasive revisionist study. In this radical reassessment of union/black/state relations in the U.S. from the nineteenth century to the present, Moreno offers a reinterpretation — a "new history" — of the role of race and racial discrimination.

Breaking with historians' seemingly deadlocked debate over the importance of race in labor organization, Moreno applies insights of the law-and-economics movement to formulate a compelling and simple labor-race theorem: White unionists found that race was a convenient basis on which to do what unions do — control the labor supply. Not racism, pure and simple, but rather "the economics of discrimination" explains historic black absence and under-representation in unions. Moreno's reexamination stretches from the antebellum period to the present, integrating relevant biographical details of principal figures such as Frederick Douglass and Samuel Gompers, Isaac Myers and Booker T. Washington, and W. E. B. Du Bois and A. Philip Randolph.

Black Americans and Organized Labor: A New History, by Paul D. Moreno (2006) 360 pp. Louisiana State University Press, http://www.lsu.edu/lsupress/. Hardcover, $49.95.

Teach Your Children Well

If new teachers in California continue to leave their jobs at the rate they did in the 1990s, about one-fourth of new hires will be replacing other recently hired teachers who have left public school employment, according to a new study released by the Public Policy Institute of California, *Retention of New Teachers in California*

There are at least two good reasons why this matters, says PPIC program director Deborah Reed. First, numerous studies show that experienced teachers are more effective at raising student test scores than inexperienced teachers. Second, new teachers are less likely to be fully credentialed. In California, adherence to the federal No Child Left Behind Act requires that teachers either be fully credentialed or participate in an internship program — otherwise schools risk losing their federal funding.

The study tracks California teachers during their first seven years of employment, finding that 13 percent of new hires leave within their first or second year and 22 percent leave by the end of their fourth year. The numbers are even higher among teachers of grades seven through twelve — 27 percent leave by year four. For those who teach kindergarten through sixth grade, the attrition rate is only slightly lower, at 20 percent.

This high level of turnover exacerbates other education challenges for California, including the state's shortage of credentialed teachers. The deficiency is particularly troubling because noncredentialed teachers are heavily concentrated in high poverty school districts where test scores are relatively low, precisely where credentialed teachers are needed the most. The report finds that professional development programs are a successful, cost-effective way of retaining new teachers — even more so than higher salaries. The authors stress, however, that compensation remains an important factor.

Retention of New Teachers in California, by Deborah Reed, Kim Ruben, and Elisa Barbout. Public Policy Institute of California. Free download at http://www.ppic.org/main/home.asp/.

Among several other PPIC studies that can be downloaded are ***Statewide Survey: Californians and Their Government*** (March 2006) and ***Time to Work: Commuting Times and Modes of Transportation of California Workers***. The transportation study provides a detailed look at commuting behaviors and statistics in the state's major regions and counties. Following long-term trends in commute times and transportation modes, the report analyzes the impact of the decentralization of jobs and housing on commuting choices.

Political Philosophy and the American Labor Movement

Offering yet another facet of the political history of the labor movement, Clayton Sinyai examines the relationship between labor activism and the American democratic tradition. Sinyai shows how America's working people and union leaders debated the first questions of democratic theory — and, in the process, educated themselves about the rights and responsibilities of democratic citizenship.

In tracing the course of the American labor movement from the founding of the Knights of Labor in the 1870s to the 1968 presidential election and its aftermath, Sinyai explores the political dimensions of collective bargaining, the structures of unions and businesses, and labor's relationships with political parties and other social movements. The book analyzes how labor activists wrestled with fundamental aspects of political philosophy and the development of American democracy, including majority rule versus individual liberty, the rule of law, and the qualifications required of citizens of a democracy. Offering a balanced assessment of mainstream leaders of American labor, from Samuel Gompers to George Meany, and their radical critics, including the Socialists and the Industrial Workers of the World, the author provides an unusual perspective on American labor history.

Schools of Democracy: A Political History of the American Labor Movement, by Clayton Sinyai (2006) 304 pp. Cornell University Press, http://www.cornellpress.cornell.edu/. Hardcover, $55; softcover, $22.50.

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, TEERA, the Trial Court Act, and the Court Interpreter 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

Board vacates previous decision finding prima facie case of unfair practice: State of California (Dept. of Corrections).

