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letter from the editor

Dear *CPER* Readers:

Last month, the Labor and Employment Section of the State Bar of California once again renewed its pledge of financial support to *CPER* by providing funding for our legal internship program. This contribution furthers the common goals and strong bond that we have enjoyed with the Section for many years.

CPER first joined forces with the Section back in 1994, in a two-pronged effort to bring more attention to matters of interest to public sector practitioners. Back then, members of the Section's Executive Committee voiced concerns that the annual program — as terrific as it was *and is* — did not include many sessions that were specifically geared toward the many public sector practitioners who make up our ranks. Toward that end, the Executive Committee initiated a dialog with *CPER*, and from those discussions the annual public sector program was born.

As those of you who attended the 12th Annual Public Sector Conference in April know, the program has been a resounding success! For over a decade, we have offered a full-day program that addresses those issues near and dear to our public-sector hearts. And it's not too soon to mark your calendar for next year's event — to be held on Friday, April 20, 2007, in Sacramento.

In addition to this collaborative effort, the Labor and Employment Section can take deserved credit for adding a valuable component to what *CPER* is able to offer the public sector community. During early discussions between the Executive Committee and *CPER*, we were likewise concerned that law students nowadays often find it difficult to squeeze a traditional labor law course into their legal education. Beyond that, it has become next-to-impossible to find a labor law course that focuses just on the public sector.

From these exchanges grew the notion of the Labor and Employment Section Internship Program. The idea was — and remains — to provide a law student interested in pursuing a career in public sector labor law with the opportunity to work as a legal intern at *CPER*. During the course of an academic year, the student becomes familiar with the vast array of collective bargaining statutes that govern various segments of the public sector and gets acquainted with the workings of the Public Employment Relations Board. Over the years, as the Labor and Employment Section has enabled *CPER* to offer this unique opportunity, several of our intern "graduates" have gone off to join us as labor lawyers in California — on behalf of both labor *and* management, you'll be glad to know!

So please join me in saluting the Section for its many years of support.



Carol Vendrillo
CPER Editor and Director

Flu Pandemic: New Approaches to a New Problem

*Jeffrey M. Tanenbaum
and Joshua M. Henderson*

Imagine this scenario: Shortly after returning from a trip to Southeast Asia, an agency employee complains to his manager of a respiratory infection. He does not recall visiting any agricultural areas or purchasing any raw poultry products. However, he reports that his return flight to the United States was delayed and for several hours he'd sat in a crowded airport where people were coughing and sneezing. The employee's manager agrees he should go home and rest.

Two days later, coworkers hear the employee's condition has quickly deteriorated and he's in critical condition, not responding to treatment. Coincidentally, on that same day, the World Health Organization reports a number of cases of respiratory failure, including several casualties, in a country visited by the employee. The WHO report confirms that some individuals have contracted the H5N1 virus — avian flu. The WHO statement suggests that transmission may have occurred via casual person-to-person contact, and an investigation is continuing. The agency, now concerned that H5N1 may be in its workplace, does not know what steps to take next.

The ability of viruses to mutate and the potential for a pandemic caused by new drug-resistant flu strains are cause for worry beyond the medical community. As observed in the aftermath of Hurricane Katrina, the demands placed on public employers and employees are enormous. In addition to the physical and emotional toll, the financial cost of a pandemic can be in the millions of dollars.

The number of communicable illnesses, such as avian flu and SARS, makes the release of timely and useful regulations a challenge, and issuance of non-mandatory guidelines can come too late during an outbreak. Nevertheless, employers need to prepare for any emergency affecting their employees and constituencies to the best of their abilities. This article addresses the employment law issues involved in preparing for, and responding to, a pandemic flu.

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Developing an Effective Communicable Illness Program

The tasks of preparing for, and then responding to, a flu pandemic may seem overwhelming. However, there are reasonable steps to take. Preparation requires development of a communicable illness program (CIP) that provides a structure for early identification of potential outbreaks, steps to respond to emergencies, and a plan to return to business after the outbreak is contained.

The critical function of a CIP is to protect the safety and health of employees and others using the principle of “safety first.” From an employment law context in California, this means the CIP must comply with any applicable CalOSHA standards; although none exists at present, an early draft is in the works. The CIP also must comply with CalOSHA’s injury and illness prevention program and emergency action plan requirements.¹ These generally govern occupational safety and health concerns affected by emerging hazards and emergency circumstances. To ensure compliance with CalOSHA, the plan should address the following elements.

Scope. A single CIP should cover any communicable illness or disease that poses a credible threat of transmission in the workplace. Examples include active tuberculosis, SARS, and the flu, but the policy should not be limited to currently known outbreaks. A broadly worded single program provides clarity and eliminates the need for multiple plans. In a crisis, there should be no question whether the CIP applies to a particular situation. One approach is to include all CIP provisions in an employer’s existing disaster response plan because many of the same steps will be taken during a disaster.

With a CIP of broad scope, however, an employer must be careful to avoid discriminating against individuals who are disabled or perceived to be disabled. Thus, a CIP should exclude any communicable illnesses that do *not* pose a credible threat of transmission in the particular workplace

(e.g., HIV in an office environment). Such exclusions will help avoid violations of the California Fair Employment and Housing Act and, with proper explanation, help alleviate employee concerns of CIP misuse.

Responsibility. The CIP should designate the individual or individuals charged with maintaining and enforcing the program. Their tasks would include monitoring communicable illness developments by reviewing information disseminated by the National Centers for Disease Control, WHO, and other news reporting services following legal developments that could require changes in the program. For example, the previously mentioned early-

draft CalOSHA standard ultimately may further regulate an employer’s response to transmissible diseases.

Applicable regulations and instructions. The CIP should distinguish between a strict government regulation and a non-mandatory guideline. The CIP may give the employer discretion to modify guidelines in order to best address the needs of the workplace.

Information. The plan should provide several methods for distributing information to employees. Forms of communication include

distribution of printed material, email, direction to a website, posters, and training sessions. Disseminated information should include the terms of the CIP, details about illness prevention, symptoms, and recording requirements. However, where an employer must distribute information about a communicable illness suffered by one or more employees, care must be taken to protect medical confidentiality while still providing necessary details.

Universal precautions. The CIP should mandate the use of universal precautions. While every illness is different, there are certain simple, yet effective, steps that every employee can follow to minimize the potential for infection and transmission of communicable illnesses.

Frequent hand washing. Since access to soap and water is not always convenient (and some employees are allergic to antibacterial products found in some soaps), a hypoallergenic

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hand sanitizer should be made available. In an office setting, this might mean distributing containers of sanitizers to work stations. In other environments, it might mean providing wall dispensers in convenient locations. Employees should be instructed to frequently wash or sanitize their hands (for example, after shaking hands, using a phone, or handling money). An employer can provide sanitizing towelettes so employees can wipe phones, chair arms, etc., before use. While this may seem excessive, it is easy to implement, and medical experts note that it is effective.

Other precautions. The fear and uncertainty generated by outbreaks of serious communicable illnesses have resulted in controversial public health responses in some countries. Employees have been forced to have their body temperature taken before entering the workplace and ordered to wear respirators or other personal protective equipment. Because each communicable illness outbreak must be evaluated on its own, we do not recommend that the CIP include such specific screening or equipment requirements. Instead, a provision could instruct the employer to determine the need for screening tools or protective equipment after a review of information from appropriate public health authorities. Discussion with legal counsel, too, is a consideration. For example, while providing optional vaccinations may be considered, mandatory vaccinations raise a host of legal concerns.

Minimizing exposure. It is critically important to minimize exposure to those who are ill or infectious. However, this task must be accomplished with care. A CIP should recommend that when an outbreak is suspected, employees who appear symptomatic will be sent home, pending release from a physician. The CIP also should state that employees who are ill or infectious will be encouraged to stay home.

Some employers may fear that such a provision will allow employees to abuse the policy. But that concern must be weighed against the tremendous cost of having a widespread illness in the workplace. To deter abuse, employees who misuse the policy are subject to discipline, up to and including

discharge. To further minimize misuse, employers can include a policy requiring medical certification of an employee's sickness. A well-written absenteeism policy can minimize misuse. Of course, the policy must conform to all applicable leave laws (e.g., California Family Rights Act) and collective bargaining obligations.

In addition to employees who are ill, the CIP needs to consider those employees who are infectious but not yet symptomatic. For some communicable illnesses, this period may extend for a week or more. Generally, an employer's CIP should require that employees believed to be exposed to a communicable illness stay away from work until the

incubation period has passed and a release to work is provided by a medical provider. Concern on the part of an impacted employee can be minimized if this incubation period is a paid absence. The CIP should specify the circumstances under which an employee will be required to stay away from work and whether the employee will be paid during this time.

Reporting requirements. A CIP should require employees to inform the employer when (a) they are diagnosed with an illness communicable in the workplace; (b) they believe they may have

been exposed to a person diagnosed with a communicable illness; or (c) they recently have visited a location where there has been an outbreak of a communicable illness.

Such a reporting obligation raises employee concerns about privacy and confidentiality. A CIP should advise employees that the reported information will be kept confidential to the extent reasonably possible, but that full confidentiality cannot be guaranteed. The CIP can extend additional assurances that no retaliation will occur and that good faith reporting protocols will be followed.

Travel procedures. A CIP should note that the employer will follow the travel advisories issued by the CDC or other appropriate agencies. Distinctions can be made between work travel and personal travel. This distinction can determine whether employees are paid during a period of quarantine, as discussed below.

Reporting obligations

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Return-to-work procedures. A CIP should require certification from a medical provider that it is safe for an employee to return to work after (a) being diagnosed with a communicable illness or (b) when an employee has been quarantined in association with such an illness.

Critical function requirements. Some employers may have positions that must be staffed even during an outbreak. The CIP should identify those positions. Employees who are assigned to these positions must be trained to protect themselves; this may include instruction on the use of special equipment, such as respirators or gloves.

Consistency with other policies and contractual obligations. Adopting a CIP will allow an employer to provide a safer workplace during a public health crisis. However, the CIP must be consistent with the employer's other policies and contractual obligations. Therefore, it might be necessary to change other policies — sick leave, paid time-off, disability leave, and travel policies — to harmonize them with the CIP. This can give rise to collective bargaining obligations.

Notice. The employer should provide notice to employees of the new plan and all new procedures. For example, the CIP itself (or a reference to the CIP) can be added to the employee handbook.

Training. Last but not least, employees must be trained in the CIP. Without meaningful training, the program will not be very effective or useful.

Implications of Wage-and-Hour and Employee Benefits: Work-Related Illnesses

In addition to CalOSHA, other employment laws affect the adoption and implementation of a CIP. The following discussion highlights some of the most common concerns. (Note, however, that it assumes there is no applicable collective bargaining agreement or MOU.)

Employee is quarantined. An employee who is not ill, but who may have been exposed to a communicable illness as a result of work-related travel, may be quarantined. In that case, an employer may offer that employee a work assignment that can be performed at home. If this is not feasible or appropriate, the employer may place the employee on administrative leave. Whether that leave is paid or unpaid will depend on the employee's exempt or non-exempt status under the Fair Labor Standards Act,² the employer's policies, and restrictions imposed by other laws.

If the employee is nonexempt, and no sick leave, paid time-off, or vacation benefits are available, the employee may be required to take time off without pay. For the reasons discussed below, this may not be a sensible approach — especially for a short-term absence.

An employee exempt from FLSA coverage must be paid his or her salary if the employee performs any work in the workweeks in which the administrative leave occurs.³ If an exempt employee is quarantined for a complete workweek, and performs no work during that week, the employee may not be entitled to compensation.

Again, for reasons discussed below, this may not be the best approach. An exempt employee typically may choose to use sick leave, paid time-off, or vacation during this period, provided the employer's policies permit the use of such benefits.

Risks of requiring administrative leave without pay. Although it may be lawful, unpaid leave is not recommended for an employee quarantined as a result of work-related exposure. This is particularly true if the decision to quarantine is made at the employer's discretion rather than as a public health directive. California Labor Code Sec. 2802 requires an employer to indemnify an employee for all losses incurred in the discharge of his or her duties.⁴ An employer's decision to quarantine an employee with a work-related illness may trigger liability under that section.

The CIP must be consistent with the employer's other policies and contractual obligations.... This can give rise to collective bargaining obligations.

Implications of Wage-and-Hour and Employee Benefits: Non-Work Related Exposure

CIP provisions addressing non-work related exposure must address CalOSHA regulations and the various employment laws, as well as the terms of any collective bargaining agreements.

Employee becomes ill. If an employee becomes ill as a result of personal travel or other non-work-related exposure, the employee is likely to be eligible to use sick leave, paid time-off, vacation, and perhaps family and medical leave and disability leave, depending on the employer's own policies and the degree of illness. If no sick leave is available, a non-exempt employee may be required to take the time off without pay. Provided the employer has a bona fide sick-leave policy, an exempt employee who either has not yet accrued sick leave benefits or has exhausted sick leave may have his or her salary docked only for complete days of absence for illness (unless partial-day absences are required by the Family and Medical Leave Act).⁵

Employee is not ill, but is quarantined. If an employee is not ill but, as a result of personal travel, quarantine is (1) required by a governmental agency; (2) recommended by a governmental agency; or (3) deemed an advisable precaution by the employer, an employer should consider providing work assignments that can be performed at home.

If this is not feasible or appropriate, the employee may be placed on administrative leave. An employee may be eligible to use accrued sick leave, paid time-off, or vacation benefits if permitted by the employer's policies. If no paid leave benefits are available, a non-exempt employee may be required to take the time off without pay. As noted above, an exempt employee must be paid his or her salary if the employee performs any work in the workweek in which the administrative leave occurs. If an exempt employee is quarantined for a complete workweek, and performs no work

in that week, the employee may not need to be compensated. An exempt employee may be entitled to use paid time-off benefits during this time, provided the employer's policies permit the use of such benefits for such a purpose.

Risks of requiring administrative leave without pay.

If the employee is placed on administrative leave for quarantine purposes, the law is unclear as to whether the leave can be without pay. If quarantine is required by a governmental agency, it is likely, but not certain, that the leave can be without pay subject to the salary-basis rules for exempt employees noted above. If quarantine is recommended but not required by a governmental agency, it is more likely that government agencies or the courts would find that the leave must be paid. However, the law does not require that such a leave be paid. The risk of an adverse decision seemingly would be greatest if an employee is quarantined and placed on unpaid leave solely at the employer's discretion.

If the employee is placed on administrative leave for quarantine purposes, the law is unclear as to whether the leave can be without pay.

Employment Contracts

Collective bargaining agreements, MOUs, or other contracts of employment must be reviewed before adopting and enforcing a CIP, particularly before requiring the use of paid time-off or imposing administrative leave without pay. Such contracts may well limit the manner in which such a policy may be implemented. An employer operating under a collective bargaining agreement or MOU may also have a duty to bargain with regard to the adoption and impact of a CIP.

Disability Discrimination Law

Under the Fair Employment and Housing Act, disability-related inquiries and medical examinations of employees are limited to situations where the inquiry or examination is shown to be "job-related and consistent with business necessity."⁶ Restrictions on medical inquiries and

examinations apply to all employees, not just to those with disabilities.

FEHA restrictions may be implicated when an employee is ordered to stay off work unless or until he or she can prove they do not pose a risk of contagion in the workplace. Such a requirement could be viewed as evidence that the employee is “regarded as” disabled by the employer. In addition, a request for a medical release could be viewed as an improper medical inquiry.

Generally, a disability-related inquiry or medical examination of an employee will be viewed as “job-related and consistent with business necessity” when the employer has a reasonable belief, based on objective evidence, that:

- An employee’s ability to perform the essential job functions will be impaired by the medical conditions, even with reasonable accommodation; or
- The employee cannot perform the essential job functions without endangering his or her health or safety, or the health and safety of others, even with reasonable accommodation.⁷

There are three situations where an employer may want an employee who has been exposed to a communicable illness to undergo a medical examination and obtain a medical release before returning to work.

The first occurs when a public health agency quarantines an employee. There is minimal risk of violating the FEHA if the employer requires the employee to provide a medical release before returning to work. In that situation, the employer could rely on reasonable objective evidence that the employee poses a direct threat to the health of others.

Similarly, if a public health agency recommends, but does not require, that an employee be quarantined, the employer’s decision to condition a return to work on a medical release would be viewed as job related and consistent with business necessity. This directive would be based on relevant

objective factors, such as the recommendation of a public health agency. The information provided by the public health agency could be viewed as objectively reliable and likely to trigger a reasonable belief that returning the employee to work prematurely could pose a threat to others, but the risk of FEHA liability seems somewhat higher than in the first situation.

The third scenario is less clear. If a public health agency does not direct or recommend that an employee be quarantined, there is greater risk of liability if an employer conditions an employee’s return to work on a medical release. A request that an employee submit to a medical examination or obtain a medical release before returning to work could be viewed as action based not on objective evidence, but on an unsupported assumption that someone traveling to a specific area would be infected with avian flu. Unless there is other objective evidence, e.g. the person is showing some symptoms of the illness, such a directive carries a risk that it will be unlawful. Of course, much will depend on the seriousness of the outbreak and what is known about it. The more serious the pandemic and the less that

is known about it, the more discretion will be given to employers to take reasonable precautionary steps to protect employee safety and health.

Discrimination on the Basis of Other Protected Classifications

It is possible that the outbreak of a particular communicable illness might disproportionately affect members of a protected classification (e.g., race or national origin, depending on the geography of the outbreak). Employers must be cognizant of this and ensure they are not discriminating against such groups. Evidence may better withstand criticism if an employer can show that it has adopted a CIP which covers all communicable illnesses, not

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just one that disproportionately affects a protected group. Examples of nondiscriminatory enforcement also will be important.

Conclusion

Much can be done to effectively respond to a pandemic flu and protect the safety and health of employees and others. However, an effective response depends on preparedness *before* an emergency occurs. An employer with a fully developed communicable illness program following the steps described in this article will have an advantage in providing a quick and effective response to a most serious situation. *

1 Title 8, Cal. Code of Regs. Secs. 3203 and 3204.

2 29 USC Secs. 201 et seq.

3 See 29 CFR Sec. 541.602.

4 See Cal. Lab. Code Sec. 2802 (“An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties....”)

5 See 29 CFR Sec. 541.602.

6 See Gov. Code Sec. 12940(f).

7 See Gov. Code Sec. 12940(a)(1).

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The Health Benefits Equation: A Joint Labor-Management Solution

Ruben Ingram and Cindy Young

Ruben Ingram is the executive director of the School Employers Association of California. He is the former executive director of the California Commission on Teacher Credentialing, and prior to that was district superintendent for the Fountain Valley School District.

Cindy Young is a senior member benefits coordinator for the California School Employees Association.

It's no secret that exploding health care costs and spending are wreaking havoc in every sector of our economy. Six straight years of double-digit premium increases have undermined wages and pensions, strained public budgets, eroded timely access to beneficial medical service, caused layoffs, and hurt the overall economy. The public school system in California, overburdened and financially precarious, is no exception.

Both rapidly escalating health care costs and deficient quality of care are key concerns for California's public school employers and their unions. To ensure affordable comprehensive and high-quality health benefits to employees and their families, creative solutions are being sought, such as the California Education Coalition for Health Care Reform. The goal of this joint labor-management committee is to address the root causes of the cost and quality problems without shifting those expenses to patients. Sharing the history and success of this committee offers public employers and their unions a blueprint to assess their own needs and create a model for their own health care solutions.

What's Wrong With Hospitals and Hospital Care

Numerous factors contribute to health care cost inflation, but hospital costs are the single largest contributor, accounting for 54 percent of the annual growth in health care spending in 2003.¹ While this crisis is national and even international,² it is especially acute in California, where hospitals' costs are growing at almost twice the national average.³ Adding to price unpredictability, hospital charges vary enormously within California's geographical markets.⁴ For example, heart surgery costs three times as much in Sacramento as in San Diego, and the charge for a hysterectomy in Sacramento alone can vary by as much as \$30,000. As

one expert stated, “The amount and cost of hospital treatment in a community have more to do with the number of physicians there, their medical specialties and the procedures they prefer than with the health of the residents.”⁵ That quote was made in 1982, making it apparent that not much has changed in the last 25 years.

Substantial variation also exists in the quality of patient care.⁶ Overall, experts estimate that between 20 and 30 percent of health care spending is attributable to poor care. Research shows dramatic and medically unjustified variations in hospital admissions, elective surgery rates, use of diagnostic tests and procedures, mortality rates, infections and complications — variations that raise alarming questions about the appropriateness and effectiveness of care.⁷

Two major barriers hinder purchasers’ ability to align payment with high-quality hospital services. The first is the lack of publicly available data on provider quality and costs. Most quality reporting is voluntary, not mandatory. As a result, there is sparse facility-specific information on patient outcomes for high-risk and high-cost procedures, hospital-acquired infection rates, and serious adverse events such as life-threatening medication errors, surgery on the wrong person or body part, and suspicious deaths or injuries.

Data on prices charged for specific procedures is equally hard to come by. Several years ago, California enacted legislation requiring hospitals to make their “chargemasters” — or the list prices charged for specific medical products and services — available to the public. However, the list prices bear only a limited relationship to the amounts actually paid by health plans and insurers. Prices are negotiated separately with health plans or large-group purchasers by hospitals or hospital systems and are known only to the negotiating parties.⁸ The lack of transparency in negotiated rates and hospital billing, the resistance of health plans to make meaningful provider-specific cost and quality data publicly

available, and the highly fragmented nature of paid-claims data make it almost impossible for purchasers and patients to know which hospitals, surgeons, and other medical specialists are delivering superior patient outcomes at lower costs.

The consolidation of hospitals into larger and larger systems is a second major barrier hindering purchasers’ efforts to obtain value for their health care dollars.⁹ Consolidation leaves employers and employees alike with fewer insurers and less competition in the marketplace. Studies of hospital mergers and acquisitions show that consolidation increases market power and prices without any necessary improvements in either the quality or efficiency of care.¹⁰

A Model That Works

The inspiration for California Education Coalition for Health Care Reform came from the successful model of the United Food and Commercial Workers Local 186-D. The union represents approximately 4,000 retail workers in California’s Central Valley who received health care coverage through the UFCW National Health and Welfare Trust Fund.¹¹ With

health care costs increasing 40 percent over a two-year period, the UFCW Fund saw a growing number of beneficiaries exhaust their lifetime benefits and realized that it must take action to preserve access to health benefits for its members. The Fund’s strategy enabled it to analyze costs and quality of care by Modesto-area hospitals, identify cost drivers, negotiate direct contracts with area facilities, and educate its members.

The first step was to commission an analysis of hospital charges. Results showed that when adjusted for severity of illness, average charges at the two Modesto hospitals were 61 percent to 225 percent higher than the Northern California average — yet quality ratings ranged from average to poor.¹² The UFCW Fund approached both hospitals in the

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community, seeking greater control over costs and quality standards through a direct contracting relationship. One hospital refused to negotiate its prices, and the other chose to sit down and engage in a dialog with the Fund. A direct contract relationship was established that reduced health care costs by 48 percent and resulted in a quality-improvement plan.¹³

The UFCW Fund developed a comprehensive education campaign to inform members of the cost crisis and the outcome of negotiations with the two hospitals. Armed with facts, the UFCW membership supported excluding a hospital that would not work collectively on this important issue. Dropping that hospital from the plan saved the Fund approximately \$1,300 a year per member. Member education was so successful that only one complaint was made among the thousands of beneficiaries affected by the network restriction.

Action by the School Employers and Employee Organizations

Eager to emulate the success of the UFCW Fund, several labor and management groups in education banded together in 2004 to organize the California Education Coalition for Health Care Reform. It was funded by a grant from the Federal Mediation and Conciliation Service. FMCS historically has supported labor-management committee projects but, because the Coalition was not an official entity, the grant was written and submitted through the Center for Collaborative Solutions, a statewide organization with representatives from labor and management.¹⁴

The grant was written by this article's coauthor, Ruben Ingram, and CCS consultant Neil Bodine, an experienced labor relations attorney and trainer. CCS President Janet Walden submitted the grant, with eight state education labor and management organizations signing in support. Labor organizations included the California Federation of Teachers, California Teachers Association, California School

Employees Association, and Service Employees International Union. Management participants included the Association of California School Administrators, California Association of School Business Officials, California School Boards Association, and School Employers Association of California. CCS received notification of the award in the fall of 2004.¹⁵ Article coauthor Cindy Young, senior benefits coordinator for CSEA, was elected co-chair for labor, and coauthor Ingram was elected co-chair for management.

The Coalition decided not to 'nibble' around the edges of problems or engage in zero-sum solutions, such as shifting costs from employers to employees.

The Coalition's initial meeting was in December 2004, with one representative from each of the eight participating organizations. Several decisions made at that meeting have served the group well. First, it was determined that there would be two representatives from each organization to assure the presence of at least one at every meeting. Second, we decided we were not going to "nibble" around the edges of the problem or engage in zero-sum solutions, such as shifting costs from employers to employees. Rather, we would take a bold approach to finding lasting solutions that would serve the mutual interests of both parties. Third, we agreed to use

consensus decisionmaking whenever possible. Eighteen months later, we have not varied from those original agreements. In fact, there has not been one partisan disagreement during the entire life of the Coalition.

The labor representatives to the Coalition have been a combination of staff and officers, with the greatest percentage being union staff members. Management representatives have been a balance of staff and association members/officers. Presentations to outside groups are a shared responsibility, including at least one labor and one management representative.

Since December 2004, the Coalition has met once a month, with meetings hosted by each member organization at their headquarters. All the organizations are headquartered in Sacramento, with the exception of the School Employers Association of California, which convenes its meetings in

Irvine. The co-chairs create the agenda with input from all the members and Coalition staff.

The largest percentage of the grant money was expended on staff. Through the grantee, CCS, the Coalition hired Neil Bodine and a part-time administrative assistant. The staff coordinates all meetings, compiles the agenda, records the minutes, and secures speakers, materials, and locations to support the Coalition and its work.

Setting Priorities

Initially, that work took the form of short-term and long-term goals. Districts and their employee groups needed immediate help with health benefits and insurance. In the long-term, the Coalition would look for solutions that did not involve constant maintenance and attention.¹⁶

The short-term priorities surfaced after several experts informed the Coalition about the current cost-drivers of health insurance and the barriers to understanding how the system works. In response, the Coalition developed a Tool Box and Trainer of Trainer Plan to help districts disseminate consistent, clear, and comprehensive information statewide.¹⁷ The materials are ready for dissemination in this 2006-07 school year.

An unexpected, intermediate goal became apparent when the California Health Care Coalition and its executive director, Sally Covington, came before us and impressed us with their parallel mission. The CHCC was examining specific regions in the state where they could lower costs and raise quality by building public and private collaborations among employer and employees. Our Coalition decided to support their efforts by encouraging our member organizations to join the CHCC. Most of the education unions joined, as did a cooperative of the school management associations. In addition, several school districts joined CHCC. When CHCC organized and elected its permanent

board of directors, a number of our Coalition members were elected to that board.¹⁸

Our long-term goal has two parts. First, we will work toward establishing a common pool of all public school employees insured under one system much like our current retirement systems, State Teachers Retirement System and Public Employees Retirement System. Assembly Bill 256 (D-De La Torre) has been approved by the legislature and signed into law by the governor. It requires a study to examine the feasibility and cost-effectiveness of creating a single statewide health care pool that would cover all public school employees working in school districts, county offices of education, community colleges, and entities created or established by those employers, including, but not limited to, joint powers agencies, regional occupational centers, and regional occupational program.¹⁹ That study has been assigned to CalPERS

Second, the Coalition had input on Senate Bill 840 (D-Kuehl), the California Health Insurance Reliability Act, which would establish a single-payer system of health insurance covering all California residents.²⁰ All union organizations represented on the Coalition have endorsed and supported S.B. 840. Management associations are studying and considering it.

A long-term goal is to help establish a common pool of all public school employees insured under one system much like our current retirement system.

Six-Point Program

The Coalition's program generally can be broken down into six facets: education, awareness, trainings, advice, consultation, and legislative action.

Education and awareness presentations. In December 2005, the Coalition initiated its campaign to provide an educational program to the entire state. Toward this goal, one of our most useful endeavors has been joint presentations by at least one management and one labor representative, who present a unified and non-partisan message. By June 1,

2006, over 40 presentations to over 2,500 people had taken place, with many groups requesting follow-up information and training. The audiences ranged from large labor groups, superintendents, and county office human resources administrators to joint groups of district administrators and local union leaders. In addition, presentations were made at most of the major conferences in the state.

The basic presentation covers a review of the United States health care system and why it is in need of reform; data and statistics regarding the negative impact of higher costs and lower quality on the school employees of California; the work of the Coalition; participation in the California Health Care Coalition; and an analysis of S.B. 840, the California Health Insurance Reliability Act.²¹

The Coalition presents special programs as necessary. A panel from the Coalition attended a two-day retreat of the board of education, superintendent, and staff of the Los Angeles Unified School District. In addition to answering their questions, the Coalition learned more about the severity of the problem facing California's largest school district. The Coalition also made a special presentation to the insurance committee of the Norwalk-La Mirada Unified School District. This was the first of many such presentations designated to assist joint labor-management insurance committees in solving their local problems of cost and quality.

Consultation services. Several consultations have taken place at the request of employers. In one such meeting with a county office of education to compare services and costs of brokers, the result revealed a significant difference in charges for the same services. In another instance, the Coalition co-chairs met with a third-party administrator of a large self-funded health insurance group of school districts. The conference call, which included a major insurance company, spurred the administrator to demand and receive answers and cost comparisons that previously had been withheld.

