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letter from the editor

Dear *CPER* Readers:

This issue of *CPER* is packed with an extraordinary selection of in-depth, topical stories. But, rather than give you a glimpse of what the *Journal* has to offer, I'm bursting with news on another front.

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Carol Vendrillo
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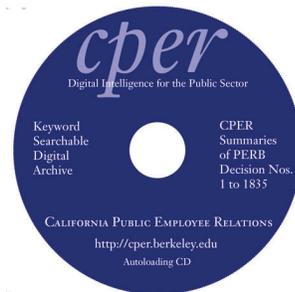
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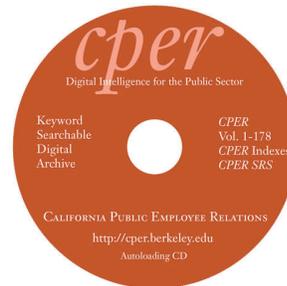
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Public Employee Free Speech in the Wake of *Ceballos*

Martin Fassler

The recent Supreme Court decision in *Garcetti v. Ceballos*¹ brings to mind a few well-known admonitions: (1) “Easier said than done”; (2) “Be careful what you wish for”; and (3) “If at first you don’t succeed, try another court, or another legal theory” (admittedly, a modification of the usual wording). At the same time, *Ceballos* leaves unchanged much long-standing law, at least in the Ninth Circuit, regarding First Amendment protections for public employees.

This article suggests that lawyers representing both California public employees and public employers may have difficulty applying *Ceballos* in some situations, although in other instances its consequences will be clear. And if, in some instances, *Ceballos* closes the door to the federal courthouse, lawyers representing employee-plaintiffs who believe they have suffered retaliation for speaking out on the job will have avenues to pursue in California court for vindication.

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Ceballos Facts and Holding

The *Ceballos* facts and decision were ably described by Eric Borgerson in the last issue of *CPER Journal*, and so are highly condensed here. In a 5-4 decision written by Justice Anthony Kennedy, the Supreme Court remanded to the Ninth Circuit a case in which Los Angeles deputy district attorney Richard Ceballos challenged a reassignment to a less-respected position, a transfer to another courthouse, and a denial of a promotion, alleging that all three actions were in retaliation for his exercise of First Amendment rights.

Ceballos was a first-level supervisor in the Pomona courthouse. He investigated the accuracy of an affidavit signed by a deputy sheriff in support of a search warrant in a pending criminal prosecution. He concluded the affidavit

contained “serious misrepresentations.” Ceballos wrote a memorandum outlining his observations and conclusions to two of his supervisors, and voiced his views in a meeting with the two managers and sheriff department officers. The sheriff officers did not agree with his views. The D.A.’s office went ahead with the prosecution.

Not long afterward, Ceballos was removed from his position as trial deputy, transferred to another courthouse, and denied a promotion. Eventually he sued under 42 USC Sec.1983, alleging retaliation for exercise of First Amendment rights. The district court dismissed the case, but the Ninth Circuit reversed that ruling, holding that Ceballos’ “allegations of wrongdoing in the memorandum” to his superiors was protected by the First Amendment. The Ninth Circuit explicitly declined to rule on whether other acts by Ceballos — voicing his views to the defense attorney, to others in the D.A.’s office, and to sheriff department personnel — were protected by the First Amendment. The Supreme Court granted the county’s certiorari petition.

In its ruling, the Supreme Court honored its previous holdings in *Pickering v. Board of Education of Township High School Dist.*,² *Rankin v. McPherson*,³ and *Givhan v. Western Line Consolidated School Dist.*⁴ Thus:

That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. [Citing *Givhan*.]

And:

The memo concerned the subject matter of Ceballos’ employment but this, too, is non-dispositive. The First Amendment protects some expressions related to the speaker’s job....[Teachers] should be able to speak out freely on such questions without fear of retaliatory dismissal. [Citing *Pickering*.] The same is true of many other categories of professional employees.

Despite these principles, however, Ceballos, was not protected by the First Amendment because:

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 explained its conclusion in this way:

Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.

.....

Employers have heightened interests in controlling speech made by an employee in his or her professional capacity....If Ceballos’ superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

Ambiguities in the Majority Decision

Later in the decision, Kennedy recognized that deciding whether an employee’s statements or actions are within “the scope of an employee’s duties” may be difficult in some cases. But Kennedy, and thus the majority, declined to provide a useful analytical approach to navigate in these gray areas. In *Ceballos*, the parties acknowledged that Ceballos’ memo was written pursuant to his official duties. Accordingly, Kennedy wrote:

We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee’s duties where there is room for serious debate. We reject, however, the suggestion [in the Souter dissent] that employers can restrict employees’ rights by creating excessively broad job descriptions. The proper inquiry is a factual one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee’s

In Ceballos, the majority declined to provide a useful analytical approach to navigate the gray areas.

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.

These comments leave the path ahead rather murky.

At the end of the majority decision, Kennedy injected some additional ambiguity:

We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

Does the reference to “professional duties” (a phrase used earlier in the opinion as well) exclude statements made by public employees who traditionally are not considered to be “professionals,” among them, clerical workers and blue-collar workers? And, does the second sentence leave open the possibility that *some* statements (but not “every” statement) by a public employee in the course of doing his or her job remain protected by the Constitution?

Branches of Public Employee Free Speech Law That Remain Unchanged

Some principles established by the earlier decisions protecting First Amendment rights of public employees would appear to remain unchanged, since the employee's actions would not be within her job duties. In addition to the acknowledgment in the *Ceballos* opinion of the principles enunciated in *Pickering*, *Rankin*, and *Givhan*, these Ninth Circuit precedents (among others) would seem to remain good law, unaffected by the reasoning of *Ceballos*:

- The right of a public employee to speak to the elected governing body (city council, school board, etc.) without retaliation. For example, see *Lambert v. Richard*⁵ (library employee speaks to city council on behalf of library employees); *Anderson v. Central Point School Dist.*⁶ (assistant coach and teacher address and write to school

board regarding high school athletic program); and, of course, *Pickering*, in which a teacher addressed to the school board his comments about the school district's expenditures on athletics.

- The right of a public employee to support a candidate for office. Ex., *DiRuzza v. Tehama County*.⁷
- The right of a public employee to report actions of the employee's own agency to a higher-level regulatory agency. Ex., *Coszalter v City of Salem*⁸ (city public works employee reports dangerous working conditions and spillage of sewage to state agency).
- And, as Justice Stevens noted in a dissenting opinion, public employees continue to enjoy First Amendment protection when they speak out critically in public, although they no longer enjoy that protection when trying to improve things within their agency. See, for example, *Allen v. Scribner*.⁹ As Justice Stevens commented in his dissent, “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.”
- Traditional issues involving “academic freedom” are beyond the scope of the holding and analysis. As Justice Kennedy said, “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.”

Easier Said Than Done: Was It Part of the Employee's Job?

In *Ulrich v. City and County of San Francisco*,¹⁰ administrators of a county hospital decided to lay off a number of physicians, as a budgetary decision. At a medical staff meeting, Ulrich, a physician not scheduled to be laid off, criticized the decision because of the likely adverse affects on patients. Other doctors joined his criticisms. Ulrich then was subject to various adverse actions, and challenged them in a lawsuit alleging they were retaliation for his exercise of protected First Amendment rights. The Ninth Circuit held his actions were protected by the First Amendment. Would the decision be the same after *Ceballos*? If Ulrich had no overall responsibility for the performance of the hospital

and the medical staff, don't his comments deserve the same protection that would be given to a citizen commenting on a matter of public interest?

In *Gillette v. Delmore*,¹¹ a firefighter commented to a fire captain and to several other firefighters and police officers that, in his observation, the others had used excessive force in responding to an ill citizen who had first called for emergency medical assistance but then objected to the help. Gillette was one of the firefighters who had responded to the call. He later was dismissed, ostensibly for misconduct. He claimed his dismissal was in retaliation for his statements involving the response to the call for medical assistance. The Ninth Circuit held that his comments were protected by the First Amendment. Would that decision be the same after *Ceballos*?

In *Blair v. City of Pomona*,¹² a police officer reported to a superior within the department about thefts that had been committed by other on-duty officers assigned to the Major Crimes Unit. Blair was not assigned to the unit but had heard about the crimes from a colleague who was in the unit. As a result of Blair's disclosure, several police officers were formally accused of misconduct and dismissed. Blair, however, was ostracized by other police officers, was not supported by management, and ultimately was dismissed. He filed suit alleging these actions were all in retaliation for his reporting of crimes. The Ninth Circuit held that his actions were protected by the First Amendment. Certainly a person who was not a police officer would be protected by the Constitution from retaliation by police. Would that decision be the same after *Ceballos*?

In *Settlegoode v. Portland Public Schools*,¹³ a special education teacher, at the end of her first year of employment, sent a 10-page letter to her supervisor's supervisor, about the problems she observed in the Adapted Physical Education Program of the district. She criticized "systematic discrimination, mal-administration, access, pedagogy, curriculum, equity and parity." Her supervisor's evaluation

of her in the second year was far more negative than her evaluation in the first year, which was generally positive. Settlegoode wrote to the school superintendent, alleging retaliation and repeating her beliefs that the facilities for disabled students were inadequate. Her contract was not renewed at the end of her second year. She sued, alleging violation of First Amendment rights. A jury awarded her nearly \$1 million in damages. The magistrate judge overruled the entire verdict, but the Ninth Circuit reversed, holding that the First Amendment protected Settlegoode from retaliation.

Was Settlegoode acting within her job responsibilities in seeking to improve the program by writing first to a higher-level manager, and then to the school superintendent? Did her position require her to do so? If so, and under the *Ceballos* standard, would she be excluded from the protection of the First Amendment?

Be Careful What You Wish For

With the *Ceballos* standard in place, suppose the circumstances described in past Ninth Circuit decisions were to be repeated in a new case. Would the standard lead to a result contrary to the previous holdings, and would that be a desirable outcome?

In *Roth v. Veterans Administration*,¹⁴ Dr. Roth was hired specifically to clean up and improve a poorly functioning hospital medical staff. Among the problems he was instructed to confront and eliminate were delivery of primary care to patients by non-physicians; erratic, non-medical standards for patient admission and care; and conflict between the nursing staff and physicians. Once he was employed, Roth altered staffing responsibilities and staff/patient ratios, improved the treatment of patients, and facilitated their movement through the program. He reported wastefulness, mismanagement, and incompetence to his superior and to administrative personnel. "His criticisms apparently provoked hostility and resistance from existing staff and administrative personnel. Defendants had predicted

Employees of local agencies have some alternative paths open, although they may well be inferior to filing a Sec. 1983 suit in federal court.

this outcome and promised to support Roth.” Instead, after nine months, the administration demoted Roth and told him he would be terminated 10 weeks later.

Roth filed suit, alleging retaliation for exercise of First Amendment rights. The trial court denied the defendants’ motions for summary judgment on the ground of qualified immunity, and the defendants appealed. The Ninth Circuit upheld the trial court ruling, noting: “[The plaintiff] spoke out, then, for the express purposes of addressing management and operational problems besetting the VA, at the wish of the defendants and for the good of the institution, the Veterans it serves, and the public.”

If the *Ceballos* standard were to be applied to these facts, wouldn’t it be proper for the trial court to dismiss the claim, inasmuch as Roth was acting squarely within the scope of his job responsibilities? He would have had no access to state court, as the defendants were federal employees and a federal agency.¹⁵

If at First You Don’t Succeed, Try Another Court, or Another Legal Theory

Kennedy’s opinion, in an effort to reassure those of us who would like to see public agency rank-and-file and supervisory employees speak up when they know of ways to improve the effectiveness and integrity of public service, suggested there are legal avenues other than the First Amendment to protect public employees offering “constructive criticism” to public agency employers. At least for California, he is partially right. Employees of local agencies have some alternative paths open, although they may well be inferior to the filing of a Sec. 1983 suit in federal court.