(*Zanchi v. State of California [Dept. of Corrections]*, No. 1826-S, 3-3-06; 8 pp. + 17 pp. ALJ dec. By Chairperson Duncan, with Member McKeag; Member Neuwald concurring and dissenting.)

Holding: The charging party failed to demonstrate a prima facie case because the filing of a fraudulent reimbursement, not the filing of a grievance, prompted the investigation.

Case summary: The charging party was a corrections officer for the Department of Corrections. In 2001, she accepted an assignment as acting sergeant and, per department policy, had to forfeit a vacation scheduled during the term of the out-of-class assignment. As a result, the charging party was unable to use her nonrefundable airlines tickets. She filed a grievance seeking reimbursement of the airline expense. The department denied the grievance, asserting that it had no financial obligation to compensate the charging party because she agreed to the assignment.

Thereafter, the department learned from a coworker that the charging party's reimbursement request was fraudulent, and it initiated an investigation. Although the department found the charging party had attempted to defraud it, no personnel action was taken.

The charging party filed an unfair practice charge alleging the department violated the Dills Act by retaliating against her for filing a grievance. She alleged the department began its investigation, and denied her an extension of her temporary assignment and a promotion, as a result of her protected activity.

The board agent dismissed the charge for failure to demonstrate a nexus between the protected activity and the adverse action. In *State of California (Department of Corrections)* (2003) No. 1579-S, l64 CPER 105, the board reversed the dismissal and issued a complaint. The case proceeded to a hearing before an ALJ.

The ALJ found that the charging party established a prima facie case. However, the ALJ held that since the charging party did not meet the burden of disproving her misconduct and since the department demonstrated that its investigation was the result of the unprotected contents of the grievance, it was not an unlawful retaliation. Furthermore the ALJ found no evidence of unlawful animus in denying the charging party opportunities for promotion.

On exceptions filed by the charging party, the board affirmed the ALJ's dismissal of the complaint, but based on

---

Reprint Service

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

(Note: PERB headquarters in Sacramento will provide copies of decisions, currently at $5 a case, plus $3 shipping and handling. Also, PERB decisions are collected in the government documents section of all state depository libraries, including the libraries of major universities. Most county law libraries and major law school libraries also receive copies. The decisions also are available on PERB's website at http://www.perb.ca.gov.)

the conclusion the charging party failed to establish a prima facie case. The board explained that while filing a grievance is a protected activity, "making a fraudulent claim is not." Since the charging party was investigated because of the information provided by a coworker and not because she filed a grievance, the investigation was not an adverse action tied to the grievance. The board agreed with the ALJ that there was no unlawful animus with regard to the charging party's promotion opportunities.

The board vacated *Corrections* and dismissed the charge without leave to amend.

Member Neuwald concurred with the majority that the charging party failed to demonstrate an unfair practice occurred. However, she disagreed with the decision to vacate *Corrections*. In her view, overturning the board's prior decision would not be instructive and would leave the public sector community uncertain as to what unique or novel distinction the board wanted to elucidate.

Charge was untimely and charging party no longer had standing: Dept of Transportation.

(*Kunkel v. State of California [Dept. of Transportation]*, No. 1835-S, 4-10-06; 2 pp. + 6 pp. R.D. dec. By Chairperson Duncan, with Members McKeag and Neuwald.)

Holding: The charge was dismissed because it was untimely and, as the charging party was no longer a state employee, he no longer had standing to file an unfair practice charge under the Dills Act.

Case summary: The charging party was an employee of the Department of Transportation until he was terminated in December 2003. Prior to his termination, the charging party was involved in a variety of union and legislative activities. He contends that since the termination, the state has been monitoring his home telephone and computer.

On November 15, 2005, the charging party filed an unfair practice charge alleging that the department had unjustly terminated his employment based on his protected activity and that it continued to harass him by telephone and over the Internet.

The regional director noted that the charging party failed to provide enough information to substantiate his protected activity. Furthermore, the charge itself was untimely. And lastly, as the charging party was no longer a state employee, he had no standing to file an unfair practice charge under the Dills Act.

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

EERA Cases

Unfair Practice Rulings

Changing ratio of bargaining-unit to non-bargaining-unit employees does not constitute violation: LAUSD.