Training programs. In June, all the key staff of the member organizations attended a "Train the Trainer" session. We spent two full days training teams of labor and management staff on the fundamental principals of our program. California was divided into seven regions, and each was assigned a labor and management team. Each team will develop additional trainers in their region so there are enough knowledgeable people to provide "hands on" information to the insurance or health committees at the local school districts.

Advisories. The Coalition has developed advisory papers covering issues on which school employers and unions need guidance. Some of the most pressing topics are health savings accounts, the role of district insurance committees, best practices for hiring insurance brokers and consultants, and the long-term effects of cash-in-lieu of benefits, putting benefit dollars on the salary schedule, and opting-out of health insurance.

Legislative action. The eight diverse association members of the Coalition have pursued slightly different political courses of action regarding the way health benefits are provided to school employees in California. A.B. 256 was sponsored by the California School Employees Association, supported by School Employers Association of California, and signed by the governor last year. The bill required CalPERS to conduct a study that examines the feasibility of creating a single, statewide health care pool for all public school employers. CalPERS will present the study to the state legislature early next year.

Summary

The Coalition is convinced that its programs of education, awareness, training, advice, consultation, and legislative action will bring better quality health care at more reasonable costs to all school employees in California. The

*By June , over 40
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Coalition also believes that the right health benefits program, properly funded, will remove one of the major barriers to management-labor cooperation. As a result, fewer resources will be spent on negotiating health benefits and more time, energy, and funding will be devoted to the education of our students. *

1 Milliman USA Health Cost Index, as reported by Strunk and Ginsburg, 2004; and Bradley C. Struck, personal communication, July 20th, 2004.

2 In 2003, the United States had fewer practicing physicians, practicing nurses, and acute care bed days per capita than the median country in the Organization for Economic Cooperation and Development. The U.S. health spending per capita was almost two-and-a-half times the per capita health spending of the median OECD country. (*Health Affairs*, May/June 2006, Vol. 25, p. 819.) There are two striking differences between the U.S. health care system and other OECD countries: (1) The U.S. has 46 million uninsured Americans, while all other OECD countries provide universal access to health care to its citizens; and (2) according to the World Health Organization, the U.S. health care system ranks 37th in overall quality and performance. (Annex Table 10: Health System Performance in All Member States, WHO Indexes Estimates for 1997 World Health Report 2000, http://www.who.rh/whr/2000/en/whroo_en.pdf/.)

3 Between 1998 and 2001, inpatient hospital expenditures grew at an annual rate of 11.3 percent, compared to 5.9 percent nationally. This was the second-highest rate of annual inpatient expenditure growth in the nation and four times the rate of inflation during 1998 and 2002.

4 Similarly wide ranges exist for other surgical procedures. (Peter V. Lee, Testimony Before the Subcommittee on Oversight of the House Committee on Ways and Means, June 22, 2004.)

5 John Wennburg and Alan Gittlesohn, *Scientific American* (1982).

6 The Dartmouth Center for Evaluative Clinical Science, for example, states that 20 to 30 percent of U.S. visits, hospitalizations and treatments that neither extend nor improve the quality of life. See <http://www.dartmouth.edu/-cecs/>. Similarly, the Institute of Medicine estimates that health costs could be reduced by 25 percent if inappropriate care was eliminated. See "Crossing the

Quality Chasm: A New Health System for the 21st Century," 2001 (Washington, DC).

7 See John E. Wennberg, Elliot S Fisher, Terese A. Stukel, and Sandra M. Sharp, "Use of Medicare Claims Data to Monitor Provider-Specific Performance Among Patients With Severe Chronic Illness," *Health Affairs-Web Exclusive* (October 2004): 5-18 Also see Institute of Medicine, "Crossing the Quality Chasm: The IOM Health Care Quality Initiative" (March 1, 2001), <http://www.napedu/books/0309072808/hmtl>. See also Institute of Medicine, "To Err is Human: Building a Saver Health System" (November 1, 1999), <http://www.nap.edu/books/0309068371>.

8 The California state audit report on CalPERS' decision to expel high-priced hospitals from its Blue Shield HMO network complains that actual hospital costs are shielded by proprietary agreements. See "California Public Employees' Retirement System: It Relied Heavily on Blue Shield of California's Exclusive Provider Network Analysis, an Analysis That is Reasonable in Approach but Includes Some Questionable Elements and Possibly Overstates Estimated Savings, California State Auditor, Bureau of State Audits" (March 2005). Accessed at <http://www.bsa.ca.gov.bsa.summaries/2004-123.html>.

9 Recent mergers include Wellpoint (Blue Cross) and Anthem, as well as UnitedHealth Group and PacifiCare.

10 Allison Evan Cuellar and Paul J Gerler, "How the Expansion of Hospital Systems Has Affected Consumers: Hospital Consolidation Has Resulted in More Negatives Than Positives for Consumers So Far," *Health Affairs*, Volume 24, No. 1 (January/February, 2005): pp 213-219. See also Joel Hay, "Hospital Cost Drivers: An Evaluation of State-Level Data" (October 15, 2002), and Glen Melnick, Emmett Keller and Jack Zwaniger, *Health Affairs*, Vol. 18, No. 3 (May/June 1999): pp. 167-173.

11 The UFCW Trust Fund is commonly referred to as a "Taft-Hartley" fund. "Taft-Hartley" funds are pooled resources, where multiple employers make payments to provide health care benefits to their employees based on collective bargaining agreements. Employer and labor representatives jointly oversee the "Taft-Hartleys." Payments for claims are made directly from the fund resources based on individual health care policies.

12 According to HealthGrades.com and PacifiCare.com, Sutter's Memorial Hospital earned a Grade C for overall quality. Tenet's Doctors Hospital received a Grade B for overall quality, only slightly better than the ratings for Memorial. PacifiCare.com Quality Index (2002) data is derived from the California Office of State Health Planning and Development, MedPAR and Leapfrog Group datasets.

13 Based on Doctors Medical Center's current patient mix.

- 14 Center for Collaborative Solutions, *Application for Labor-Management Committee-FY2004*, Sacramento, 2004.
- 15 Federal Mediation and Conciliation Service, *Center for Collaborative Solutions #04-CA/PS-008*, Washington, D.C., 2004.
- 16 California Education Coalition for Health Care Reform, *Brochure*, Sacramento, 2005.
- 17 California Education Coalition for Health Care Reform, *Statewide Training Program: Toolkits and Resources*, Sacramento, 2006.
- 18 California Health Care Coalition, *Bylaws and Articles of Incorporation*, San Francisco, 2006.
- 19 Gov. Code Secs. 20432.6 and 22849. Repealed Sec. 31485.12.
- 20 S.B. 840 (D-Kuehl), Legislative Sessions, Sacramento, 2005-06.
- 21 California Education Coalition for Health Care Reform, "School Management and Labor Unions Together Are Attacking Escalating Health Cost," Sacramento, 2006.

THREE IMPORTANT FALL EVENTS

**60th Anniversary Celebration and Open House, Institute of Industrial Relations
Friday, September 15, U.C. Berkeley**

In addition to showcasing the electronic resources and multi-disciplinary facilities of IIR's newly renovated library, this all-day program includes a panel discussion on the state of the union movement, immigration, globalization, and public policies to improve wage markets. The public is invited.

Check the IIR website at <http://www.iir.berkeley.edu>

**Public Employment Relations Board 30th Anniversary
Thursday, September 21, Sacramento**

CPER is cosponsoring this in-depth review of charge processing — from filing of unfair practices through board review of proposed decisions. Plus a special lunch presentation: former and current board members will participate in a retrospective discussion.

Find program information and register online at <http://www.perb.ca.gov>

**24th Labor and Employment Section Annual Meeting
Friday and Saturday, October 27-28, San Jose**

It's not too early to mark your calendar for this important event, which will be held at the San Jose Marriott.

Watch for information at the State Bar website, www.calbar.ca.gov

New Supreme Court Sharply Circumscribes Public Employee Free Speech Rights

Eric Borgerson, CPER Associate Editor

Instead of determining whether public employee speech occurring during the course of performing ordinary duties unduly disrupts an employer's operations, courts must now painstakingly determine what constitutes an employee's 'ordinary duties' not withstanding written job descriptions.

As widely anticipated, the resignation of Justice Sandra Day O'Connor and the recent appointments of Chief Justice John Roberts and Justice Samuel Alito have produced a new, more conservative Supreme Court that weighs employers' interests markedly more heavily when examining public employees' fundamental constitutional rights.

The accuracy of that expectation is readily apparent from the court's recent split decision in *Garcetti v. Ceballos*, severely restricting the First Amendment rights of public employees to comment on matters of public concern. At issue in *Garcetti* was the distinction between constitutionally protected public employee speech, on one hand, and personal disagreements with the employer that are properly subject to employer restriction and discipline, on the other. Where and how to draw that line divided the court into four camps.

With Justice Alito providing a key swing vote that likely would have gone the other way if O'Connor were still on the bench, a five-to-four majority starkly proclaimed that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate the communications from employer discipline."

A deep ideological split in the new court is revealed by the fact that the decision garnered three dissenting opinions voicing varied but strongly worded concerns over the implications of the court's analysis. Unpersuaded that statutory whistleblower remedies will adequately protect employees who uncover illegality or incompetence in the administration of public agencies, the dissents characterize the majority's decision as an unjustified departure from established precedent, and a blow to important employee and public interests in ensuring the efficient and lawful administration of the government.

Background

Richard Ceballos was employed by the Los Angeles County District Attorney's Office as a deputy district attorney with supervisory authority over other attorneys in the Pomona branch. In February 2000, a defense attorney contacted Ceballos about alleged inaccuracies in a deputy sheriff's affidavit used to obtain a search warrant in a pending criminal matter being prosecuted by the D.A.'s office. Ceballos examined the affidavit and visited the location it described, determining that the affidavit contained "serious misrepresentations." He spoke with the deputy sheriff who had signed the affidavit, but was unsatisfied with his response. Ceballos reported his concerns to two of his supervisors, then prepared a memorandum recommending dismissal of the case. He followed up with a second, consistent but toned-down memorandum after a second conversation with the deputy sheriff.

A meeting later convened between Ceballos, his supervisors, the deputy-sheriff affiant, and other employees of the sheriff's department. The meeting became heated, and one lieutenant from the sheriff's department sharply criticized Ceballos for his handling of the case.

Notwithstanding Ceballos' concerns about the legitimacy of the prosecution, his supervisor decided to proceed with the case, pending resolution of a defense motion to "traverse," or challenge, the search warrant. Ceballos was of the professional opinion that he was required to produce his memoranda to the defense attorney as exculpatory evidence under the rule articulated by *Brady v. Maryland*.¹ His supervisors required him to redact from the memoranda any of his professional conclusions as privileged "work product," which he did. He also was told that he would suffer retaliation if he testified that the affidavit contained intentional fabrications.

At the hearing on the motion, Ceballos was called by the defense as a witness. He recounted his observations about

the search warrant but he was forbidden to testify regarding his legal opinion as to the validity of the warrant. The court overruled the defense motion regarding the warrant and the prosecution proceeded.

Ceballos' Lawsuit

Ceballos claimed that the events described above were followed by a series of retaliatory actions by his supervisors, including demotion from his supervisory position to a trial deputy position, transfer to another courthouse, and denial of a promotion. He filed an employment grievance but it was denied on grounds that he had not suffered any retaliation. Ceballos then filed suit in federal court under 29 USC Sec. 1983, alleging that the District Attorney's Office had discriminated against him in retaliation for his second memorandum, thereby violating his rights under the First and Fourth Amendments to the U.S. Constitution.

The federal trial court judge granted summary judgment in favor of the District Attorney defendants, reasoning that, because Ceballos had issued his memorandum during the course of the performance of his ordinary duties, his speech was not entitled to First Amendment protection.

Ninth Circuit Finds Speech Protected

The Ninth Circuit Court of Appeals reversed, holding that Ceballos' memorandum constituted protected speech under the First Amendment, citing *Pickering v. Board of Education*² and *Connick v. Myers*.³ The Ninth Circuit determined that Ceballos' memo, because it discussed what he viewed to be governmental misconduct, was "inherently a matter of public concern."

Citing Ninth Circuit precedent holding that a public employee's speech is not deprived of First Amendment protection merely because it is expressed to government

Ceballos was of the professional opinion that he was required to produce his memoranda to the defense attorney as exculpatory evidence.

workers or others pursuant to an employment relationship, the Court of Appeals balanced Ceballos' interest in his speech against the employer's interest in responding to it. The Ninth Circuit concluded that Ceballos' First Amendment right to speak as he did was "clearly established" and that, since the employer failed even to suggest that it was disruptive to operation of the D.A.'s office, the employer's actions were not objectively reasonable.

A concurring opinion agreed that the Ninth Circuit's decision was mandated by its own precedent, but argued that the precedent should be revisited and overruled. A majority of the Supreme Court accepted the invitation to review the case and reversed the decision of the Court of Appeals.

Divided High Court Reverses Ninth Circuit

The court majority began its analysis by acknowledging that "public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."

The majority found that *Pickering* provided a "useful starting point" for its rationale. In *Pickering*, the Supreme Court found that a teacher who wrote a letter to a newspaper critical of the local school board had engaged in speech protected by the First Amendment and that the district was constitutionally prohibited from taking adverse action against the teacher for the expression. The court in *Pickering* stated that the problem is "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon 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." This has become known as the "*Pickering* balancing test."

In *Pickering*, the court found that it was neither shown nor could it be presumed that the teacher's speech in any way impeded the teacher's performance in the classroom or

interfered with the operation of the school district. Accordingly, the court in *Pickering* found that the district's interest in limiting the teacher's ability to contribute to public debate was "not significantly greater" than its interest in limiting such a contribution by any member of the public.

The present court majority reasoned that *Pickering* mandates two inquiries. First, it must be determined "whether the employee spoke as a citizen on a matter of public concern." If the answer is no, said the court, "the employee has no First Amendment cause of action based on his or her

employer's reaction to the speech." If the answer is yes, then "the possibility" of a First Amendment claim arises and "the question becomes whether the relevant governmental entity had an adequate justification for treating the employee differently from any other member of the general public."

Exploring the underpinnings for this doctrine, the court cited a plurality opinion in *Connick v. Meyers* for the principle that "the government as an employer has far broader powers than does the government as sovereign," which means that when a citizen enters public employment, he or she "must accept certain limitations on his or her freedom." The court explained:

Without a significant degree of control over employees' words and actions, there would be little chance for the efficient provision of public services.

Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services....Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

Nevertheless, noted the court, government employers face First Amendment limits on their abilities to restrict "the liberties employees enjoy in their capacities as private citizens." The court further stated, "So long as employees are speaking as citizens about matters of public concern,

they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.”

Moreover, noted the court, prior case law has observed that not just the interests of the employee, but those of the public are implicated by such speech. The court in *Pickering* observed that teachers are “the members of a community most likely to have informed and definite opinions” about school expenditures and that it is necessary to promote a “vibrant dialog in a democratic society.”

However, presaging the current court’s narrow interpretation of *Pickering*, the court stated that the First Amendment does not empower public employees “to constitutionalize the employee grievance.” Drawing the appropriate line between expression of public employees on matters of public concern and personal disputes with the employer that are properly subject to employer regulation was the task posed in *Garcetti*, as acknowledged not only by the majority, but by the dissents. But, the court was deeply split on where and how to make that distinction.

The majority introduced its approach to Ceballos’ case with two caveats. First, the court said it was not dispositive that Ceballos expressed his views inside his office rather than publicly. “Employees in some cases may receive First Amendment protection for expressions made at work,” said the court. Second, the court said the fact that Ceballos’ memo concerned the subject matter of his work was non-dispositive because public employees often are best situated to authoritatively comment on matters related to their workplaces.

“The controlling factor in Ceballos’ case,” announced the court, “is that his expressions were made pursuant to his duties as a calendar deputy.” Stating the core of its holding, the court declared:

That consideration — the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending

case — distinguishes Ceballos’ case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

The court rejected arguments that its holding would infringe on rights public employees hold as private citizens. Ceballos “did not act as a citizen” when he performed his

daily professional activities, including writing his memo regarding disposition of a pending case, said the court. Rather, he was acting as a government employee. “The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance,” quipped the court.

The court opined that “refusing to recognize First Amendment claims based on government employees’ work product does not prevent them from participating in public debate.” The majority emphasized that, “the employees retain the prospect of constitutional protection for their contributions to the civic discourse.” However, that prospect “does not invest them with a right to perform their jobs however they see fit.”

The court then emphasized the importance its case law has placed on an employer’s ability to manage its operations. In that vein, the court stated, “Supervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.” The court found Ceballos’ memo “illustrative.” “It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff’s department. If Ceballos’ superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action,” said the court.

*The First Amendment
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public employees
to constitutionalize
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grievance.’*

To hold otherwise, cautioned the majority, “would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business.” Such an outcome would be “inconsistent with sound principles of federalism and the separation of powers,” according to the majority.

The majority disagreed with the Ninth Circuit that an “anomaly” would be created by requiring employers to “tolerate certain employee speech made publicly but not speech made pursuant to an employee’s assigned duties.” The majority emphasized that “employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.” Similar considerations would apply to writing a letter to a local newspaper or discussing politics with a coworker, said the court.

In addition, found the court, employers could reduce the “perceived anomaly” by “instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.”

The court dismissed suggestions by one dissent that the majority’s rule could be abused by employers who develop excessively broad job descriptions for public employees. “The proper inquiry is a practical one,” said the court, and “the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.”

The court also cautioned that “we need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”

Finally, the majority offered as justification for its decision that there is in place a “powerful network” of federal and state “whistleblower” laws, as well as other constitutional and professional restrictions that could be invoked by employees who seek to expose wrongdoing in their workplaces.

Dissenting Opinions

Justice John Paul Stevens, writing in dissent, agreed with the majority that a public employer may take corrective action when an employee’s speech is “inflammatory or misguided.” But, Stevens asked, “what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone discover?” Stevens cited several appeals court decisions in which police officers were disciplined for reporting corruption within police departments and city government.

“The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one’s employment is quite wrong,” contended Stevens. Citing *Givhan v. Western Line Consol. School Dist.*,⁴ Stevens noted that, in a unanimous decision authored by then Chief Justice William Rehnquist, “we had no difficulty recognizing that the First

Amendment applied when...an English teacher raised concerns about the school’s racist employment practices to the principal....Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial.” Stevens maintained that it is “senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description.”

Moreover, he stated, “it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.”

Turning the court’s characterization of Ceballos’ memo against the majority itself, Stevens scolded, “While today’s novel conclusion to the contrary may not be ‘inflammatory,’...it is surely ‘misguided.’”

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The most impassioned dissent was written by Justice David Souter, joined by Justices Stevens and Ruth Bader Ginsburg. Souter acknowledged the importance of an employer's ability to effectuate its policies and expect competence and honesty from its employees. However, he said:

I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

Souter identified two extreme poles regarding speech protected by the First Amendment. At one end, open speech by a private citizen on matters of public concern "lies at the heart of expression subject to protection by the First Amendment." At the other end, "a statement by a government employee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee," said Souter, citing *Connick v. Meyers*.

Citing *Pickering*, Souter continued:

In between these points lies a public employee's speech unwelcome to the government but on a significant public issue. Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements.

As in Stevens' dissent, Souter cited the *Givhan* case, in which a teacher was found to have been unconstitutionally fired for complaining to a school principal about the racial

composition of the school's administrative, cafeteria, and library staffs. "The difference between a case like *Givhan* and this one" said Souter, "is that the subject of Ceballos's speech fell within the scope of his job responsibilities, whereas choosing personnel was not what the teacher was hired to do." The effect of the majority's line-drawing between the two situations, Souter argued, "is that a *Givhan* school teacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that the principal disapproved of hiring minority job applicants."

Souter found this "an odd place to draw a distinction," particularly since the majority's opinion conceded that the same statements made in a public forum might enjoy constitutional protection. Souter found "no justification" for the majority's line "categorically denying *Pickering* protection to any speech uttered" pursuant to official duties.

Underlying the court's decision in *Pickering*, reasoned Souter, "is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public." The public's interest in receiving the information is as much at issue as the employee's interest in disseminating it, noted Souter. Expanding on this point, Souter proclaimed:

This is not a whit less true when an employee's job duties require him to speak about such things: when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior's order to violate constitutional rights he is sworn to protect....The majority, however, places all these speakers beyond the reach of First Amendment protection against retaliation.

Souter's dissent acknowledged the importance of an employer's ability to effectuate its policies and expect competence and honesty from its employees.

Souter agreed with the majority that “official communications have official consequences, creating a need for substantive consistency and clarity.” So, “up to a point,” he said, “the majority makes good points: government needs civility in the workplace, consistency in policy, and honesty and competence in public service.” However, he rejected the rigid line drawn by the majority, complaining that it failed to account for “the undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths.” Moreover, justifying where to draw the line in the *Pickering* analysis “has to account for the need actually to disrupt government if its officials are corrupt or dangerously incompetent.”

Souter argued that an adjustment to the *Pickering* analysis would suffice to resolve the instant case. First, he said, “an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it.” As examples of speech that should qualify for protection, Souter identified “comment[s] on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety.” Applying such a standard would enable trial courts to sift out meritless claims on summary judgment, thereby avoiding the unduly intrusive role feared by the court majority, contended Souter.

Second, under the general *Pickering* approach long accepted in the Ninth Circuit and other courts of appeals, there have been very few claims to constitutional protection for speech made within the workplace, said Souter, citing statistics for the year Ceballos’ claim was filed. But, even that low number would be diminished if the high standard he articulated for eligible speech were to be applied, Souter opined.

Moreover, Souter chided the majority, the court’s decision invites a flood of litigation over what exactly constitutes an employees’ official duties, since, as the majority

states, job descriptions are neither “necessary nor sufficient” to determine what an employee officially does.

Souter also criticized the court for misconstruing two lines of case law extraneous to the *Pickering* analysis. The first involves employees who speak officially on behalf of the government and whose speech therefore constitutes speech by the government itself. For example, in *Rust v. Sullivan*,⁵ the Supreme Court held that there was no violation of speech rights of federal fund recipients when the government forbade

on-the-job abortion counseling because “when the government appropriates funds to promote a particular policy of its own it is entitled to say what it wishes.”

Souter observed that Ceballos was not hired to voice any particular position or policy on behalf of the D.A.’s office. “He was paid to enforce the law by constitutional action: to exercise the county government’s prosecutorial power by acting honestly, competently, and constitutionally.” Souter continued:

The only sense in which his position apparently required him to hew to a substantive message was at the relatively abstract point of favoring respect for the law and its evenhanded enforcement, subjects that are not at the level of controversy in this case and were not in *Rust*. Unlike the doctors in *Rust*, Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden.

Souter acknowledged that the D.A. would have a legitimate interest in restricting Ceballos’ speech if it “undercut effective, lawful prosecution,” “created needless tension among law enforcement agencies,” or contained “inaccurate statements or false ones made in the course of doing his work.” However, those interests are unrelated to the majority’s concern that when an employee like Ceballos speaks, he does so as the voice of the government itself, which was not true in this case.

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Souter expressed additional concern that “this ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’”

Nor, in Souter’s opinion, is comfort to be drawn from the continued availability of state and federal whistleblower statutory remedies. Generally, such statutes come into play only when complaints are voiced to third parties outside the workplace, which would not have aided Ceballos. Nor would it have helped the teacher whose complaints to the principal were found constitutionally protected in *Givhan*. “In any event,” Souter warned, “the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief.” Thus, he explained, “individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.”

Perhaps the most dispassionate dissent was authored by Justice Stephen Breyer, writing alone. He identified four areas where he believed there was “common ground” among all the justices. First, he asserted that because most human interaction takes place through speech, it cannot all be afforded First Amendment protection. Next, he observed that where government employee speech is at issue, it is due First Amendment protection only where it will not unduly interfere with legitimate governmental interests, such as in efficient administration. “That is because the government, like any employer, must have adequate authority to direct the activities of its employees,” he noted. Breyer also proclaimed that where a government employee speaks as an employee upon

matters only of personal interest, the First Amendment offers no protection. Finally, Breyer identified agreement that the court’s precedent does not define what “screening test” should be used when a government employee speaks regarding a matter of public concern but does so in the course of his ordinary professional duties.

Breyer said that he agreed with much of Souter’s analysis but believed that it gave insufficient weight to the managerial and administrative concerns identified by the majority. Breyer continued:

Breyer agreed with Souter’s analysis but believed it gave insufficient weight to the managerial and administrative concerns identified by the majority.

There are...far too many issues of public concern, even if defined as “matters of unusual importance” for [Souter’s] screen to screen out very much. Government administration typically involves matters of public concern. Why else would government be involved? And “public issues,” indeed, matters of “unusual importance,” are often the daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public’s health, safety, and the environment.

“Indeed,” said Breyer, “this categorization could encompass speech by an employee performing almost any public function, except perhaps setting electricity rates” (an exclusion Californians might dispute).

Breyer also was sympathetic to the majority’s consideration of the availability of statutory whistleblower protections, finding that they “diminish the need for a constitutional forum.”

However, the majority’s conclusion that a public employee may “never” receive constitutional protection when speaking in the course of ordinary duties as an employee is “too absolute,” according to Breyer.

Breyer noted that Ceballos’ speech “is subject to independent regulation by canons of the profession.” As such, Breyer contended, “the government’s own interest in forbidding that speech is diminished.” In addition, citing

Kyles v. Whitley,⁶ Breyer pointed out, “a prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government’s possession.” A prison doctor might have a similar “constitutionally related professional duty” to report to superiors unsafe or unsanitary conditions in a cell block. Other such examples likely exist, he surmised.

“Where professional and special constitutional obligations are both present, the need to protect the employee’s speech is augmented,” Breyer argued. He would find that the Constitution mandates special protection of employee speech within the *Pickering* balancing test.

Justice Breyer concluded that the First Amendment does protect public employee speech regarding a matter of public concern occurring during the course of the performance of ordinary professional duties, but “only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public’s affairs.” In Breyer’s view, those conditions were met in this case and should have been resolved in Ceballos’ favor under the *Pickering* balancing test.

What Now?

The court majority remanded the case to the Ninth Circuit for reconsideration in light of the court’s decision. However, important questions regarding Ceballos’ claim remain unanswered.

Justice Souter encouraged the Ninth Circuit to consider several facts when reviewing the case on remand. Ceballos’ lawsuit alleged retaliatory action not just for his second, toned-down memorandum, but for his testimony, for talking with his superiors, testifying truthfully at the hearing, and for a speech he delivered to the Mexican American Bar

Association about misconduct of the Sheriff’s Department. The Ninth Circuit found that the second memo, alone, was speech entitled to First Amendment protection and did not consider these other bases for Ceballos’ claim. “Upon remand,” guided Souter, “it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties

in any obvious sense, and the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process.”

It remains to be seen how the court would handle a situation where a person in Ceballos’ circumstances goes directly to the press with allegations of misconduct by his or her employer. The high court majority indicated that such speech would be afforded “some protection.” However, it seems equally true that professional canons requiring confidentiality, and perhaps even more pronounced questions regarding interference with the efficient administration of the employer’s operation, would come into play under

such circumstances.

Varied statutory remedies remain available to public employees, but, as noted by Souter’s dissent, have varying requirements and provide uneven degrees of protection. Only in jurisdictions statutorily protecting or requiring employees to report misconduct or incompetence to supervisors would such speech be protected. If left to rely on the First Amendment to the Constitution, public employees now will be forced to run the risk of expressing their concerns regarding matters of public importance in some manner outside their ordinary duties. It seems unavoidable that the majority’s decision will chill public employee efforts to correct improprieties in their government workplaces.

Additionally, the high court may have simply substituted the daunting task of determining what constitutes an employee’s actual duties, notwithstanding job descriptions,

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when determining whether speech is protected for the task of determining, under the *Pickering* test, whether protected speech unduly disrupted employer operations. It is difficult to see how that task will be less burdensome on trial courts.

Some insight should emerge through the Ninth Circuit's analysis on remand and possible additional Supreme Court review after the Ninth Circuit issues its ruling. As Ceballos did not file any statutory whistleblower causes of action, the Ninth Circuit will be required to resolve the remaining questions in his case entirely on constitutional grounds as guided by the Supreme Court's new opinion.

One thing is for certain: this case portends a novel jurisprudential course under the steerage of the newly configured court. Ceballos' case had been orally argued before the court while O'Connor remained on the bench. It was set for re-argument after her resignation, indicating that Alito's vote changed the direction the case was to take. Had O'Connor been involved, Souter's analysis likely would have constituted the opinion of the court.

CPER will track this case on remand and beyond and will report on these critically important issues affecting the balance of employers' and employees' interests as this new era of case law unfolds. (*Garcetti v. Ceballos* [5-30-06] 126 S.Ct. 1951, 2006 DJDAR 6495.) *

1 (1963) 373 U.S. 83.

2 (1968) 391 U.S. 563.

3 (1983) 461 U.S. 138, CPER SRS 22.

4 (1979) 439 U.S. 410.

5 (1991) 500 U.S. 173.

6 (1995) 514 U.S. 419.