The clearest path is the filing of a civil suit pursuant to Labor Code Sec. 1102.5, which says, in relevant part:

(b) An employer may not retaliate against an employee for disclosing information to a government or law

enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

(c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

***Labor Code Sec.
1102.5 established
protections for some
public employees for
some activities, but not
for all employees, and
not for all activities.***

The last provision, enacted in 2003, codifies the holding of *Gardenhire v. Housing Authority*.¹⁶

This law, then, establishes protections for some public employees for some activities, but not for all employees, and not for all activities. It would protect, for example, the plaintiff in *Nunez v. Davis*,¹⁷ in which a court administrator insisted on assigning all clerical employees under her supervision to certain training, although the presiding judge wanted to limit the availability of the training to the clerical workers who had supported him in a recent election. And it would protect a teacher like the one in *Brewster*

*v. Board of Education*¹⁸ who brought to light dishonest attendance reporting by a school clerk.

On the other hand, Sec. 1102.5 would do nothing for a public employee who believes, and says out loud, that his or her department is acting in an extremely foolish — even if legal — manner, as did the doctor in *Ulrich*. Section 1102.5 might protect entomologist Allen if he told his bosses that the actions they were taking did not comply with either state law or regulations applicable to the situation. But the section would not protect Allen if the substance of his remarks to his supervisors was that they were acting too slowly, or inefficiently, or focusing on the wrong crops or wrong geographical area. And, of course, Sec. 1102.5 would do nothing for federal employees because their employers are not subject to suit in state court.

Government Code Sec. 8547.8 is designed to protect whistleblowers in California state agencies. But it inserts time-consuming and burdensome requirements for “exhaustion of administrative remedies” on the hundreds of thousands of U.C. and CSU employees around the state.

Nor is it clear if Sec. 1102.5 applies to either U.C. or CSU employees. Is either a “government agency” or an “employer” within the meaning of the statute? There are no reported court decisions. U.C. might well argue that the California Constitution, Article IX, Section 9, exempts it from the reach of that section.

Speaking of the California Constitution — it has a free speech clause, too: Article I, Section 2, which the California Supreme Court has held is broader than the federal Constitution’s First Amendment provision. That provision would provide a basis for injunctive relief, and monetary relief as well, although the latter concept may be attacked by public agency employers, following two decisions issued by the California Supreme Court in 2002.

In *Katzberg v. Regents of University of California*,¹⁹ the Supreme Court held that there are no monetary damages available to a public employee on the basis of a violation of the due process clause of the California Constitution. In *DeGrassi v. Cook*,²⁰ decided the same day, the court held that there were no monetary damages available for the First Amendment claim alleged there — a city council member alleging that the other council members, the chief of police, the city manager, and others had violated her free speech rights by excluding her from council meetings, denying her access to information, and otherwise interfering with her participation as a city council member. The court ultimately phrased their conclusion denying damages to DeGrassi carefully and in a limited way:

We decline to recognize a constitutional tort action for damages to remedy the asserted violation of Article I, section 2(a) alleged in the present case. This does not

mean that the free speech clause, in general, never will support an action for money damages.... We conclude that the loss or damage of which plaintiff here complains — interference with her functioning and effectiveness as a legislator — does not support recognition of a constitutional tort for damages....

And in footnote 1 of the decision, the court cited a passage of *Katzberg*:

We do not here consider the propriety of actions such as those based upon grounds established under common law tort principles — for example... wrongful termination based upon violations of public policy or the like. In such actions, a breach of duty or violation of public policy may be established by demonstrating a violation of a constitutional provision, and damages properly may be awarded to remedy the tort.

The general reasoning of the court in *Katzberg* and *DeGrassi*, however, which looks back to the history of the enactment of the constitutional provision, including the printed ballot arguments in 1974, when the Constitution was revised, may provide

grounds for public agency employers to argue against monetary damages for whistleblowers, even if the constitutional violation is established.

There are other whistleblower statutes scattered throughout the Government Code that apply to particular kinds of agencies,²¹ but these often have built-in limitations. The law applying to community college district employees, as an example, requires submission of a complaint to the State Personnel Board.²²

Disadvantages of Filing in State Court

From a plaintiff’s point of view, as a tactical matter, reliance on a state court suit based on Sec. 1102.5, another state law, or on the California Constitution, rather than a federal cause of action based on Sec. 1983, has several

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disadvantages. In state courts, no punitive damages may be granted against a public agency. In addition, state court jurors asked to award damages to be paid by the county or city in which they live — which provides a wide range of service to them, and to which they may pay property taxes — may be reluctant to vote in favor of a large monetary judgment against the defendant. A federal court jury composed of citizens from several counties may not be similarly motivated.

Conclusion

The *Ceballos* decision clearly does not entirely obliterate First Amendment/free speech law that, for many decades, has protected public employees against retaliation by resentful employers. But it will close the federal courthouse door to an unknown number of federal, state, and local employees seeking federal court protection. This is consistent with the Supreme Court's predilection to close off either the state or federal courthouse to workers and retirees, using an imaginative and expansive view of the 11th Amendment to protect states,²³ or ERISA preemption theories to protect private employers in cases brought by retirees.²⁴ We may expect this area of the law to remain an active battleground. *

- 1 (5-30-06) 126 S.Ct. 1951, 179 CPER 21.
- 2 (1968) 391 U.S. 563.
- 3 (1987) 483 U.S. 378, 74 CPER 63.
- 4 (1979) 439 U.S. 410.
- 5 (9th Cir. 1995) 59 F.3d 134, 113 CPER 78.
- 6 (9th Cir. 1984) 746 F.2d 505.
- 7 (9th Cir. 2000) 206 F.3d 807.
- 8 (9th Cir. 2003) 320 F.3d 968.
- 9 (9th Cir. 1987) 812 F.2d 426.
- 10 (9th Cir. 2002) 308 F.3d 968, 157 CPER 64.
- 11 (9th Cir. 1989) 886 F.2d 1194, 83 CPER 44.
- 12 (9th Cir. 2000) 223 F.3d 1074.
- 13 (9th Cir. 2004) 362 F.3d 118, 166 CPER 18.
- 14 (9th Cir. 1988) 856 F.2d 1401, 79 CPER 60.
- 15 Presumably, an employee in a position like Roth's would have access to federal courts through 5 USC Sec. 2302(b)(8) (noted by Justice Kennedy), which prohibits federal agency retaliation against whistleblowers. Enforcement is available through the Merit Systems Protection Board and its Special Counsel. See 5 USC Secs. 1221 and 1214.
- 16 (2001) 85 Cal.App.4th 236, 146 CPER 68.
- 17 (9th Cir. 1999) 169 F.3d 1222, 135 CPER 65.
- 18 (9th Cir. 1998) 149 F.3d 971, 131 CPER 46.
- 19 (2002) 29 Cal.4th 300, 158 CPER 64.
- 20 (2002) 29 Cal.4th 333, 158 CPER 64.
- 21 Gov. Code Secs. 53296 et. seq. for cities and counties, Gov. Code Sec. 44110 for K-12 school districts and employees, and Ed. Code Sec. 89570 for CSU employees.
- 22 Ed. Code Secs. 87160 et seq.
- 23 See, e.g. *Board of Trustees of University of Alabama v. Garrett* (2001) 531 U.S. 356, 147 CPER 50.
- 24 See, e.g. *Shaw v. Delta Air Lines* (1983) 463 U.S. 85, and its hundreds of progeny, including *Marshall v. Bankers Life & Casualty Co.* (1992) 2 Cal.4th 1045.

K-12 Teacher Termination Hearings: Are They Worth the Cost?

Michael Blacher

Tenure is a concept inextricably associated with teaching. Yet the text of the California Education Code makes no reference to “tenure” for K-12 teachers. Rather, these teachers, like many other public employees, serve a probationary period after which they become “permanent.”¹ What, then, distinguishes the rights of teachers from other permanent public employees?

The major difference is the legislatively mandated procedure required to release a permanent teacher. Unlike many other public employees — including those with specific job protections such as peace officers² — the legislature has mandated an “extremely costly, time-consuming, and difficult” process for terminating permanent teachers.³ Like other public employees, teachers unquestionably are entitled to due process protections. But is the required process for terminating a permanent teacher worth the cost?

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Purpose of Tenure

Over the last century, job protections for teachers have gone from the exception to the norm. In 1913, Arthur Lovejoy formed the American Association of University Professors. A founding principle of the organization was to establish tenure for college professors.⁴ In 1915, the AAUP explained that tenure should allow a professor to “interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because the conclusions are unacceptable to some constituted authority within or beyond the institution.”⁵ Though the AAUP promoted tenure specifically for those in higher education, the principle of providing a guard against arbitrary, capricious, or discriminatory terminations spread to elementary and high schools as well. In 1927, California granted tenure to teachers in K-12.⁶

By today's standards, the demands of the AAUP for basic tenure protections could be described as both modest and anticipatory. In a Statement of Principles issued in 1940, the AAUP called for educational institutions to guarantee:

- A written contract of employment that clearly set forth the precise terms and conditions governing the appointment;
- A probationary period of a specified maximum length; and
- Minimum procedural standards for the termination of a tenured appointment for cause.⁷

The principles envisioned by the AAUP have been nearly universally realized. For example, all permanent public employees, including teachers, now are constitutionally entitled to minimum due process rights before significant disciplinary action may be implemented.⁸ Those rights include the receipt of a written notice containing the grounds and facts that support the discipline, copies of the documents on which the discipline is based, and a meaningful opportunity to respond to the proposed charges before a final decision is taken.⁹

In addition, it is well established that all public employees enjoy constitutionally protected free speech rights regarding statements that address matters of public concern.¹⁰ A teacher cannot, therefore, be terminated merely for engaging in speech that is unpopular.¹¹ Moreover, federal and state laws prohibit employers — including public employers — from taking adverse action against employees on account of race, gender, disability, and a plethora of other protected categories.¹²

A Separate Process for Termination

The due process afforded to permanent K-12 teachers is unlike that of other public employees. In particular, the procedural hurdles required to terminate teachers exceed

what is necessitated for other public employees. Moreover, the court-imposed standard that must be met when terminating a permanent teacher adds an additional level of complexity.

Opportunity to improve. Teacher terminations may be based only on statutorily listed causes.¹³ Before a school district may pursue termination of a permanent teacher based on charges of unprofessional conduct or unsatisfactory performance, it must provide the teacher with an opportunity to improve.¹⁴ Specifically, the governing board may not act on any charges of unprofessional conduct unless it has provided the teacher with written notice of the conduct that describes the specific instances of unprofessional behavior with particularity sufficient to allow the employee an opportunity to correct his or her behavior. The notice must also include a copy of the teacher's last evaluation. The employee then is entitled to at least 45 days to correct the offensive conduct.¹⁵

If the charge is unsatisfactory performance, the requirements are similar. The governing board may not act unless the employee has been given at least 90 days to correct his or her behavior.¹⁶ The notice must be in writing and specify the nature of the conduct with sufficient particularity to allow the employee to correct his or

her faults and to overcome the charges alleged by the district. The notice also must include the teacher's last evaluation.¹⁷

These statutory prerequisites result in artificial time lines. Although all public employees are entitled to progressive discipline, the 45- and 90-day waiting periods that apply to permanent teachers seem arbitrary and do not appear to take into account egregious situations. Moreover, these time lines may encourage school districts to list alternative bases for termination. For example, instead of unprofessional conduct or unsatisfactory performance, teachers may be charged with evident unfitness for service. The legislature could simplify the process and ensure fairness merely through the proper application of modern principles of progressive discipline.

The due process afforded to permanent K-12 teachers is unlike that of other public employees.

Unnecessarily complex and costly hearings.

Termination hearings for teachers are conducted under the Administrative Procedures Act.¹⁸ The APA provides for a more formalized hearing process than is typically provided in a collective bargaining agreement or the rules of other agencies, including school districts themselves. The procedures for discipline of classified employees, while fair and affording due process, are not nearly as complex.

For example, the APA permits pre-hearing written discovery.¹⁹ Likewise, the parties may demand the names of all potential witnesses.²⁰ The parties may depose witnesses using the same procedures that apply in superior court.²¹ If there is a dispute as to the production of documents, the APA provides a mechanism to compel discovery.²² The result is a hearing procedure that is more like litigation than arbitration in both complexity and cost.