(*Los Angeles School Police Assn. v. Los Angeles Unified School Dist.*, No. 1827, 3-8-06; 2 pp. + 8 pp. R.A. dec. By Member McKeag, with Chairperson Duncan and Member Neuwald.)

Holding: A change in the ratio between bargaining unit and non-bargaining unit employees performing similar work does not constitute a unilateral change or transfer of bargaining unit work.

Case summary: The union filed an unfair practice charge alleging the district violated EERA by transferring bargaining unit work out of the unit. The charge alleged the district unilaterally changed its policy by using fewer school police officers and more county sheriffs at district football games. The union stated that while sheriffs may have worked to provide security in the past, they were not under the direction of the district and the number of sheriffs never affected the number of school police officers used. The union was unable to provide specific information about whether sheriffs had been hired or paid in the past and how their pay and assignments currently are handled.

The R.A. noted that the school police officers and sheriffs have had overlapping security duties at football games and there is no discernable difference between the tasks performed by each group. The R.A. stated that the facts showed only a change in ratio between the groups, not that the police had ceased to perform certain duties or had been replaced. Therefore, the union failed to support a claim of unilateral change. In support of this conclusion, the R.A. cited *Eureka School Dist.* (1985) No. 481, 64X CPER 19, in which the board held that merely decreasing the quantity of work performed by bargaining unit employees while increasing the quantity of work performed by non-bargaining unit employees did not violate the duty to negotiate in good faith.

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

Charge dismissed for failure to demonstrate protected activity: Los Banos USD.

(*Casper v. Los Banos Unified School Dist.*, No. 1828, 3-9-06; 2 pp. + 6 pp. B.A. dec. By Member Neuwald, with Chairperson Duncan and Member Shek.)

Holding: The charge was dismissed for failure to state a prima facie case because the charging party failed to provide any evidence of protected activity.

Case summary: The charging party was a teacher in the district until summer 2004. There was a disagreement over money owed to the charging party, and the district provided the charging party with a release and settlement of his claims. The charging party filed an unfair practice charge alleging the district violated EERA by refusing to pay him back wages owed unless he waived his grievance rights.

The board agent noted that while the charge was timely, it failed to establish what protected right the charging party had engaged in and therefore failed to establish that the district discriminated against him based on his protected activity.

The charging party presented new allegations and evidence on appeal. The board did not consider these because the charging party failed to demonstrate good cause for first raising these matters on appeal.

The board adopted the board agent's decision as that of the board itself and dismissed the charge without leave to amend.

Religious objector required to pay equivalent of temporary dues assessment to charity: Arcadia Teachers Assn.

(*Heggem v. Arcadia Teachers Assn.*, No. 1833, 4-10-06; 2 pp. + 7 pp. R.D. dec. By Chairperson Duncan, with Members McKeag and Neuwald.)

Holding: The charge was dismissed because the union could require the charging party, a religious objector, to pay the equivalent of a temporary dues assessment to one of its designated charities.

Case summary: The charging party, a teacher in the Arcadia School District, had sincere religious objections to joining or financially supporting the union. Since the settlement of a lawsuit in 2003, she was required to pay a sum equivalent to union dues to one of the charities listed in the parties' collective bargaining agreement. In 2005, union delegates voted to approve a temporary dues increase in order to counter propositions scheduled for the November 2005 election. The charging party was told she would have to pay the increase for at least three years. She filed an unfair practice charge alleging the union discriminated against her by requiring her to make a charity-substitute payment in an amount equal to the dues and assessment paid by union members.

The regional attorney noted that religious objectors and agency fee payers/objectors are not the same. Under Gov. Code Sec. 3546, religious objectors are not required to join the union but are required to pay an amount equal to service fees to one of three charitable funds designated by the union. The R.A. relied on *Madsen v. Associated Chino Teachers* (C.D. Cal.2004) 317 F.Supp.2d 1175, 167 CPER 34, in which a federal court found that requiring religious objectors to make charitable contributions does not violate Title VII, the Establishment Clause, or the Equal Protection Clause. Therefore, the R.A. found the charge failed to state a prima facie case.

The board upheld the R.A.'s dismissal and adopted it as a decision of the board itself.