Recent Developments

Local Government

Contra Costa County Workers Strike, Superior Court Issues TRO

For one day in June, about 6,000 Contra Costa County workers walked off their jobs to protest deadlocked talks between the county and their union representatives. The number of employees who participated in the job action was somewhat curtailed, however, by a temporary restraining order issued by Superior Court Judge Terence Brieniers. Rejecting the argument that the Public Employment Relations Board has exclusive jurisdiction to decide whether to seek an injunction, the judge ordered about 100 employees to remain on the job because of critical health and safety concerns raised by the county.

For over a year, the county has been at the bargaining table with a coalition of unions whose contracts expired in September 2005. The unions are the Service Employees International Union, Local 535; American Federation of State, County and Municipal Employees, Locals 512 and 2700; Public Employees Union, Local 1; Western Council of Engineers; and Physicians and Dentists Organization of Contra Costa.

Back in May, hundreds of social workers represented by SEIU staged a one-day job action outside of the county government building in Martinez to signal their displeasure with the

county's salary proposals and plans to cut jobs in the Employment and Human Services Department. At that point, the union was seeking a 10 percent salary increase in each of three years; the county's offer was for a 3 percent increase over the term of a four-year agreement.

Although the parties continued to meet with the assistance of a mediator from the State Mediation and Conciliation Service and both sides believed they were making some progress, the union coalition announced plans to hold a one-day strike on June 27. One of the main sticking points involves a cost-of-living adjustment. The union is seeking a COLA-based increase for all unit members; the county is offering the COLA increase only for those employees who are paid wages below the market rate.

With news of the planned strike circulating, the county began to develop contingency plans to keep essential services available. An editorial in the local newspaper implored workers not to walk off the job and to give the state mediator a chance to forge an agreement. The newspaper also defended the county's position that it could not afford the across-the-board COLAs sought by the unions and that

deferring wage increases is an essential part of the county's fiscal recovery program. But, measured by their actions, union members were dissatisfied with the county's bargaining position. On June 22, approximately 6,000 employees staged a demonstration protesting the county's latest offer that included a two-year wage freeze and a 1 percent increase in year three.

At that point, just days before the scheduled job action, attorneys for the

The county said the strike would endanger those in need of critical services.

county sought a court order from the Contra Costa County Superior Court, charging that the threatened strike would endanger those in need of critical services. It sought a restraining order prohibiting close to 300 employees from participating in the strike. The unions argued, along with PERB, that the county was required by clearly established case law to go to the board to get any injunction. The county argued it was not preempted from going to court since it did not have enough time to go to the administrative agency for relief.

The unions also charged that the court's authority to enjoin a strike is curtailed by Labor Code Sec. 1138.1, a provision sometimes referred to as the

Little Norris LaGuardia Act. The state statute requires that before any injunction is issued, the court must hold an evidentiary hearing and find that unlawful acts have been threatened or committed, that substantial and irreparable injury to property will follow, that the complainant has no adequate remedy at law, and that the public officers charged with the duty to protect the complainant's property are unable or unwilling to do so.

PERB will argue that it has exclusive preemptive jurisdiction over strikes.

On Friday, June 23, Judge Brieniers rejected PERB's preemption argument and ruled that Sec. 1138.1 has application in the private sector, but not in the public sector.

On Monday, the day before the scheduled strike, the judge signed off on the TRO directed at Local 1 and AFSCME, but not against SEIU. The judge's order targeted fewer employees than the county's request had originally identified.

In the meantime, the parties engaged in marathon talks into the night on Monday. Those meetings were unsuccessful, and on Tuesday, June 27, as

planned, about 6,000 county workers stayed away from the job.

Negotiations have continued after the one-day job action. Members of the union coalition and management have met with the help of a mediator. Discussions by individual unions also are being conducted at side tables. While the parties report they are making progress, no agreement was reached as CPER went to press.

The dispute in Contra Costa represents the second instance where an employer has gone to court rather than to PERB when seeking to enjoin a strike by local government employees operating under the Meyers-Milias-Brown Act. The City of San Jose recently sought a temporary restraining order against Operating Engineers Local 3. In that case, when the trial court refused to issue the TRO, the city filed a petition with the Sixth District Court of Appeal. The appellate court ordered a stay of all strike activity that would pose a substantial and imminent threat to the continued operation of the sewer system or traffic signals.

The court has allowed the board to intervene in the case to argue that it has exclusive preemptive jurisdiction over strikes and that the parties must seek injunctive relief through PERB, not directly from the courts, when the conduct complained of is arguably an unfair practice under the MMBA. In addition, as in the Contra Costa County case, the union has been permitted to persuade the court that its authority to enjoin a public sector strike is con-

If you're going through hell, keep going.

Winston Churchill

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

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strained by the provisions of Labor Code Sec. 1138.1.

Many in the public sector community are eagerly awaiting the Court of

Appeal ruling in this important case testing PERB's jurisdiction under the MMBA. *

Supervisors Not Excluded From Bargaining Obligation Under Transit Act

The Santa Clara Valley Transportation Authority is required to bargain with the American Federation of State, County and Municipal Employees, Local 101, even though the bargaining unit represented by AFSCME includes supervisory personnel of the transit district. The thorny legal issue decided by the Sixth District Court of Appeal concerned two provisions of the Public Utilities Code enacted in 1994 to facilitate a reorganization that transferred workers from the county to the transit authority. One code provision directs that questions concerning VTA employees' collective bargaining rights are to be resolved by application of relevant portions of the federal Labor Management Relations Act of 1947, which does not extend bargaining rights to supervisors or managers. The other provision requires the transit authority to recognize employee organizations that represented employees prior to their transfer to VTA. One of the incumbent exclusive representatives served as the bargaining agent for rank-and-file employees as well as a group of supervisory and managerial employees.

The appellate court concluded that the legislature intended to provide for the continuity of collective bargaining rights of all transferring county employees. And, it reasoned, the obligation that VTA grant recognition to the representatives of all transferring employees implies that the transit authority must accept the bargaining unit inclusive of supervisors as it currently is composed.

Statutory Scheme

The Santa Clara County Transit District Act created the transit authority in 1969. The act sets out the labor relations provisions that grant collective bargaining rights to VTA employees. It contemplates representation by employee organizations and imposes an obligation to bargain in good faith over wages, hours, and working conditions. Public Utilities Code Sec. 100301 provides that questions concerning majority support in an appropriate bargaining unit must be submitted to the Department of Industrial Relations and, in resolving these questions, the DIR must apply "the relevant federal law and administrative practice" developed un-

der the Labor Management Relations Act. The LMRA is the comprehensive federal labor law that applies to labor relations in the private sector, not in the public sector. It specifically excludes from the definition of employee any individual employed as a supervisor.

As part of the VTA reorganization put in place in 1994, the legislature passed new legal provisions which preserved the benefits and rights that employees had earned and enjoyed as county employees. In addition, PUC Sec. 100309 required VTA to recognize employee organizations that served

The legislature intended to provide for the continuity of collective bargaining rights.

as the exclusive representative of former county employees and to observe all provisions of existing labor contracts for the remainder of the contract term.

Past Representation

At the time the transfer took effect, employees in the supervisory-administrative unit — including employees classified as supervisors or managers — were represented by the County Employees Management Association. In

order to clarify its bargaining obligation, the new transit authority filed a petition with the DIR to resolve a dispute over which unions were entitled to serve as the exclusive representative.

DIR concluded that when the legislature passed the reorganization legislation, it intended to maintain the status quo with respect to existing labor relationships so that unions representing county employees would continue to do so. Although Sec. 100309 required VTA to honor existing labor agreements until they expired, DIR ordered the transit authority to continue to recognize and bargain with the labor representatives, including CEMA, after expiration of the existing contracts.

Following the transfer, VTA bargained with CEMA as the representative of the supervisory-administrative unit and entered into labor agreements with it. When the contract between VTA and CEMA expired in 2003, AFSCME petitioned the DIR to decertify CEMA as the exclusive representative of the unit. VTA opposed this move and asserted that, under federal law, it could not be compelled to bargain with an organization representing supervisory or managerial personnel. At the direction of a DIR hearing officer, an election was held among employees in the supervisory-administrative unit and AFSCME was selected as the exclusive representative.

VTA sought to reverse the DIR ruling, and the trial court concluded that the DIR had exceeded its jurisdic-

tion by failing to apply relevant federal law and exempt the supervisors from the bargaining unit. AFSCME and DIR appealed the lower court's ruling.

Sections 100308 and 100309

VTA is required by Sec. 100309 to "grant recognition" to any employee organization that was the recognized representative prior to the 1995 transfer. Although that section says nothing about the composition of the bargaining units that selected those represen-

The most compelling reason for recognition is the absurdity of a contrary conclusion.

tatives, the Court of Appeal found that that omission does not signal the legislature's intent to exclude supervisory and managerial employees from any unit. "To the contrary," said the court, "in our view, the Legislature intended that VTA accord collective bargaining rights to all the transferring county employees to the extent the employees enjoyed such rights in their prior employment."

In support of this conclusion, the court pointed out that VTA's obligation to maintain existing benefits that were accrued as county employees applies to all transferring employees regardless of

job description. Additionally, the court observed that at the time of the transfer, the legislature would have been aware that employees transferring to VTA would have had collective bargaining rights as county employees under the Meyers-Milias-Brown Act. "Since the MMBA accords collective bargaining rights to supervisors and managers, the Legislature must have anticipated that there would be organizations of supervisory or managerial employees among those transferring to VTA. Yet the Legislature required VTA to recognize the employees' existing bargaining representatives without expressly limiting the requirement to any particular employee categories."

The legislative history of Sec. 100309 also added support to the conclusion that the legislature intended to provide for continuity of collective bargaining rights for all the transferring county employees.

The most compelling reason for concluding that Sec. 100309 applies to all transferring county employees and requires VTA to recognize the supervisory-administrative bargaining unit as it was composed at the time of transfer "is the absurdity of a contrary conclusion." If the statute allowed VTA to exclude supervisors and managers from an existing bargaining unit, reasoned the court, the exclusion would alter the composition of the unit that selected the representative in the first place. That would make the requirement of Sec. 100309 — that VTA grant recognition to the "recognized representa-

tives of the former county employees” — completely meaningless.

The court was not persuaded to alter its interpretation of Sec. 100309 by the command of Sec. 100301 that the DIR must apply *relevant* federal law. “This requirement does not demand slavish adherence to the LMRA,” said the court. “Where state and federal labor laws substantially differ, it is error to rely upon federal law to construe the state law requirements.”

The court gave significant deference to the DIR’s conclusion that, by imposing the requirements of Sec. 100309, the legislature intended to maintain the existing collective bargaining rights of all employees involved in the transfer, including supervisors. “The DIR decided that the LMRA’s no supervisors rule was not relevant to the question at hand.”

Finally, the court dismissed VTA’s argument based on the 2003 enactment of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act. That statute gave supervisory employees of the Los Angeles transit authority the right to be represented by an employee organization for collective bargaining purposes. VTA argued that, in light of that purpose, the legislature must have understood that existing law did not provide these rights to supervisors or it would not have needed the new statute. “Assuming that VTA’s analysis of the law applicable to LACMTA is correct,” said the court, “we note one difference between the

two transit acts that is fatal to the analogy: The statutes applicable to LACMTA do not include any provision similar to section 100309.”

Accordingly, the court held that Sec. 100309 requires VTA to continue to grant recognition to the representative of the supervisory-administrative unit that transferred to VTA as part of the 1995 reorganization, even though the unit includes employees classified as supervisors. “In light of section

100309, VTA may not demand the exclusion of supervisors or managers from the Supervisory-Administrative unit solely because, under the LMRA, it would not be compelled to bargain collectively with employees in those categories.” (*Santa Clara Valley Transportation Authority v. Department of Industrial Relations; AFSCME, Loc. 101, RPI* [6-28-06] H028841 [6th Dist.] ___ Cal.App.4th ___, 2006 DJDAR 8341.) *

Binding Interest Arbitration Upheld Under Agricultural Labor Relations Act

An appeals court has dismissed a constitutional challenge to the mandatory interest arbitration provisions added in 2002 to the Agricultural Labor Relations Act that allow a “mediator” to establish the final terms of a collective bargaining agreement. Proponents of the amendments asserted that a new mechanism was necessary because unions that have been certified to represent agricultural workers have been unable to gain agreement with employers on the terms of a contract.

The case resolved by the Third District Court of Appeal involved The Hess Collection Winery doing business in the Napa Valley. After the United Food and Commercial Workers Union and Fresh Fruit and Vegetables Workers, Local 1096, was certified as the exclusive representative of Hess’s agricultural employees, the parties began

bargaining. Between 1999 and 2003, Hess and the union engaged in 23 bargaining sessions, which ended in impasse. Hess then implemented its last, best, and final offer.

In April 2003, the union advised the Agricultural Labor Relations Board that it had failed to reach agreement with Hess, and the board ordered the parties to utilize the multi-step process outlined in Labor Code Sec. 1164.

The parties chose Gerald McKay as a third-party neutral and engaged in typical mediation. When that process proved unsuccessful and the parties were unable to come to an agreement, McKay invoked what the statute refers to as “mandatory mediation and conciliation.” Despite that wording, the process amounts to compulsory interest arbitration.

The union participated in the process and presented evidence to McKay. However, Hess refused to participate, taking the position that mandatory mediation was invalid because Sec. 1164 violates principles of due process and equal protection. McKay assumed the accuracy of the union's evidence

The legislature added arbitration provisions to 'more fully attain' the purposes of the ALRA.

and crafted a collective bargaining agreement for the parties. He filed his report with the ALRB on September 24, 2003. The board declined Hess' request that it review McKay's report and concluded that it lacked the authority to determine the constitutionality of Sec. 1164.

Court Analysis

Writing for two members of the panel, Justice Richard Sims first found "no doubt that the Legislature has the authority to regulate employment." The question, he said, is whether the legislature exercised that authority in a constitutional manner when it created a process of compulsory interest arbitration.

The court rejected Hess' contention that the statutory scheme violated

principles of substantive due process by interfering with the company's right to contract. "These days," said the court, a law will not be struck down on these grounds unless it is "manifestly unreasonable, arbitrary, or capricious, and has no real or substantial relation to public health, safety, morals, or general welfare." In this case, the court observed, the legislature felt the need to add the arbitration provisions to "more fully attain" the purposes of the ALRA in an industry where "the power to strike is illusory" in light of the unskilled nature of the work and the low wages paid to workers. The court also noted that the compulsory interest arbitration process is limited in scope, applying only to the initial bargaining efforts of an employer and a union. "The statutory remedy is a one-time thing," the court underscored.

Hess also argued that the statutory scheme strips it of the right to judicial review of the imposed agreement. "It does not," said the court. The reviewing court will consider whether the agency acted within its authority, employed fair procedures, and acted with evidentiary support. "The statutory scheme gives Hess the scope of judicial review that is constitutionally required."

Likewise turned aside was the assertion that the statute violates principles of equal protection because it applies only to agricultural employees. Framing the appropriate test to be whether the classification affected by the statute bears a rational relationship

to a legitimate state purpose, the court took note of the legislature's recognition that agricultural employers were refusing to agree to the terms of collective bargaining agreements. The "peculiar problems" with the collective bargaining process between agricultural employers and employees provides a rational basis for the legislation, concluded the court.

Delegation

Finally, Hess argued that the statute invalidly delegated fundamental policy decisions to the arbitrator. Again the court disagreed. The ALRB regu-

The statutory scheme gives Hess the scope of judicial review that is constitutionally required.

lations outline specific factors that it and the arbitrator must use in arriving at a collective bargaining agreement. And, delegating the authority to craft the agreement to a private party is not necessarily unconstitutional.

In addressing the delegation argument, the court brushed aside the ruling of the Supreme Court in *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 160 CPER 19, which struck down a statute requiring coun-

ties and local public agencies to submit to binding arbitration of economic issues that arose during negotiations with unions representing firefighters or law enforcement officers. In *Riverside*, the high court found that the statute violated the constitutional provision that prohibits delegation by the legislature to a private person or body “the power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions.”

A dissenting member of the appellate court panel reached a contrary conclusion, relying in part on *Riverside* and on the dissenting opinion of Justice Janice Brown in *Stop Youth Addiction v. Lucky Stores* (1998) 17 Cal.4th 553. Writing in opposition to the statutory scheme, Justice George Nicholson criticized the labor law for delegating legislative power “to a lone private mediator to draft a collective bargaining agreement, virtually by fiat.” He concluded that the law was invalid because it gave the mediator “power to create basic public policy, provided no standards for resolving the disputed issues between the parties, and lacked meaningful review of the mediator’s award.” And, he said, Sec. 1164 “invalidly delegated legislative authority.”

While this specific statutory scheme found in the Labor Code has no application to public sector employees, the court’s decision provides further insight into the legal analysis of

binding interest arbitration. The *Riverside* decision that struck down the provisions imposing binding arbitration on police and fire bargaining impasses may not be the final word on the subject. After the *Riverside* case was decided, the legislature made an adjustment to Code of Civil Procedure Secs. 1299 et seq. at issue in that case. The statutory scheme was changed to allow for the rejection of an arbitrator’s award by a unanimous vote of the public entity’s governing body. Whether that

is enough to cure the constitutional infirmity cited by the Supreme Court remains to be seen. And, should the Supreme Court be called upon to revisit the issue, the *Hess* ruling may prove to be instructive. (*The Hess Collection Winery v. California Agricultural Labor Relations Board; United Food and Commercial Workers Union and Fresh Fruit and Vegetable Workers, Local 1096, RPI* [7-5-06] C045405 [3d Dist.] ___Cal.App.4th___, 2006 DJDAR___) *

Decision Not to Dismiss Public Employee Need Not Be Reported Under Brown Act

The Ralph M. Brown Act recognizes that members of the public have a right to know of and participate in actions taken by local legislative bodies. The act attempts to balance this open meeting obligation with legislatures’ need to carry out certain of its duties in private. So while legislative bodies of local agencies are required generally to conduct business openly and publicly, there are some areas of decision-making the act shields from public participation.

One qualifying exception is a governing body’s session undertaken to address personnel-related matters such as employee discipline and dismissal. Although these sessions are closed to public participation and debate, the act does require that *actions* taken in these sessions be publicly disclosed.

A California State Senator recently requested an opinion of the Attorney General on this provision, asking whether the outcome of a closed session held to consider the dismissal of a public employee must be reported even if the employee is retained by the local entity. In the opinion of California’s Attorney General Bill Lockyer, the answer to that question is “no.”

The relevant language of the Brown Act reads, “Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session... shall be reported [to] the public.” The act defines “action taken” as either a positive or negative decision that brings about some modification or change in employment status.

The act's specificity as to what actions must be reported made Attorney General Lockyer's task a straightforward one. Where an action taken does not modify or change employment status, the opinion reads, the reporting requirement for personnel-related closed sessions does not apply. Choosing to retain rather than dismiss an employee is simply maintenance of the status quo and therefore need not be disclosed.

Some personnel actions taken in closed session need not be disclosed.

Support for this proposition was found in a prior opinion of the Attorney General, in which it was observed that the primary reason for the personnel exception is to save an employee from undue publicity and embarrassment. It reasoned that reporting the decision to retain an employee, when the public was not aware the employee was being considered for dismissal, would render the employee undue embarrassment. Further, requiring a public report on all actions taken on personnel matters could "effectively destroy the 'personnel exception.'"

The Attorney General rejected the argument that approval of Proposition 59 by California voters in 2004 requires a different result. Prop. 59 requires narrow construction of a statute

that limits public access to information. The A.G. reasoned that the personnel exception, first enacted in 1975, 29 years prior to the implementation of Proposition 59, remains in full force

and effect notwithstanding the recent adoption of Prop. 59. (*Opinion by A.G. Bill Lockyer*, Ops.Cal.Atty.Gen., No. 05-701 [5-25-06].) *

One-Year Limitations Period Bans Police Officer's Pay-Grade Reduction

The Court of Appeal reinstated a Los Angeles police officer to his level III position because the police department added the downgrade penalty more than one year after it learned of the underlying misconduct.

The court strictly construed Sec. 3304(d) of the Public Safety Officers Procedural Bill of Rights Act, which provides that no punitive action for misconduct may be taken if investigation of the allegation is not completed within one year of the discovery of misconduct. As is explained in *Jackson v. Los Angeles* (2003) 111 Cal.App.4th 899, 162 CPER 33, this section encourages "prompt investigation of allegations of officer misconduct, . . . promotes the public interest in maintaining the efficiency and integrity of the police force, [and] promotes the police officer's interest in receiving fair treatment by requiring the diligent prosecution of known claims. . . ." Officer Ronald Sanchez felt he was denied fair treatment and filed a petition for a writ of administrative mandate challenging the department's action.

Background

In September 1998, Officer Sanchez was charged with six counts of misconduct: one allegation that he had directed another officer to falsify information and five counts of conducting personal business while on duty. In August 1999, within one year of the dis-

The department contended its decision related back to the initial charge.

covery of the misconduct, Sanchez's superior, Captain Melton, served Sanchez with a notice of proposed disciplinary action. In it, Melton indicated he would propose to the police chief that Sanchez be suspended for 20 working days. This was the only proposed discipline mentioned in the notice; all other possible disciplinary measures — including "demotion/downgrade considerations" — were labeled "none."

On September 8, 1999, exactly one year after the misconduct was discovered, the chief rejected Melton's proposed discipline and instead issued a personnel complaint against Sanchez on the same six charges. This complaint was to be heard and decided by a board of rights. Then, on October 27, 1999, more than one year after the discovery of misconduct, Melton served Sanchez with a memorandum requesting that he be reduced in pay grade to police of-

The dispositive issue was whether Sanchez was put on notice of the downgrade within the one-year period specified in Sec. 3304(d).

icer II. Melton based this request on the six counts of misconduct then pending before the board of rights, and on a 31-day suspension Sanchez received in 1993, and a 10-day suspension from 1995.

In a series of hearings that took place between 2000 and 2001, the board found Sanchez not guilty on the count of falsification, as well as on one of the counts of conducting personal business while on duty. The board found him guilty as to the other four counts. The recommended discipline was a 22-day

suspension without pay, only two days more than the original 20 days proposed by Melton. The chief acted in accord with this recommendation, and Sanchez served his suspension.

In the meantime, Sanchez still had the downgrade to contend with. On December 8, 1999, now one year and three months past the date of discovery, the chief approved Melton's proposal to downgrade Sanchez. Sanchez pursued an administrative appeal, the outcome of which was a recommendation to overturn the downgrade and reinstate Sanchez as an officer III. The chief disregarded this recommendation and upheld the downgrade order. Sanchez then filed a petition for writ of mandate to set aside the chief's decision. Sanchez argued that the chief's decision was an abuse of discretion since Sanchez had not been advised of the downgrade within the one-year time period set forth in Sec. 3304(d). The department argued it had complied with that section when it served Sanchez the original notice on August 25, 1999. It was the department's contention that it was not limited to the discipline proposed in the notice, and that its decision to downgrade Sanchez's position related back to the initial charge and disciplinary action.

The trial court agreed with neither party. Instead, it issued its own interpretation of the PSOPBRA section. The court read the statute to require that only the recommended punishment be disclosed to the accused within one year, not what the final punishment will

be. The first recommendation — the 20-day suspension — was made within the required time frame; however, the reduction in pay grade was not. Nonetheless, the court concluded that the administrative appeal the department afforded to Sanchez cured this defect, and it therefore denied Sanchez's petition.

On appeal, the court agreed with the trial court's conclusion that the chief improperly had imposed the downgrade, but it rejected the contention that the administrative hearing cured the defect. Instead, it reasoned that Sec. 3304(d) requires the department to "notify the officer of the specific disciplinary action that is being proposed, not merely to advise the officer that *some* disciplinary action is being contemplated." It also found the administrative appeal did not cure the defect of the time-barred downgrade. The court relied on *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 27 CPER 37, which provides that a civil service employee is entitled to notice of the proposed disciplinary action, the reasons for the action, a copy of the charges and the materials on which the action is based, and the right to respond. It made no difference to the court that Sanchez would not have taken different defensive measures had the downgrade been mentioned in the original notice; instead, the dispositive issue was whether Sanchez was put on notice of the downgrade within the one-year period specified in Sec. 3304(d). (*Sanchez v. City of Los Angeles* [5-26-06] B182835 [2d Dist.] 139 Cal.App.4th 1297, 2006 DJDAR 6604.) *

Binding Arbitration Unnecessary When Impasse Is Reached Over Antidiscrimination Effort

The California Supreme Court recently reversed a lower court holding that ordered the City and County of San Francisco to engage in binding interest arbitration with the San Francisco Fire Fighters, Local 798, over a bargaining impasse concerning a rule change for promoting firefighters.

At issue was Rule 313, known as the “Rule of Three Scores,” which governed promotions within the department. Under this rule, employees with the three highest scores on the civil service exam were certified as candidates for promotion when a position was available. The Civil Service Commission notified the union that it intended to revise Rule 313, and offered to meet and confer regarding the proposed changes. In negotiations, the focus was on the banding method used to certify promotional candidates. The commission wanted to lessen reliance on promotional exams, which have a history of discriminatory impact, and instead increase reliance on other measures of ability. After two years of negotiations, the commission declared an impasse and amended Rule 313 to include statistically valid grouping, or a sliding band, that would allow it greater discretion when selecting candidates for promotion.

The sliding band would treat those scoring within a certain range as comparably situated. If at any time the high-

est score in the grouping were to be exhausted, the band would slide so that its upper limit would rest on the highest score remaining on the list. The amendment deleted any reference to Equal Employment Opportunity goals and established that the commission also would use “secondary criteria,” determined by the appointing officer,

The Supreme Court interpreted the word ‘necessary’ more broadly.

to select promotional candidates. This secondary criteria was to be non-discriminatory and announced to, and approved by, the commission in advance of any job announcement.

Following this rule change, the union invoked binding arbitration under Sec. A8.590 of the city charter. This section provides that a matter be submitted to binding interest arbitration if the parties bargained to impasse without reaching an agreement. The commission, however, refused to use that process. It claimed that the promotional rule was excepted under Sec. A8.590-5(g)(3), which exempts from arbitration

“any rule, policy, procedure, order or practice...which is necessary to ensure compliance with federal, state or local antidiscrimination laws, ordinances or regulations.” The Court of Appeal disagreed with the commission. It concluded the amendment was not necessary for compliance with antidiscrimination laws and ordered the parties to utilize the binding arbitration process. (For more on the lower court’s ruling, see *CPER* No. 170, pp. 44-48.)

The California Supreme Court reversed this holding, focusing on the word “necessary” in Sec. A8.590-5(g)(3). While the lower court strictly interpreted “necessary” to mean something that is indispensable, the Supreme Court interpreted the word more broadly so that it was able to reconcile two seemingly contradictory paragraphs of Sec. A8.590-5.

Paragraph one exempted “necessary acts,” while paragraph two stated that “*anyact*” by the city to ensure compliance with antidiscrimination laws was exempt from binding arbitration. Under the Supreme Court’s broad definition, “when the City takes an action to ensure compliance, such as adopting, amending, or implementing a rule, etc., that is convenient, useful, appropriate, suitable, proper or conducive to ensure compliance with antidiscrimination laws, that action is itself ‘necessary’ to ensure compliance...and therefore exempt from binding arbitration.”

The change in Rule 313 was reasonably related to the goal of ensuring compliance with antidiscrimination

laws, the court wrote, and thus according to Sec. A8-590-5(g)(3) was not subject to arbitration. The court emphasized the narrowness of its holding, determining only that the commission “acted in amending rule 313 to ensure compliance with antidiscrimination laws, notwithstanding the fact that the union disputes the means of compliance chosen. As such, Sec. A8.590-

5(g)(3) explicitly provides that binding arbitration is not the means of resolving this dispute, and implicitly permits the City to implement the new rule 313 unilaterally after bargaining in good faith to impasse.” (*San Francisco Fire Fighters, Loc. 798 v. City and County of San Francisco* [5-18-06] 38 Cal.4th 653, 2006 DJDAR 6019.) *

The high court reasoned that the supervisor’s letter directed Stephens to leave work temporarily until his medical condition improved. At no time was he dismissed from his employment. The court summed up:

Although the phrase “dismissed...for disability,” as used in section 31725, has been interpreted to encompass employer actions that are functionally equivalent to terminating an employee, Stephens cites no authority, and we have found none, holding that an employer functionally or effectively terminates an employee by telling the employee to go out on sick leave until his or her medical condition abates sufficiently to enable return to the job.

(*Stephens v. County of Tulare* [5-25-06] 38 Cal.4th 793.) *

Supreme Court Says ‘Dismissed’ Means Terminated

In a unanimous opinion, the California Supreme Court has reversed the ruling of the Fifth District Court of Appeal in *Stephens v. County of Tulare* and announced that a county employee who is not “dismissed” from his employment is not entitled to the protections afforded by Government Code Sec. 31725. The case involves the employ-

instructed by his supervisor not to return to work until he was able to perform his assigned tasks without restrictions or until his condition improved.

The county retirement board denied his application for a service-connected disability retirement. The county eventually reinstated him to a modified position, but in his lawsuit, he sought backpay and benefits from the date of his supervisor’s letter.

The Court of Appeal found that Sec. 31724 required the county to procure the backpay award even though the employee never was formally terminated. (See *CPER* No. 169, pp. 27-29, for a complete summary of the lower court ruling.)

The Supreme Court reached a contrary conclusion, finding that the plain meaning of the word “dismissed” as used in Sec. 31725 describes a circumstance in which the employment relationship, at the employer’s election, has ended.