A process governed by the APA, however, is not reason enough to consider a teacher termination case particularly complex. After all, the APA regulates administrative hearings for all state employees as well as for academic employees at community colleges.²³ What unduly burdens the termination process is the way in which it has been altered specifically for K-12 teachers. Termination hearings for K-12 teachers are unlike those held for other permanent employees. In community colleges, for example, a termination hearing for an academic employee is conducted by a mutually selected arbitrator or, if the parties cannot agree to one, an administrative law judge appointed by the Office of Administrative Hearings.²⁴ Other public agencies (including school districts in classified discipline cases) use a similar process for selecting a neutral party to hear the case.²⁵

For permanent K-12 teachers, however, the hearing is not decided by a single hearing officer chosen from a randomly produced list or by mutual agreement of the parties. Instead, the Education Code requires that a Commission on Professional Competence hear the case.²⁶ The commission is made up of three members. One is an administrative law

judge selected by the Office of Administrative Hearings, one is selected by the employee (usually by the teacher's union), and one by the school district.²⁷

There are limitations as to who the employee and school district may choose to serve on the commission. Neither may choose someone related to the employee or employed by the district initiating the dismissal. Moreover, the individuals selected by the employee and the district must "hold a currently valid credential and have at least five years' experience within the past 10 years in the discipline of the employee."²⁸ This limitation effectively eliminates highly experienced administrators from serving on the commission since it is unlikely that during the past 10 years they have taught in the same discipline as the employee being terminated.

Further complicating the hearing process is the requirement of a three-person panel, which is meant to provide some balance between legal reasoning and the realities of teaching. While the experience of educators may be advantageous when considering certain charges, that same consideration does not apply in all situations. A single administrative law judge, for example, could weigh expert testimony on the issues being considered. Moreover, when hearing cases dealing with issues other than satisfactory performance in the classroom (e.g., dishonesty or sexual harassment of students), one need not

have classroom experience to render a decision.

The three-person panel is problematic for other reasons as well. When conducting factfinding, one of the purposes of the panel is to reach a consensus, if possible. In a teacher termination hearing, that goal is less likely to be achieved. As a practical matter, the union representative and management representative frequently vote with their constituency. As a result, the argument of the parties usually is directed at the administrative law judge.

Finally, requiring each party to select a representative makes the hearing more inconvenient than necessary. The representatives need time off from their own employers to

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serve on the commission. This can become a serious problem, particularly when the average hearing takes weeks, not days, to complete. As a result, the strain of a teacher termination hearing is spread beyond the school district initiating the termination to the districts employing the two additional panel members.

Another costly difference between the K-12 system and that governing other public employees is the Education Code provision that a school district must by and large continue to pay a teacher his or her regular salary and benefits until the commission has rendered its decision.²⁹ This provision is unique to the K-12 system. Academic employees at a community college, for example, do not continue to receive salary and benefits through the conclusion of the hearing. The employee only receives compensation for 30 days after receiving the statement of charges from the governing board.³⁰ Similarly, classified employees generally are off payroll during the appeal process. This idiosyncrasy in the law not only greatly increases the cost for a school district, it provides permanent teachers with an economic incentive to pursue a hearing regardless of its merits.

The requirement that teachers continue to receive pay during the termination process adds to the already significant costs and length of the hearings. Numerous examples can be found. One case in the Los Angeles area cost the school district approximately \$150,000. In San Diego, a termination proceeding took more than four years and cost more than \$300,000 in legal fees.³¹ By one estimate, the average cost of terminating a tenured teacher can be approximately \$200,000.³² Of course, “every dollar a district spends on teacher dismissals is one less dollar available for basic educational programs and services that improve the performance of students.”³³

Extending teacher probationary periods would not lessen the costs of these hearings. Even in states with longer

probationary periods for teachers, the cost and time required to terminate a permanent teacher are extreme.³⁴ For example, in New Jersey, teachers do not obtain tenure until their fourth contract year. Nonetheless, the process required to terminate a tenured teacher may take years. In 2005, “three out of five [teacher termination cases] took more than a year to decide. The shortest of the five took two months; the longest, more than two years.”³⁵ The costs were equally onerous.³⁶

A Separate Standard for Termination

In most non-teacher discipline cases, the “central concept permeating discipline and discharge...is ‘just cause.’”³⁷ This standard generally requires that employers provide employees with adequate due process, sufficient notice, and opportunity to improve.³⁸ If these conditions were met, the discipline should be upheld even though reasonable minds might differ as to its appropriateness.³⁹ For permanent teachers, however, a standard more stringent than “just cause” applies.

In the seminal case of *Morrison v. State Board of Education*,⁴⁰ teacher Marc Morrison engaged in a consensual homosexual relationship with another teacher, Fred Schneringer. Approximately one-year later, Schneringer informed the school district of the relationship. As a result, the district revoked Morrison’s teaching credential. The district terminated Morrison after determining that the relationship constituted immoral and unprofessional conduct, as well as an act involving moral turpitude.

The California Supreme Court overturned the decision. The court determined that the school district was motivated by animus for Morrison’s conduct and that the district could not demonstrate a reasonable nexus with his position as a teacher. The court noted:

In most non-teacher cases, the central concept permeating discipline and discharge is ‘just cause.’ For permanent teachers, a more stringent standard applies.

The board offered no evidence that a man of petitioner's background was any more likely than the average adult male to engage in any untoward conduct with a student. The board produced no testimony from school officials or others to indicate whether a man such as petitioner might publicly advocate improper conduct....This lack of evidence is particularly significant because the board failed to show that petitioner's conduct in any manner affected his performance as a teacher.⁴¹

Before the district could fire Morrison, it needed to demonstrate "an adverse effect on fitness to teach."⁴²

The court, in reaching its decision, noted that it had considered similar cases of unprofessional conduct or moral turpitude. For example, a lawyer could not be denied admission to the bar for participating in civil rights demonstrations because those acts did not "bear a direct relationship to [his] fitness to practice law."⁴³ Instead, the state bar would need to "provide a reasonable basis" for the decision.⁴⁴

To assist those considering teacher termination cases, the court provided guidelines for understanding whether particular conduct indicated an unfitness to teach.⁴⁵ To make that determination, the court stated that a school district *may* consider a number of factors.⁴⁶ Those considerations, known as the *Morrison* factors, are as follows:

- The likelihood that the conduct adversely affected students or fellow teachers;
- The degree of such adversity anticipated;
- The proximity or remoteness in time of conduct;
- The type of teaching certificate held by the party involved;
- The extenuating or aggravating circumstances, if any, surrounding the conduct;
- The praiseworthiness or blameworthiness of the motives resulting in the conduct;

- The likelihood of the recurrence of the questioned conduct; and
- The extent to which disciplinary action may inflict an adverse impact or chilling effect on the constitutional rights of the teacher involved or other teachers.⁴⁷

Though these factors may appear to be merely a variation of "just cause" for teachers, the effect has been to create a higher standard. *Morrison* has been broadly interpreted. Commissions and courts do not restrict themselves to examining only whether there is a reasonable nexus between the alleged conduct and the teacher's fitness to teach.⁴⁸ Rather, the *Morrison* factors have evolved from recommended guideposts into a formulaic test when considering a teacher termination case.⁴⁹ Therefore, unlike other public employers who are properly bound by "just cause," a school district must go beyond simply demonstrating a reasonable decision based on a nexus with the teacher's responsibilities.⁵⁰

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Conclusion

Teachers, perhaps more than other public employees, are required to explore unpopular positions and to challenge conventional thinking. Their role certainly places them in a uniquely demanding and important profession. Yet, the legislatively created procedures meant to guard permanent teachers against arbitrary, capricious, and

discriminatory termination may not be worth the cost.

Permanent teachers undoubtedly are entitled to all of the legal protections provided to other public employees. When it comes to process and standards for teacher termination, however, the legislative protections may be doing more harm than good. The current procedures required to terminate a permanent K-12 teacher clearly are atypical and have resulted in a process that is inefficient both in terms of time and cost. The legislature should consider reforms. *

- 1 Ed. Code Secs. 44929.20-44929.29.
- 2 The Public Safety Officers Procedural Bill of Rights Act, Gov. Code Secs. 3300 et seq.
- 3 *California School Boards Association: Report by the Task Force on Teacher Tenure*, 1996.
- 4 Lawrence White, "Academic Tenure," 44 St. Louis ULJ 51, 62-63 (2000).
- 5 W. Stuart Stuller, "High School Academic Freedom," 77 Neb. L. Rev. 301, 308 (1998).
- 6 See: "Tenure of California Teachers" (1936) 24 Cal.L.Rev. 441 and "Teacher Tenure Laws" (1966) 39 S.Cal.L.Rev. 593. Teachers were given a three-year probationary period from 1927 until 1983 when the legislature reduced it to two years. Ed. Code Sec. 44929.21.
- 7 White, *supra*, at 68.
- 8 *Board of Regents v. Roth* (1972) 408 U.S. 564, 92 S.Ct. 270.
- 9 *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 539 P.2d 774, 45 CPER 19.
- 10 *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951, 179 CPER 21.
- 11 *Perry v. Sindermann* (1972) 408 U.S. 593, 92 S.Ct. 2694.
- 12 See, for example, California's Fair Employment and Housing Act, Gov. Code Secs. 12940 et seq.; Americans With Disabilities Act, 42 USC Secs. 12101 et seq.; Title VII, 42 USC Sec. 2000e et seq.; Title IX, 20 USC Secs. 1681 et seq. The FEHA protects individuals on the basis of actual or perceived race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation. Individuals who are harassed or discriminated against because of their association with members of a protected class likewise are protected.
- 13 Those grounds are: (1) immoral or unprofessional conduct; (2) commission, aiding, or advocating the commission of acts of criminal syndicalism...; (3) dishonesty; (4) unsatisfactory performance; (5) evident unfitness for service; (6) physical or mental condition unfitting him or her to instruct or associate with children; (7) persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her; (8) conviction of a felony or of any crime involving moral turpitude; (9) violation of Sec. 51530 or conduct specified in Sec. 1028 of the Government Code...; (10) knowing membership by the employee in the Communist Party; or (11) alcoholism or other drug abuse which makes the employee unfit to instruct or associate with children.
- 14 Ed. Code Sec. 44938; *McKee v. Commission on Professional Competence* (1981) 114 Cal.App.3d 718.
- 15 Ed. Code Sec. 44938(a).
- 16 Ed. Code Sec. 44938(b).
- 17 *Ibid.*
- 18 Ed. Code Sec. 44944(d), which refers to Gov. Code Secs. 11500 et seq.
- 19 Gov. Code Sec. 11507.6.
- 20 *Ibid.*
- 21 Gov. Code Sec. 11511.
- 22 Gov. Code Sec. 11507.7.
- 23 See, for example, Ed. Code Sec. 87675.
- 24 Ed. Code Secs. 87674 and 87678. California State University has a similar provision. See Ed. Code Sec. 89539.
- 25 This is true even for negotiated collective bargaining agreements. Also, see the process for academic employees at the California State University, Ed. Code Sec. 89539.
- 26 Ed. Code Sec. 44944.
- 27 *Ibid.* Each party is allowed one peremptory challenge against the administrative law judge. ICCR Sec. 1034.
- 28 *Ibid.*
- 29 Ed. Code Sec. 44939.
- 30 Ed. Code Secs. 87672 and 84673.
- 31 School Services of California, "Liability Litigation and California's Schools," 1998, p. 10.
- 32 *Ibid.*
- 33 *School Boards Association: Report by the Task Force on Teacher Tenure*, 1996, p. 10.
- 34 Proposition 74, in 2005, which would have lengthened the probationary period from two to five years and was defeated by voters, may have done little to address the time and cost issues related to teacher termination cases. While Prop. 74 would have offered some relief by permitting termination based on two consecutive unsatisfactory performance evaluations, it did not address the underlying problems relating to the complexity and cost of terminating a permanent teacher.
- 35 "Tenure Helps Good Teachers and Shelters the Bad Ones," July 19, 2006, *North Jersey.com*.
- 36 *Ibid.*
- 37 Norman Brand, editor, *Discipline and Discharge in Arbitration* (1998), p. 29.
- 38 *Id.* at 31-33.
- 39 *Ackerman v. State Personnel Board* (1983) 145 Cal.App.3d 395.
- 40 *Morrison v. State Board of Education* (1969) 1 Cal.3d 214.
- 41 *Id.* at 236.
- 42 *Id.* at 226.
- 43 *Id.* at 379-380, quoting *Hallinan v. Committee of Bar Examiners* (1966) 65 Cal.2d 447.
- 44 *Ibid.*

45 *Id.* at 386. Though *Morrison* dealt specifically with immoral or unprofessional conduct, later cases have extended what have come to be known as the *Morrison* factors to other grounds for dismissal. See, for example, *Board of Trustees v. Judge* (1975) 50 Cal.App.3d 920 (applying the *Morrison* factors to charges of evident unfitness for service); *Bassett Unified School Dist. v. Commission on Professional Competence* (1988) 201 Cal.App.3d 1444, 78 CPER 53 (applying the *Morrison* factors to charges of dishonesty).