Agency fee payer was given opportunity to be heard: Kern High Faculty Assn.

(*Masskant v. Kern High Faculty Assn., CTA/NEA,* No. 1834, 4-10-06; 2 pp. + 8 pp. R.A. dec. By Chairperson Duncan, with Members McKeag and Neuwald.)

Holding: The charge was dismissed because the union had provided the agency fee payer with information and an opportunity to be heard, and because he was not entitled to vote.

Case summary: The charging party is an employee of the Kern High School District and a nonmember agency fee payer. Prior to becoming a fee payer, the charging party had an opportunity to complete a union survey regarding negotiations. On August 3, 2003, he received a letter from the union giving him the option of paying the agency fees in full or through monthly paycheck deductions; he paid in full. Thereafter, he discovered the union was intentionally not sending him bargaining updates. The updates were posted on the union's website and placed in a binder in the staff lounge, which the charging party could access. In October 2003, the union conducted question and answer sessions and a ratification vote on the agreement. Members were notified of the meeting through flyers placed in their mailbox, and the information was posted on the union's website.

On March 12, 2004, the charging party filed an unfair practice charge alleging the union violated its duty of fair representation under EERA by withholding non-chargeable fees, withholding information on collective bargaining, excluding non-members from providing input and voting on the collective bargaining agreement, and improperly categorizing non-chargeable expenditures.

The regional attorney found that the charging party had become aware of the fees being withheld more than six months prior to filing the charge and therefore the allegation was untimely. Since agency fee calculations currently were before an arbitrator, that issue was placed in abeyance. The R.A. found that negotiating information was available to the charging party and he had an opportunity to be heard, both as a survey participant and at the question and answer meeting. Therefore, he was not denied notice or an opportunity to express his viewpoint. Furthermore, as a nonmember, he was not entitled to vote in the ratification election. The R.A. found the charging party failed to state a prima facie case.

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

Duty of Fair Representation Rulings

Late filing because of PERB error excused: SEIU Loc. 99.

(*Jones v. SEIU Loc. 99,* No. Ad-352, 3-10-06; 2 pp. By Chairperson Duncan, with Members Shek and Neuwald.)

Holding: The board accepted the late-filed exceptions to an ALJ's proposed decision because the charging party had not been timely served by PERB.

Case summary: The charging party filed an unfair practice charge against SEIU Local 99, alleging it violated its duty of fair representation. Thereafter, the charging party contacted PERB to inquire why he had not been served the ALJ's proposed decision. The board subsequently served the charging party and, that same day, the charging party filed a motion requesting the board accept his late-filed exceptions to the ALJ's proposed decision.

The board found good cause to accept the charging party's late-filed exceptions since the necessity for the late filing was cause by PERB's error.

HEERA Cases

Unfair Practice Rulings

Union satisfied its obligation to disclose documents: CSU Employees Assn.

(*Sarca v. California State University Employees Union, SEIU Loc. 2579, CSEA,* No. Ad-351-H, 3-2-06; 23 pp. + 3 pp. B.A. dec. By Member McKeag, with Members Shek and Neuwald.)

Holding: The complainant's petition to compel production of financial documents was dismissed because the union had produced the required documents.

Case summary: The complainant, a bargaining unit member, twice requested the union provide him with a financial status report for 2004. Dissatisfied with the union's response, the charging party filed a petition to compel the production of those documents. The union then provided the complainant with its notice to fair share fee payers and numerous copies CSUEU's 2004 financial statements, CSEA's 2004-05 budget, and independent audits of CSUEU, CSEA, and other affiliates. Based on the production of documents, the board agent determined that the union had complied with HEERA, and he dismissed the complaint.

The complainant appealed the dismissal, alleging the fee calculation could not be evaluated without a financial report. He also asserted that the union had an obligation to provide him with the documents and that a fee calculation based exclusively on expenditures violates Supreme Court rulings.

The board noted that the petition to compel the disclosure of financial documents is not an unfair practice charge. Once the statutory disclosure requirement is met, the issue is resolved. The board found the union's document production was sufficient and determined the petition was properly dismissed by the B.A. The board determined that the documents the union provided, when taken together, satisfied the adequate financial record requirement under Gov. Code Sec. 3587. The board declined to address the complainant's assertion that the union had an obligation to provide him with financial reports pursuant to Sec. 3587, saying it would not issue an advisory opinion.