*‘Dismissal’ pending
resolution of disability
is not employment
termination.*

ment of John Stephens, a county detention specialist, who suffered a work-related injury, was given a light-duty assignment, complained to his supervisor that the assignment was causing him to re-injure himself, and was then

Public Schools

Attorney General OKs Deduction From CalSTRS for PACs

The Attorney General for the State of California has issued an opinion holding that the California State Teachers' Retirement System may make a deduction from a member's retirement allowance and redirect the amount to a political action committee at the member's request so long as STRS requires the political action committee to pay any additional administrative costs involved in redirecting the funds.

CalSTRS members can redirect their own funds in the manner they see fit.

CalSTRS asked the attorney general to determine whether the general rule prohibiting public agencies from using public funds to promote a politically partisan position, the election of a particular candidate, or the passage or rejection of a ballot initiative applied to it in this particular situation. In concluding that it did not, the attorney general recognized that, according to a

number of California court decisions, "pensions, or retirement benefits, are income to the recipient and subject to taxation under state and federal income tax laws," and therefore not public funds.

Further, Ed. Code Sec. 24608 specifically authorizes CalSTRS to make retirement allowance deductions at a member's request if the cost involved in making the deduction is paid by the entity receiving the funds, said the attorney general.

The opinion noted that the Attorney General's Office previously had determined that a school or community college district could make employee payroll deductions and contribute them to a PAC at the request of an employee without violating the prohibition against using public funds contained in Ed. Code Sec. 7054. In that opinion, at 84 Ops.Cal.Atty.Gen 52, the attorney general stated:

Section 7054 has no application here. The "funds, services, supplies, or equipment" of a school district or community college district would not "be used for the purpose of urging the support or defeat of any ballot measure or candidate." Rather, it would be the employees' funds that might con-

ceivably be so used by the political action committee. The district's resources would only be affected to transfer the employees' funds to the employees' designated recipient. The district would have no control over the employees' funds other than to act as the agent of the employees in making the transfer of the employees' funds. This is not the type of "political activity" to which section 7054's prohibition is directed.

The attorney general reasoned that a similar conclusion should be reached in the present situation:

As with the payroll deduction procedures at issue in our earlier opinion, the retirement allowance procedures set forth in section 24608 provide a means for CalSTRS members to redirect their own funds in the manner they see fit. We find no meaningful distinction between (1) a public employee's use of a payroll deduction program to contribute to a PAC of his or her choosing and (2) a pension recipient's use of an allowance deduction program to do the same. In both situations, the public agency has a legal obligation to pay that individual, regardless of how he or she might use the money received. It is the individual who exercises the option of using the administrative tool of a payroll or allowance deduction, authorized by statute, to dispose of his or her own funds.

*(Opinion of Bill Lockyer, Attorney General [6-12-06] ___Ops.Cal.Atty. Gen___, 2006 DJDAR 7371.) **

Teachers Union Opens Ranks to Support Staff

On June 4, the California Teachers Association announced that it would open up membership to school secretaries, bus drivers, and other education professionals who are not teachers. The decision was implemented by the State Council of Education, the union's top policymaking body, composed of about 800 teachers from around the state. The

The greatest impact is likely to be felt in the charter schools.

council's action immediately inducts approximately 5,000 support staff into full membership. Those workers previously had been affiliated with CTA by virtue of their membership in the National Education Association. Now, as full members, they have a right to vote and no longer have to sit in the "visitors" section at union meetings.

The greatest impact is likely to be felt in the charter schools, however. In general, charter schools have relatively few teachers, many of whom have elected not to unionize. The number of charter schools has risen substantially in the last 10 years. Now more than 200,000 California students are en-

rolled in 574 charter schools with many new operations in the planning stages. Hundreds of teachers have left their traditional classrooms for charter schools. For example, nearly 700 Los Angeles USD teachers have taken leaves of absence to teach at the district's 100 charter schools. CTA has been attempting to organize charter school teachers, but the organization expects that the council's decision to allow non-teachers to join the union will make organizing efforts easier. It "will also facilitate wall-to-wall charter school organizing," the union's top executives wrote in a June 2 letter to members.

The union also had been seeking to position itself to organize preschool staffers had Proposition 82, the preschool initiative on the June 6 ballot, passed.

More than 230,000 school support staff currently are represented by another union, the California School Employees Association. According to CSEA President Rob Feckner, CTA assured him that it would not try to steal members from that organization.

Prior to the state council decision, CTA had been in the distinct minority in limiting membership to teachers. Teachers unions in 48 other states already count educational support professionals among their members. *

Mixed Reaction to L.A. Mayor's Plan to Restructure LAUSD

From the minute he took office, Los Angeles Mayor Antonio Villaraigosa has been working hard to take control of the troubled Los Angeles Unified School District.

Villaraigosa has been campaigning for more than a year to wrest power over the district from the school board, arguing that mayoral control was the only way to streamline school district bureaucracy and put more money and resources into the classrooms. He has said that the drop-out rate in the largely

nonwhite district, calculated at 56 percent by a recent study, is "the new civil rights issue of our time," and has vowed to do everything in his power to lower that rate and sharply improve student achievement. "We cannot allow the status quo to continue," he has said. "It is unacceptable." The mayor has made taking over management of the district a cornerstone of his administration. "I will not be deterred in this effort," said Villaraigosa. "There's too much at stake."

In the face of local opposition from the school board, the superintendent of schools, and the teachers unions, Villaraigosa moved the battle for control to the state legislature in Sacramento. There, he lobbied for legislation that would allow him and the mayors of 26 other cities served by the school district to hire and fire the superintendent and oversee L.A. Unified's multi-billion-dollar budget. Under his proposed plan, the seven-member elected school board would assume a limited advisory role. In support of his position, the mayor pointed to measurable improvements in the level of education in other cities where mayors have gained control of school districts, such as New York and Chicago.

But Villaraigosa was not the lone voice in Sacramento. School Board President Marlene Canter, Superintendent Roy Romer, and other district officials also went to lobby *against* the mayor's proposals and launched a public relations counter-offensive. Legislators expressed concern about allowing Villaraigosa to bypass local voters and about whether he had the necessary expertise to run a nearly \$30 billion dollar educational enterprise affecting 727,000 students in 858 schools.

Realizing that his legislative bid was in trouble, Villaraigosa brokered a deal with two powerful teachers unions in June. The California Teachers Association and its Los Angeles affiliate, United Teachers of Los Angeles, both had opposed Villaraigosa's takeover plan, but, after two days of intense ne-

gotiations, the group reached a compromise with the mayor. The unions forced Villaraigosa to abandon his bid for complete control. Under the new proposal, incorporated into A.B. 1381 carried by Assembly Member Dario Frommer (D-Los Angeles) and Senator Gloria Romero (D-Los Angeles), the school board will be allowed to select a superintendent to replace the retiring Roy Romer, but a council made up of the 27 mayors would have veto

The union got greater control for teachers over instructional methods.

power over the selection. Because 80 percent of the district's students live in Los Angeles, Villaraigosa would be the dominant voice on the council. That body would have input on the budget, as well as direct control over 36 of the district's lowest-performing schools.

In exchange for their support, the unions got something they have been seeking in recent contract negotiations with the school board: greater control for teachers over instructional methods. UTLA has long complained about what it considers overly restrictive mandates from the district's top officials and has wanted more leeway for teachers to decide what works best at their schools.

The conflict stems from a change in policy instituted by the Board of Education in 2000. At that time, the board adopted a rigidly structured reading program — Open Court — for all district elementary schools. The program came with thick guides that told teachers what to teach and when. “Pacing plans” were introduced to keep teachers on the same page on the same day. The union fought the plan since its inception, saying that the one-size-fits-all approach did not work and that teachers needed more flexibility. The school-site authority controversy played a pivotal role in the legislative deal the unions negotiated with Villaraigosa. UTLA President A.J. Duffy said that allowing schools to determine curriculum was a “critical piece” of the reform agreement.

Assembly Speaker Fabian Nunez (D-Los Angeles) and Senate Speaker Pro Tem Don Perata (D-Oakland) have said they support the legislation. Governor Arnold Schwarzenegger pledged to sign the bill if passed, even before it was drafted. In a written statement, the governor praised Villaraigosa's “bold leadership” and said the legislation “is exactly what needs to be done.”

However, the bill faces stiff opposition from a number of powerful forces. Six unions representing district workers other than teachers, including the school administrators union, have come out against the plan. School board members and other district officials were outraged by the deal, condemning it as a power grab that would un-

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dermine an urban system that has recently shown marked progress. They rebuked the mayor and teachers union officials for ignoring the board, parent groups, and several other unions that represent district employees. Kevin Reed, the district's top lawyer, said that possible lawsuits are being discussed.

The Los Angeles Parent-Teacher Association condemned the plan. "We know what's best for our children," said President Scott Folsom.

UTLA is facing opposition within its own ranks.

At the time the compromise was announced, Superintendent Romer raised concerns about future superintendents having to answer to multiple bosses. "Every day that he goes to work, he's going to think, 'Who is the person or group to whom I report?' Who's going to be the person in control?" he said. In a scathing article that appeared in the *Los Angeles Times* several days later, Romer wrote, "The mayor's compromise is about power and money, not about children — and certainly not about education reform." Romer also testified against the bill before the Senate Education Committee.

The *Los Angeles Times* editorial board is strongly opposed to the plan. One recent editorial criticized the

mayor for giving up his goal of mayoral control for a "convoluted compromise that would actually lead to more confusion and less accountability." The article said it was "appalling to see Villaraigosa effectively hand control over curriculum to individual schools."

Assemblyperson Keith Richman (R-Granada Hills) opposes the bill and has said that he does not believe it will get much support from his Republican colleagues. "This proposal is really the worst alternative," he said. "It's a proposal that diffuses responsibility and there's no accountability," he explained. "With the school board, the mayor, the mayor's council, [and] the superintendent [sharing power,] nobody's going to know who's in charge and who's responsible or accountable." Richman and Senator George Runner (R-Antelope Valley) are in favor of breaking up the district instead.

The mayors of six of the cities that are to be represented in the proposed mayors' council also have come out against the proposed legislation. In a strongly worded letter to their representatives, the six mayors said Villaraigosa's plan would create a "diffused and confusing oversight structure" that would leave residents of their cities with "a muted voice and ultimately no decision-making power over education."

And, UTLA is facing opposition to the plan from within its own ranks. Disgruntled members called a special meeting demanding that union officials explain and justify the deal. While those

attending were split on the legislation itself, they were united in their frustration over not having been involved in the process leading to the compromise. About half of the union's 300-member House of Representatives attended the meeting. "This house is the policy-making body, and nothing should be done without coming to you first," said one teacher. "Where was the democratic process? Did they [union officials] ask teachers anything?"

Recent versions of the legislation have watered down flexibility.

Regarding the specifics of the legislation, many members expressed skepticism at the meeting. Encouraged by early drafts of the proposed bill, which included language that would have allowed teachers and principals the freedom to select curricula for their classrooms, their enthusiasm has waned. Recent versions of the legislation have dramatically watered down this flexibility. "There's really nothing in this bill now to recommend it to teachers," said teacher Warren Fletcher, who helped organize the meeting. "This is a bill that is already lethally vague, and trying to fix it with more vagueness isn't going to cut it."

But the bill has cleared its first legislative hurdle. It was approved by the Senate Education Committee by a vote of seven to one prior to a month-long legislative break. Villaraigosa has

launched a website — www.excellenceinlaschools.com — that he hopes will bring together an army of parents to put pressure on state officials to pass the bill into law. *

documents. The documents were placed in the mailboxes by teachers during non-duty time.

In October 2004, the district instructed SLTA to stop using the mailboxes to distribute material containing “impermissible political endorsements” in violation of Education Code Sec. 7054, which states, in part:

No school district...funds, services, supplies or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district.

SLTA filed an unfair practice charge with PERB, alleging the district’s directive violated the Educational Employment Relations Act by denying the access rights conveyed in Government Code Secs. 3543.5(a) and (b). PERB refused to issue a complaint and dismissed the charge. (See discussion of PERB’s ruling at *CPER* No. 174, pp. 86-87.) Undeterred, SLTA filed a lawsuit in superior court.

Superior Court Decision

SLTA argued that the district’s policy of restricting it from including political endorsements in its newsletters distributed in district mailboxes violated its members’ rights of free speech conveyed by Article I, Section 2, of the California Constitution. The district argued that the mailboxes are a “service” or “equipment” of the district within the meaning of Sec. 7054 and

Union Can Use Teachers’ Mailboxes for Political Communications

A superior court judge has ruled that school districts cannot prohibit teachers unions from distributing newsletters with political content to members’ school mailboxes.

The ruling by Winifred Y. Smith, judge of the Superior Court of Alameda County, in *San Leandro Teachers Assn. v. Governing Board of the San Leandro Unified School Dist.*, not only overruled the Public Employee Relations Board holding in this case, but also directly contradicted PERB’s decision in *San Diego Community College Dist.* (2001) No. 1467, 152 CPER 86.

Factual Background

The San Leandro Teachers Association is the exclusive bargaining representative of the certificated employees of the district. Each school in the district maintains a set of mailboxes for certificated employees on site. The district uses the mailboxes to distribute written communications to employees. SLTA also uses the mailboxes to distribute written communications to employees. The collective bargaining agreement between SLTA and the dis-

trict conveys to SLTA the right to “use teacher mailboxes...for lawful communications to teachers.”

The district paid the cost of constructing the mailboxes and continued to pay the cost of maintaining them. The boxes do not require any specialized maintenance or servicing.

The legislature’s intent was to prohibit the use of public funds in election campaigns.

Several documents distributed to the mailboxes by SLTA discussed its representation activities, including contract negotiations, and the activities of its political action committee. Members were asked to volunteer to help in SLTA’s campaign to elect certain school board candidates it had endorsed. SLTA paid the costs of producing the

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that it is required by that section to prevent the use of the mailboxes to distribute messages with political content.

Noting that it “must interpret the statute so as to effectuate its purposes,” the court looked to the statutory language to determine the legislature’s purpose in enacting it. In a 1995 amendment, the statute read, in part, “No public entity should presume to use money derived from the whole of taxpayers to support or oppose ballot measures or candidates.” The court determined the legislature’s intent clearly was to prohibit the use of public funds in election campaigns.

The court also acknowledged that, in a situation where “a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional...the court will adopt the construction which...will render it valid in its entirety.” In this case, the court said:

The District’s interpretation of Section 7054 is at odds with the apparent purpose of the statute — to prevent the use of public District resources for political campaigning. Here, the “use” of public funds is nominal, at best. The mailboxes exist. There is no cost or use of public resources over and above the normal costs of the mailboxes which is incurred by the District on account of SLTA’s use of the mailboxes. The newsletters at issue here are produced and distributed entirely by SLTA, with no use of any District resources. This is simply not the type of political campaigning activity to which Section 7054 is directed.

The court recognized that its holding was in direct opposition to PERB’s decision in *San Diego Community College Dist.* (2001) No. 1476, 152 CPER 86, where PERB found that “the plain meaning of Education Code 7054 prohibited the use of mailboxes as a means of distributing political information.” It determined that PERB’s reasoning was faulty and that it had overstepped its jurisdictional boundaries:

First, the interpretation of the statute taken by PERB and urged by the District leads to absurd results obviously not intended by the statute. For example, two teachers on off-duty time are plainly permitted to have a conversation about which school board candidates they support, and are allowed to have that conversation on school grounds. The fact that they are “using” school property when they communicate with each other — sheltered by the school’s roof, illuminated by the school’s lightbulbs, warmed by the school’s ventilation system — does not mean that the District’s “funds, services, supplies or equipment...[are being] used for the purpose of urging the support or defeat of any ballot measure or candidate.” Similarly, the fact that a teacher parks a car bearing a bumpersticker with a political slogan in a District parking lot doesn’t run afoul of the District’s obligations under Section 7054.

Further, PERB’s jurisdiction does not extend to a determination of whether any particular interpretation of Education Code Section 7054 is unconstitutional. That is the Court’s task here.

Turning to the constitutional issue, the court rejected the district’s argument that the school mailboxes are a non-public forum and that, therefore, the district may impose any reasonable limitations on communications distributed through them. It distinguished *Perry Employee Assn. v. Perry Local Educator’s Assn.* (1983) 460 US 37, 57 CPER 53, a case relied upon heavily by

School mailboxes are a forum that has been opened to SLTA by statute.

the district. “The *Perry* case was primarily about restrictions on access to a forum, rather than content restrictions on communications within the forum,” said the court. In *Perry*, the Supreme Court found that the district had not violated the equal protection and free speech rights of a rival union by excluding it from access to the mailboxes while permitting access to the exclusive representative. The *Perry* court noted that “the very concept of the labor-management relationship requires that the representative union be free to express its independent view on matters within the scope of its representation.”

“In this case,” said the court, “the school mailboxes are a forum that has been opened to SLTA by statute, by the

terms of the collective bargaining agreement, and by the conduct of the District.” Therefore, it instructed, any restrictions by the district as to this designated group are subject to strict scrutiny. Any restrictions on the use of the forum, or the content of the speech must be shown “to serve a compelling state interest... [and be] narrowly drawn to achieve that end,” said the court, quoting from the Supreme Court’s opinion in *Widmar v. Vincent* (1981) 454 U.S. 263.

California courts interpreting the State Constitution’s free speech protections have also held that speech in a “semi-public” forum cannot be prohibited unless it is “basically incompatible” with the forum’s primary purpose or normal activities, noted the court. Applying these tests to the facts, the court concluded that the district’s policy violated the constitutional protections:

The District’s only stated compelling interest [underlying its policy] is in not appearing to violate Education Code Section 7054. The District’s interpretation of Section 7054 is not narrowly tailored to prohibit only speech conduct that would put the District in violation of Section 7054. While the District has a legitimate interest in limiting speech that might be attributed to it on matter of politics, its teachers have a right to engage in political expression, even when on school property....The newsletters in question were plainly expressing the views of SLTA, not the District. While the District could have made a policy requiring that SLTA’s communications

clearly state that they were not made or endorsed by the District, in order to avoid the appearance of political campaigning prohibited by Section 7054, the District instead broadly prohibited political speech.

Attorneys for the district have announced that it will appeal the court’s decision. Priscilla Winslow, the attorney representing SLTA, told *CPER* she is confident that Judge Smith’s decision will be upheld. “The decision is well-reasoned and based strongly in California law,” she said. “We are confident that our position will be vindicated.” (*San Leandro Teachers Assn. v. Governing Board of the San Leandro School Dist.* [5-3-06] Ala.Co.Sup.Ct. RG05235795.) *

Higher Education

Report Questions U.C. Regents' Decision to Start Retirement Contributions

The Regents of the University of California made a premature decision to resume contributions to the University of California Retirement Plan, asserts a report requested by a coalition of U. C. unions. The unions asked Venuti & Associates, an actuarial and benefit

The university suspended all contributions in 1990.

consulting firm, to review UCRP documents and other information, and issue an opinion on the regents' March decision to begin employer and employee contributions in July 2007. The plan covers about 125,000 active members and 41,000 retired members.

U.C. Looking at Options

Prior to 1990, employees paid 2 to 3 percent of their salaries into the plan, and the university contributed an amount that ranged from 4 to 16 percent of payroll. The university suspended all contributions in 1990, when actuaries determined that UCRP was so well-funded that it could pay benefits far into the future. U.C. states that

paying benefits out of the assets of the fund has drawn down the surplus to the point that contributions must be resumed to avoid having the plan become underfunded in 2010. The university has not decided how much employees would be required to contribute, but has floated plans to split equally the normal cost of benefits, which has averaged over 15 percent in the recent past. The regents have emphasized that starting early will allow them to gradually increase contributions. In response to union claims that the university is considering placing new employees into a defined-contribution plan and instituting a two-tiered system with better benefits for managers and professors, U.C. says only that it is considering alternative options for employees.

Members of the U.C. Union Coalition, including the California Nurses Association, the Coalition of University Employees, University Professional and Technical Employees-CWA Loc. 9119, University Council-American Federation of Teachers, and the American Federation of State, County and Municipal Employees Local 3299, were alarmed when the university began discussing plans to reinstitute contributions a year ago. Many university employees' salaries were stagnant in

2003-04 and 2004-05, and pension contributions would eat into increases in take-home pay that were gained for 2005-06 and 2006-07. The unions have been organizing protests and circulating petitions against benefits changes. They also hired an actuarial firm for a second opinion on plan funding and the need to resume contributions in 2007. According to AFSCME, "the Coalition requested the report in the wake of the UC executive pay scandal, because the trust level of most UC employees in management decisions is at an all time low."

The Union Coalition requested the report in the wake of the U.C. executive pay scandal.

Incomplete Information Cited

Venuti & Associates reviewed actuarial reports and funding projections and minutes from regents' meetings. They met with Howard Pripas, executive director of U.C. Labor Relations, and two representatives of UCRP's actuarial firm, the Segal Company. U.C. responded to specific questions and requests for additional information and documents.

The Segal Company based its projection of the date UCRP would become underfunded on an assumed 7.5 per-

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

Pocket Guide to the Higher Education Employer-Employee Relations Act

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

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

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cent return on investments. But, Venuti pointed out, the fund's return has averaged 15 percent for the last three years and 12.31 percent from 1985 to 2005. In addition, the authors charged, the Segal Company disregarded its own advice to clients — and that of actuarial professional associations — to consider a range of assumptions or use a different statistical model of asset liability when attempting to predict potential investment income. The most recent “stochastic” study was performed more than three years ago.

U.C.'s actuary dismissed the need for a stochastic analysis, saying that it would introduce variables that would “unnecessarily complicate the picture.” Instead, the Segal Company chose to update the stochastic study with several projections, each of which led to the prediction that the plan would become underfunded in a few years. Venuti indicated that it is waiting for information on what projections, other than the prediction assuming a 7.5 percent investment return, were performed.

Venuti questioned a statement in the Segal report that, without contributions, the funded ratio is projected to decline unless “extraordinary market gains were to occur.” According to the Venuti report, Segal had not calculated prior to the meeting what rate of return would forestall a decline in the funded ratio, but Venuti calculated the necessary rate at 10 to 11 percent, a rate less than UCRP's average return on investment in recent years.

The authors also noted that the regents had decided to resume contributions without considering the effects of their recent decision to invest in additional asset classes managed by outside investment managers. U.C. explained to Venuti that the treasurer of UCRP has not calculated the increase in the expected rate of return of the investments managed by outside consultants.

The most recent experience study — which looks at variables such as ages, salaries, and retirement timing of UCRP plan members — was done in

*Venuti was skeptical
of projections that
salaries would increase
between 4.9 and
6.5 percent a year.*

2004 based on June 30, 2002, data. The effects of a spin-off of some Los Alamos laboratory employees into a separate retirement plan have not been studied. (See story on the spin-off in *CPER* No. 178, pp. 48-51.) The authors also questioned the assumption that future inflation would be 4 percent rather than the 2.5 percent rate of the last 10 years. They were also skeptical of projections that salaries would increase between 4.9 and 6.5 percent a year starting in June 2007, given the history of raises during the continuing state budget struggles.

Lower inflation and salary increase assumptions would improve the plan's funding picture.

The authors concluded that the regents had “not had the benefit of projections and analyses that we would consider best practices under accepted actuarial guidelines.” In light of the present over-funded status of the plan, they advised that there is “ample time to do additional studies and update the actuarial assumptions” before deciding to restart retirement contributions.

Liabilities Growing

U.C. stands by its decision to resume pension contributions in the near future. U.C. spokesperson Paul Schwarz informed *CPER* that the university was still reviewing the Venuti report at press time. He stressed that U.C. “is being prudent and planning ahead...to avoid the funding problems that other plans have encountered.” While staff unions may be against restarting contributions, the strategy is fully supported by the Academic Senate.

The university insists that its treasurer and consultants expect that UCRP's return on investment will be below 7.5 percent in the near term. UCRP's liabilities are growing every year by \$1 billion, and it is paying out over \$1 billion every year in pension benefits.

In May, well before Venuti issued its report, the regents decided they needed further information before acting on a schedule of contributions. Schwarz indicated that the university

still intends to resume contributions on July 1, 2007, subject to availability of funding, completion of the budget pro-

cess, and collective bargaining for represented employees. *

only 8 percent of all faculty work in these departments. The task force reported that the numbers of underrepresented faculty are so low that they experience isolation and marginalization at the university.

With a sense of urgency, the task force emphasized that steps must be taken now to enhance diversity. Professors often have 40-year careers, and workforce turnover tends to be minimal. As a result, only 500 to 600 new faculty members have joined the 9,200 tenured and tenure-track faculty each year since 2001. Increasing retirement

U.C. Task Force Urges Focus on Faculty Diversity

“A diverse faculty enhances the breadth, depth, and quality of our research and teaching programs by increasing the variety of experiences, perspectives and scholarly interests among our faculty....U.C. will remain competitive as a leading institution of higher education only if it fully utilizes

trends and identify areas of concern. Although it adopted the Academic Senate’s definition of diversity, which includes disability, socioeconomic status, and other types of differences, the task force focused its study on racial and ethnic diversity. The creation of the task force was inspired by the success of a 2001 Bureau of State Audits report on gender disparities, which led to altered hiring behaviors at the campus level and prompted changes in university policy and practices. (See story on the gender equity report in *CPER* No. 148, pp. 45-47.)

The task force focused on racial and ethnic diversity.

the available talent pool,” begins a report issued by the University of California President’s Task Force on Faculty Diversity. The report, “The Representation of Minorities Among Ladder Rank Faculty,” emphasizes that an increased rate of faculty retirement in the next decade offers a one-time opportunity to address the current underrepresentation of minority scholars at U.C.

The task force, made up of a representative from each of U.C.’s 10 campuses, was appointed in May 2005. It was charged with reviewing the diversity efforts at each campus to analyze

The diversity of U.C. faculty has not kept up with the increasing percentage of non-white college-age youth in California or the diversity in the national pool of doctoral candidates, the task force found. Of non-Caucasians, only Asians are well-represented in the faculty, although they are overrepresented in some fields while underrepresented in others. In some disciplines, such as science and engineering, the numbers of underrepresented minority faculty — African-American, Hispanic, and Native American — are even lower than in the university as a whole. For example, almost 25 percent of underrepresented minority faculty are in education, languages, and ethnic studies, whereas

Underrepresented faculty experience isolation and marginalization.

rates among U.C. professors in the next decade offer a unique opportunity to change the composition of the faculty.

Hiring practices that advance equal opportunity need to be developed, the task force stressed. Approximately 10 percent of U.C. hires from 1991 to 1995 were underrepresented minority faculty, but that rate fell to 7 percent after Proposition 209. While underrepresented minorities constitute 12 percent of the national Ph.D. pool, only 9.4 percent of U.C. hires from 2001 to 2004 were from underrepresented groups. The rate of hiring underrepresented minorities in the

humanities and social sciences actually has exceeded the percentage of underrepresented minority Ph.D. recipients in those fields, but their hiring in the engineering and physical sciences is far below their availability in the Ph.D. pool.

At U.C.'s post-Prop. 209 hiring rate, the proportion of underrepresented minorities would fall to early-1990s levels within 20 years. At the same time, the student body will become more diverse. Even if the current pattern of hiring continues, the percentage of underrepresented minority professors at U.C. is projected to increase by only 1 percent in the next 10 years, and that would occur only if retention of underrepresented minorities improves.

Administrators report that U.C.'s competitors actively recruit the university's minority faculty. African-Americans are almost twice as likely to leave as whites, and professors of every minority group have higher resignation rates than whites, particularly in the early years. Becoming tenured at U.C. is more likely for whites and Asians than for underrepresented minorities. Eight years after being hired as assistant professors, 73 percent of whites hired in 1993 were tenured and 23 percent had left U.C., while only 59 percent of underrepresented faculty had tenured positions at U.C. and 30 percent had resigned.

When compared to eight private and public competitor universities, such as Stanford and the University of Michigan, U.C. has a similar percent-

age of underrepresented minority faculty as the four public institutions and a higher percentage than the four private institutions. However, as it employs a greater proportion of Asians and Hispanics than the others, U.C.'s percentage of African-American professors (2.3 percent) is lower than even the 2.7 percent proportion at comparable private institutions.

Becoming tenured is more likely for whites and Asians.

The task force pointed out that U.C. is in a position to increase the diversity of the faculty pool, since it produces 8 to 10 percent of the Ph.D. recipients in the nation. The report recommends that U.C.'s academic planning include steps to promote diversity and equal opportunity in selection of graduate and postdoctoral students.

U.C. has already changed its Academic Personnel Policies to recognize contributions to diversity and equal opportunity in faculty evaluations. The task force also recommends the creation of high-level administrative positions charged with encouraging diversity, making diversity integral to research, curriculum and program reviews, monitoring the climate of faculty, and issuing annual

reports. It emphasized that incentives, such as funding for research and allocation of funding for positions in targeted areas, will be essential to influence action. The report can be found online at www.universityofcalifornia.edu/facultydiversity/report.pdf.

To those who wonder if the focus on racial and ethnic diversity violates the spirit of Prop. 209, the task force responds that "the non-discrimination requirement in Proposition 209 can be understood as supporting the University's commitment to provide equal opportunity in hiring, compensation and all other employment programs." And, the report's authors note, in *Grutter v. Bollinger* (2003) 539 U.S. 306, 162 CPER 5, the United States Supreme Court recognized that diversity in higher education is a "compelling state interest." *

State Employment

Marathon Negotiations Avert SEIU Local 1000 Strike

Three days of around-the-clock bargaining under threat of a strike produced tentative three-year agreements for nine state bargaining units represented by Service Employees International Union, Local 1000, CSEA. The state won a few of the concessions it demanded when bargaining began a year and a half ago, but the union fended off the pressure to agree to other take-aways that some state employee unions have in their new pacts. A compensation survey completed by the Department of Personnel Administration in April led to equity increases for employees in specified classifications.