46 *Morrison, supra*, at 386.

47 *Ibid.*

48 See, for example, *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327.

49 Compare *Board of Trustees v. Stubblefield* (1971) 16 Cal.App.3d 820, 826, which, quoting *Morrison*, noted that a teacher “is entitled to a careful and reasoned inquiry into his fitness to

teach by the Board of Education *before he is deprived of his right to pursue his profession*” (italics in original) with *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1445, 93 CPER 21. “These criteria [the *Morrison* factors] must be analyzed to determine, as a threshold matter, whether the cited conduct indicates unfitness for service.”

50 The court did not state that school districts or courts must consider these factors in every case. It did not demand that they contemplate them at all. Rather, the court explained that these factors were relevant “to the extent that they assist the board in determining a fitness to teach, i.e., in determining whether the teacher’s future classroom performance and overall impact on his students are likely to meet the board’s standards.” *Morrison, supra*, at 386-387.

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Effects Bargaining Recognized, But 'Transactional Cost' Now in the Mix

Carol Vendrillo, CPER Editor

The Supreme Court has affirmed that implementation of an employer's fundamental decision is a "separate consideration" for purposes of the MMBA's meet-and-confer obligations. But when that duty to bargain emerges and what showing is needed to ignite it remain unclear.

In a long-awaited opinion authored by Justice Ming Chin, the California Supreme Court focused its attention on the meet and confer obligation under the Meyers-Milias-Brown Act and set forth a three-part test to determine when implementation of a fundamental managerial decision triggers an obligation to bargain.

In *Claremont Police Officers Assn. v. City of Claremont*, the high court found that the city was entitled to unilaterally implement a data-collection study designed to assess whether police officers were engaged in racial profiling. Adopting the balancing test first enunciated in *Building Material & Construction Teamsters Union, Loc. 216 v. Farrell*, the court announced that management must meet and confer with a recognized employee organization when the implementation of a fundamental managerial or policy decision significantly and adversely affects a bargaining unit's wages, hours, or working conditions. If significant and adverse effects arise from implementation, instructed the court, then under the balancing test, an action taken to implement a fundamental policy decision is within the scope of representation only if the employer's need for unencumbered decisionmaking is *outweighed* by the benefit to employer-employee relations derived from the bargaining process. The three-part balancing process may incorporate consideration of whether the "transactional cost of the bargaining process outweighs its value," added the court.

In this case, the court found that the city was not required to meet and confer with the association before implementing the study because it did not have a significant and adverse effect on the officers' working conditions. The court deemed the additional workload associated with implementation of the study "*de minimus*."

Because the court made that finding, it did not apply the newly articulated balancing portion of the test to the facts in this case and, therefore, much of what it articulated in the decision is dicta. Nonetheless, some public sector practitioners

have criticized the court for adopting a test that tips the balance in favor of the employer and requires a showing of demonstrable effects *before* recognizing a bargaining obligation.

Factual and Procedural Background

Back in May 2000, the City of Claremont police department implemented a tracking program to determine if its police officers were engaging in racial profiling. An officer who stopped a vehicle or person without issuing a citation or making an arrest was required to radio the department with information about the stop, including the person's race. After one year, the police commission concluded that the data collected in the pilot tracking program was insufficient to determine whether officers engaged in racial profiling. It appointed a subcommittee and advisory panel to study the situation further.

In February 2002, the commission adopted the subcommittee's recommendation that the department implement a vehicle-stop data-collection study. The study required officers on all vehicle stops to complete a preprinted form that included questions regarding the driver's perceived race and ethnicity. On average, it took two minutes for an officer to complete the form; between four and six forms were completed during each 12-hour shift. Each form was traceable to the individual officer making the stop.

In April 2002, the Claremont Police Officers Association requested that the city meet and confer prior to implementing the study. The city refused and informed officers that it would implement the study on July 1, 2002, as planned. The association then filed a petition with the superior court to compel the city to meet and confer prior to implementation of the study. On August 22, 2002, the superior court denied the petition. It concluded that the policy underlying the study was a management prerogative and outside the scope of

representation as defined in MMBA Sec. 3504. It also concluded that the study did not substantially affect the terms and conditions of the officers' employment given the "*de minimus*" impact on the officers' workload.

The Court of Appeal reversed the lower court ruling. It acknowledged that the city's decision to take measures to combat racial profiling involved a fundamental policy that directly affects the police department's mission to protect and serve the public. However, the court held that the decision precisely how to implement that fundamental policy is not itself a fundamental policy decision. The Court of Appeal found that the city could not unilaterally impose the vehicle stop policy because it significantly affected officers' working conditions, including their job security and freedom from disciplinary action, their prospects for promotion, and their relations with the public. (See *CPER*No. 163, pp. 36-37, for a complete summary.)

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the service.*

Supreme Court Analysis

The MMBA requires public employers and recognized employee organizations to meet and confer in good faith over matters within the scope of representation, defined in Sec. 3504 as "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment." Despite that broad language, cautioned the court, to require an employer to bargain, its action or policy must have "a significant and adverse effect on the wages, hours, or working conditions of the bargaining unit employees," quoting from *Building Material*.

Even if an employer's action or policy has a significant and adverse effect on employees' wages, hours, and working conditions, the court elucidated, the statute further states that an employer may not be required to bargain if the matter at issue involves the merit, necessity, or organization of the service. This language was intended to remove fundamental managerial policy decisions from the bargaining obligation.

In the present case, the city and the association were in agreement that the decision to take measures against racial profiling — including its decision to implement the study as a necessary first step — was a fundamental managerial or policy decision. Thus, the court noted, the association concedes that the city “may have the right to unilaterally decide to implement a racial profiling study.”

Nevertheless, the association asserted that the implementation and effects of the study involve many factors which are distinct from the city’s fundamental decision to adopt the study. These include the methodology used to collect the data and the effect of using the data once it is collected. For example, the association voiced concerns as to whether the data would be used for study purposes only, whether the data would be made public, whether and under what circumstances the results of the study could be used against officers to support discipline or deny promotions, and how the study results would implicate officers’ privacy or self-incrimination rights. The association argued that meeting and conferring on the implementation and effects of the study would not interfere with the city’s right to exercise its managerial prerogative to initiate the study to address concerns about racial profiling.

Calling the “dichotomy” concerning the decision and effects of the study “unprecedented,” the city maintained that a public employer’s fundamental decision and the implementation of that decision both should be excluded from the collective bargaining process. In a “friend of the court” brief, the League of California Cities argued that drawing a distinction between the decision and its implementation is “artificial” and “unworkable.” Because the policy and its implementation are interwoven, a decision to compel negotiation over the implementation would inevitably compel negotiations over the policy decision itself, the League argued.

The court rejected this view and, drawing on long-standing precedent interpreting the National Labor Relations

Act, continued to recognize the distinction between an employer’s managerial decision and the effects of that decision. The reality is that every managerial decision has some impact on wages, hours, or other conditions of employment, said the court, and the MMBA “codifies the unavoidable overlap between an employer’s policy making discretion and an employer’s action impacting employees’ wages, hours, and working condition.” Relying on *Building Material and First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, the court concluded that “while drawing a

distinction may sometimes be difficult, the alternative — which would risk sheltering any and all actions that flow from an employer’s fundamental decision from the duty to meet and confer — is contrary to established case law.” Implementation of an employer’s fundamental decision, said the court, “is a separate consideration” for purposes of the MMBA’s meet and confer requirement.

Narrow Issue Addressed

In the court’s view, the issue before it was whether the city was compelled to meet and confer with the association

before it required officers involved in vehicle stops to fill out the forms as part of the study. Based on “the limited record” before it, the court found “no evidence regarding what effects would result from implementing the Study.” For example, the court said, there is no evidence whether the data collected and analyzed would result in discipline if an officer were found to have engaged in racial profiling or whether the city would publicize the raw data collected by the officers. It was not clear from the record what exact methodology the city adopted to analyze the data. Nor was the court willing to say that racial profiling studies have been so historically associated with employee discipline that their implementation invariably raises disciplinary issues. “Thus,” the court concluded, “we do not decide the issue whether the City was required to meet and confer with the Association over any effects resulting from the City’s decision to

The court continued to recognize the distinction between an employer’s managerial decision and the effects of that decision.

implement the Study.” Instead, the court limited its focus to the city’s implementation of the study and the requirement that officers fill out forms in order to collect data on possible racial profiling.

The Applicable Test

The court next concerned itself with the appropriate test to use to determine whether there is a meet and confer obligation growing out of the implementation of a fundamental decision. The city argued that the court should employ a balancing test that considers the employer’s need for unencumbered decisionmaking and, if the balance weighs in favor of the employer, the court should find no bargaining obligation even if the employer’s action has a significant and adverse impact on employees’ working conditions. The association countered that the balancing test should apply only to the fundamental decision itself and should not play a part in the court’s analysis as to whether the implementation or effects of the decision are negotiable.

Guided by *Building Material*, the court instructed, “If an action is taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer’s need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer–employee relations of bargaining about the action in question.”

Thus, the court concluded that the balancing test under *Building Material* “applies to determine whether management must meet and confer with a recognized employee organization...when the implementation of a fundamental managerial or policy decision significantly and adversely affects a bargaining unit’s wages, hours, or working conditions.”

The court also highlighted the observation made in *Building Material* that the concept of mandatory collective bargaining is premised on the belief that bilateral discussions will result in decisions that are better for both management and labor and for society as a whole. But this is true “only if the subject proposed for discussion is amenable to resolution through the bargaining process.” To that end, said the court, when balancing competing interests, “a court may also consider whether the transactional cost of the bargaining process outweighs its value.” “We believe this ‘transactional cost’ factor is not only consistent with the *Building Material* balancing test, but its application also helps to ensure that a duty to meet and confer is invoked only when it will serve its purpose.”

The court summarized the three-part inquiry it established:

*Application of the
‘transactional cost’
factor helps to ensure
that a duty to meet
and confer is invoked
only when it will serve
its purpose.*

First, we ask whether the management action has a significant and adverse effect on the wages, hours, or working conditions of the bargaining unit employees. If not, there is no duty to meet and confer. Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then, as in *Building Material*, the meet-and-confer requirement applies. Third, if both factors are present — if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees — we apply a balancing test. The action is within the scope of representation only if the employer’s need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer–employee relations of bargaining about the action in question. In balancing the interests to determine whether parties must meet and confer over a certain matter, a court may also consider whether the transactional cost of the bargaining process outweighs its value.

Application of the Test

The court applied the test first developed under *Building Material* and concluded that the implementation of the study did not have a significant and adverse effect on the officers' working conditions. The record reflected that the study only required that slightly more information be collected by the officer than required in completing a citation or arrest report. The impact on the officers' working conditions — the two minutes it takes to complete the form between four and six times during a 12-hour shift — was *de minimus*, said the court. Therefore, "because there was no significant and adverse effect, the court was not required to balance the city's need for unencumbered decisionmaking — in this case, the policymaking prerogative to eliminate the practice and perception of racial profiling and to determine the best means for doing so — against the benefit to employer-employee relations from bargaining about the subject."