The board also found that the complainant's appeal regarding the fee calculations was unrelated to his claim concerning the production of documents. Moreover, the board noted, petitions to compel the release of documents are not the appropriate vehicle to challenge agency fee calculations. PERB Reg. 32994 governs challenges to agency fee calculations, and the record included no evidence that the complainant exhausted that appeal procedure.

Board lacks authority to modify regulations, orders issuance of complaint: UPTE.

(*Hermanson et al. v. UPTE, CWA Loc. 9119*, No. 1829-H, 3-10-06; 6 pp. By Chairperson Duncan, with Member McKeag; Member Shek concurring.)

Holding: The charges were remanded to the general counsel for issuance of a complaint because the board agent did not have the authority to modify PERB regulations concerning the time period in which an agency hearing may be requested.

Case summary: The charging parties filed unfair practice charges alleging that the union violated HEERA and PERB regulations by failing to timely request an impartial hearing regarding the calculation of agency fees.

The board agent determined that the union could allow extra time for fee payers to file their objections before the 45-day time period to request a hearing would begin to run. The B.A., therefore, found no violation and dismissed the charging parties' charges.

The charging parties appealed the dismissal.

Under PERB Reg. 32994(b), agency fee payers have 30 days to file an objection to the agency fee calculation after the notices are sent; the exclusive representative then has 45 days to request an impartial hearing on the fee calculation. The board observed that the regulation clearly states the time line for the objection period and that the B.A. gave no authority for granting an extension. The board stated that in *Dyna-Med, Inc. v. FEHC* (1987) 43 Cal.3d 1379, 75 CPER 68, the California Supreme Court held an administrative agency may not create a remedy the legislature has withheld. The board observed that neither HEERA nor PERB regulations give either express or implied authority for the board, its agents, or the parties to decide that an exclusive representative does not have to follow the regulation as written. Therefore, the B.A. had exceeded the board's authority in modifying the requirements. The board found that the charging parties had met their burden in presenting a prima facie case, and it remanded the charge to the general counsel for issuance of a complaint.

Member Shek filed a concurring opinion in which she stated that the B.A.'s dismissal was in error. She also noted that the union asserted in its response to the charge that the charge was untimely. Shek stated that since the B.A. did not address that defense in the dismissal, she would refer it to the general counsel for further investigation.

Allegations support issuance of complaint for failure to request hearing: UPTE.

(*Trout v. UPTE, CWA Loc. 9119,* No. 1830-H, 3-10-06; 5 pp. By Chairperson Duncan, with Member McKeag; Member Shek concurring.)

Holding: The charge was remanded to the general counsel for issuance of a complaint because the information required by the board agent was neither relevant to the charge nor within the charging party's control.

Case summary: The charging party, an agency fee objector, filed an objection after receiving a *Hudson* notice from the union. When he did not receive a letter informing him of the hearing date, he contacted the American Arbitration Association and was sent a letter advising him of the date. Unlike previous letters he had received from the AAA, this one did not include the date the union had requested the hearing. The charging party then filed an unfair practice charge alleging the union violated HEERA and PERB regulations by failing to timely request an impartial hearing regarding the agency fee amount.

The union did not respond to the charge or the amended charge.

The board agent dismissed the charge, finding the charging party had failed to state a prima facie case because he had not provided the information the B.A. requested. The B.A. had asked for the date the charging party had received the notice from the union, the date the charging party submitted his objection to the agency fee, and the date the union requested the hearing.

The charging party appealed the dismissal. In its response to the appeal, the union stated that the notices it sent out did not specify a date by which appeals must be filed. Instead, it advised employees that objections and challenges had to be filed within 35 days of the notice's mailing. The union also provided a copy of a letter that it allegedly sent to the AAA regarding a request for a hearing.

The board first noted that according to the information provided by the union, it had failed to request a hearing within the time period prescribed by PERB regulations. The board also found that the information requested by the B.A. was either irrelevant to the charge, such as the date the notice was received or the date of the objection, or outside of the charging party's control, such as the date the union requested the hearing. The board said the B.A. should have considered the facts as alleged by the charging party as true. The board concluded that there was a dispute as to whether the union timely requested a hearing and that the charging party had made a prima facie case. The board remanded the charge to the general counsel for issuance of a complaint.