Take-Aways on the Table

In January 2005, the Schwarzenegger administration sunshined its agenda for collective bargaining. The state proposed to scrap two holidays, obtain leeway to implement five days of furlough in times of fiscal urgency, and cap vacation and annual leave accrual. To eliminate provisions more generous than the Fair Labor Standards Act, it also demanded changes in overtime eligibility calculations to exclude sick leave and other paid leave from the 40 hours of "time worked" after which employees are paid premium pay.

That January also marked the beginning of the pension reform wars. Both at the bargaining table and in the legislature, the governor contended that new employees should be entitled only to a defined contribution retirement plan. (See story in *CPER* No. 170, pp. 28-32.) The administration proposed that employees have the choice to opt out of the Public Employees Retirement System and instead receive a salary stipend. It also demanded employees pay one-half of the actuarial cost of their pensions, instead of 5 percent of their salary, as most miscellaneous members of the retirement system pay.

Health benefit contribution cuts also were on the table. The governor wanted to jettison the formula the unions had gained from the Davis administration that provided for the state to pay 80 percent of the weighted average premiums of the four health plans with the largest enrollment. New employees would not be eligible for employer contributions for the first six months of employment under the governor's proposal.

Predictably, bargaining proceeded slowly. Local 1000 charged that the concessions the state proposed would

amount to at least a 14 percent pay cut for an employee earning \$43,000 annually, the average income of the employees that the union represents.

But, while swarms of employees in purple shirts rallied against the take-aways, other state employee unions were acceding to some of the state's demands. The California Association of Psychiatric Technicians and CAUSE-The Statewide Law Enforcement Association agreed to exclude sick leave, but not other paid leave, from the calculation for overtime pay eligi-

Local 1000 charged that the concessions would amount to at least a 15 percent pay cut.

bility. (See story in *CPER* No. 173, pp. 40-43.) CAUSE and the California Association of Attorneys, Administrative Law Judges and Hearing Officers in State Employment agreed to phase in over two years a new employee's entitlement to employer contributions for dependent health care. CASE agreed that unit employees would pay another 1 percent of their salary into the retirement system. New unit employees' pensions will be based on the average of the highest three years of salary, not the highest single year. (See story in *CPER*

No. 175, pp. 50-53.) The CAUSE agreement allowed furloughs, elimination of a holiday, and retirement plan changes if other unions agreed or the law changed. All of these unions had failed to settle with the Davis administration for the 80 percent health benefit contribution formula and were unable to win formula-based health care benefits that would increase automatically with a rise in premiums.

Compensation Survey

The tentative agreements were a long time coming. As negotiations passed the one-year mark, the state still had not offered a salary increase. Except for nurses and prison teachers, employees represented by Local 1000 had not received a raise since July 2003, a raise that actually was delayed for a year in return for additional days of leave. No money was in the governor's January budget for 2006-07 pay increases except those already promised in collective bargaining agreements covering other units.

The Department of Personnel Administration, which represents the state in collective bargaining, held off on wage offers while it completed a survey comparing state employees' wages and benefits with those of other public sector workers and the private sector workforce. In April, DPA released a preliminary report, with the caveat that it had not been able to capture data on non-wage compensation in the private sector. Statistics showed generally that the state's salaries lagged those paid by

other public sector employers, but that some classifications of employees were paid more than counterparts in the private sector. According to DPA spokesperson Lynelle Jolley, the department offered to meet with the union at the end of April with an economic offer, but the union was unable to meet until May 22.

The union announced that 85 percent voted to authorize the strike.

Strike Threat

In early April, before the compensation survey was released, Local 1000 began planning a strike authorization vote. No state bargaining unit has ever held a strike. When asked whether the strike vote represented a change in strategy, John Simmons, director of contracts, pointed out that this is the first contract that Local 1000 has bargained without the influence of its parent, California State Employees Association, which he referred to as a "supervisor-dominated" organization.

At the time of the vote, no bargaining impasse had been declared. The prior contract between the state and most Local 1000 units had expired in July 2005, but it had a no-strike clause that, under the Dills Act, remains in

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

Gloria Steinem

State employees, discover how the Dills Act fits in with your collective bargaining rights. CPER's Pocket Guide includes a concise description of the act, how it works, its history, and how it fits in with other labor relations laws. Also included are an up-to-date text of the act, summary of all key cases that interpret the act (with complete citations and references to CPER analysis), summary of PERB regulations, case index, and glossary of terms.

Useful for labor relations and personnel officers, union officers and shop stewards, managers and supervisors, negotiators, and consultants.

Pocket Guide to the Ralph C. Dills Act

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effect after the contract's expiration. Although Jim Hard, the union's president, assured members that a strike would not be called until the parties reached impasse, DPA took the position that employees did not have the right to strike and warned that they would be charged absent without leave, have their pay docked, and face disciplinary consequences if they struck.

Local 1000 members were not deterred, however. On June 12, the union announced that 85 percent voted to au-

DPA used the compensation survey to prioritize which classifications would receive equity raises.

thorize the strike. Hard threatened that the state would have difficulty preparing for the rolling strikes that Local 1000 was contemplating.

In early June, DPA was offering a 3 percent raise effective July 1, 2006, demanding an increase in employee health premium contributions, and proposing the elimination of a holiday, according to Local 1000. The union was demanding 4 percent increases for four years, beginning July 1, 2005. As the deadline for passage of a state budget drew near, the parties, who had been meeting

nearly every day, began meeting around the clock under a news blackout.

Two COLAs

After three days, the parties emerged with a tentative agreement for a 3.5 percent raise effective July 1, 2006. An additional increase between 2 percent and 4 percent, depending on the rise in the Consumer Price Index, will begin on July 1, 2007. Employees will receive a \$1,000 ratification bonus, which the union says is equivalent to 2.3 percent of salary for an employee earning the average SEIU-represented employee income of \$43,000. Juvenile justice teachers, who reached their own compensation agreement with the state in March, will not receive the raises. (See story on their agreement in *CPER* No. 178, pp. 38-40.)

According to Jolley, DPA used the compensation survey to prioritize which classifications of employees would receive equity raises. Because DPA found that their salaries were well below market rates, the maximum pay for auditors, information technology workers, respiratory care workers, laboratory workers, and licensed vocational nurses will be boosted another 5 percent in January 2007. The top salary for registered nurses who did not receive raises as a result of a court order last December will rise 7.5 percent. (See story in *CPER* No. 176, pp. 40-42.) In 2008, the maximum salary for employees in dental classifications and for those teachers not in the juvenile justice system will increase 5 percent.

The union beat back DPA's attempts to move to a fixed-dollar employer health premium contribution from the 80 percent formula that was in the contracts of eight of the nine units. Only the unit 3 agreement has flat dollar amounts that will not increase as premiums rise without further negotiations. Unit 3 never had a contribution formula in their contract because the union refused to agree to the delayed 5 percent pay raise that the other Local 1000 units traded for improved health benefits in 2003.

Local 1000 compromised with the administration on dependent health coverage for new employees.

Local 1000 did compromise with the administration on dependent health coverage for new employees. New hires will receive only 50 percent of the state's usual contribution for dependent coverage in their first year of employment and 75 percent of the contribution in the second year.

The union did not give in to the demand to increase employee pension contributions. The retirement benefits of new employees will be based on the

highest consecutive three-year average salary, rather than the highest annual salary calculation to which current employees are entitled. The change will prevent employees from working in a new higher-paying position for only a year before retirement to boost pension benefits. The one-year formula can result in pension payments that are not adequately funded because of the years of contributions based on a lower salary.

The state agreed to several other economic enhancements. Its contribution to dental benefits will increase, and it will pay for safety footwear for some engineering and scientific technicians

who work in the field. The mileage reimbursement rate for business use of an employee's personal vehicle will increase from 34 to 44.5 cents per mile, reflecting higher gasoline prices. The lower rate prompted the union to urge state workers to insist on using state automobiles rather than their own cars for the past six months.

SDI Expansion

Local 1000 gained a significant benefit for employees who must take a disability leave. Employees in the nine units that it represents became eligible for State Disability Insurance in April.

SDI provides payments for up to 52 weeks to employees who are disabled, and up to six weeks for those who are eligible to take paid family leave to care for a seriously ill family member or bond with a new child.

The state agreed to continue its contribution to health, dental, and vision care premiums for up to 26 weeks while an employee is disabled or on family leave. Because SDI pays only about 55 percent of an employee's salary, the union negotiated a provision that allows use of leave credits to supplement SDI payments up to the full salary amount.

unit 12 settles for package similar to seu local 1000

The tentative agreement between the state and Service Employees International Union, Local 1000, may have set a pattern for settling contracts up for renegotiation. (See story on pp. 56-60.) Two weeks after the state reached agreement with Local 1000, it announced a similar pact with the International Union of Operating Engineers, which represents 10,800 crafts workers and maintenance employees in unit 12.

Employees will receive a \$1,000 ratification bonus, a 3.5 percent general salary increase effective July 1, 2006, and a cost-of-living increase of 2 to 4 percent on July 1, 2007, depending on the Consumer Price Index. The top salary of some hydroelectric, telecommunication and electronics, and equipment operator classifications will rise an additional 5 percent on January 1, 2007.

While health benefit contributions are not expressed as a formula, the state has agreed to contribute the flat dollar equivalent of an 80/80 formula — now \$788 for fam-

ily coverage — and to increase its contribution to match the 80/80 formula when rates rise in 2007 and 2008. New hires, however, will be eligible for only half of the usual dependent contribution in their first year of employment and for 75 percent of the amount during the second year.

IUOE staved off employee pension contribution increases but accepted a change in benefit calculations for new hires. Benefits will be based on the highest consecutive three-year salary.

Unit 12 gained the mileage reimbursement increase won by Local 1000, as well as some extra benefits. Caltrans employees assigned to hazardous duties outside their classification specifications will receive special-duty pay of \$6 an hour while rock scaling, climbing, transporting explosives, or working in suspension. In addition, the state agreed to pursue legislation for a new death benefit payable to the survivors of highway maintenance employees if they are killed working on the highways.

Local 1000 estimates the tentative agreement is equivalent to an 11.7 percent increase over two years, assuming a 4 percent raise in the second year, rather than the 14 percent pay cut the state originally proposed. The compensation of employees who receive equity increases will rise nearly 17 percent.

DPA negotiators like the fact that both sides think they reached a fair contract, Jolley told *CPER*. The phased-in health benefit contribution for new hires saves the state \$20 million over two years. If ratified, the tentative agreement, which will expire on June 30, 2008, will increase the state's costs by about \$486 million. *

such as public bidding and avoiding displacement of civil service workers, as long as there is no "overriding public interest in having the state perform the function."

In 1997, the Supreme Court struck down the legislature's 1993 attempts to bypass constitutional strictures on contracting by declaring the use of private contractors a new state function that did not duplicate Caltrans' existing functions. (See *Professional Engineers in California Government v. Department of Transportation* [1997] 15 Cal.4th 543, 124 CPER 58.) But that court noted that Caltrans' reasons for contracting out, "if factually based, might support a constitutional amendment to clarify, or indeed abrogate, the private contracting restriction."

The electorate responded to the invitation in November 2000 by passing Proposition 35. The initiative added Article XXII to the Constitution. Article XXII provides that the "State of California...shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement. The choice and authority to contract shall extend to all phases of project development...." It also states, "Nothing contained in Article VII of this Constitution shall be construed to limit, restrict or prohibit the State...from contracting with private entities for the performance of architectural and engineering services."

PECG Loses Another Battle in Fight Against Contracting Out

Provisions on contracting out that the Professional Engineers in California Government bargained with the Davis administration in 2003 are in conflict with Article XXII of the State Constitution, the California Court of Appeal has held. The court upheld an injunction against implementing the contracting out section of the memorandum of understanding between PECG and the state because the Constitution exempts architectural and engineering services from the general civil service limitations on contracting out work that civil service employees perform. The decision in *Consulting Engineers and Land Surveyors of California v. Professional Engineers in California Government* does not affect the validity of similar provisions the state negotiated with unions other than PECG.

Proposition 35

PECG, which represents state-employed engineers, architects, and

land surveyors in Unit 9, has battled private contracting for decades, and the decision contains a description of the legislation and litigation that led to Article XXII. (See story in *CPER* No. 141, pp. 41-43.) Article VII of the California Constitution establishes a civil service system under which appointment and promotions in state employment must be based on merit. While the civil service article does not expressly outlaw contracts for services with private entities, courts have found that it limits private contracting because contracting out traditional state services would eventually erode the civil service system. The bar against contracting out extends to work that civil service employees can perform adequately and competently, but not to new functions that the state undertakes. Civil service law allows the state to contract out services to obtain cost savings if the state complies with requirements,

Labor-Management Committee Review

The Department of Personnel Administration, which represents the state in collective bargaining, agreed with PEGG that the state would make “every effort to hire, utilize and retain Unit...employees before resorting to the use of private contractors.” Exceptions were made for “extremely unusual or urgent, time-limited circumstances, or under other circumstances where

The committee is charged with determining by mutual agreement ‘which contracts should and can be terminated.’

contracting out is recognized or required by law, Federal mandate, or court decisions/orders.” The purpose of the provisions is “to guarantee that the State does not incur unnecessary, additional costs by contracting out work appropriately performed at less expense to the State by Unit 9 employees.”

The state agreed to provide PEGG with requests for bids or proposed contracts to allow the union to present alternatives to contracting out services

while satisfying the state’s needs. But the union gained more than access to new contracts. Each collective bargaining agreement set up a committee consisting of representatives of PEGG, DPA, the Department of Finance, and the contracting state entities to review existing contracts. The committee is charged with determining by mutual agreement “which contracts should and can be terminated immediately...which contracts may continue...and how...to transition contract employees or positions into civil service.”

The MOU also allocates any savings from terminated contracts toward several purposes, such as avoiding layoffs or displacements in the bargaining unit. Employees in the unit have preference over contract employees if the duties being contracted are consistent with the employee’s classification, the employee is qualified to perform the job, and there will be no disruption in services. If an employee is threatened with displacement, the employing agency must review existing contracts to determine if work in the employee’s classification is being performed by a contractor. If the labor-management committee determines it is permissible under the contract to assign the work to the employee, the MOU requires the assignment “be implemented consistent with the other terms of this [provision],” and provides that the state and PEGG will meet and confer about the assignment.

CELSOC Challenge

The Consulting Engineers and Land Surveyors of California filed a petition for writ of mandate charging that the contracting out section of the MOU was invalid under Prop. 35. CELSOC asserted that PEGG had unlawfully attempted to resurrect civil service restrictions on personal services contracts. Caltrans filed a friend of the court brief in support of CELSOC.

Caltrans filed a friend of the court brief in support of CELSOC.

The trial court disagreed with PEGG’s contentions that the MOU merely created a committee to analyze public data to determine whether the state is incurring unnecessary costs on contracting services and that the preference for state employees did not violate Prop. 35. It issued an injunction against implementation of the contracting out provision. PEGG appealed.

MOU Restrictions Unconstitutional

The Court of Appeal rejected PEGG’s argument that the contracting out provision did not conflict with Prop. 35. The court measured the effect of

the provision against the goals of the proposition. The express purposes of the constitutional amendment include removing restrictions on contracting for architectural and engineering services, encouraging public/private partnerships, promoting fair competition so that both public and private sector engineers and architects work more efficiently, and speeding completion of backlogged transit projects.

The court found that the provisions requiring preference for state employees, and permitting termination of private contracts and assignment of contract work to employees threatened with displacement, restrict “the ability of state authorities to freely contract out engineering services.” Finding no consideration of cost in the displacement avoidance provisions, the court observed, “The mandatory preference for civil service engineers, without a concomitant requirement of cost savings, does not ensure the best value for California taxpayers, and it undermines the goal of promoting fair competition.” Common sense, said the court, indicates that the provisions would not speed completion of backlogged projects.

The court characterized as “nonsensical” PECG’s assertions that the initiative abolished only the restrictions that existed in November 2000. The MOU’s provision reimposing restrictions on contracts is the very type of action the voters meant to preclude, the court chided.

The court was unconvinced by PECG’s assertions that the provision was meant to open debate on existing contracts and not intended to interfere with the state’s decision whether to contract for services. The provisions that require the state to make every effort to use unit employees before resorting to private contracts, to disclose proposed contracts and review existing contracts, and to meet and confer to avoid displacement of employees are significant restrictions on the state’s current and future ability to contract for services, the court observed.

The court also did not concur with the union that the “mutual agreement” requirement for committee decisions was an acceptable way of allowing the contracting department to make the choice contemplated by Prop. 35. “Mutual agreement” is not the same as unanimous agreement, pointed out the court. Evidence in the record indicated the committee had not yet reached consensus on whether “mutual agreement” requires anything more than a simple majority vote.

PECG also contended that the reference in Prop. 35 to allowing the “state” to freely contract allocated to the legislature the choice whether to contract out. Based on this premise, the union argued that the legislature had chosen to bind itself to restrictions when it approved the MOU. The court found this contention illogical, since the state includes the executive branch and its agencies. “After all,” said the court, “it is through those agencies that

Make everything as simple as possible, but not simpler.

Albert Einstein

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

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

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the state conducts its business.” The proposition’s supporters’ references to the Legislative Analyst’s recommendation that “Caltrans contract out more work” buttressed the court’s conclusion. The court emphasized that proponents of Prop. 35 wrote in the ballot materials that one purpose of the initiative was to reverse the effects of lawsuits that prevented Caltrans’ use of private contractors.

The dissent accused the majority of ignoring the fact that Proposition 35 merely allows contracting.

The court held that the MOU’s contracting out provision could not be harmonized with Prop. 35. PECCG argued that a constitutional interpretation of the MOU provision was possible, stressing the mutual agreement requirement and a stipulation in the MOU that review and cancellation of contracts would not disrupt state services. The court reiterated its view that the mutual agreement term did not guarantee that an agency would agree with a committee decision to terminate a contract. Without further discussion, the court concluded that there were irreconcilable conflicts between the MOU and Prop. 35.

The court upheld the injunction issued by the trial court. Substantial evidence supported the lower court’s finding that implementation of the MOU would cause irreparable injury to the public in the form of “disruption of ongoing projects and waste of scarce funds that would be caused by termination of existing contracts.” Because “nothing in the MOU provides that the mandatory preference for using Unit 9 employees for future projects is inapplicable if it would be more cost effective to use outside engineers,” the court found injury to the public arises from “the loss of the benefits that would flow to it from future contracts.” In addition, the parties may have made investments to be able to perform the contracts. Premature termination of the contracts may cause unrecoverable losses to the parties, the court explained.

The dissent accused the majority of ignoring the fact that Proposition 35 merely allows contracting with private entities for architectural and engineering services, and that the state agreed to the MOU’s restrictions. Interpreting the majority’s opinion to compel contracting, the dissent protested, “The majority does not explain the alchemy that transforms language permitting the state to contract with private entities into language compelling it to do so.” The dissent also asserted that the majority’s interpretation of the constitutional language was more in line with

public policy and the voters’ intent gleaned from the ballot pamphlet than with the actual language of the constitutional amendment.

But the court rebuffed these contentions. Not only did the dissent address an argument not properly raised by PECCG in the lower court, the court said, the record did not show that all the affected state entities agreed to the MOU provision since the copy of the contract in evidence did not include the signature page. In addition, the court explained, “the voters decided, as a matter of public policy, that there must be *no limits* on a state entity’s ability to contract out. Surely, allowing state agencies to impose upon themselves general limitations on such contracting out runs afoul of this public policy decision of the voters.” Besides, the court retorted, its decision does not compel contracting out; it simply holds that there can be no limitations on the state’s choice to contract out. (*Consulting Engineers and Land Surveyors of California, Inc. v. Professional Engineers in California Government* [6-14-06] 140 Cal.App.4th 466, 2006 DJDAR 7399.) *

Hostility Apparent on CCPOA Website

A recent report by Special Master John Hagar in a federal district court case paints a picture of a warming relationship between the California Correctional Peace Officers Association and the Schwarzenegger administration. But a picture on the CCPOA website in June was not designed to endear the union to the Department of Personnel Administration. The incident signals a long, drawn-out process to bargain a successor to the 2001-06 agreement.

Capitol Access Reported

Hagar is a special master appointed by Judge Thelton Henderson to monitor the prison system and develop a remedial plan to end excessive force by correctional officers in the state's prisons. In June, he reported that Schwarzenegger's chief of staff, Susan Kennedy, and cabinet secretary, Fred Aguiar, have been meeting with CCPOA representatives, a fact that led to the resignation of Department of Corrections and Rehabilitation Secretary Rod Hickman and several managers who have been involved in efforts to reform the prison system. Hagar was alarmed at this development, as he had been assured by the administration that it would not engage in a practice that was termed the "Capitol walk" during the Davis administration, in which CCPOA negotiators purportedly went

to the governor if they could not get what they wanted from DPA.

Hagar claimed that CCPOA was able to torpedo the appointment of Tim Virga as CDCR's Acting Assistant Secretary of Labor Relations. Acting Secretary Jeanne Woodford, who had requested Virga's appointment, then stepped down and retired a few months

DPA recently hired a private consultant, Dennis Batchelder, to negotiate a successor contract.

later. Hagar asserted that Kennedy and Aguiar also had urged DPA executives Michael Navarro and Bill Avritt to leave, "giv[ing] rise to the question of whether the State is in a position to adequately negotiate a contract which protects the court's remedial plan."

According to DPA spokesperson Lynelle Jolley, however, department staff have known of Navarro's pending retirement for months, but the director had not selected a date until recently. Bill Avritt's retirement would not affect bargaining since he oversees benefits and other areas separate from labor relations. DPA recently hired a private

consultant, Dennis Batchelder, to negotiate a successor to the contract that expired in July.

'Running Away'

Bargaining over ground rules began June 9, but did not last long. The photograph displayed on CCPOA's website showed Batchelder, Labor Relations Officer Dianne Navarro, and three others walking away from the camera. CCPOA characterized them as DPA negotiators "running away" from CCPOA headquarters.

The photo was fallout from CCPOA's insistence on videotaping negotiation sessions, according to DPA. Batchelder contended that videotaping was not conducive to good faith negotiations, and he left when the union refused to stop recording. The union asserted it was videotaping the discussions in the interests of open government and avoiding potential future disputes over what occurred in bargaining. CCPOA reported that the first session lasted only 18 minutes.

Future bargaining sessions will need to last a little longer to deal with the myriad issues the two sides have sunshined. DPA proposed limits on union released time and changes to the grievance and arbitration article of the contract. It also wants to exclude leave hours from calculation of overtime pay eligibility, reduce overtime hours, and amend the sick leave sections of the collective bargaining agreement. It is proposing revisions to the sections of the contract that allow employees to

bid on 70 percent of the correctional officer and medical technical assistant position, which are then assigned to the

bidder with the greatest seniority. The union sunshined 38 pages of proposed enhancements to the contract. *

Novel Question Raised in Bid for New State IT Unit

Revocation cards have been showing up at the Public Employment Relations Board while PERB is in the process of determining whether there is sufficient support for a representation election among information technology workers currently represented by Service Employees International Union, Local 1000. Labor Relations Specialist Roger Smith told *CPER* that the board's decision in *Antelope Valley Health Care Dist.* (2006) PERB No. 1816-M, 177 CPER 26, is causing PERB to reconsider its usual treatment of revocations of previous union support. In the decision, the board recognized the right to submit letters that revoked previously signed authorization cards as long as the letter clearly indicates the desire not to be represented by the employee organization in collective bargaining.

Unit 22 Request

An independent employee organization named IT Bargaining Unit 22 filed a petition in June to sever 7,500 IT workers from state bargaining unit 1, which includes over 41,000 professional administrative, financial, and staff services employees. Lyle Hintz, a retired IT worker who is spearheading

the effort, told *CPER* that the motive for the petition is "terrible representation" by Local 1000. IT workers in the California State University system are paid 32 percent higher than state IT workers, at least before the recent tentative agreement between the Local 1000 and the state, he said.

Local 1000 encouraged employees to sign revocation cards.

Hintz also complained that Local 1000 is doing little to stop \$4 billion worth of state contracts with private contractors for IT work. The huge amount of subcontracting restricts the job opportunities and promotion possibilities for the state's IT workforce, he pointed out. He charges that Local 1000 has not taken advantage of provisions in its contract to terminate private contracts for IT services and convert contractors to employees. (See story on contracting out challenges in *CPER* No. 178, pp. 41-43.) Local 1000 has successfully challenged only about \$2 million in contracted services, he

claimed. In the tentative agreement, Local 1000 agreed to eliminate the joint labor-management committee that was designed to review contracts and decide whether to terminate them, Hintz complained.

IT workers need training to stay current in their fast-changing field. Employees finally gained a contractual apprenticeship program in the last contract, but it has yet to be implemented, Hintz asserted.

Revocation Cards Urged

Local 1000 encouraged employees to sign revocation cards which stated that Unit 22 organizers had misled employees who signed a petition for support. In particular, the cards suggest that some employees may have signed the support petition believing that the severed unit would continue to be represented by SEIU.

Local 1000 emphasizes that the challenging union has no staff, lawyers, lobbyists, researchers, office equipment, or clout. The union contends Hintz began the severance move only after he lost an internal union election.

Local 1000 questions the basis for the purported 32 percent salary lag behind CSU since there are numerous classifications of IT workers. In addition to the 3.5 percent raises effective July 1, 2006, the tentative agreement did gain equity increases at the top salary step for at least 28 information technology classifications. The maximum step of the salary schedules will be boosted 5 percent on January 1, 2007, for

employees who have been at the top for at least 12 pay periods.

Margarita Maldonado, bargaining chair for unit 1, told *CPER* that classification studies and a new classification structure needed to be completed before implementation of the apprenticeship program and training system. The current classifications for the programmer apprenticeship program already are outdated because of technological advances.

The Dills Act does not provide for revocation cards.

Although the labor-management committee on contracting was eliminated, provisions are still in place for the union to review contracts with the contracting department. Maldonado asserted that the union has been much more successful when working directly with the departments, rather than having DPA as a middleman. Employees still will be eligible for released time to review the contracts.

In addition, the union has been instrumental in moving DPA and the State Personnel Board to secure \$640,000 in funding to develop a recruitment plan and a skills-based certification option for testing IT applicants, she said. Current examinations test a wide variety of skills that are not used in the positions for which employees are hired.

Revocations To Be Counted?

In the past, PERB has considered only authorization cards when assessing proof of support, assuming that changes of support for a union would be reflected at the ballot box. But the Meyers-Milias-Brown Act allows an employer voluntarily to grant recognition to an exclusive representative, without an election, if presented with proof of majority support. In *Antelope Valley*, the district had adopted a procedure and a deadline for sending in letters that revoked prior authorization signatures. The board decision would allow properly filed revocation letters to be counted when determining sufficiency of support for a union.

The Dills Act, however, does not provide for revocation cards and requires a representation election rather

than allowing voluntary recognition of an exclusive representative. Smith told *CPER* that PERB is determining the applicability of *Antelope Valley* to the issue of revocation cards under the Dills Act. He expects that the issue will also arise under the Educational Employment Relations Act and the Higher Education Employer-Employee Relations Act, which also permit an employer to voluntarily recognize an exclusive organization.

PERB's decision regarding the proof of support and the propriety of the unit is expected early this month. If there is proof of majority support, PERB will consider any arguments about the propriety of the proposed IT unit before deciding whether to hold an election. *

Seasonal Firefighters Gain From CDFP Contract Extension

CDF Firefighters quickly agreed to roll over most provisions of their memorandum of understanding after the state agreed to increase pay for seasonal firefighters by at least 17 percent. CDFP defeated attempts to eliminate one holiday and to subject to legislative approval any arbitration award that costs the state more than \$250,000. The state gained a reduction in some employees' workweeks that will save overtime pay costs. There will be no pay

increase for most of the 5,500 employees in the unit.

Quick Agreement

The state sunshined its proposals for the firefighters bargaining unit on May 2. Fifteen days later, the Department of Personnel Administration announced the two-year rollover agreement. A factor motivating the state's quick action was the pending expiration of a 10-year agreement that allowed

the state to avoid overtime payments for five hours of sleep time each night firefighters were on duty, unless they were awakened to respond to an emergency. For each firefighter working a four-day, 96-hour shift, the state was facing an additional 20 hours of overtime pay a week.

The agreement decreases the regular work hours of seasonal firefighters from 96 to 72 hours a week, which reduces the expected increase in overtime pay for sleep time as well as the number of overtime hours scheduled each shift. However, a hefty pay increase for seasonal firefighters will be accomplished by raising their hourly wage from \$8.62 to \$9.09, and paying one-and-a-half times that rate for all hours after the 53rd hour, including those hours formerly exempted as sleep time. The state hires from 800 to 1,200 seasonal firefighters annually, who work approximately nine months of the year. Because of the shorter shifts, the Department of Forestry and Fire anticipates needing an additional 225 seasonal firefighters.

The small number of employees that work a 40-hour week will receive a 3 percent cost-of-living adjustment effective July 1, 2006. These 138 employees include forestry assistants, foresters, air operations officers, and employees in fire prevention classifications. The agreement allows the union to reopen the contract to revisit the salary increase in light of settlements the state reaches with other unions.