The court cautioned that its holding was a narrow one: "In determining that the City was not required to meet and confer with the Association before implementing the Study, we do not decide whether such a duty would exist should issues regarding officer discipline, privacy rights, and other potential effects...arise after the City implements the Study. Based on the record, that question is not before us."

Moreno and Kennard Concurrence

In a short concurring opinion, Justice Moreno emphasized the narrow reach of the majority's holding, underscoring the absence of any evidence regarding any effects that would result from implementing the study. Specifically left undecided was whether the city was required to meet and confer with the association over any effects resulting from the city's decision to implement the study.

That said, however, Moreno found it "no doubt true" that the study results potentially may be used to discipline police officers or have other adverse employment consequences for them because racial profiling is a serious form of police misconduct. In the view of Moreno and Kennard, who joined with Moreno in his concurrence, the use of the study as an additional basis for discipline would give rise to a duty on the city's part to meet and confer with the association. "The City's adoption of a new basis for disciplining police officers goes to the heart of officers'

employment security, and is therefore one of the critical 'terms and conditions of employment' at the core of Government Code section 3504. Although the City plainly has the authority and responsibility to discipline officers who persistently engage in racial profiling, its unfettered right to do so does not outweigh the Association's interest in ensuring, through negotiations with the City, that any such discipline follows due process and that the study results have been accurately and fairly analyzed."

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Commentary

The high court's decision continues to recognize the basic labor law principle that differentiates between a decision exercising a managerial prerogative (which is outside of the scope of representation) and effects of that decision (which are subject to the meet and confer obligation). The court expressly rejected the city's argument that the decision and the effects are too closely entwined to permit bargaining over the effects that impact wages, hours, and terms of employment. Attorney Alison Berry Wilkenson, who filed a "friend of the court" brief on behalf of PORAC's Legal Defense Fund, told *CPER* that, given what the cities were arguing for, the court's adherence to that concept was "a huge relief." Attorney Michael A. Morguess, of Lackie & Dammeier, which represented the association, also viewed the court's reaffirmation of the distinction between the

decision and the effects as a “good result.” Employers can no longer argue that they have no obligation to negotiate over the implementation and effects of their managerial policy decision, he said.

Not surprisingly, Richard Kreisler, an attorney with Leibert Cassidy Whitmore, who represented the city through much of the litigation, told *CPER* that the court’s decision did not go as far as he had hoped. The real issue in the case was whether an agency has to meet and confer over the implementation of a fundamental policy decision. He believes that if the matter involves such a decision, the city should not have to meet and confer even if the decision has a negative impact on employees because the benefits to the community outweigh the benefits of negotiations.

Notwithstanding that enunciation of the law, however, the court’s analysis is bothersome to some labor advocates because it seems to suggest that the employer’s obligation to bargain over effects springs to life only when those effects have become demonstrable.

For example, the court took pains to clarify that it was not deciding whether the city was required to meet and confer with the association over any effects resulting from the city’s decision to implement the racial profiling study because the limited record before the court contained no evidence as to what effects would result from implementing the study. In announcing that the city was not required to meet and confer with the association before implementing the study, the court expressly stated it did not decide whether such a duty would exist should issues regarding officer discipline, privacy rights, and other potential effects arise after the city implements the study. In other words, because there was no evidence in the record that any officer had been disciplined based on data collected as part of the study, the potential that that might happen in the future was insufficient to ignite a bargaining obligation over that potential effect.

Some observers see a problem with the court’s analysis in that the laudatory influence of the bilateral bargaining process is delayed until *after* the significant and adverse effects of the unilateral policy decision are already evident. A contract proposal exchanged at the bargaining table is in or out of scope based on its relationship to wages, hours, or working conditions, not whether the party seeking to negotiate can make an evidentiary showing that the absence of the sought-after proposal has a significant, adverse effect. The duty to bargain over the effects of a unilateral policy decision likewise should turn on whether the employee organization can articulate bargaining proposals that reasonably can be said to address wages, hours, or working conditions.

Attorney Berry Wilkinson told *CPER* that the court’s analysis contemplates bargaining the effects of a managerial decision “after the fact.” The lesson to be learned, she said, is that advocates must do more to develop the record before the court to clarify with some specificity what the impact of the decision is likely to be.

Morguess had a similar view, commenting that, by requiring proof of effects before engaging in bargaining, the court’s decision “puts the cart before the horse.” He added, however, that the court’s opinion is narrow, and cautioned practitioners not to ignore the language

in Moreno’s concurrence, which states, for example, that the use of the study data as an additional basis for discipline “would give rise to a duty” on the city’s part to meet and confer with the association.

The court’s decision also has been faulted for its summary conclusion that the results of the city’s implementation of the study were *de minimus*. The reporting requirements of the study changed the duties of each and every officer who made traffic stops during his or her shift. Whether that was a matter of critical concern is a matter for the association to decide. The fact that the court saw this impact as insignificant should be irrelevant, some observers claim. It is the association’s call as to whether it wishes to

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compel bargaining over the implementation of a managerial policy decision. By deeming the impact *de minimus*, the court has substituted its judgment for that of the employees' representative.

Labor advocates also have asserted that the transactional cost analysis grafted on to the court's three-part test has the potential to eviscerate the bargaining obligation. The meet and confer process imposed by the MMBA is not an efficient method of decisionmaking. It is time consuming, frustrating, and necessitates the expenditure of money. The parties frequently rely on attorneys and professional negotiators to draft bargaining proposals and sit at the table. By its very nature, the costs associated with the bargaining process may appear excessive to a judge who may not be sufficiently attuned to the principles underlying the state labor laws. Whether the transactional costs are appropriate is "a matter of perspective," Berry Wilkinson said. As noted above, it

seems inappropriate for a reviewing court to decide that the employee organization's decision to insist that the employer honor its duty to meet and confer was, in balance, outweighed by the cost of the bargaining process or did not serve the purpose of the collective bargaining statute.

But management attorney Kreisler believes that concerns about the transactional cost element added to the balancing test by the court are "fallacious" because before that issue is considered by a judge, it must be decided that the matter being implemented involves a fundamental public policy. In most cases, the matter about which the union wants to bargain concerns wages, hours, or working conditions. The likelihood that the transactional cost element will undermine the MMBA is "highly unlikely," he said. (*Claremont Police Officers Assn. v. City of Claremont* [8-14-06] 39 Cal.4th 623.) *

Arbitrator May Rule on Legal Defense to Grievance

Katherine Thomson, CPER Associate Editor

If a party has a statutory defense to an arbitrable grievance, when do the courts become involved? The Court of Appeal says an arbitrator looks at the grievance first and may decide a statutory issue.

Labor arbitrators disagree on some subjects, and one of those is when they should interpret and apply statutory law in the process of deciding a grievance under a collective bargaining agreement. A recent decision in *CCPOA v. State of California* will not cause a consensus of opinion on the subject, but it will reassure arbitrators who look at external law that interpretation of California statutes is not solely within the domain of the courts. The Court of Appeal reached that conclusion when it held that the state's statutory defense to a grievance does not permit the state to bypass the arbitration process merely because resolution of the dispute would involve statutory interpretation.

Disrupted Negotiations

CCPOA represents about 31,000 correctional officers in bargaining with the Department of Personnel Administration, which represents the state in relations with state employees. The union also represents correctional supervisors in meet and confer sessions under the Excluded Employees Bill of Rights Act. The act does not allow non-excluded employees to "participate in meet and confer sessions on behalf of supervisory employees." Neither may supervisors negotiate on behalf of nonexcluded employees.

In the past, the supervisors could observe rank-and-file CCPOA bargaining sessions "by mutual agreement." In 2001, however, the parties agreed on a new groundrule for negotiations, which stated, "With prior notice, observers may attend negotiation sessions."

In 2005, DPA announced it would no longer allow supervisors and officers to observe each other's negotiations because a rank-and-file officer had disrupted supervisor negotiations "and inserted himself" into the process. DPA twice refused

to negotiate matters affecting the bargaining unit when supervisors would not leave the room in which the bargaining sessions were held. In both situations, CCPOA had notified DPA of the observers' attendance.

Refusal to Arbitrate

CCPOA filed two grievances contending that the department's refusal to negotiate in the presence of supervisors violated the parties' agreements. One grievance related to negotiations over the effects of converting two youth correctional centers to adult correctional institutions. The second concerned discussions of the correctional agency's plans for implementing a consent decree.

DPA took the position that the grievances were not arbitrable. It also argued that permitting supervisors to observe rank-and-file negotiations would violate the EEBRA.

The union petitioned to compel arbitration. In court, DPA argued that the relevant section of the EEBRA superseded inconsistent provisions in the parties' observer agreement and that courts, rather than arbitrators, have the exclusive power to interpret state statutes. The department alternatively contended that the collective bargaining agreement did not require arbitration of the dispute. The trial court agreed that the EEBRA provision controlled the outcome of the underlying dispute; that the courts, not an arbitrator, should interpret the statute; and that no terms of the agreement superseded the EEBRA.

Arbitrable Grievances

The appellate court easily dispensed with the argument that the parties' contract did not require arbitration of the dispute. The collective bargaining agreement allowed binding arbitration of grievances that "involve the interpretation, application or enforcement of the provisions of this [memorandum of understanding]." It also contained

a section that required the state to negotiate changes in working conditions of correctional officers on subjects not covered by the MOU if the union requested negotiation. DPA did not contend that it abandoned negotiations because the subjects were not negotiable under the contract, and the court found the grievances arbitrable because they attempted to enforce the state's contractual obligation to bargain.

DPA argued that the grievances should not be arbitrated because the MOU did not require the department to allow observers at negotiations, but the court considered this view of the arbitration clause too narrow. The union sought to

arbitrate the state's obligation to negotiate, the court pointed out. It would be the state's choice to defend its actions on the basis that supervisors insisted on attending the negotiations sessions.

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Statutory Interpretation

When presented with a motion to compel arbitration, a court that finds that the parties' arbitration agreement covers the dispute must compel arbitration of the matter unless the party resisting the arbitration can show that it meets one of three exceptions.

DPA, emphasized the court, had not invoked any of the exceptions. Instead, DPA argued that its defense to the grievance involved interpretation and application of a statute, and that only the courts had the power to interpret and apply statutes.

There are no California cases determining whether courts have exclusive power to interpret statutes, the court noted. It was not swayed by the state's citation to a case that discussed the separation of powers in California. The separation of powers doctrine prevents one branch of government from infringing on the powers of another, instructed the court. "Arbitrators are not agents of either the executive or the legislative branch; they act only upon the agreement of the parties," the court reasoned.

Court decisions that relate to arbitration assume that arbitrators will interpret and apply statutes, the court pointed

out. For example, in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 144 CPER 69, the Supreme Court identified the minimum procedural requirements that would permit arbitration of certain statutory claims. “[I]t is inevitable that an arbitrator asked to resolve a statutory claim will be required to engage in statutory interpretation,” the court observed. The Supreme Court in *Moncharsh v. Heily and Blase* (1992) 3 Cal.4th 1, concluded that courts generally may not review an arbitrator’s decision for “errors of fact or law.” It implied that arbitrators may consider statutory defenses, advising that courts could review an award “when according finality to the arbitrator’s decision would be incompatible with the protection of a statutory right.” In its later decision in *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 118 CPER 48, the Supreme Court held that it was proper to review an arbitrator’s decision to ensure it did not violate public policy where a provision of the collective bargaining agreement conflicted with the Education Code. “Despite the school district’s purportedly conclusive statutory defense, the Supreme Court did not suggest that such a case should never have reached the arbitrator,” the *CCPOA* court emphasized.