Member Shek filed a concurring opinion agreeing that the charge should be remanded for issuance of a complaint. She found the B.A.'s question regarding the date the charging party filed his objection to be relevant. However, she noted that since the union did not raise a defense that the charging party's claim was untimely and also requested a hearing on his behalf, it could be assumed his objection was timely filed.

Board lacks authority to modify regulations, orders issuance of complaint: UPTE.

(*Booth et al. v. UPTE, CWA Loc. 9119,* No. 1831-H, 3-10-06; 5 pp. By Chairperson Duncan, with Member McKeag; Member Shek concurring.)

Holding: The charges were remanded to the general counsel for issuance of a complaint because the board agent did not have the authority to modify PERB regulations concerning the time period in which an agency fee hearing may be requested. See discussion of No. 1829-H, above.

No negotiable effects resulted from increased transfer of work: U.C.

(*State Employees Trade Council United v. Regents of the University of California [San Diego],* No. 1832-H, 3-24-06; 4

pp. + 7 pp. R.D. dec. By Chairperson Duncan, with Member Neuwald; Member Shek concurring.)

Holding: The charge was dismissed because the charging party failed to establish that the increased transfer of work resulted in negotiable effects and because the charge was untimely.

Case summary: In August 2004, the union filed a unit modification petition, which later was withdrawn, requesting to include development technicians in the skilled crafts unit. In support of its petition, the union provided examples of development technicians performing skilled crafts work as early as 1996.

On September 9, 2005, the union filed an unfair practice charge alleging that the university was transferring work out of the unit by allowing technicians to perform skilled crafts work. The university contended that there was no unfair practice because the technicians have been performing similar work for over 25 years. Furthermore, the university asserted the charge was untimely filed.

The regional director noted that in order to state a prima facie case, the charging party must demonstrate that the transfer of work resulted in unit employees not performing the overlapping work at all or at least a reduction in hours in bargaining unit positions. The R.D. stated the charge showed only that there was a change in the amount of work being assigned to the technicians and the skilled crafts unit. The R.D. concluded the union failed to establish that the unit ceased performing its exclusive work or that there was a reduction of hours. Furthermore, the R.D. found, the charge was untimely because the six-month statute of limitations period began to run when the charging party knew or should have known about the violation.

The board upheld the partial dismissal and adopted the R.D.'s decision as that of the board itself.

Member Shek filed a concurring opinion, responding to the union's contention that it had not received the partial warning letter because it was sent to the wrong address. Shek noted that the proof of service was sent to the appropriate street number, but to a different suite. This was a known business addresses for the union on record with the board and the address appeared on a fax sent to the board. She concluded that the since the letter was correctly addressed and properly mailed to one of the addresses on file, the board could presume the union received the letter.

MMBA Cases

Unfair Practice Rulings

Charge sent back to general counsel for further investigation: County of Alameda.

(*Alameda County Probation Peace Officers Assn. v. County of Alameda*, No. 1824-M, 3-1-06; 6 pp. + 15 pp. R.A. dec. By Chairperson Duncan, with Member Whitehead; Member McKeag concurring and dissenting.)

Holding: The partial dismissal of the charge was remanded to the general counsel for further investigation.

Case summary: In 2002, the county and all of its safety unions, with the exception of the Alameda County Probation Peace Officers Association, signed an agreement that extended the safety employee coalition contract with certain modifications. Among the changes, the parties agreed to substitute two floating holidays for Admission Day and Columbus Day. The county and the coalition again reached agreement in 2003; the association abstained from signing. Pursuant to the agreement, the county eliminated the Columbus Day holiday.

The county and association had been negotiating a successor contract since 2003. They met over 30 times and reached a tentative agreement on six subjects. The other safety organizations all reached contract agreements with the county.

In 2004, the association filed an unfair practice charge alleging the county made unilateral changes, refused to provide information, engaged in surface bargaining, and bargained in bad faith. The association alleged that the county unilaterally changed its overtime policy, reduced the number of bargaining unit positions without meeting and conferring, transferred and phased out the use of group counselors, allowed staffing levels to fall below mandatory state guidelines, changed the shift-bidding process, and eliminated the Admission Day and Columbus Day holidays.