Addressing Compaction

There is a vacancy rate of approximately 40 percent in the supervisory ranks of CDF due to high pay in the most-senior rank-and-file positions and insufficient salaries for supervisors and managers. The union agreed to slightly lower pay for new battalion chiefs, the highest non-supervisory employees. Their workweek will be reduced from 84-hour shifts to 72-hours, which will reduce by 12 hours the amount of scheduled overtime they work. In addition, their pay rate will be less for scheduled overtime hours.

The union agreed to slightly lower pay for new battalion chiefs.

The changes will not be applicable to current battalion chiefs, but the department is expecting a large number of retirements in the next few years. Gradually, battalion chiefs at the lower compensation level will replace those at the higher level. The Legislative Analyst's Office reports that neither the union nor the department believes that this change in compensation will entice sufficient numbers of employees to apply for supervisory positions, and recommends that the legislature plan how to rectify the problem.

The agreement rolls over several expensive benefits that the union negotiated in 2001. Employees will continue to receive the same health and retirement benefits. On January 1, 2006, unit employees became entitled to state health premium contributions equal to 85 percent of the weighted average employee-only premiums of the four health plans with the largest enrollment and, if applicable, 80 percent of dependent care coverage. The cost of the state's contribution is estimated to rise \$3 million in 2006-07. The retirement formula for unit employees will continue to be based on 3 percent of salary at 50 years of age. Retirement contribution costs for the unit will increase \$4 million beginning in 2007-08.

If approved by the legislature and ratified by the membership, the contract will expire June 30, 2008. *

Discrimination

Supreme Court Adopts Broad Standard for Proving Retaliation Under Title VII

In a surprising decision, the United States Supreme Court has ruled that employees who complain of harassment or discrimination are protected against retaliation under Title VII of the Civil Rights Act of 1964, even if the retaliatory act is not connected to the terms, conditions, or status of employment. Eight justices joined in Justice Stephen G. Breyer's opinion in *Burlington Northern & Santa Fe Railway Co. v. White*. The decision resolved conflicts between various federal appellate circuits regarding whether the challenged action has to be employment — or workplace — related and about how harmful that action must be to constitute retaliation. The ruling is considered a significant victory for employees and civil rights groups, and a substantial blow to the business community, which had anticipated a narrower standard of liability given the pro-employer leanings of many of the current justices. Only Justice Samuel A. Alito, who concurred in the judgment in favor of the employee, would have adopted the stricter standard.

Factual Background

Sheila White was the lone woman working in the employer's maintenance-of-way department and the only

forklift operator at her job site. White complained that her immediate supervisor, Bill Joiner, had repeatedly told her that women should not be working in her department and also had made insulting and inappropriate remarks to her in front of her male coworkers. The employer suspended Joiner and sent him to a sexual-harassment training session.

The ruling is considered a substantial blow to the business community.

On the same date that White was informed about Joiner's discipline, the head of the department, Marvin Brown, reassigned her from operating the forklift to less desirable tasks. Brown told her the reassignment was because coworkers had complained that a "more senior man" should have the "less arduous and cleaner job" of forklift operator. White filed a complaint with the Equal Employment Opportunity

Commission, claiming that the reassignment amounted to sex discrimination and retaliation for having complained about Joiner.

About two weeks later, White filed another complaint with the EEOC, claiming that Brown had placed her under surveillance and was monitoring her daily activities.

A few days after the second complaint was mailed to Brown, he suspended White without pay for insubordination. An internal grievance procedure determined that White had not been insubordinate, and she was reinstated with backpay for the 37 days she was suspended. White filed another retaliation charge with the EEOC based on the suspension.

After receiving a right-to-sue letter from the EEOC, White brought a federal lawsuit against Burlington, alleging that the reassignment and the suspension without pay constituted retaliation in violation of Title VII. The jury found in her favor on both counts. The Sixth Circuit Court of Appeals affirmed, applying the same standard for retaliation that it applied to a substantive discrimination offense, holding that an employee alleging retaliation must show an "adverse employment action," defined as a "materially adverse change in the terms and conditions" of employment.

The Conflict in the Circuits

As the court noted, prior to its decision in this case, there was disagreement between the various circuit courts

as to the standard to be applied in a case of alleged retaliation. "Some Circuits have insisted upon a close relationship between the retaliatory action and employment," wrote Justice Breyer, citing the Sixth Circuit's decision in this case as an example. Those circuits applied the same standard for retaliation that they applied to a substantive discrimination offense, holding that the challenged action must "result in an adverse effect on the 'terms, conditions, or benefits' of employment."

Prior to its decision in this case, circuits disagreed as to the standard to be applied.

The Fifth and Eighth Circuits adopted a more restrictive standard, ruling that actionable retaliatory conduct is limited to "ultimate employment decisions" such as "hiring, granting leave, discharging, promoting, and compensating."

The Ninth Circuit, following EEOC guidance, held that the employee must simply establish "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."

But it was the reasoning of the Seventh and District of Columbia Circuits that the court found most compelling.

Those Courts of Appeals have said that the employee must show that the "employer's challenged action would have been material to a reasonable employee."

The Supreme Court Decision

Statutory interpretation. Burlington argued that the Sixth Circuit was correct to require a link between the retaliatory action and the terms, conditions, or status of the employment. It maintained that Title VII's anti-retaliation provision should be read in conjunction with, and limited by, the substantive anti-discrimination provision that protects an individual only from employment-related discrimination.

The court disagreed, stating, "the language of the substantive provision differs from that of the anti-retaliation provision in important ways." While the former provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual...with respect to his compensation, terms, conditions, or privileges of employment...", the latter contains no such limiting language. Section 704(a), Title VII's anti-retaliation provision, states only that it shall be an unlawful practice for an employer "to discriminate against any of his employees...because [the employee] has opposed any practice" made unlawful by the substantive provision. The court explained, "There is strong reason to believe that Congress intended the differences that its language suggests, for the two provisions differ

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Gloria Steinem

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not only in language but in purpose as well.”

Said the court:

The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status.... The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.

The court further explained that, to secure the first objective, a discrimination-free workplace, Congress did not need to prohibit anything other than employment-related discrimination. But the second objective cannot be achieved by focusing only on employer actions and harm that concern employment and the workplace. “An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing harm *outside* the workplace,” said the court, citing *Rochon v. Gonzales* (CADC 2006) 438 F.3d 1211, where the retaliation against the employee took the form of the FBI's refusal to investigate death threats made by a federal prisoner against an agent and his wife.

“Thus,” concluded the court, “purpose reinforces what language already indicates, namely that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.”

The standard. The court clarified that the anti-retaliation provision does not protect an individual from all retaliation, “but from retaliation that produces an injury or harm.” Adopting the

*The anti-retaliation
provision seeks to
prevent harm to
individuals based on
what they do.*

formulation set forth by the Seventh and District of Columbia Circuits, the court said that, in its view, “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse,” meaning, “it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

“We speak of *material* adversity because we believe it is important to separate significant from trivial harms,” explained the court. “Title VII, we have said, does not set forth a general civility code for the American workplace.” The anti-retaliation provision does not pro-

tect workers from “petty slights, minor annoyances, and simple lack of good manners” because, the court reasoned, those actions are not likely to deter the reporting of discriminatory behavior.

“We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective,” the court said. “An objective standard is judicially administrable” it explained, because “it avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings.”

Focusing on the peculiarities of the workplace environment, Justice Breyer wrote:

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.... A change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.... A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.... Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.

Justice Breyer emphasized, in response to a comment in Justice Alito's concurring opinion, "contrary to the claim of the concurrence, this standard does *not* require a reviewing court or jury to consider 'the nature of the discrimination that led to the filing of the charge.'" "Rather," he wrote, "the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint."

Many reasonable employees would find a month without a paycheck to be a serious hardship.

Application of the standard. Burlington maintained that reassignment of White from operating the fork lift to other tasks could not constitute retaliatory discrimination because all the duties fell within the same job description. "We do not see why this is so," replied the court. "Almost every job category involves some responsibilities and duties that are less desirable than others," and "common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are

easier or more agreeable." The court found, based on the evidence before it, that the jury could have reasonably concluded the reassignment of responsibilities would have been materially adverse to a reasonable employee.

Burlington also argued that the 37-day suspension without pay was not actionable because Burlington eventually reinstated White with backpay. The court rejected this reasoning, finding that the jury's conclusion that the suspension without pay was materially adverse was reasonable:

White did receive backpay. But White and her family had to live for 37 days without income. They did

not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. And White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused....A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former.

*(Burlington Northern & Santa Fe Railway Co. v. White [6-22-06] Supreme Court 05-259, ___U.S.___, 2006 DJDAR 7866.) **

California Supreme Court Applies FEHA Sexual Harassment Amendment Retroactively

In a long-awaited opinion, the California Supreme Court unanimously has ruled that an amendment to the Fair Employment and Housing Act making employers liable when their employees are harassed by nonemployees applies retroactively. The 2003 amendment applied to a case pending at the time of its enactment because the amendment did not change existing law, but merely clarified it, reasoned the court in *Carter v. California Department of Veterans Affairs*. The decision settled a split in the Courts of Appeal over the issue. (See discussions of the conflict between the Second District Court of Appeal holding in *Salazar v. Diversified*

Paratransit, Inc. at CPER No. 166, pp. 47-49 [2004] 103 Cal.App. 4th 131, [*Salazar II*]; and the Fourth District Court of Appeal holding in *Carter* [2004] 121 Cal.App.4th 840, at CPER No. 168, pp. 63-66.)

Factual and Procedural Background

Helga Carter worked as a nurse in a veterans residence facility operated by the Department of Veterans Affairs. She sued the veterans home alleging that resident Elbert Scott Brown, 84, asked Carter to sleep with him after he got a penile implant, threatened to ruin her reputation if she refused, made lewd remarks, and left sexually explicit voice

messages at her home. He chased her in the hall with his scooter and tried to ram her on several occasions.

Carter complained to her supervisor about Brown's behavior. The employer counseled Brown to stop the harassment, but he did not. Carter went on administrative leave because of stress and later resigned. In her lawsuit, Carter argued that her employer failed to maintain a workplace free from sexual harassment.

At trial, the jury found that Carter was subjected to hostile environment harassment, the department knew or should have known of the harassment, and failed to take immediate and appropriate steps to correct the situation. Carter was awarded approximately \$185,000 in economic and noneconomic damages.

The department appealed, arguing in part that it could not be held liable for the conduct of a client or customer under the FEHA. The Fourth District Court of Appeal agreed and reversed the judgment in *Carter v. California Department of Veterans Affairs* (2003) 109 Cal.App.4th 469, 161 CPER 71. The California Supreme Court granted Carter's petition to review the case. It already had agreed to review the Second District's decision in the first *Salazar* case, (*Salazar v. Diversified Paratransit Inc.* [2002] 103 Cal.App. 4th 131, 157 CPER 53 [*Salazar I*]), in which the Second District Court of Appeal ruled that an employer cannot be held liable to its employees for harassing conduct perpetrated by customers or

clients. However, before the Supreme Court could consider either case, the legislature amended Sec. 12940, subdivision (j)(1), of the FEHA to provide for employer liability for sexual harassment by nonemployees. The Supreme Court then dismissed its grant of review and sent both cases back to their respective Courts of Appeal for reconsideration in light of the new legislation.

'It is the intent of the Legislature in enacting this act to construe and clarify the meaning and effect of existing law.'

The Second District, in *Salazar II*, determined that the amended statute applied retroactively and sent the case back for a new trial. But the Fourth District, in *Carter v. California Department of Veterans Affairs* (2004) 121 Cal.App. 4th 840, 168 CPER 63, held that retroactive application of the amendment would be "constitutionally objectionable." Carter petitioned the Supreme Court for review.

The Supreme Court Decision

To answer the question of retroactivity, the court instructed that it must determine whether the amendment

changed or merely clarified existing law. "A statute that merely clarifies, rather than changes, existing law is properly applied to transactions pending at its enactment," it said. "However, a statute might not apply retroactively when it substantially changes the legal consequences of past actions, or upsets expectations based on prior law."

Though the courts have the constitutionally assigned power to interpret a statute, "if the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration," said the court, quoting from *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 164 CPER 73. In this case, the court had not yet finally and definitively interpreted Sec. 12940(j)(1).

The court noted that the legislature introduced the amendment less than two months after the *Salazar I* decision and included in it the following language: "It is the intent of the Legislature in enacting this act to construe and clarify the meaning and effect of existing law and to reject the interpretation given to the law in *Salazar v. Diversified Paratransit, Inc.* (2003) [*Salazar I*] 103 Cal.App.4th 131." Although this statement of legislative intent is "entitled to consideration," it is not determinative, said the court. The court independently must analyze whether the amendment changed the law existing at the time of its enactment. "In order

to determine whether the 2003 amendment clarified existing law or substantially changed it, we must determine whether section 12940, former subdivision (j)(1), could not have been properly construed to impose liability on employers for sexual harassment of employees by nonemployees.”

The legislature’s clear reference to ‘clientele’ shows an intent to include nonemployees.

The V.A. argued that the former section required each entity to take all reasonable steps to prevent harassment of employees from occurring and to take immediate and appropriate action when the entity is or should be aware of the conduct, *only if* an employee caused the harassment. The court was not persuaded by this argument, pointing to language in the uncodified section 1 of the former statute in which the legislature declared that it is the existing policy of the state to establish procedures for employees to fairly adjudicate allegations of harassment by “agents,” “supervisors,” “nonsupervisors,” and “clientele.” “The Legislature’s clear reference to ‘clientele’ shows an intent to include nonemployees within the former statute’s ambit,” concluded the court.

Section 1’s inclusion of the employer’s “clientele” as persons that could create employer liability for sexual harassment is consistent with Sec. 12940(j)(1)’s first sentence, which prohibits an employer or “any other person” from harassing an employee, noted the court. Carter argued that Secs. 12940(j)(1) and (k) have always required an entity to take all reasonable steps to prevent harassment from occurring, and have never placed limitations on the source of the harassment. The V.A. criticized the reliance on section 1, arguing that “legislative intent is not gleaned solely from the preamble; it is gleaned from the statute as a whole, which includes the particular directives,” and that, even if section 1 establishes a public policy against sexual harassment by clientele, the FEHA does not provide a remedy for a violation of that policy.

Although the court clearly was more persuaded by Carter’s arguments than by those of the V.A., it did not find either position determinative. “[W]hether the pre-2003 version of the statute included nonemployees is somewhat ambiguous, and both [Carter] and the V.A. have made credible arguments in favor of their positions,” said the court. “Therefore, based on the language of the statute, we could reasonably interpret section 12940, former subdivision (j)(1), either way, and must assume that the former statute was ambiguously worded.”

In order to aid in its interpretation of the statute, the court turned to an

examination of legislative intent. The V.A. presented drafts of the 1984 amendment to former subdivision (i), now (j)(1), to support its contention that the legislature declined to expand employer liability. It also produced letters from the author of the legislation, indicating that she did not believe that the final bill did not cover “outside harassment” or “customer harassment.”

Reliance on changes in successive drafts and statements from the author are not particularly useful.

The court did not find this evidence persuasive. “Though the VA’s arguments are not without merit, we find reliance on changes in successive drafts and statements from the author not particularly useful here in clarifying any perceived statutory ambiguity.” It was much more impressed with the legislature’s language in the 2003 amendment:

In this case, in 2003 the Legislature very clearly expressed its intent to clarify section 12940, subdivision (j)(1). The amendment was made promptly in response to the Courts of Appeal opinions in *Salazar I* and the present case, in order to clarify the ambiguities that caused confusion in the appellate courts and among litigants. Any ambiguity that

existed in the language and legislative history of section 12940, former subdivision (j)(1), when combined with the Legislature's prompt and clear response to an appellate court's contrary interpretation of the statute and the Legislature's statement in uncodified section 2 of the 2003 statute that the 2003 amendment was intended to clarify existing law, leads us to conclude that the Legis-

lature merely clarified existing law when it amended section 12940, former subdivision (j)(1), to refer specifically to acts of nonemployees.

(Carter v. California Department of Veterans Affairs [6-8-06] Supreme Court S127921, ___Cal.4th___, 2006 DJDAR 6386.) *

Employers Must Reasonably Accommodate Employees 'Regarded As' Disabled

In a case of first impression, the Second District Court of Appeal has ruled that California's Fair Employment and Housing Act requires employers to provide reasonable accommodations to employees regarded as disabled, even if not actually disabled. And, employers must engage in an informal interactive process aimed at effecting accommodation, said the court.

Factual Background

Charles Gelfo, a senior metal fitter for Lockheed Martin, suffered a work-related injury to his back in September 2000. He continued to work but filed a workers' compensation claim and began treatment with an orthopedic surgeon. A month later, he was laid off as part of a reduction in force. Under the terms of the collective bargaining agreement, he was placed on a recall list and was eligible for rehire as a metal fitter or in a related job classification for up to five years.

In May 2001, Gelfo's doctor released him back to work with a restriction on repetitive lifting, bending, or stooping. However, Lockheed had no metal fitter positions available at the time. In September 2001, the same doctor reexamined Gelfo and said that he would not be able to return to his position as a metal fitter and that he should do no "heavy lifting, no repetitive bending, and no prolonged sitting or standing."

In the fall of 2001, Gelfo participated in a Lockheed training program to become a plastic parts fabricator. When he completed the program, Lockheed offered him a job as a fabricator but then revoked the offer. Gelfo was told that a review of his file revealed medical restrictions which were incompatible with the physical demands of the fabricator position. Gelfo told the company his back "felt great" and he believed there was "nothing that he couldn't do." He returned to his doctor who, he said, agreed the work re-

strictions were no longer necessary. Gelfo claimed he received a complete release from the doctor but did not give it to Lockheed on the advice of his attorney.

On July 12, 2002, the company advised Gelfo that it had considered possible accommodations to enable him to perform the fabricator job. Although it believed it could accommodate the lifting restriction, it could not accommodate the other restrictions. Gelfo asked the company to reconsider, arguing that it was misinformed about his medical restrictions, that he had successfully completed the training without incident, and that his doctor agreed he could perform the job. He also said he concurrently was working in a position for another company that required him to perform the same functions as a fabricator, and he was doing so without accommodation or incident.

Lockheed adhered to the view that Gelfo's inability to sit or stand for more than three hours a day — one of the restrictions that appeared in his file — was a physical limitation for which no reasonable accommodation could be made.

After exhausting his administrative remedies, Gelfo filed suit alleging violations of the FEHA, including disability discrimination, failure to accommodate, and failure to engage in a timely good-faith interactive process. The trial court granted Lockheed's motion to dismiss portions of the case, finding that Gelfo did not have an "actual" disability and, as a result, Lockheed had no duty to provide reasonable accom-

modation or to enter into an interactive dialogue with him regarding possible accommodations. The only issue that the jury was allowed to decide was whether Lockheed violated the FEHA by refusing to rehire Gelfo in February 2002 because it “regarded” him as dis-

The jury concluded that Lockheed did not ‘mistakenly’ believe the injury limited his ability to work.

abled. The jury concluded that Lockheed did not “mistakenly” believe that Gelfo’s back injury limited his ability to work, and Gelfo appealed.

Court of Appeal Decision

In bringing his action, Gelfo claimed the alternative theories that either he had an actual qualifying disability or that Lockheed regarded him as having one. The appellate court upheld the lower court’s determination that Gelfo was not actually physically disabled. The court agreed with Lockheed that the evidence on this issue was uncontradicted. “With respect to his ability to engage in the major life activity of working, the trial court correctly observed that Gelfo was firmly convinced and unwavering in his belief he could have performed the job Lockheed denied him,” said the court.

“In short, Gelfo conceded he felt he could do anything.”

However, the Court of Appeal took the trial court to task for failing to find that Lockheed regarded Gelfo as disabled:

After determining, based on his own admissions, that Gelfo was not “actually physically disabled,” the trial court was obligated to determine, based on Lockheed’s similar factual admissions, that the company had in fact “regarded” him as such. Lockheed never maintained its decision not to hire Gelfo was premised on anything other than its belief that medical restrictions imposed as a result of Gelfo’s lower back injury rendered him unable to perform the essential functions of a fabricator....Accordingly, no factual question remained for the jury to decide.

The court found the trial court compounded this legal error by giving an erroneous and confusing jury instruction. The typical instruction given in a case where the plaintiff alleges unlawful discrimination based on a perception of disability asks the jury to determine whether the employer believed the employee’s physical condition limited his ability to work. In this case, the trial court instructed the jury that Gelfo had to show that Lockheed “mistakenly believed” his back injury limited his ability to work. The same language appeared in the verdict form that was submitted to the jury. And to the question, “Did Defendant mistakenly believe that Plaintiff’s low back injury limited his ability to work?” the jury answered “no.”

The court rejected Lockheed’s assertion that the FEHA’s “regarded as” protection is limited to persons who are denied jobs or who lose jobs based on an employer’s reliance on the “myths, fears or stereotypes” frequently associated with disabilities. While recogniz-

Employers must reasonably accommodate individuals ‘regarded as’ disabled.

ing that some support exists for this view, the court found “the statutory language does not expressly restrict the FEHA’s protections to the narrow class to whom Lockheed would limit its coverage.” “To impose such a restriction would exclude from protection a large group of individuals, like Gelfo, with more mundane long-term medical conditions, the significance of which is exacerbated by an employer’s failure to reasonably accommodate,” it said.

The court then turned to the issue that no California court had yet addressed: Does an employer’s duty to accommodate apply only to an employee or applicant who is “actually” disabled? Lockheed argued that this question must be answered in the affirmative, relying on federal cases interpreting the Americans With Disabilities Act. The court disagreed, stating, “on these issues, which are novel to

California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal interactive process to determine any effective accommodations."

Two federal cases relied on by Lockheed to support its argument, *Weber v. Strippit, Inc.* (8th Cir. 1999) 186 F.3d 907, and *Kaplan v. City of North Las Vegas* (9th Cir. 2003) 323 F.3d 1226, held that employees who are regarded as disabled by their employers have no

Statutory text 'does not distinguish between actually and 'regarded as' disabled.

right to a reasonable accommodation under the ADA. The California court found the reasoning of these cases unpersuasive, and turned instead to what it called the "better-reasoned decision" of *Williams v. Philadelphia Housing* (3d Cir. 2004) 380 F.3d 751. Holding that employees regarded by their employers as disabled are entitled to accommodation under the ADA, the *Williams* court said the statutory text "does not in any way distinguish between actually disabled and 'regarded as' individuals in requiring accommo-

dation." It dismissed the *Weber* court's argument that applying the reasonable accommodation requirement to "regarded as" disabled employees could produce a "bizarre result." The *Williams* court found that remote possibility provided "no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text."

Weber and *Kaplan* reasoned that, if "regarded as" employees were entitled to accommodation, non-disabled employees would receive a benefit denied to similarly situated employees based on their employer's misperceptions and individuals would not be motivated to educate their employers about their true abilities or encourage employers to see their true talents. The court in *Kelly v. Metallics West, Inc.* (10th Cir. 2005) 410 F.3d 670, joined with *Williams* in rejecting this argument. It stated:

The ADA is concerned with safeguarding the employees' livelihood from adverse actions taken on the basis of stereotypic assumptions not truly indicative of individual ability of the employee....The real danger is not that the employee will fail to educate an employer concerning her abilities, but that the employee whose limitations are perceived accurately gets to work, while the employee perceived as disabled is sent home unpaid.

The Court of Appeal found the legal analysis set forth in *Williams* and its progeny equally applicable to the case before it:

As with its federal counterpart, FEHA's disjunctive definition of "physical disability" offers no statutory basis for differentiating among the three types of plaintiffs [actually disabled, with a history of disability, and regarded as disabled] in determining which individuals are entitled to a reasonable accommodation. Moreover, the protections provided employees by FEHA are broader than those provided by the ADA....To further the societal goal of eliminating discrimination, the statute must be liberally construed to accomplish its purposes and provide individuals with disabilities the greatest protection.

Similarly, the court rejected Lockheed's argument that an employer owes no duty to engage in a "futile" discussion with an employee who is merely regarded as disabled and to whom no duty of reasonable accommodation is owed. Having found that such an employee is owed a duty of accommodation, the court concluded the employer also must engage in an informal dialogue to determine effective reasonable accommodations with an applicant or employee regarded as disabled. "An employer's duty to accommodate is inextricably linked to its obligation to engage in a timely, good faith discussion with an applicant or employee" whom it knows or believes to be disabled, before that individual may be deemed unable to work, instructed the court.

The court sent the case back to the trial court for further proceedings consistent with its opinion. (*Gelfo v. Lockheed Martin Corp.* [6-2-06] B178676 [2d Dist.] 140 Cal.App. 4th 34, 2006 DJDAR 6921.) *

Public Sector Arbitration

City Failed to Prove Employee's Inappropriate Sexual Relations

Those of us who use our 10 o'clock break to get coffee and check email could learn a thing or two from the Fresno employee involved in a (supposed) scandalous assignation while on city time.

The grievant was fired from his position as an employee of the city planning and development department after an alleged frolic with a neighborhood prostitute. The accusation was that the grievant, while on his 15-

by, and observed that the grievant's city vehicle was left parked and unattended for over 20 minutes. The police soon arrived, but alas, the grievant had departed the scene.

When the city learned of these events, it terminated the grievant for using city resources to facilitate personal sexual relations with a prostitute, characterizing the behavior as "conduct unbecoming an officer or employee of the City." In his defense, the grievant contended that there had been no sexual activity at the time and place in question, and that he had not inappropriately used city resources.

Arbitrator Philip Tamoush reduced this case to a question of proof. At the evidentiary hearing, the grievant proved he had not met with a prostitute, but with an off-duty city employee to discuss "work issues." The female friend and fellow (off-duty) city employee called the grievant prior to his break and asked if he would meet with her. The grievant acquiesced and left his assigned area. According to the grievant's testimony, he and his friend shared "friendly kisses," but did not engage in sexual relations. Further, the grievant testified, any notion that they had engaged in sexual activities in the

The arbitrator reduced this case to a question of proof.

minute break, went to an area well known among police officers for having a high rate of prostitution. Once there, the grievant exited his city vehicle and entered the car of an off-duty female coworker. A witness testified that he saw the grievant "on top" of the woman in the car. After watching the alleged sexual events continue, the witness called the police department to issue a complaint. Not one to neglect his civil duty, the witness obligingly stood

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

Molly Ivans

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front seat of a car was belied by the fact that he and his friend each were approximately 5 feet 7 inches tall and weighed more than 200 pounds. Tamoush found that this evidence successfully refuted the testimony of the sole eyewitness who said he saw the parties in flagrante delicto, and that the city had exceeded its authority by terminating the grievant without sufficient proof of the elements of just cause.

The grievant exercised poor judgment in his choice of meeting location.

The city urged that termination still was appropriate because the grievant had misused the city's vehicle and time, met with a friend while on duty and in uniform, and exceeded the standard 15-minute break time. Tamoush disagreed, pointing to the grievant's exemplary work record and the absence of a rule barring employees from tak-

ing breaks with others. Tamoush conceded the grievant may have exercised poor judgment in his choice of meeting location and may have slightly extended his break time. However, Tamoush continued, these matters were not at the heart of the city's case. Instead, the city dismissed the grievant for having sexual relations with a prostitute, a fact it could not prove to the level needed to justify discipline.

Although the city, in a separate and unrelated matter, terminated the female employee from her probationary position, the grievant fared better. Tamoush ordered him reinstated with full backpay and benefits. (*City of Fresno and the grievant* [10-8-05] 8 pp. *Representatives*: Victoria Parks Tuttle [deputy city attorney], for the city; Berry Bennett, Esq. [Bennett & Sharpe], for the union. *Arbitrator*: Philip Tamoush [CSMCS Case No. ARB-04-3035].) *

Arbitration Log

- **Contract Interpretation — Job Assignment**

- **Contract Interpretation — Seniority**

California School Employees Assn., Chap. 704, and Union School Dist. (8-16-05; 13 pp.). *Representatives:* James Trujillo, labor relations representative, for the association; Sandra Kloster, Esq. (Littler Mendelson), for the district. *Arbitrator:* John F. Wormuth (CSMCS No. ARB-04-2851).

Issue: Did the district violate the contract when it assigned the grievant to a new work location without regard to his seniority?

Union's position: (1) The grievant, a custodian, was transferred from one work location to another in violation of the parties' agreement, which provides transfers shall be based on seniority. The district's decision to close two schools necessitated the layoff of custodians. During discussions of the proposed layoff of unit members, the seniority dates of affected unit members were established and an agreement was reached to reassign based on in-class seniority.

(2) Consistent with the parties' bargaining history, the district signified its acceptance of this proposal by issuing a "thumbs up." The union relied in good faith on the district's representation that it would issue transfers according to seniority.

(3) The district failed to fully negotiate the effects of the layoff and job transfers. Work location and shift assignment are integral parts of the working conditions enjoyed by custodians, and any change should be fully negotiated.

(4) Under the district's current method of assignment, a less-senior custodian may dislodge a more-senior custodian from a preferred work assignment. For that reason, the district should assign custodians in order of seniority.

District's position: (1) The layoffs were affected in compliance with the contract. No provision for transfers was agreed to; no provision can be inferred to compel the district, as a result of the effects of layoff, to assign custodians to work locations on the basis of seniority. A question concerning the grievant's seniority ranking arose during layoff discussions but it was resolved.

(2) No agreement by consensus or otherwise was reached to amend the contract or to modify the statutory lay-

off procedures. As such, the transfer of the grievant was executed in compliance with the existing transfer provision of the agreement.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) The contract language is clear and unambiguous; it must be held to the plain meaning rule.