While California courts have not established whether they have the exclusive power to interpret statutes, federal courts have required parties to arbitrate claims that one party asserted were inconsistent with the law or public policy. The court quoted at length from *Carey v. General Electric Co.* (2d Cir. 1963) 315 F.2d 499, in which a company claimed that it would be forced to commit an unfair labor practice if the arbitrator accepted the plaintiff’s interpretation of the collective bargaining agreement. The *Carey* court held that the dispute should be submitted to arbitration because it raised a question of contract interpretation appropriate for the arbitrator to decide. Before arbitration, conflict between the contract and NLRB law was “wholly conjectural,” the *Carey* court said, since the grievance might not be sustained,

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or the arbitrator might decline to make an award that would conflict with federal labor law. “We cannot construct a framework of legal principles governing arbitration on the theory that the arbitrator is ignorant or oblivious of the pronouncements of the Board and the courts,” the *Carey* court explained.

The *CCPOA* court accordingly found DPA’s contentions without merit. “It is certainly true that courts will, in some instances, be the *final* interpreters of statutory law as a result of their appellate authority, but nothing in the statutes or the case law suggests that arbitrators cannot also interpret statutes,” it declared. Not only do court opinions recognize that arbitrators will be called on to resolve statutory issues, the court reiterated, but the law governing motions to compel arbitration does not provide an exception for cases that present a potentially dispositive statutory issue.

DPA tried to expand its claim that the *EEBRA* supersedes a contract provision into an argument that the *EEBRA* supersedes the obligation to arbitrate, the court observed. In essence, the court concluded, the department was arguing that *CCPOA*’s claims were meritless as a matter of law. But, chided the court, procedural law forbids a court from denying a motion to compel arbitration on the ground that one party’s claims have no merit.

Arbitrator Conflict

This decision does not require arbitrators to consider external law in all circumstances in California public sector cases. Arbitrators recognize that their authority derives from the collective bargaining agreement and that, in accordance with the United States Supreme Court’s ruling in *Steelworkers v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593, an award must draw “its essence from the collective bargaining agreement.” In keeping with this principle, an arbitrator will interpret and apply statutory or case law at the parties’ mutual

request or when the contract incorporates external law. When the contract contains an ambiguous provision that one party claims conflicts with external law, most arbitrators will construe the contract to avoid inconsistency with the law.

Arbitrators vary, however, on whether they are to apply external law when there is a conflict between a clear obligation under the contract and the dictates of the law. Some will ignore the law and enforce the agreement on the ground that their authority derives from the contract. They contend that the parties, not the arbitrator, should rewrite the contract to avoid an unlawful outcome.

Others assume, particularly in public sector cases, that the parties' agreement is subject to the law and, therefore,

interpret and apply the law even if the contract does not expressly refer to it. They contend that it does not further the collective bargaining relationship to order a remedy that requires a party to seek judicial review of the award to avoid being compelled to act unlawfully. The *CCPOA* case offers comfort to the arbitrator who does apply external law. However, it does nothing to persuade those who adhere closely to the "four corners of the contract" that they should consider and apply external sources when interpreting and applying provisions of the contract. (*California Correctional Peace Officers Assn. v. State of California* [8-23-06] 142 Cal.App.4th 198; opinion modified 9-13-06.) *

Recent Developments

Public Schools

Is Villaraigosa's Win LAUSD's Loss?

Los Angeles Mayor Antonio Villaraigosa's long struggle to gain control over the Los Angeles Unified School District, the largest school district in the county, is over. A.B. 1381, entitled the Gloria Romero Educational Reform Act of 2006, is now law. While the act grants the mayor increased powers over the management of the district, it is very different from his original proposal. Villaraigosa and his supporters were forced to make many compromises in order to get the bill enacted. In the end, the Senate and the Assembly passed the measure, but by a margin of only one vote in each chamber.

Villaraigosa's odyssey began over a year ago when he first announced that he would make mayoral control of LAUSD a priority of his administration. He immediately faced opposition from the school board, the superintendent of schools, teachers unions, and parent organizations. He attempted to outmaneuver his opponents by taking the issue to the state legislature, where he lobbied for a bill that would allow him and the mayors of 26 other cities served by the school district to hire and fire the superintendent and oversee LAUSD's multi-billion-dollar budget.

But his opponents followed him to Sacramento and lobbied against his

proposed legislation. Realizing that he would have to compromise to get any bill through, Villaraigosa made a deal with two powerful unions, the California Teachers Association and the United Teachers of Los Angeles, last June. In exchange for their support, and

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for agreeing to abandon his bid for complete control of the district, the unions got a provision inserted in the legislation that gives teachers greater control over instructional methods. (See story in *CPEP* No. 179, pp. 43-47.)

Villaraigosa had to make a number of other concessions along the way. The mayor managed to assuage a cluster of cities in southeast Los Angeles County that were strongly opposed to the bill by giving them more say in the choice of their local superintendents, thereby winning the vote of Senator Martha Escutia (D-Whittier). In order to appease some powerful individu-

als with influence in the legislature, among them former Los Angeles Mayor Richard Riordan, former Governor Pete Wilson, and billionaire philanthropist Eli Broad, Villaraigosa had to remove a clause which ensured that if part of the bill were found to be unconstitutional, the rest would stand.

In a written opinion issued before the legislation was finalized, the Legislative Counsel's Office suggested that a constitutional amendment might be needed to allow a mayor to manage a school district, or any part thereof, because the state Constitution requires public schools to be operated within the state education system. In an attempt to comply with the constitutional requirement, the bill drafters inserted a provision that places within the jurisdiction of the Los Angeles County Department of Education the schools under Villaraigosa's personal authority.

Shortly before the vote on the legislation, Villaraigosa garnered the unanimous support of the Los Angeles City Council, whose members previously had expressed skepticism. In addition, he obtained the endorsement of the Los Angeles Area Chamber of Commerce, in spite of the fact that the president had said publicly that the bill did not provide for the needed "fundamental overhaul" of the district and that its consequence "may be worse than what we already have."

The new legislation does not give Villaraigosa control of the district. It gives the council of 27 mayors the right to participate, along with the school

board, in the selection and evaluation of the district superintendent. Although the council has no vote on the selection, it must ratify the appointment, contact terms, contract renewal, or involuntary removal of the superintendent. The council of mayors will have an advisory role in determining the budget, and input in decisions regarding facilities. Because the council is set up with proportional representation, and 80 percent of the district's 727,000 students are in Los Angeles,

The mayor's powers under the new act will be tested immediately.

Villaraigosa will be the most dominant voice on the council. Only 90 percent of the weighted vote is required for the council to act. The superintendent will have expanded authority over personnel, contracting, and budget decisions, and the school board will have less power in these areas. The board retains final authority over the district's spending, however. In what the reform act termed a "demonstration project," Villaraigosa will have direct control over three high schools and the schools that feed them, totaling approximately 36 of the district's lowest-performing schools.

Passage has not quieted opposition to the bill. The school board spent more than \$350,000 in taxpayer money

to defeat the new law and has pledged to continue the fight. The board has decided, by a vote of 6 to 1, to file a lawsuit to determine the constitutionality of the plan. School board members criticized the bill, saying that it threatens to blur the lines of accountability and roll back instructional reforms. Legislators who opposed the bill expressed concern about whether the law contains adequate checks and balances, and questioned whether it is possible to fix the problems of the district without breaking it up. They also warned that it is a harmful precedent and may prompt dozens of other mayors to line up in Sacramento to take control of their city's school districts. Disgruntled UTLA members have submitted enough signatures to trigger an internal referendum on the new act, though the vote did not take place prior

to passage.

It is clear that the mayor's powers under the new law, which does not go into effect until January, will be tested immediately. LAUSD Superintendent Roy Romer is retiring when his successor is named. The school board is moving ahead with efforts to find his replacement and will not commit to slow that process. Villaraigosa has threatened to fire any superintendent who he deems inappropriate. Board President Marlene Canter said that the superintendent would have job security without having to worry about Villaraigosa. "There is no way he can fire the superintendent," she said. Added Superintendent Romer, "The mayor doesn't have the right to fire. The mayor has the right to ratify, and the decision will be made before January." *

Lawsuit Settlement Benefits Lowest-Performing Schools

Legislation that would settle a lawsuit brought by the California Teachers Association against Governor Schwarzenegger will, if signed into law, benefit students at approximately 500 public schools in the lowest two ranks of the state's Academic Performance Index.

S.B. 1133, known as the Quality Education Investment Act and authored by Senator Tom Torlakson (D-Antioch), would require the state to spend \$2.9

billion over the next seven years to reduce class sizes, improve teacher training, and add counselors at the targeted schools. The money would come on top of the operating funds that schools get each year from the state.

CTA and state Superintendent of Public Instruction Jack O'Connell filed suit against the state last year, contending that Schwarzenegger had reneged on a promise to repay schools money

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owed under Proposition 98, the school financing law. The amount of the settlement was considered to be part of this year's budget, but exactly how the money was to be spent was left up in the air until now.

Research conducted by CTA found that 80 percent of students in the lowest-ranked schools qualify for the federal free or reduced-price school lunch program and that 88 percent of the teachers are credentialed in the lowest-ranked schools, compared with 95 percent at other schools. The new legislation would maintain class-size maxi-

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mums at 20 in grades K through 3 and reduce class sizes to an average of 25 in grades 4 to 12. A credentialed counselor would be provided for every 300 students in high school. The act would require schools to have highly qualified teachers in all core academic subjects by the end of the third year of the program. It would provide for the establishment of a state teacher-quality index to ensure that average teacher experience at the school equals or exceeds the district average. The money also would go to train staff and administrators.

Schools will be eligible to apply for the funds if their students averaged in the lowest 20 percent statewide on the 2005 Academic Performance Index. However, there is enough funding only for approximately 500 of the 1,600 schools in that category, so only about

one-third of the targeted schools would benefit.

State education officials estimate that an additional 2,000 to 3,000 teachers would need to be hired to implement the act. ❁

'Dance of the Lemons' Cut Short?

Under many existing labor contracts common in large and mid-size urban districts, principals are required to accept for open positions veteran teachers who have been edged out of other schools in the district so long as they agree to leave their former posts voluntarily. And, the principals must keep positions open for this purpose throughout the summer, forcing more-desirable candidates to look elsewhere, usually in suburbia. This contract provision has resulted in what many principals call the "dance of the lemons," where bad or ineffective teachers are passed from school to school, landing mostly in high-poverty, high-minority schools, according to a recent study by the New Teacher Project, a national non-profit group. The practice of forced hiring has been part of labor contracts since the early 1960s, beginning with East Coast districts and growing in popularity over the years, according to the project.

In its nationwide study, the project looked at the impact of forced hires in

five urban districts across the country. It found that city schools have large numbers of unwanted teachers. Teachers who should be fired are instead passed from school to school, and good teachers who are unwilling or unable to wait all summer for the chance to be considered, apply elsewhere, usually by June.

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But, in California, the dance soon may be slowing down, if not stopped altogether, due to a new bill passed by the legislature. S.B. 1655, introduced by Senator Jack Scott (D-Pasadena), chair of the Senate Education Committee, was approved 33-1 by the Senate and 59-12 by the Assembly in spite of opposition from two powerful unions, the Cali-

ifornia Teachers Association and the California Federation of Teachers.

Under the new legislation, which adds Education Code Sec. 35036, existing labor contracts with teachers unions would be honored, but future agreements could not contain the same provisions requiring forced hiring. Principals in low-scoring schools, those that rank 1, 2, or 3 on the state's 10-point Academic Performance Index, no

and a fit — personalities that work better together," she said. "I'd like to have some choice in who comes in and who is going to be a good fit for the school."

Education Trust-West, an advocacy group for poor and minority students, strongly supports the bill. "Right now, poor kids and kids of color don't have their fair share of the state's experienced, credentialed teachers," said Executive Director Russalynn Ali. "By giving a principal in a high-poverty,

high-minority school some power to recruit those teachers, we can finally make headway on closing that teacher-quality gap."