The regional attorney dismissed all unilateral change allegations. The R.A. stated that the contract allowed the county to schedule overtime at its discretion; did not guarantee employment, tenure, or assignments of intermittent employees, such as group counselors; and did not list Admission Day as a holiday. The R.A. found the allegation regarding the elimination of the Columbus Day holiday, which was asserted in the amended charge, was untimely. The R.A. stated that the association had approved the changes in the bidding process.

As for the remaining unilateral change allegations, the R.A. found the association failed to provide enough facts to support its claims. Similarly, the R.A. found the association failed to provide specific allegations to support its claim that the county failed to provide information. Lastly, the R.A. stated that while the county did withdraw three of its initial proposals and refused to modify the health benefits and retirement plans, the evidence indicated that the county actively was meeting and bargaining with the association and had adequately explained why it could not change its benefits offer.

The board found the R.A. mistakenly had concluded that the Columbus Day allegation was untimely because it had been included in the initial charge. As for the surface bargaining charge, the board observed that the county implemented portions of the safety agreement even though it stated that parts of it would not go into effect until all the safety organizations had reached agreement. The board directed that the entire partial dismissal be remanded to the general counsel for further investigation.

Member McKeag agreed that the Columbus Day holiday was not sufficiently considered and should be remanded. However, she found that the association failed to provide sufficient facts to support a prima facie case of surface bargaining and that that portion of the charge therefore should be dismissed.

County violated retroactive language in parties' agreement: County of Riverside.

(*SEIU, Loc. 1997 v. County of Riverside*, No. 1825-M, 3-1-06; 23 pp. By Member Whitehead, with Chairperson Duncan; Member Shek concurring.)

Holding: The charge was upheld because the board found that the parties' language applied retroactively and, therefore, the county had refused to honor the agreement.

Case summary: In 2002, a senior appraiser filed a grievance alleging the county violated the parties' agreement by failing to interview her for a supervising appraiser position. The appraiser was included in a list of eligible candidates for the position but was never offered an interview. The county rejected the grievance on the basis that the issue was not grievable. The union filed an unfair practice charge alleging the county refused to process the grievance thereby repudiating the grievance procedure section of the agreement. Thereafter, the parties agreed to new contract language that provided they would use representatives from the State Mediation and Conciliation Service to determine if unresolved issues were grievable. However, when the union attempted to use that method, the county refused. The appraiser's grievance was not brought forward at that time.

The board then issued a complaint alleging that the county unilaterally changed its policy concerning pending grievances by refusing to use a mediator to determine the grievability of the appraiser's charge.

The administrative law judge determined that new contract language did not apply retroactively and rejected the complaint as written. However, after reframing the issue to conform to the union's initial charge, but not the issue found in the complaint, the ALJ found the county repudiated the agreement by refusing to process the grievance.

Comparing the difference in the charge and the complaint, the board concluded that the complaint was issued to reflect the board agent's understanding of the parties' new agreement and the current issue. Therefore, the board found that the ALJ erred in reframing the issue. The correct issue was whether the new contract language applied retroactively and, if so, whether the county failed to comply with it.

The board determined that language used in the agreement clearly stated it was meant to apply retroactively. The board then determined that the county unilaterally repudiated the new language when it refused to refer any of the pending grievances to mediation. The board also found it would have been futile for the union to bring forth the appraiser's grievance at that time, since the county had refused to refer all other grievances to mediation. Therefore, the board found that the county violated the parties' agreement and that the ALJ erred in entertaining unalleged violations. In order to meet the requirements necessary to address an unalleged violation, each of the four requirements must be fully discussed, providing a clear rationale for reaching those issues not found in the complaint.

Member Shek filed a concurring opinion based on a different rationale. She rejected the board's finding that the charge and complaint clearly were different and found compelling reason to entertain the unalleged charge. While Shek concurred that the new language applied retroactively, she found no evidence that the new language replaced the previous contract language regarding grievances. Therefore, Shek agreed with the ALJ's proposed decision that found the county interfered with the appraiser's right and the right of other bargaining unit members to participate in the activities of an employee organization, and the union's right to represent its members. Shek also proposed that the county be ordered to cease and desist from those actions.