(2) The parties met to establish and verify the seniority list to be used to accomplish layoffs. Seniority is based on time spent in an incumbent's current classification or higher. Seniority has no bearing on work location or shift assignment.

(3) The contention that the layoff resulted in the right to be assigned to work locations and shifts based on seniority is not supported by the layoff procedure or the terms and conditions of the contract.

(4) The union offered testimony that the parties reached an agreement that work location and hours would be assigned according to seniority; the district denies this contention and the union has offered no proof to support its claim. Absent a mutually recognized and accepted consensus, written contract language must be given full force and effect.

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(5) The occurrence of a layoff alone does not nullify the transfer article of the contract, and the grievant's assignment to a new work location was done according to the transfer section of both the then-existing and current contract language.

(6) The union failed to establish that its bargaining rights were abridged. There is no compelling evidence showing that the union's right to bargain the effects of the layoffs was hampered. During the layoff, the parties had regular and frequent contact with each other.

(7) The union and the district did not enter into an agreement to modify the contract and no agreement was reached to assign custodians to work locations according to seniority. The district did not violate the contract when it transferred the grievant in compliance with the then-existing transfer provision. The district was afforded the opportunity to negotiate, and under the contract, seniority is applied to layoffs, not assignments of custodians.

(Binding Grievance Arbitration)

- **Contract Interpretation**
- **Training Incentive Pay**

International Union of Operating Engineers, Stationary Engineers, Loc. 39, and Placer County Superior Court (10-11-05; 15 pp.). *Representatives:* Brooke D. Pierman, Esq. (Weinberg, Roger & Rosenfeld), for the union; Michael A. Bishop, Esq., and Roger Yang, Esq. (Matheny, Sears, Linkert & Long, LLP), for the court. *Arbitrator:* Frank Silver (CSMCS No. ARB-04-2746).

Issue: Did the court violate the MOU by failing to pay a training incentive bonus?

Union's position: (1) The MOU unambiguously provides that for an employee to receive a training incentive bonus, the employee may not be a supervisor or senior court services clerk. The employee must be "assigned" to train another employee, and the training assignment must meet or exceed 40 hours.

(2) Three employees received an email from their supervisor assigning them to train a new employee. The assigned training lasted five to six weeks. The training was conducted in a manner similar to the way a previous training session had been conducted and for which court employees were compensated with a training-incentive bonus.

(3) The court's attempt to limit the bonus pay to "special projects," "out of the ordinary circumstances," and to situations in which an employee is relieved of regular duties to perform training is unfounded; it is an effort to create limitations not found in the contractual language. This should be rejected because arbitration is an inappropriate forum to renegotiate contract language.

(4) Given the provision's unambiguous language, clear bargaining history, and the fact that bonus pay has been given for similar training activities, the court should pay the affected employees the training incentive bonus.

Court's position: (1) The language of the contract requires that a non-supervisory employee be assigned to

train another employee for 40 or more hours. This means the employee must be removed temporarily from his or her regular job and placed in a dedicated assignment to train another employee for a set amount of time.

(2) The contract does not refer to the performance of the employees' regular duties, nor does it provide bonus pay for employees answering questions about their jobs.

(3) The contract provision has never been construed to mean that 40 hours could be aggregated over an indefinite period of time.

(4) The training incentive was intended only for significant, exceptional training duties. The previous payment of the training incentive was for an intense and unprecedented training session during which employees had to create training materials, generate training schedules, and evaluate trainees. These tasks were significantly outside of the employees' job responsibilities and justified payment of the incentive.

(5) The court has applied its training incentive program consistently since it first was negotiated in 2001.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) The language of the disputed contract provision straightforwardly provides that to receive the incentive pay, an employee must be assigned to train another employee, and that the training must take at least 40 hours. Here, there is no question that the employees were assigned to train.

(2) The 40-hour requirement is ambiguous since there is no indication in the contract language or from previous negotiations whether the 40 hours must be worked consecutively. According to testimony, the training consumed more than 40 hours over a relatively short period. Under these circumstances and absent any contrary agreement, the 40 hours of training meet the technical requirements of the contract.

(3) The court's argument that the bonus must be paid only for "special training projects" is rejected. The contract language is relatively unambiguous, and there is no evidence from prior bargaining that such criteria should be applied to the provision.

(4) The grievants are entitled to the incentive bonus, subject to the condition that each grievant spent 40 or more hours engaged in the assignment.

(Binding Grievance Arbitration)

• **Discipline — Dishonesty**
[Police Officer] and City of Marysville Police Dept. (10-24-05; 25 pp.). *Representatives:* Steven W. Welty, Esq. (Mastagni, Holstedt, Amick, Miller, Johnsen & Uhrhammer), for the appellant; Stacey Sheston, Esq., and G. Richard Brown,

Esq. (McDonough, Holland & Allen PC), for the department. *Arbitrator:* William E. Riker (AAA Case No. 74 390 L 00284 05 LYMC).

Issue: Did the city have just cause for terminating the appellant police officer?

City's position: (1) The appellant has a long history of misbehavior. The current allegations of wrongdoing and dishonesty concern a note the appellant placed in the wallet of a citizen he arrested. The note was sexually offensive and used derogatory language. The appellant denied writing or having any knowledge of the note, but a handwriting analyst confirmed that the note was authored by the appellant.

(2) The appellant offered no evidence to rebut the expert's testimony. Therefore, the evidence demonstrates that the appellant did write the note and his denial indicates he lied about his actions.

(3) The appellant waived his rights under the Public Safety Officers Procedural Bill of Rights Act by not raising it during the Skelly hearing. His claim that discussions with superior officers regarding the incident were in violation of the act therefore must fail.

(4) Even if he had not waived his PSOPBRA right, he was not "interrogated" by his superior officers; they merely engaged in a dialogue. Even if the discussions were construed as "interrogations," the protections conveyed by Sec. 3303(i) do not apply to conversations with superiors during the normal course of duty, counseling, instruction, or informal verbal admonishment.

(5) Through application of progressive discipline, the appellant should have concluded that he needed to correct his behavioral problems. However, no discipline short of termination can remedy the appellant's dishonesty. Given the totality of the circumstances and evidence, termination was reasonable and within the department's discretion.

Appellant's position: (1) The sole basis for termination is an allegation of dishonesty. If appellant did not write the note, he has not been dishonest with the department.

(2) The appellant's prior disciplinary history is irrelevant because none of the prior events were thoroughly investigated; nor were they addressed by progressive discipline.

(3) The appellant's assertion that he did not write the note, though truthful, should be disregarded because it was taken in violation of the Bill of Rights Act.

(4) The termination of a law enforcement officer must be supported by clear and convincing evidence, not a preponderance of evidence. There is no direct evidence to support the allegations, only the handwriting analyst's

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conclusion that the appellant wrote the note. The credentials of the handwriting analyst are questionable as is the process he used to analyze the writing. Thus, the analysis does not provide the level of confidence necessary to be the sole evidentiary factor supporting the appellant's guilt.

(5) There is no proof the appellant lied about writing the note, nor is there any indication of a motive to lie about doing so. Stating that he does not remember writing the note is not an admission of guilt. The discipline should be modified or revoked.

Arbitrator's recommendation: The appeal should be denied.

Arbitrator's reasoning: (1) The paramount issue in this case is whether the appellant was dishonest.

(2) The appellant violated the city's personnel rules when he took actions that discredited the city. As a police officer, the appellant is required to testify in court, and in the future his testimony continually would be subject to challenge.

(3) The investigation of the matter was full and fair, and the appellant had the benefit of counsel.

(4) The evidence fails to support the claim that the department violated the appellant's right under the Bill of Rights Act or due process principles.

(5) The witnesses and documentation support the department's findings that identify the appellant as the author of the note. It is unlikely that the appellant did not remember having written the note; thus, his statements were dishonest.

(6) Dishonestly by itself is a serious charge and serves as a basis for termination regardless of any prior discipline. The department established a prima facie case. The appellant subjected himself to termination, and it should be upheld.

(Administrative Appeal)

- **Contract Interpretation**
- **Call-Back Pay**

State of California, Dept. of Corrections and Rehabilitation, and International Union of Operating Engineers (10-27-05; 11 pp.). *Representatives:* Adam N. Stern, Esq. (Levy, Stern & Ford), for the union; Barrett McInerney, for the department. *Arbitrator:* Bonnie G. Bogue.

Issue: Did the county violate the collective bargaining agreement by refusing to issue to grievants four hours of call-back pay?

Union's position: (1) The bargaining agreement clearly and unambiguously states that an employee who has completed a normal work shift, and then is called back to work, is entitled to four hours of call-back pay when the employee did not receive notification of the call back prior to completing his shift.

(2) Following department custom, the grievants signed out of work prior to parking their state vehicles and turning in their keys. After they signed out from their regularly scheduled shifts, but before they returned the equipment and left the premises, the grievants were told they would have to work overtime.

(3) Although the grievants had signed out, they had not left the

worksite before they were called back. Nothing in the contract requires an employee to physically leave the worksite in order for his shift to have ended.

(4) The contract provides for mileage reimbursement when the call back requires an additional commute. This provision clearly demonstrates that the parties contemplated a situation in which employees would be called back to work without an additional commute, such as occurred here.

Department's position: (1) The contract provides that if an employee leaves the place of employment and subsequently is asked to leave home and return to work, then that employee is guaranteed a minimum of four hours in overtime pay. The contract also provides that if the employee is told before the end of the regular shift that overtime is required, then that employee will be paid overtime only for the time actually expended.

(2) If the normal work shift is extended to include duties that are "off-the-clock" (such as returning the truck and keys), then the time during which an employee can be notified to perform overtime without qualifying for four-hour call-back pay is similarly extended. The minimum four-hour pay rule would not be triggered unless notice occurred after the grievants had returned the equipment.

(3) Since the first grievant's overtime assignment commenced at the precise time his regular shift ended, and since the second grievant admitted he did not complete the final task of his

regularly scheduled shift until five minutes after his overtime began, the notification of overtime must have occurred prior to completion of both grievants' normal shifts.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) This case raises a question of exactly when the request to return to work must occur to trigger the four-hour call-back guarantee. The contract states that an employee will be credited with a minimum of four hours work time when "ordered back to work" after having completed a "normal work shift." The parties' sole dispute is how to determine when the grievants completed their normal work shift.

(2) The grievants followed the department's established practice of logging their sign-out time as four o'clock, although it was actually several minutes before four o'clock when they did so. After signing out, the grievants returned their work trucks and keys. It was approximately four o'clock when this was completed. The grievants designated four o'clock as their sign-out time because that was the end of their scheduled shift. However, there are no records that demonstrate the precise time the grievants turned in their trucks and keys. Therefore, the department should not rely on the timesheets to prove when the grievants' shifts ended and overtime began.

(3) The union bore its burden of proving the grievants' normal work shifts end with the act of turning in their keys. Since this is the established prac-

tice at the department, the most reasonable interpretation of the contract language is that handing in the keys constitutes the completion of a shift for the purposes of call-back pay. Therefore, an employee is entitled to call-back pay if notified of the call back after the keys are turned in, unless there is objective evidence that the keys were turned in, or that the call-back notice was given, prior to four o'clock.

(4) Since the department did not use a time clock to objectively establish the grievants' sign-out time, the only evidence of when they completed their shifts was their sworn testimony, which no one refuted.

(5) The department is obligated to pay each grievant four hours of call-back pay, reduced by the amount of regular overtime pay received.

(Binding Grievance Arbitration)

• **Pay Claim — Travel Reimbursement**

CDF Firefighters, Bargaining Unit 8, and State of California, Department of Forestry and Fire Protection (04-03-06; 13 pp.). *Representatives:* Ronald Yank, Esq. (Carroll, Burdick & McDonough), for the union; Edmund "Deak" Brehl (labor relations counsel, Dept. of Personnel Administration), for the department. *Arbitrator:* Katherine J. Thomson.

Issue: Did the department violate the contract when it denied the grievant reimbursement for her expenses?

Union's position: (1) The grievant was assigned to assist with the emergency quarantine and destruction of

infected poultry. The task force activity was assigned an incident number and the grievant was on portal-to-portal travel status while assigned to the incident.

(2) Under the MOU, when an employee is engaged in an emergency activity to which an incident number has been assigned, the employee must be reimbursed for the actual cost of meals not provided by the employer, and for incidental expenses, without regard to mileage limitations.

(3) The grievant worked 24-hour days while on assignment. While other task force members stayed in a hotel, the grievant traveled home each night for dinner and to sleep. This did not change her travel status, and her requests for reimbursement should not be denied. The grievant should not be punished for saving the department money by sleeping at home rather than in a hotel.

(4) It has been the department's past practice to pay firefighters for lunch and incidentals if on an emergency assignment, even if they slept at home.

(5) The section of the DPA travel rules that forbids reimbursement for per diem expenses while on the premises of the employee's dwelling fails. This section has not been enforced consistently since the grievant was not denied breakfast and dinner, and the grievant's expenses should not be disallowed because she slept at home.

Department's position: (1) The grievant did not travel for 24 hours or more and therefore was not entitled to lunch or incidentals.

(2) DPA travel rules forbid reimbursement for per diem expenses incurred on the premises of an employee's primary dwelling.

(3) References to other times when employees who slept at home were reimbursed for lunch and incidentals are hearsay, may have been mistakes, or are not sufficiently similar to the current incident.

(4) The fact that the grievant saved the department money by staying at home is not determinative. The rules clearly do not allow reimbursement; if that result is absurd, the union can try to change the contract language.

Arbitrator's decision: The grievance was denied in part and upheld in part.

Arbitrator's reasoning: (1) The contract language indicates that eligibility for meals and incidentals is not absolute.

(2) The union offered no evidence that unit members assigned to an emergency incident would always receive reimbursement for expenses. Nor did it offer evidence of any discussion during bargaining that all expenses would be reimbursed if a unit member slept at home.

(3) The provision stating an employee is ineligible for reimbursement of lunch and incidentals if on travel status for less than 24 hours is applicable here since the employee slept at home each night, at which time the travel ceased.

(4) The union failed to prove a past practice. There is evidence of only one prior time the grievant received reimbursement for expenses when on travel

status and sleeping at home.

(5) The department did not violate the contract when it denied reimbursement for lunch and incidental expenses. However, the department shall reimburse the grievant for all other expenses incurred during the assignment.

(Binding Grievance Arbitration)

Public Employment Relations Board

Orders & Decisions

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

Reneging on prior tentative agreements not unfair practice: DPA.

(California Attorneys, Administrative Law Judges & Hearing Officers in State Employment v. State of California [Dept. of Personnel Administration], No. 1836-S, 5-8-06; 2 pp. + 7 pp. R.D. dec. By Chairman Duncan, with Members McKeag and Neuwald.)

Holding: The charge alleging bad faith bargaining was dismissed for failure to state a prima facie case.

Case summary: CASE appealed the dismissal of its unfair practice charge alleging that DPA violated the Dills Act by reneging on tentative agreements. The MOU between CASE and DPA expired on July 2, 2003. The parties engaged in successor agreement negotiations, and signed off on various tentative agreements in August, September, and October of 2003. In November 2003, due to changes in government personnel following the recall election of Governor Gray Davis, the DPA negotiator previously assigned to bargain with CASE was replaced with a new negotiator.

In October 2004, the newly appointed DPA representative informed CASE that DPA would be “revisiting” 16 of the articles on which CASE and the previous DPA negotiator had tentatively agreed in 2003. In February 2005, DPA

made proposals on two of these articles. In March 2005, DPA made proposals on two more articles to which the parties had previously tentatively agreed, but also verbally indicated readiness to again reach tentative agreements regarding 5 of the 16 articles. In April 2005, DPA made a new proposal on another article to which the parties had previously tentatively agreed. CASE argued that these actions by DPA evidenced a per se violation of the duty to bargain, as well as demonstrated evidence of surface bargaining.

Relying on *Chino Valley USD* (1999) No. 1326, 136 CPER 171, the R.D. found that a refusal to honor prior agreements following a change in negotiators was evidence of surface or bad faith bargaining. However, considering the holding outlined in *Ventura County CCD* (1998) No. 1264, 130 CPER 74, that one must look at the totality of circumstances in a surface bargaining claim, the R.D. held that one indicium of bad faith was insufficient to demonstrate a prima facie case.

The R.D. advised CASE of the time period in which it could file a first amended charge to establish its claim. Three days after that deadline had passed, CASE filed an amended charge alleging that in October 2003, the DPA negotiator stated several times that he would have to “take back” to others the matters discussed at the meetings, to ensure that

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the negotiations were on the “right track.” CASE also asserted in the amended charge that the articles the new negotiator wanted to “revisit” were at the “very heart” of the contract. CASE reiterated its allegation that each time DPA submitted a new proposal on a matter previously tentatively agreed upon, it violated its duty to bargain in good faith.

Because CASE filed its amended charge three days after the deadline, the R.D. would not consider the allegations in the amended charge when assessing the sufficiency of the charge. In the dismissal letter, however, he stated that his decision would have been the same even if he had considered the facts alleged in the amended charge, as they did not establish a prima facie case of a violation of the duty to bargain in good faith.

In its appeal, CASE reasserted the facts alleged in its unfair practice charge. The board adopted the R.D.’s decision as the decision of the board itself and dismissed the charge without leave to amend.

EERA Cases

Representation Rulings

Confidential designation of payroll specialist not warranted by needs of small district staff: CSEA.

(Burlingame Elementary School Dist. v. California School Employees Assn., No. 1847, 6-13-06; 2 pp. + 14 pp. H.O. dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: The district’s unit modification petition to exclude the benefits and payroll specialist from a classified wall-to-wall bargaining unit was denied because the incumbent did not have regular access to, or possession of, information concerning the district’s employer-employee relations and thus did not support classification as a confidential employee.

Case summary: Because the district was having difficulty finding a candidate to fill an accountant position, it agreed with CSEA to create an excluded accounting supervisor position; this allowed the district to increase the salary and attract more qualified candidates. In exchange, the dis-

trict agreed the position of benefits and payroll specialist would be assigned to CSEA’s unit and reclassified as non-confidential.

Approximately two years later during contract negotiations between the district and the Burlingame Education Association, the superintendent instructed the benefits and payroll specialist to conduct research regarding the longevity of teachers’ tenure. He then presented a proposal to BEA to eliminate certain benefits in exchange for added longevity steps. BEA accepted this proposal.

After learning of this agreement, CSEA said it would not ratify its tentative agreement with the district unless it too received longevity increases. The district believed the benefits and payroll specialist, who also was the newly elected CSEA chapter president, had informed CSEA of the private settlement with BEA. The specialist disclaimed any knowledge of the agreement.

Following this dispute, the district demanded the benefits and payroll specialist be removed from the bargaining unit and reclassified as confidential. The district filed an unfair practice charge against CSEA, asserting that the association’s unwillingness to do so was a violation of EERA. That charge was dismissed by the board in *Burlingame ESD* (2003) No. 1510, 159 CPER 72.

CSEA also filed an unfair practice charge, arguing that the district sought to have the position removed less than one month after agreeing to a new contract and that, by its conduct, was challenging the incumbent’s right to be represented by CSEA. Following the issuance of a complaint, the parties reached a settlement; the district agreed to keep the position within the unit, but removed certain of its duties. Nonetheless, the district filed the current claim subsequent to the settlement agreement, arguing that the position should be removed from the unit as confidential.

The district acknowledged that the specialist’s duties did not include regular access to or possession of confidential material, but contended that owing to its small size, it must rely on employees to perform a variety of functions and it was likely that the specialist would be called on to perform a confidential duty at a later date. To support this claim, the

district asserted that the benefits and payroll specialist already had disclosed confidential information by releasing the longevity data relative to the district's bargaining proposal.

CSEA maintained that the benefits and payroll specialist had never performed confidential duties and that if the assignment to gather longevity information was confidential, it should not have been given to the specialist since the district already had agreed it was not a confidential position.

The H.O. found that the benefits and payroll specialist position did not meet the definition of "confidential employee" set out in EERA, which must be strictly construed. The specialist did not have regular access to, or possession of, information concerning the district's employer-employee relations. The only instance of access to confidential information occurred during a time the specialist was not classified as confidential. The H.O. dismissed the argument that small districts need "all hands to help," since there was no indication that support staff shared duties or responsibilities. "The fact that the management team is overworked and an additional confidential position is needed does not, no matter how compelling the argument, warrant a finding that this classification should be designated as confidential."

In light of the above findings, the H.O. dismissed the claim. The board agreed and adopted the decision of the H.O. as the decision of the board itself.

HEERA Cases

Unfair Practice Rulings

Board finds no duty to bargain before creating, contracting with, auxiliary corporation for housing services: CSU.

(*California State Employees Assn. v. California State University*, No. 1839-H, 5-12-06; 34 pp. + 13 pp. ALJ dec. By Member Neuwald, with Chairperson Duncan; Member Shek concurring.)

Holding: The university did not unilaterally change its contracting out policy or deny unit employees bargaining

rights when it entered into an operating agreement with an auxiliary organization.

Case summary: CSEA filed an unfair practice charge against CSU alleging that the university unilaterally changed its long-term contracting out policy when it entered into an operating agreement with an auxiliary organization before providing CSEA notice and an opportunity to bargain.

Due to high demand, CSU endeavored to create student housing for its San Marcos campus. Because it was economically infeasible for CSU to finance such a project, it formed the auxiliary San Marcos University Corporation to do so. CSU entered into a 10-year operating agreement with the corporation, granting it a 35-year lease at a cost of \$1. The corporation in turn entered into a 10-year contract with Allen & O'Hara Education Services to design, construct, staff, manage, and lease the apartments to students. All remaining functions were reserved for CSU campus employees. CSU approved this plan. Allen & O'Hara subsequently contracted with CSU for telephone and computer services; all work in relation to this contract was performed by CSEA unit employees. CSU was not otherwise involved in the development of the housing project or execution of the contract with Allen & O'Hara.

Following CSU's approval of the plan, CSEA requested that the parties meet regarding long-term contracts for maintenance and service of the housing project. In its reply, CSU stated that it could discuss concerns regarding the project, but that the project was owned and operated by the corporation, not CSU. As such, HEERA was not applicable. Nor were Secs. 3.2 or 3.3 of the parties' bargaining agreement, which provided, respectively, that CSU could contract out only if doing so would not displace bargaining unit employees, and that CSU should notify CSEA when contracting out for more than 180 days.

CSEA then brought this unfair practice charge alleging that CSU violated its duty to bargain the effects of its decision when it signed the operating agreement with the corporation or when the corporation, which CSEA claimed was an alter ego of CSU, entered into its contract with Allen & O'Hara.

In analyzing CSEA's claim, the ALJ relied on *Stockton USD* (1980) No. 143, 48 CPER 61, and *Walnut Valley USD* (1981) No. 160, 49 CPER 64, and utilized the "per se" test, which is applicable to unilateral changes. Under this test, the ALJ sought to determine if CSU had implemented a policy change before it notified CSEA and provided an opportunity to negotiate, and, if so, if the change concerned a matter within the scope of representation. Section 3.2 of the parties' bargaining agreement granted CSU the right to unilaterally contract out provided no unit employee was displaced. Finding that displacement had not occurred, the ALJ concluded CSU had not implemented a change in policy under Sec. 3.2. Reading Sec. 3.3 of the bargaining agreement in conjunction with Sec. 3.2, the ALJ reasoned that notice and opportunity to bargain would not apply here since no unit employees had been displaced. If, however, Sec. 3.3 were read separately from Sec. 3.2, the ALJ stated that it would be clear CSU gave CSEA neither notice nor opportunity to bargain.

The ALJ next asked whether CSU's conduct was within the scope of representation, or whether CSU otherwise had an obligation to bargain. Applying the standard set forth in *San Diego CCD* (1988) No. 662, 77 CPER 85, the ALJ found there was no common ownership between CSU and the corporation. Accordingly, PERB did not have jurisdiction over the corporation and the auxiliary could not be required to be a party to, or be in compliance with, CSU's bargaining agreement.

The ALJ noted that CSU did not transfer bargaining unit work out of the unit or substitute one group of employees for another. Nor did it create the auxiliary corporation for the purpose of saving labor costs or to avoid bargaining. Consequently, CSU was not obligated to bargain with CSEA regarding its decision to form the corporation or enter into the operating agreement; nor was it obligated to negotiate the effect of its decision on unit employees.

In its appeal, CSEA reasserted the facts alleged in its unfair practice charge. The board adopted the ALJ's decision as the decision of the board itself and dismissed the charge without leave to amend.

Member Shek filed a concurring opinion in which she found student housing services were not a statutorily mandated function of the university, that the corporation and CSU were neither single nor joint employers, and that the corporation was not an alter ego of the university. Thus, Shek concluded that CSU did not unilaterally change its contracting out policy under the bargaining agreement. Shek did find the impact of CSU's decision negotiable under the bargaining agreement, but that CSEA's failure to seek negotiations after receiving an invitation from CSU to "discuss concerns" constituted a waiver of the unit's right to bargain.

Clerical error and 'quirk' in postage meter no excuse for untimely filing: U.C.

(*Coalition of University Employees, Loc. 6 v. Regents of the University of California, San Francisco*, No. Ad-353-H, 05-18-06; 3 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: A clerical error leading to insufficient postage and subsequent delay in delivery is no excuse for filing a late appeal.

Case summary: CUE attempted to file an appeal to the dismissal of an unfair practice charge. Because there was insufficient postage on the envelope, the post office returned the appeal. After applying the appropriate postage, CUE resent the appeal, which arrived 10 days after the deadline. The B.A. therefore dismissed the unfair practice charge, and CUE appealed that administrative determination.

CUE claimed the insufficient postage was due to a clerical error and "quirk" in its postage machine that causes it to default to the regular postage rate. Relying on *Coachella Valley USD* (1998) No. Ad-292-S, 134 CPER 70, and *State of California (Dept. of Insurance)* (1997) No. Ad-282-S, 124 CPER 81, the board found that here, where filing would have timely occurred but for a clerical error, there was not good cause to excuse the late filing. It thereby denied CUE's request to accept its late-filed appeal.

Failure to negotiate policy change not bad faith where parties could not agree on meeting place: CSU.

(*Academic Professionals of California v. Trustees of the California State University*, No. 1842-H, 5-18-06; 2 pp. + 15 pp. ALJ dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: Because the parties were unable to agree on a meeting place, the university did not act in bad faith when negotiations on a policy change within the scope of representation did not occur.

Case summary: The Academic Professionals of California filed an unfair practice charge against California State University alleging that the university breached its duty to negotiate in good faith when it unilaterally changed its sick leave and vacation credits policies.

While the parties were engaged in talks for a successor agreement, the university sent a letter to APC stating its intention to change its reporting unit for sick leave and vacation credits from one-hour to half-hour increments. In response, APC asserted that the proposed change was within the scope of representation, and that it expected CSU to refrain from subjecting any unit employee to the change until the university had discharged its collective bargaining obligation. After failed attempts to meet regarding the policy change, APC filed this unfair practice claim.

The parties stipulated that CSU applied the policy changes to unit members at the Humboldt campus, and that such policies were within the scope of representation. CSU argued, however, that APC failed to agree on the setting for negotiations and instead attempted to fold the issue into successor agreements already in session.

Looking to *Grant Joint Union HSD* (1982) No. 196, 55 CPER 69, for guidance in assessing the unfair practice charge, the ALJ found that APC proved all but one of the elements of unilateral change, which was whether CSU provided the union adequate notice and opportunity to bargain. The ALJ noted that CSU sent an explanatory letter to the union one month prior to the policy's implementation, and that the policy change was an uncomplicated matter that did not re-

quire extensive talks. Therefore, the one-month notice was adequate.

After receiving the letter, APC attempted to refer discussion of the policy to ongoing successor negotiations, and would not agree with CSU's attempt to do otherwise. APC argued that an employer ordinarily may not implement a change during ongoing negotiations for a successor agreement, presenting the union with a fait accompli, and expect the union to bargain back to the status quo. The ALJ disagreed, finding that APC missed its opportunity to bargain when it rejected CSU's proposal to meet outside of ongoing negotiating sessions. After this rejection, the parties engaged in several bargaining sessions during which APC did not mention the policy change.

The ALJ concluded that neither party acted in bad faith, but instead that the negotiations regarding the policy failed to commence because the parties could not agree on where the negotiations should take place. The board adopted the ALJ's decision as the decision of the board itself, and dismissed the claim with prejudice.

Asserted facts fail to show interference with employees' rights: U.C.

(*Coalition of University Employees v. Regents of the University of California*, No. 1843-H, 5-18-06; 2 pp. + 7 pp. R.A. dec. By Member Neuwald, with Chairperson Duncan and Member McKeag.)

Holding: Where the charging party cannot demonstrate an employee engaged in a protected action or invoked the right to union representation, a claim of interference will not stand.

Case summary: The unfair practice charge relates to disciplinary measures taken by the university against union members.

CUE alleged that the university interfered with the rights of two bargaining unit employees. One member received a "Performance Improvement Notice" and a reduction in pay for leaving work without permission. CUE claimed the member was a "union contact," and the disciplinary action interfered with the member's exercise of pro-

tected rights. CUE failed, however, to demonstrate how and when its member asserted a protected right, or how the disciplinary action was unlawful as there was no indication the member had permission to leave the worksite during work hours.

CUE also claimed the university denied union representation to one of its members when it held an investigatory interview following a complaint concerning the employee's poor work performance. CUE did not claim the member had invoked her right to union representation during the interview, but instead that the university failed to schedule a second meeting with the member and a union representative. Relying on *NLRB v. Weingarten*, the R.A. concluded that CUE had not demonstrated a prima facie case of interference because the facts did not allege that the employee requested, and was denied, union representation.