If signed by the governor, California would be the first state in the nation to stop the practice. "There are a lot of states watching what is happening in California, and I think it will have significant ramifications nationwide," said Michelle Rhee, chief executive officer of the New Teacher Project. ❁

Principals in low-scoring schools no longer would be required to hire unwanted teachers.

longer would be required to hire unwanted teachers. Principals in higher-scoring schools would have to give preference to veteran teachers only until April 15. After that point, those teachers will have to compete equally with other applicants.

CTA President Barbara Kerr called the bill "insulting to teachers" because it implies that every teacher who voluntarily leaves a school is a poor one. Some teachers leave for other reasons, perhaps prompted by a personality clash with a principal, she said. But according to Patricia Gray, principal of San Francisco's Balboa High School, "it's not just about good and bad teachers." "Sometimes there's a chemistry

AFT Makes It a Three-Way Fight for Part-Time Teachers

The local chapter of the American Federation of Teachers has entered the battle to represent 1,000 part-time instructors at Grossmont and Cuyamaca Community Colleges, located in El Cajon. AFT Guild, Local 1931, collected over 300 signatures to qualify to appear on a ballot along with United Faculty and the Community College Association, which is part of the California Teachers Association. CCA has filed a petition with the Public Employment Relations Board to form a separate unit for part-time teachers, who are now represented by United Faculty in the same unit as full-time teachers. (See complete story at *CPER* No. 178, p. 32.) If PERB grants CCA's petition, the part-time faculty then will have a choice of three unions.

One advantage that the federation has over CCA is that 300 part-time instructors at Grossmont and Cuyamaca also work in the San Diego Community College District, where the union is the exclusive representative. Local 1931 President Jim Mahler told *CPER*

AFT was not going to give up the part-timers to CTA without a fight.

that while he thinks that CCA's breakaway plan is not in the best interest of the part-time teachers, he was not

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By Dale Brodsky

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going to give up the part-timers to CTA without a fight in the unlikely event that PERB does authorize a separate union.

AFT's maneuver has infuriated leaders of the other labor unions. David Milroy, a part-time instructor at Grossmont College and one of the leaders of CCA's drive, said the federation is hurting the breakaway effort. "AFT is trying to kidnap our movement," he complained. In a memo to part-time instructors, Milroy said, "The only group that gains by the chaos of the AFT's late participation is the United Faculty, the current full-timers' union from which we are trying to sever."

But United Faculty does not agree. "AFT has initiated an open attack on

United Faculty," said union president Zoe Close. Close characterizes AFT and CCA as large unions more interested in increasing their memberships than representing the interests of part-time instructors, which, she says, United Faculty is doing. She points to a tentative agreement reached with the Grossmont-Cuyamaca Community College District that addresses part-time issues. She claims that part-time instructors are to receive an 8.57 percent pay increase retroactive to the last school year and will have access to a medical benefit plan, details of which will be explained during workshops in November. ❀

ency requirement. However, a requirement that pupils must reside in the home county or in an adjacent county to receive state funding is generally applicable to all schools offering "independent study" programs under the Education Code, the Attorney General concluded. Regulation 11963.1 specifies that all schools providing nonclassroom-based instruction must comply with independent-study program requirements. The board's regulations require online charter schools to comply with the conditions placed on independent-study programs, one of which is that a school offering independent study may not receive funding for students who do not meet the residence requirement. Therefore, reasoned the Attorney General, an online charter school may not receive funding for students who do not reside in the charter school's home county or in an adjacent county. (*Opinion of Bill Lockyer, Attorney General* [8-10-06] ___Ops.Cal.Atty.Gen___, 2006 DJDAR 10577.) ❀

No Funds for Non-Resident Students of Online Charter Schools

The Office of the Attorney General has issued an opinion determining that online charter schools may not receive state funding for the instruction of pupils unless they reside in the county where the school is chartered or in an adjacent county.

The opinion notes that the legislature encourages the use of computer and communications technology in the instruction of students, citing Education Code Sec. 51865, which provides that "distance learning" should be used by the state to achieve equity in learning and quality in education.

Under the Education Code, charter schools normally are required to operate within the boundaries of the chartering district, said the Attorney General. They are authorized to instruct their pupils via the Internet, subject to regulations adopted by the State Board of Education governing the state funding of charter schools for non-classroom based instruction, including distance learning and computer-based education.

Although the board has specific regulations governing online charter schools, they do not contain a pupil resi-

Local Government

Sacramento County Endures Two-Week Work Stoppage

When negotiators for the County of Sacramento readied themselves for bargaining this year, they must have known they would be wading into rough waters. First, they would be hammering out new labor agreements covering 26 separate bargaining units all at the same time. And, the county had let it be known that it intended to get employees to shoulder a significant portion of the financial burden for rising health care costs. Against this backdrop, the county could not have been surprised when, in August, a coalition of unions representing thousands of county employees announced plans to strike in September.

Strike Preparation

Negotiations continued on many fronts, but the possibility of a strike dominated the headlines. As the unions set a strike date for September 5 and spoke about the severe disruption to county services that would surely result from a strike, county officials began to draft contingency plans and prepare to assume responsibility for a wide assortment of rank-and-file jobs.

With the strike deadline looming, a tentative agreement was reached by county negotiators and the California

Nurses Association, which represents 37 supervisory and 246 non-supervisory nurses. The five-year pact overwhelmingly ratified by the registered nurses included cost-of-living increases ranging from 11 to 23 percent and a 22 percent equity increase over the term of the contract. The CNA contract maintained the existing contract provision regarding health care contributions that requires nurses to contribute 80 percent of the lowest-cost HMO.

Despite this settlement with CNA, the county undertook further preparations to weather the strike. On Friday, September 1, it persuaded Superior Court Judge Shelleyanne Chang to issue a temporary restraining order directing approximately 250 county employees not to participate in the planned job action. The TRO targeted employees essential to safeguard the public health and safety, including those who performed dispatch work at the airport and in the county communication center, and clerical intake duties in the district attorney's office; certain employees who engage in water-quality and water-resource functions; and those who work at the mental health treatment center. The Public Employment Relations Board and attorneys

representing labor organizations involved in the planned job action argued that the county should be required to seek injunctive relief with PERB. But Judge Chang declined to rule that the board had jurisdiction over the matter, nor did she even allow PERB to intervene.

On Tuesday, September 5, employees and their unions commenced the largest job action visited on Sacramento County in decades. Leading the charge was United Public Employees, Local No. 1, which represents 4,400 office and technical workers as well as wel-

The CNA contract maintained the existing provision regarding health care contributions.

fare and social workers; the International Union of Operating Engineers Stationary, Local 39, which serves as the bargaining agent for about 1,500 employees; the American Federation of State, County and Municipal Employees, which represents over 600 health services employees; and the Service Employees International Union, Local 535, which represents welfare supervisory employees. These and other employee organizations involved in the job action set up well-staffed picket lines

at over 100 locations. According to the county's tabulations, close to 4,000 employees stayed off the job.

Nearly from the outset, the central issue enflaming the parties' dispute focused on health care costs and efforts by the county to curtail future spending. While union representatives pressed for the status quo on medical benefits, the county sought to increase copayments, freeze the "cash back" amount that employees who do not use county-provided family coverage are

Unions were concerned that increases in health care costs would wipe out wage increases.

allowed to collect, and eliminate the 100 percent county-provided health benefit coverage enjoyed by employees in certain classifications. Another issue in the mix was whether the county intended to use a health care provider other than Kaiser, which now serves as the benchmark for the calculation of premium rates covered by the county. As the parties' negotiations progressed, the unions voiced concerns that the proposed increases in health care costs would wipe out any wage increases that were on the table. For the county's part, Labor Relations Director Steve Lakich repeated that maintaining the status

quo on health care benefits was not an option. Indeed, health care, he told CPER, was "the number one issue."

Mediation Efforts

Employees continued to support the strike in high numbers on Wednesday, September 6, with pickets again posted at many sites throughout the county. But, at the end of the day, two unions, UPE Local 1 and SEIU Local 535, agreed to halt picketing and resume bargaining efforts with the aid of mediators from the California State Mediation and Conciliation Service. AFSCME agreed to proceed in discussions with a mediator, but it did not order its members to put away their picket signs.

Large numbers of employees remained off the job on Thursday. Members of UPE Local 1 and SEIU refused to cross picket lines erected by Stationary Engineers Local 39. By the county's count, nearly 3,000 employees stayed away from work.

In the meantime, the county reached agreement with the Engineer Technicians and Technical Inspectors, which represents 373 county employees. The pact included a 3 percent general wage increase and a 7 percent equity increase the first year of the contract and cost-of-living increases between 2 and 5 percent, depending on the Consumer Price Index, in years two through five. The agreement also included a health care contribution indexed annually at 80 percent of the lowest-cost HMO.

On Friday, September 8, the county returned to court and asked the supe-

If you're going through hell, keep going.

Winston Churchill

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

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

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

(11th edition, 2004)

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rior court judge to require certain pharmacists, water-quality workers, and airport fire-equipment workers to report to work. The judge made no decision.

Mediation efforts continued through the weekend with UPE Local 1 and AFSCME. Lakich expressed some optimism. However, despite signs of progress, the impact of the strike on the public was beginning to play a significant roll. The walkout of Local 39's garbage collectors caused the accumulation of mountains of uncollected garbage. As the refuse generated by 150,000 residential customers began to grow, county officials offered residents the opportunity to dump their garbage containers at land-fill sites at no charge, and offered assurances that the uncollected trash did not pose a public health hazard.

On Monday, September 11, the county was granted a TRO directing three pharmacists to return to work; the court took no action or denied the county's TRO requests with respect to other workers. At this point, Local 39, representing 1,115 operations and maintenance employees and 432 water-quality employees, remained on strike along with AFSCME. SEIU Local 535 and the Teamsters, representing 474 general supervisory employees, though not technically on strike, were honoring picket lines. UPE Local 1, SEIU, and AFSCME continued their discussions with the help of state-appointed mediators.

As the strike entered its second week, approximately 1,200 employees remained off work. Lakich again ex-

pressed a positive position on bargaining efforts and said that the county was moving closer to a settlement. With piles of garbage continuing to mount, attention focused on the bargaining impasse between the county and Local 39. For its part, the union pledged to stay out several more weeks if necessary and said it had no plans to resume negotiations. The county began to emphasize that its current offer to Local 39 would remain valid only until Friday, September 15. Lakich told the

The court took no action or denied most of the county's TRO requests.

press that the county's offer would lift salaries at least 21 percent over five years, with the ceiling as high as 38 percent, depending on the rate of inflation. This wage increase, Lakich stressed, would offset any increase in health benefit premiums.

With that deadline in sight, Local 39 agreed to re-enter negotiations and went back to the table on Thursday, September 14, where it resumed discussions on behalf of both units. The following day, the county reached a tentative agreement with Local 39 over pacts covering the water-quality unit and the operations and maintenance units.

The county returned to court on Friday, September 15, seeking a preliminary injunction before Judge Loren McMaster. In line with the earlier temporary restraining order, he enjoined from striking certain employees in the district attorneys' office, the regional radio communications center, the telephone system, the waste-water treatment plant, the airport communications center, and the Department of Water Resources. Employees from the Sacramento County mental health treatment center also were enjoined from striking. In contrast to the earlier ruling by Judge Chang, McMaster permitted the Public Employment Relations Board to intervene in the action. As it had at the prior proceeding, PERB asserted that it, not the court, has jurisdiction over the matter.

Turning Point

Over the following weekend, Local 39 members from both units ratified the terms of a new five-year agreement with the county. In total, the water-quality workers will garner salary increases of 22 to 34 percent over the five-year contract term. Operations and maintenance workers will see a total salary increase in the range of 25 to 39 percent over the life of the contract. Under both agreements, employees will achieve significant salary increases but gradually will assume a portion of their health premiums, until the contribution rate is stopped at 20 percent of the lowest-cost HMO.

Lakich explained that, under the new agreement, current county employees will stay at 100 percent of Kaiser coverage into 2007. Thereafter, beginning in 2008, employees will receive incremental reductions in Kaiser coverage. This will mean reduction to 95 percent of full Kaiser coverage in 2008. In each successive year, that amount will decrease by 5 percent until 2011, when employees will be covered for 80 percent of the Kaiser amount.