The board found that the minimal facts presented did not establish a prima facie case of interference. It therefore adopted the decision of the R.A. as the decision of the board itself, and dismissed the claim without leave to amend. It declined to consider new charge allegations of new supporting evidence not previously presented to the R.A.

MMBA Cases

Unfair Practice Rulings

Six-month statute of limitations renders unfair practice claim untimely: County of Siskiyou.

(*Siskiyou County Employees Assn. v. County of Siskiyou*, No. 1837-M, 05-09-06; 5 pp. dec. By Member McKeag, with Chairperson Duncan and Member Neuwald.)

Holding: The California Supreme Court holding in *Coachella* overruling the three-year statute of limitations for MMBA unfair practice claims applies retroactively; consequently, the six-month statute of limitations period applicable to unfair practice claims renders the charge untimely.

Case summary: SCEA alleged that the county failed to meet and confer in good faith when it discontinued a past practice of issuing association members reimburse-

ment for licensure fees. The county had an informal practice of reimbursing employees for certain licensure fees, which it suspended in January 2002. The county informed SCEA of this change in a letter dated January 16, 2002. In September 2003, the county denied an SCEA member's request for licensure fee reimbursement. In a letter dated September 30, 2003, SCEA asserted that the county wrongfully failed to reimburse one of its members for her expenses; and on February 25, 2005, the association filed an unfair practice charge against the county.

The B.A. issued a warning letter to SCEA on April 7, 2005, in which he relied on the three-year limitations period found in Code of Civ. Proc. Sec. 338(a) to conclude that the statute of limitations had run on the cause of action. The B.A. found that the time began to run on January 16, 2002, the date the county issued its letter to SCEA regarding cessation of the fee reimbursement practice.

SCEA filed a first amended charge arguing that the time did not begin to run until September 2003, when the county denied the member's request for reimbursement. The B.A. disagreed, again finding the statute began to run on January 16, 2002, and therefore dismissed SCEA's charge as untimely.

Subsequent to the issuance of the dismissal letter, the California Supreme Court ruled in *Coachella Valley Mosquito and Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 173 CPER 18, that unfair practice charges filed under the MMBA are subject to a six-month statute of limitations period, and rejected PERB's application of the three-year period. The court found this holding applied retroactively, so long as the parties are given a reasonable time in which to sue. Because *Coachella* applies retroactively, the board found SCEA's charge against the county was not timely filed under either of the limitations theories advanced by the parties in this case.

Charge dismissed for untimely filing and violation of PERB Reg. 32621: SMUD.

(*Modic v. Sacramento Municipal Utility Dist.*, No. 1838-M, 5-10-05; 3 pp. + 6 pp. R.D. dec. By Member McKeag, with Chairperson Duncan and Member Shek.)

Holding: The case was dismissed because the charging party failed to show good cause for untimely filing.

Case summary: Modic was employed by SMUD as a meter reader for four years before being discharged. He alleged that he was terminated for engaging in protected activity and was denied union representation. The R.A. found that this information did not support a prima facie case of an unfair practice and informed Modic of his right to amend his claim, provided he did so by November 7, 2005. The R.A. did not receive the amended charge by the deadline and consequently dismissed the case. One day after the R.A. dismissed the charge, Modic filed an amended unfair practice charge, and on November 28, 2005, appealed the dismissal.

The board, in its discretion, is permitted to excuse a late filing upon a showing of good cause. Modic was informed that his charge failed to state a prima facie case and that he had until November 4, 2005, to amend his claim or it would be dismissed. Modic failed to comply with both the November 4, 2005, deadline and PERB Reg. 32621, which requires that an amended charge be filed before a dismissal is issued. Because he could not show good cause for so doing, the board upheld the R.A.'s decision and adopted it as a decision of the board itself.

Dues deduction delay while awaiting certification is not violation: County of Santa Cruz.

(*Health Services Agency Physicians Assn. v. County of Santa Cruz*, No. 1840-M, 05-17-06; 2 pp. + 9 pp. B.A. dec. By Chairperson Duncan, with Members Shek and Neuwald.)

Holding: The two-week delay in affecting dues deductions for a newly elected exclusive representative was not unlawful interference or domination.

Case summary: The unfair practice charge raised claims concerning the county's conduct immediately after HSA was certified as the exclusive representative of a small unit of employees who had been represented in a general unit by SEIU.

In June 2002, HSA sought to sever a unit comprised of clinic physicians and psychiatrists from a general unit of

employees represented by SEIU. Following an election in February 2003, a majority elected to be represented by HSA.

After the election but before the county board of supervisors certified the election results, HSA requested that the county cease deducting member dues on behalf of SEIU. HSA also requested that the county provide it with voluntary dues deduction forms so that deductions to HSA could commence immediately. Prior to HSA's request, no union had collected voluntary dues without an MOU in place. SEIU ceased its deductions eight working-days after the board certified HSA's new representative. Deductions for the new union began 11 working-days after HSA submitted its dues authorization forms.

HSA then brought an unfair practice claim alleging that the county should have ceased deducting dues on SEIU's behalf when HSA became a certified employee organization on January 3, 2003; that the delay in voluntary deductions interfered with employee rights; and that the county dominated HSA in violation of PERB Reg. 32603(d).

It support of its claim, HSA relied on Gov. Code Sec. 3507.3, which states that professional employees shall not be denied the right to representation separate from nonprofessional employees. The R.A. found this argument misguided, and held that the county had not refused to create a professional unit, and indeed had done so according to the regulation. The R.A. additionally held that under Gov. Code Sec. 3508(c), SEIU was entitled to dues while it was still operating as the exclusive bargaining representative.

Regarding the charge of interference, the R.A. noted that local rules calling for immediate deduction applied only to bargaining units with more than 100 employees; HSA's unit had only 13. Thus, the delay was necessary for the county to determine the appropriateness of providing a 13-person unit immediate dues deductions.

Lastly, the R.A. applied the test for domination established in *Santa Monica CCD* (1979) No. 103, 43 CPER 89, which considers whether the employer's conduct influenced free choice or provided stimulus in one direction or another. HSA failed to establish that the county had done either.

Given the above, the R.A. held that HSA failed to state a prima facie case, and she dismissed the charge. In its appeal, HSA reiterated the facts alleged in its unfair practice claim. The board adopted the R.A.'s decision as the decision of the board itself and dismissed the charge without leave to amend.

Employee's right to free speech protected under MMBA; letter to and survey of employees allowed absent showing of coercion: City of Fresno.

(*Stationary Engineers Loc. 39 v. City of Fresno*, No. 1841-M, 05-18-06; 2 pp. + 12 pp. B.A. dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: An employer's right to free speech is protected under the MMBA absent a showing of coercion; letter to, and survey of, employees was not direct bargaining or interference with representation; and, declaration of impasse was appropriate and did not indicate surface bargaining.

Case summary: The unfair practice charge raised claims concerning the city's conduct during successor agreements with Stationary Engineers Local 39, the exclusive representative of the city's blue collar unit.

After nine months of negotiations for a successor agreement, the city declared an impasse and refused thereafter to meet with the union. Following its declaration of impasse, the city sent to members of the blue collar unit a letter discussing its financial crises and negotiations with the union. The city also conducted a survey of the unit to assess employee satisfaction.

The union then brought this unfair practice charge. It alleged that the city, in its letter, had bargained directly with, and made threats to, employees, and that both the letter and the survey degraded the union's bargaining position and interfered with union representation. The charge also alleged the city had failed to provide requested information, had engaged in surface and bad faith bargaining, and had unlawfully declared impasse.

The letter from the city to the unit members relayed health care cost negotiations with the union, alluding to a lack of cooperation in setting fees. The letter also commented

on financial constraints that could cause the city to contract out service jobs. The union alleged that the city bargained directly with employees by sending this letter, and in so doing, violated its duty to bargain in good faith. The union further argued that sending the letter to employees directly interfered with the union's bargaining position and representation of the unit.

To determine if the city unlawfully bypassed the union, the R.A. applied the test set forth in *Walnut Valley USD* (1981) No. 160, 49 CPER 64. Under this test, the charging party must demonstrate that the employer dealt directly with its employees to create a new policy, or to obtain a waiver or modification of existing policies. Here, there was no indication in the letter that the city was offering a new proposal or that it was asking for a response from the employees.

As noted in *Firefighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 23 CPER 95, it is appropriate in interpreting the MMBA to take guidance from the National Labor Relations Act and California labor relations statutes with parallel provisions. The R.A. thus looked to NLRA Sec. 8(c) and EERA case law to determine that the right of the employer to freely disseminate its views regarding the employment relationship is protected, and the existence of a representative organization should not restrict this right. To show an employer's speech is not protected but is instead a proscribed interference, the charging party must show objectively that the employer's communication would tend to coerce or interfere with a reasonable employee in the exercise of a protected right. The R.A. held that while the letter did discuss the possibility of contracting out some city services, there was no indication that this was a false representation or that the city was attempting to coerce the employees to take, or refrain from taking, any action.

Similarly, following *Leland Stanford, Jr. University*, (1979) 240 NLRB No. 1138, the R.A. held that employee surveys do not interfere with employee rights unless the underlying purpose is to undermine organizing activities of the union. Here, the survey was an attempt to elicit information about overall job satisfaction; thus, the R.A. found it did not interfere with union activities.

The union further alleged specific incidents that evidenced surface bargaining by the city, such as canceling negotiations without explanation; sending negotiators without authority to bargain; making only package proposals; and unlawfully declaring impasse and failing to provide requested information. The R.A. held that none of these examples provided sufficient indicia of surface bargaining, and although all proposals had been rejected, there had been several unique proposals. The R.A. also found that the city had met local code requirements for declaring impasse and that the union had failed to follow through in its request for information.

In light of the above, the R.A. dismissed the unfair practice claim for failure to establish 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.

Activity Reports

ALJ Proposed Decisions (By Region), March 1 - June 30, 2006

Sacramento Regional Office — Final Decisions

Siskiyou County Employees Assn. v. County of Siskiyou, Case SA-CE-314-M. ALJ Fred D’Orazio (Issued 3-15-06; final 4-11-06; HO-U-899-M.) The county abrogated the notice requirement in an MOU when it entered into a subcontract with a private contractor before expiration of a contractual 45-day waiting period. The remedy is a cease-and-desist order and an order to negotiate effects, but the county is not ordered to return to the status quo because the union waived its right to negotiate the decision.

SEIU Loc. 1000 v. State of California (Dept. of Consumer Affairs), Case SA-CE-1504-S. ALJ Bernard McMonigle. (Issued 3-29-06; final 4-18-06; HO-U-900-S.) The complaint alleging the department unilaterally imposed a dress code and retaliated against employees is deferred to binding arbitration, where the department agreed to waive procedural defenses and the allegations arguably are prohibited by the MOU.

McKay v SEIU Loc. 1000, CSEA, Case SA-CO-270-S. ALJ Fred D’Orazio. (Issued 5-25-06; final 6-20-06; HO-U-903-S.) The union did not breach its duty of fair representation, where a representative had a rational basis for not filing a grievance and the representative’s failure to file a second grievance was based on an honest misunderstanding about the employee’s desire. Even if the union representative’s conduct was based on poor judgment or mere negligence, no violation can be found under PERB case law. The union’s mere delay in presenting an employee’s grievance to its arbitration committee does not constitute a breach of the duty of fair representation, where evidence does not support the employee’s claim that he was denied the benefit of the union’s appeal procedures.

San Francisco Regional Office — Final Decisions

There were no proposed decisions.

Los Angeles Regional Office — Final Decisions

Laborers Loc. 220, AFL/CIO v. Kern High School Dist., Case LA-CE-4789-E. ALJ Thomas Allen. (Issued 3-7-06; final 4-5-06; HO-U-898-E.) No violation was found after the union activist was placed on administrative leave and the district attorney issued a misdemeanor complaint against her, where the union failed to establish a nexus between protected conduct and administrative leave.

Jurupa Community Services Dist. Employees Assn. v. Jurupa Community Services Dist., Case LA-CE-203-M. ALJ Thomas Allen. (Issued 3-23-06; final 5-19-06; HO-U-902-M.) The allegation that the district unilaterally changed its method of payment in a standby policy for employees called out to work was dismissed where the evidence did not support existence of an open past practice that was known to the district. The ALJ also dismissed an allegation that the subsequent implementation of a new call-out sheet was retaliation against union activists, where the new sheet did not constitute an adverse action.

California School Employees Assn. and its Chap. 135 v. La Habra City School Dist., Case LA-CE-4772-E. ALJ Fred D’Orazio. (Issued 4-6-06; final 5-3-06; HO-U-901-E.) The district unlawfully altered the hours of bargaining unit employees when, in 2003, it unilaterally changed a 23-year practice of granting four hours of released time on December 24 and four hours of released time on December 31 to eight hours on December 24 and no time on December 31.

Sacramento Regional Office — Decisions Not Final

Operating Engineers Loc. 3 v. Town of Paradise, Case SA-CE-301-M. ALJ Bernard McMonigle. (Issued 4-13-06; exceptions filed 5-8-06.) The city unlawfully refused to provide information to the union about an on-call provision in an agreement, even though the parties were not engaged in negotiations at the time of the request and the grievance that prompted the request was untimely. The ALJ found that the exclusive representative was entitled to information to apprise employees about terms of the MOU and to effectively administer it.

Riverdale Teachers Assn., CTA/NEA v. Riverdale Joint Unified School Dist., Case SA-CE-2309-E. ALJ Christine

Bologna. (Issued 5-2-06; exceptions filed 6-12-06.) The district unilaterally changed its policy concerning extra-duty coaching assignments without satisfying its duty to bargain, where evidence showed the district's longstanding expectation that physical education teachers also coach two sports did not constitute a past practice or policy. The ALJ found a lack of documentation, grant of requests to coach only one sport, and admission that coaching by physical education teachers has never been required. The assignment of a teacher from a full-time physical education teacher to a full-time position at another school based on her expressed desire not to coach two sports for a few years effectively converted the district's expectation that teachers coach two sports into a mandatory policy.

State of California (Depts. of Veteran Affairs and Personnel Administration) v. SEIU Loc. 1000, CSEA, Case SA-CO-278-S. ALJ Donn Ginoza. (Issued 5-15-06; exceptions due 7-5-06.) The allegation that a union unilaterally abrogated a no-strike clause in its MOU with the state when it failed to take sufficient action to stop a sickout is dismissed as a mere contract violation, as opposed to a unilateral change in the MOU, where the union never claimed the no-strike clause had no force or effect as to the sickout, and the union took certain steps to encourage employees to return to work.

San Francisco Regional Office — Decisions Not Final

There were no proposed decisions.

Los Angeles Regional Office — Decisions Not Final

California State Employees Assn. v. Trustees of the California State University, Case LA-CE-787-H. ALJ Donn Ginoza. (Issued 3-1-06; exceptions filed 3-24-06.) The university did not unlawfully change a past practice of granting reimbursed released time to attend PERB hearings, where the MOU does not authorize providing such time and evidence does not establish a past practice of providing such time.

California Alliance of Academic Student Employees/UAW v. Trustees of the California State University, Cases LA-CE-853-H and LA-CE-888-H. ALJ Ann Weinman. (Issued 3-27-06; exceptions filed 4-21-06.) The university breached a PERB-certified agreement establishing a unit of teaching

associates, graduate assistants, and instructional student assistants when it issued a letter including only on-campus employees and later excluded AmeriCorps participants and Bridge students. The ALJ found the agreement included off-campus employees, AmeriCorps participants, and Bridge students, and the university should have used PERB's unit modification procedures rather than act unilaterally.

California Faculty Assn. v. Trustees of the California State University (San Diego), Case LA-CE-822-H. ALJ Thomas Allen. (Issued 4-6-06; exceptions filed 5-11-06.) The university did not unlawfully subcontract remedial courses to the community college district, where the university and community college offered the courses under a cooperative agreement, the university made an independent decision to cease offering the classes, and the evidence established that the university would not have offered the classes even if the community college district had not.

California School Employees Assn. and its Chap. 150 v. Escondido Union Elementary School Dist., Case LA-CE-4862-E. ALJ Ann Weinman. (Issued 4-7-06; exceptions filed 4-27-06.) The district did not retaliate against an employee by issuing him negative memos for filing a complaint and a lawsuit about an asbestos-related claim, where the evidence shows that the activity was too attenuated in time to establish a nexus, the district had no knowledge of the employee's participation in the lawsuit, the lawsuit was not protected, and the district had a lawful employment-related reason for its action. The ALJ found the district later unlawfully imposed a series of disciplinary actions on the employee in retaliation for filing an unfair practice charge, where the evidence established that the district was unable to establish credible reasons for its various disciplinary actions.

Amalgamated Transit Union, Loc. 1704 v. Omnitrans, Case LA-CE-216-M. ALJ Thomas Allen. (Issued 4-19-06; exceptions filed 5-12-06.) The agency unlawfully dismissed a union negotiator under a "no-fault" attendance policy for not giving proper notice of an absence to participate in union business and charged another union negotiator with counted absences for the same conduct, where the MOU covering "authorized union" business did not require notification for all authorized union business and did not limit authorized union business to Omnitrans-related activity.

AFSCME Loc. 809 v. City of Carson, Case LA-CE-62-M. ALJ Thomas Allen. Issued 5-26-06; exceptions due 6-20-06.) The city did not unilaterally change its negotiated drug and alcohol testing policy by distributing “educational materials” that did not include all provisions in the agreement, where evidence does not establish that the agreement was repudiated by the city or replaced by the educational materials.

Tyma v. Hemet Unified School Dist., Case LA-CE-4919-E. ALJ Thomas Allen. (Issued 6-19-06; exceptions due 7-8-06.) The district unlawfully interfered with employee rights when it issued her a written reprimand instructing her not to discuss the reprimand with any employees unless directed to do so by her supervisor. The ALJ found that the district’s conduct was inherently destructive of employee rights and failed to show that no alternative course of action was available.

SEIU Loc. 1000, CSEA v. State of California (Department of Transportation), Case SA-CE-1491-S. ALJ Christine Bologna. (Issued 6-23-06; exceptions due 7-18-06.) A supervisor did not unlawfully deny an employee’s right to representation during an interview following an incident where the employee used profanity in the workplace, where the supervisor told the employee that the interview was not to question him about the incident, no questions about the incident were asked, and there was no adverse action. Subsequent discipline of employees was found not to be retaliatory, where the union failed to establish a nexus between discipline and protected conduct and the department established independent grounds for the discipline.

Report of the Office of the General Counsel

Injunctive Relief Cases

There were eight requests for injunctive relief filed between March 1-June 30, 2006.

Public Employees Union, Loc. 1 v. City of Benicia, IR No. 500, Case SF-CE-344-M. Issue: Should the board seek an injunction to require the city to recognize Local One as the exclusive representative. A request for injunctive relief was filed on 3-10-06 and withdrawn on 3-10-06.

San Francisco Municipal Attorneys Assn. v. City and County of San Francisco, IR No. 501, Case SF-CE-354-M. Issue: Should the board seek an injunction to require the city to meet and confer under the Meyers-Milias-Brown Act. On 4-17-06, a request for injunctive relief was filed, and on 4-18-06, the parties reached a verbal settlement.

City & County of San Francisco v. Stationary Engineers Loc. 39, IR No. 502, Case SF-CO-129-M. Issue: Should the board seek an injunction requiring Local 39 to participate in binding arbitration and mandatory impasse resolution procedures. A request for injunctive relief was filed on 5-10-06 by the city, and the union filed its reply and opposition on 5-12-06. On 5-12-06, the board denied the request for injunctive relief without prejudice.

AFSCME Loc. 146 v. Carmichael Recreation and Parks Dist., IR No. 503, Case SA-CE-379-M. Issue: Should the board seek an injunction requiring the district to provide documentation and desist from discriminating against an employee. An amended UPC and request for injunctive relief was filed on 6-6-06. On 6-8-06, the district filed its position statement. On 6-13-06, the board denied the request for injunctive relief without prejudice.

City of San Jose v. Operating Engineers Loc. 3, IR No. 504, Case SF-CO-132-M. Issue: Should the board seek an injunction requiring designated employees not to participate in a scheduled work stoppage. On 6-9-06, a UPC, complaint for permanent injunction and temporary restraining order was filed. The union filed an opposition, and on 6-16-06, the case was placed in abeyance at the request of the parties.

Fresno Teachers Assn. v. Fresno Unified School Dist., IR No. 505, Case SA-CE-2363-E. Issue: Should the board seek an injunction requiring the district to provide requested information to the union regarding new bargaining unit positions that have no job descriptions. A request for injunctive relief was filed on 6-14-06, and on 6-15-06, the association withdrew the UPC and request for injunctive relief.

East Oakland Community Charter Teachers Assn. v. Education for Change, IR No. 506, Case SF-CE-2557-E. Issue: Should the board seek an injunction requiring the employer to refrain from conducting an unofficial election outside the

representation process of EERA. A request for injunctive relief was received on 6-16-06. On 6-17-06, the injunctive relief request was granted, and a PERB complaint issued on 6-19-06. PERB did not seek an injunction based on EFC's cancellation of the election.

Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 542 v. Imperial County, IR No. 507, Case LA-CE-293-M. Issue: Should the board seek an injunction to invalidate a local representation rule. A request for injunctive relief was filed on 6-26-06. CSEA requested and was granted intervention this same date. The county filed its opposition on 6-28-06.

Litigation Activity

Nine litigation cases were opened between March 1-June 30, 2006.

Leadership Public Schools and California Federation of Teachers, National Labor Relations Board, Region 32, Case No. 32-RM-800 (PERB Case SF-RR-882-E). Issue: Does the NLRB have jurisdiction over charter schools? On 3-9-06, PERB filed a motion to intervene and dismiss the representation petition which the school had filed with the NLRB. An NLRB hearing was held on 3-27-06 and 3-29-06, and briefs were to be filed by 4-19-06. On 4-21-06, California Schools Employees Association filed an amicus brief. On 5-5-06, the NLRB regional director issued a decision and order denying the school's petition. On 6-1-06, a request for review was filed with the NLRB in Washington, D.C., and PERB filed its opposition on 6-7-06.

International Assn. of Firefighters, Loc. 230 v. City of San Jose, and San Jose Police Officers Assn., Santa Clara Superior Court, Case No. 106-CV-057856 (PERB Case SF-LT-3-M). Issue: Should PERB intervene in the court proceedings to protect its jurisdiction? On 3-9-06, PERB received a notice of verified complaint for writ of mandate. On 3-27-06, a first amended verified petition to compel arbitration was filed, and a hearing was held on 5-18-06.

Board of Trustees of the California State University v. PERB and California Faculty Assn., 2d District COA, Case B189869 (PERB Case LA-CE-784-H). Issue: Did PERB err in Dec.

No. 1823-H? On 3-24-06, the board of trustees submitted its petition for review of Dec. No. 1823-H. PERB filed the administrative record on 5-5-06. On 5-25-06, all parties filed a joint stipulation for extension of time to file briefs, and opening briefs were due on 7-27-06.

Oakland Education for Change and East Oakland Community Charter Teachers Assn., National Labor Relations Board, Region 32, Case No. 32-RM-801 (PERB Case SF-RR-881-E). Issue: Does the NLRB have jurisdiction over charter schools? The school filed an RM petition with the NLRB on 2-14-06. On 3-30-06, PERB filed a motion to intervene and dismiss the petition with the NLRB. On 5-9-06, the NLRB regional director issued a decision and order denying the petition. On 6-7-06, a petition for review to the NLRB in Washington, D.C., was filed, and PERB filed its opposition on 6-28-06.

SEIU Loc. 415 v. County of Santa Cruz, Santa Cruz County Superior Court, Case No. CISCV153144 (PERB Case SF-CE-347-M). Issue: Should PERB intervene to obtain an order regarding the county strike? On 3-24-06, PERB received a letter requesting its intervention from the union, and on 4-7-06, PERB received notice that the parties had reached an agreement and litigation was closed.

City of San Jose v. Operating Engineers Local Union No. 3, Santa Clara Superior Court, Case No. 106CV064707 (PERB Case SF-LT-4-M). Issue: Does PERB have jurisdiction over the question of whether designated employees can strike? On 6-1-06, the city filed a complaint for permanent injunction and TRO. The court issued an order setting a special hearing for TRO and order to show cause regarding preliminary injunction. PERB filed its opposition to the request for injunctive relief on 6-1-06. On 6-9-06, the court dismissed the complaint based on PERB's exclusive jurisdiction.

City of San Jose v. Operating Engineers Local Union No. 3, 6th District COA Case No. H030272 (PERB Case SF-LT-4-M). Issue: Does PERB have jurisdiction over the question of whether designated employees can strike? On 6-9-06, the city filed a petition for writ of supersedeas to the Court of Appeals. On 6-14-06, PERB filed its motion and application for leave to intervene, an opposition to the writ as well as

an application for leave to file amicus curiae brief. On 6-14-06, the court issued a stay order, denying PERB's request for intervention and granting PERB's request to file an amicus curiae brief indicating supplemental response would be due by 6-21-06. On 6-20-06, PERB filed its supplemental opposition, the union filed their opposition on 6-21-06, and the city filed their reply on 6-26-06.

County of Contra Costa v. Public Employees Union, Loc. One, AFSCME Locs. 512 and 2700, and SEIU Loc. 535, Contra Costa Superior Court, Case No. MSC06-01228 (PERB Case SF-LT-5-M). Issue: Does PERB have jurisdiction over the question of whether designated employees can strike? On 6-23-06, the county filed an ex parte application for TRO and order to show cause. On 6-23-06, the unions filed oppositions to the TRO, and on 6-23-06, the court signed an order granting TRO. PERB obtained a signed order granting its application for leave to intervene. On 6-28-06, parties submitted a joint stipulation regarding extending TRO and continuing the evidentiary hearing which the judge granted and signed on 6-29-06. A hearing on PERB's jurisdiction was held on 6-30-06. The judge ordered that PERB's exclusive jurisdiction be excused.

County of Contra Costa v. California Nurses Association, Contra Costa Superior Court Case No. MSC06-01227. (PERB Case SF-LT-6-M.) Issue: Does PERB have jurisdiction over the question of whether designated employees can strike? On 6-26-06, a complaint for permanent injunction, TRO, and ex parte application with order to show cause was filed with the court. On 6-26-06, PERB filed its application for leave to intervene and opposition to request for injunctive relief. On 6-28-06, the parties submitted a joint stipulation regarding extending the TRO and continuing the evidentiary hearing on order to show cause and PERB's application for leave to intervene. On 6-29-06, PERB received the signed order granting joint stipulation.

Regulation Adoption and Modification

PERB implemented several regulation changes including new regulations regarding electronic filing on May 11.

Precedential Decisions of the

Fair Employment and Housing Commission

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

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

Rape of employee is sexual harassment, violation of Ralph Civil Rights Act: Capital Hills Arco/AM-PM.

(Department of Fair Employment and Housing v. Capital Hills Arco/AM-PM, No. 06-03-P, 6-6-06; 24 pp. ALJ dec.)

Holding: The employer engaged in sexual harassment and violated civil rights laws when he raped his female employee, an act hostile and "fundamentally violent and sexual in nature."

Case summary: This complaint arose when an employer, Aliaho Dagmy, raped his female employee.

The employee was hired as a clerk at a convenience store. Less than one month after the employee began her job, her employer asked her to accompany him to Sacramento to deliver a trailer. He offered her \$100 plus incidental expenses for doing so, and she accepted.

While driving to Sacramento, the employer parked at a rest stop and told his employee they would sleep there for the night. The trailer was equipped with a bed, and the employee lay down on it fully clothed. It was at this time that the employer forcibly raped her. The employee managed to escape, and a prolonged chase ensued. The employee eventually called for assistance, and the employer was apprehended and arrested.

The employee brought this complaint, alleging discrimination in the form of sexual harassment and sexual as-

sault, as well as constructive discharge. She alleged additionally that the rape constituted an act of violence because of sex, a violation of the Ralph Civil Rights Act, incorporated into the Fair Employment and Housing Act by Gov. Code Sec. 12948.

In support of a claim for sexual harassment, an employee must demonstrate unwanted sexual conduct occurred, and that the conduct was severe enough to alter the conditions of employment. The employee also must show that the act complained of was "fundamentally violent and sexual in nature," and occurred because of the employee's sex.

The ALJ found that the rape of an employee by an employer altered sufficiently the conditions of employment; that the act was committed because of the employee's sex; and that rape was fundamentally violent and sexual in nature. Thus, the employee met her burden of proof in both the sexual harassment and civil rights claims. The ALJ held that, as joint tenants and co-owners of the store, both the employer and his wife were jointly and severably liable for the offending acts. The ALJ awarded the employee \$26,688 in back pay, as well as \$14,950 front pay.

In his assessment of damages for emotional distress, the ALJ considered the long-lasting and profound emotional consequences the rape had on the employee. Because of the rape, the employee suffered severe emotional distress to the point of attempting suicide. The employee applied for other

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jobs, but because of her emotional instability, no one would hire her. In consideration of these factors, the ALJ held that the employer and his wife were liable for \$300,000, the maximum remedy possible in this case. The ALJ also imposed administrative fees and civil penalties. Lastly, the ALJ ordered that Dagmy pay the employee's medical expenses; attend rape prevention training; implement a sexual harassment prevention policy at work; and provide his employees with harassment prevention training.

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

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