All employees hired after January 1, 2007, will be covered under a Tier B plan, which provides for the lowest HMO full-family coverage. The significant difference between the two is that employees' medical benefit coverage under Tier A will be frozen at the current level of \$927 a month. Under Tier B, coverage will be at 80 percent of the cost of the full-family premium. Under Tier A, employees are entitled to retain their cash back in lieu of unused benefit funds.

Lakich called the Local 39 contracts the "turning point" in the talks. And, for residents of Sacramento County, the agreement was greeted with sighs of relief. The accord meant that garbage trucks were rolling again as of Monday, September 18. The following day, the county reached a tentative agreement with AFSCME. Early Tuesday morning, an accord was forged with UPE Local 1.

On Wednesday, September 20, a few pharmacists failed to report to work despite the tentative agreement worked out with AFSCME. Lakich said that if

the employees did not return, they would face disciplinary action or be deemed absent without leave after five days. By Thursday, however, the situation had been resolved, and all striking workers had returned to work.

As *CPER* went to press, the membership of UPE Local 1 and AFSCME had yet to ratify the tentative agreements. In addition, no agreement has been reached with the deputy sheriffs. Lakich was hopeful that the settlement reached with Local 39 would aid in getting a settlement with the deputy

sheriffs. But, he told *CPER*, that group is set to begin interest arbitration shortly. Also without a contract are the county probation officers.

Reflecting on the fact that this was the largest and longest countywide strike in Sacramento under the Meyers-Milias-Brown Act, Lakich told *CPER* he would not characterize bargaining as a "win" for management. "The strike never should have happened," he said, but "we satisfied our negotiating objective." *

Police Officer Disciplinary Records Are Confidential Under Public Records Act

In a lengthy and thorough opinion penned by Justice Ming Chin, six members of the California Supreme Court ruled that the records held by the San Diego Civil Service Commission relating to a peace officer's administrative appeal of a disciplinary matter are not subject to disclosure under the California Public Records Act. The majority reasoned that statutory guarantees of confidentiality found in Penal Code Sec. 832.7 are not restricted to criminal and civil proceedings and that the commission's records concerning the disciplinary appeal are protected from disclosure as records maintained by the officer's "employing agency."

The majority reasoned that, as a practical matter, peace officers should not have to choose between exercising

their right to an administrative appeal under the Public Safety Officers Procedural Bill of Rights Act and their right to maintain the confidentiality of their disciplinary records under Sec. 832.7.

In her dissenting opinion, Justice Kathryn Werdegar sharply criticized the majority for its "dubious" characterization of the commission as the officer's "employing agency" and for undervaluing the public's interest in disclosure. She also argued that a police officer who opts to appeal a disciplinary action to the commission is no different than a civil litigant who must submit to discovery and a public trial in order to vindicate legal rights in court.

Background

The litigation was initiated by the Copley Press, which publishes the *San Diego Union-Tribune* newspaper. In January 2003, Copley learned that the commission had scheduled a closed hearing in a case involving a San Diego County deputy sheriff who was appealing a termination. After the appeal was completed, Copley filed a request with the commission under the California Public Records Act, seeking the disclosure of documents relevant to the appeal. The commission refused to release the documents to the paper.

A petition filed by Copley in superior court was unsuccessful. However, following subsequent CPRA requests, the commission agreed to release the termination order, which revealed that the dismissal was based on the deputy's failure to arrest a suspect in a domestic violence incident. Unsatisfied with the commission's action, Copley filed a petition with the Court of Appeal, asking that it order the commission to disclose the deputy's name and all documents associated with the appeal. The appellate court concluded that, insofar as the commission's records are not documents contained in a personnel file or a file maintained by the officer's "employing agency," they are not exempt from disclosure under the CPRA. The Court of Appeal ordered the commission to release its records in the disciplinary appeal, including the officer's name.

Supreme Court Analysis

The court first explained that the CPRA was enacted for the purpose of increasing the release of information in the possession of public agencies. But, the act also recognizes individual privacy rights and, in seeking to effect this balance, sets out a number of exemptions that permit government agencies to refuse to disclose certain public records. The exemption at the heart of the present case appears in Government Code Sec. 6254(k), which incorporates other prohibitions on disclosure, including Penal Code Secs. 832.7 and 832.8.

The court dismissed the argument that Sec. 832.7 applies only to criminal and civil proceedings.

Section 832.7(a) provides that peace officer records and information obtained from these records "are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." At the outset, the Supreme Court dismissed the argument that Sec. 832.7 applies only to criminal and civil proceedings. Rejecting the view set out in *Bradshaw v. City of Los Angeles* (1990)

221 Cal.App.3d 908, 86 CPER 12, the court read the word "confidential" as establishing a general condition of confidentiality. It would be unreasonable to assume the legislature intended to put strict limits on the discovery of police personnel records in the context of civil and criminal discovery, and then to permit the public to obtain them through the Public Records Act, the court reasoned.

Statutory Exemptions. Section 832.7 exempts two categories of peace officer records from disclosure. The first is personnel records, which Sec. 832.8 defines as "any file maintained under [an officer's] name by his or her employing agency and containing records relating to" personal data, employee advancement, appraisal, or discipline; and complaints, or investigations of complaints, concerning an event or transaction concerning the officer's performance of his or her duties. The second category of records to which Sec. 832.7(a) applies is "records maintained by any state or local agency pursuant to section 832.5," which refers to citizen complaints.

The court concluded that the commission's records are "personnel records" made confidential by operation of Sec. 832.7(a) because of the nature of the commission's role in disciplinary proceedings for peace officers in San Diego County. The Bill of Rights Act requires every public agency to provide non-probationary public safety officers with an opportunity for an administrative appeal of disciplinary mat-

ters. In San Diego, said the court, this statutory duty is satisfied by offering peace officers administrative appeals through the commission. By charter, the commission is authorized to affirm, revoke, or modify any disciplinary order. Therefore, concluded the court, because the commission is functioning as part of “the employing agency,” any file it maintains regarding a peace officer’s disciplinary appeal constitutes a file “maintained by the officer’s employing agency” within the meaning of the statute.

The court also found that the commission’s records qualify as “records maintained by any state or local agency pursuant to section 832.5.” “The Commission, in hearing disciplinary appeals, is functioning as part of a department or agency that employs peace officers and...any records it maintains regarding such appeals are being maintained by such a department or agency.”

Other Considerations. Beyond its statutory construction arguments, the court also reasoned that the confidentiality available to peace officers should not be determined by the entity selected by a public agency to hear administrative appeals. “Under Copley’s interpretation,” said the court, “the record of the officer’s appeal in this case is unprotected only because in San Diego County, the Commission has been designated to hear the administrative appeal the law requires the officer’s employer to provide; if the officer worked in a jurisdiction where administrative

appeals are heard within the law enforcement agency, the records of that appeal would be protected.” “It is doubtful the Legislature intended to make the extent of confidentiality available to a peace officer turn on whether he or she works in a jurisdiction where responsibility for administrative appeals has been assigned to someone outside the law enforcement department.”

The court concluded:

Having reviewed the statutory language and the legislative history, we find no evidence the Legislature intended that one officer’s privacy rights would be less protected than another’s simply because his or her employer, for whatever reason, conducts administrative appeals using an entity like the Commission. In enacting section 832.7, the Legislature appears to have made a statewide decision regarding confidentiality of such records, and has expressly specified the circumstances where a local agency “may” — i.e., has discretion to — release very limited information from those records....Nothing suggests the Legislature intended to leave it up to local departments and agencies, through the mechanism chosen for handling these matters, to determine — either intentionally or by accident — how much, if any, protection to afford peace officers.

The court also found that, where appeals are heard by persons outside the law enforcement department, Copley’s interpretation would present peace officers with a “Hobson’s choice” between their rights of confidentiality under Sec. 832.7 and their rights of administrative appeal under the Bill of Rights Act.

The high court turned aside the newspaper’s appeal to policy considerations, such as the need to prevent serious police misconduct or to curtail the arbitrary exercise of police powers. There are competing policy considerations favoring confidentiality, said the court, such as protecting complainants and witnesses from recrimination or retaliation, protecting peace officers from publication of frivolous or unwarranted charges, and maintaining confidence in law enforcement agencies by avoiding premature disclosure of

*There is no
First Amendment
right of access
to administrative
records.*

groundless claims of police misconduct. The legislature made the policy decision “that the desirability of confidentiality in police personnel matters *does* outweigh the public interest in openness,” said the court, and it is for the legislature, not the court, to weigh competing policy considerations.

Given the fact that the legislature enacted a specific statute which makes the records in question confidential, the court also rejected Copley’s assertion that it has a common law right of access to the officer’s records. The court

also was unpersuaded to find a constitutionally based access right. The First Amendment affords a right of public access to various parts of a criminal and civil proceeding, said the court, but there is no First Amendment right of access to administrative records. The court declined to render an opinion as to whether Copley has a constitutional right to attend commission appeal hearings.

Werdegar Dissent

Because the majority “misconstrues the applicable statutes,” wrote Justice Werdegar, it “overvalues the deputy’s interest in privacy, undervalues the public’s interest in disclosure, and ultimately fails to implement the Legislature’s careful balance of the competing concerns in this area.”

The Public Records Act was enacted against a background of legislative impatience with secrecy in government, she said, and “begins with the general rule of openness and disclosure of government information.” Werdegar took aim at the majority’s conclusion that the commission’s records are those maintained by the peace officer’s employing agency or department. “No amount of judicial juggling or legal legerdemain can convert a county’s civil service commission into the agency that employs the county’s law enforcement officers.” The commission never accepted a job application from this deputy, conducted a background check, or hired him; contacted him about his medical, dental, or retirement benefits; had the power to promote or demote

him; or had any say over his day-to-day assignments. “That the deputy was employed by the San Diego County Sheriff’s Department, not the Commission, is plain,” she wrote.

Werdegar also was critical of the majority’s view that, should different agencies choose different entities to hear disciplinary appeals, the level of confidentiality attaching to peace officer’s appeal records may be different. Nothing in the statute precludes the possibility of different levels of disclosure. “By limiting the exception to the CPRA to personnel files maintained by the ‘employing agency,’ the Legislature left open the possibility that law enforcement-related files maintained by *other* public agencies would be subject to disclosure under the CPRA.” A particular law enforcement agency might have reasons for greater public scrutiny of police disciplinary matters, and these may push it to choose a commission rather than in-house review. “That an option exists to provide less disclosure to the public does not logically preclude an option providing for greater openness in government. The majority fails to explain why a law enforcement agency’s or local government’s choice to use an administrative review mechanism that involves more disclosure to the community is unreasonable.”

Finally, Werdegar objected to the majority’s contention that, if the records held by the commission were not confidential, deputies would be presented with a Hobson’s choice of vindicating

their rights on appeal or retaining the confidentiality of their personnel records. “A peace officer facing disciplinary charges has a viable choice: he may appeal to the Commission, in which case the proceedings before the Commission (but not his actual personnel file) will be disclosable under the CPRA, or he can decline to appeal, accept his discipline and keep everything secret. The officer’s situation is no different than that of any civil litigant who, in order to vindicate legal rights in court, must submit to pretrial discovery and endure a public trial.” The majority does not explain, said Werdegar, why a peace officer facing discipline is entitled to pursue an administrative appeal free from uncomfortable choices.

Reactions

Depending on your vantage point, the *Copley* decision either undermines the accountability of police officers or properly protects the privacy rights of officers’ disciplinary records. Those in the first camp have been quick to call on the California legislature to amend the Public Records Act to overturn the decision. Without public access to disciplinary proceedings and records, they contend, the public and the press are hampered in calling for needed reforms.

From the perspective of those who represent police officers, *Copley* ensures that police officer records are confidential and preserves important privacy rights. Records concerning peace officer misconduct will continue to be

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available in civil and criminal court proceedings, they note, but *Copley* avoids disclosure of groundless claims of police misconduct. (*The Copley Press*,

Inc. v. The Superior Court of San Diego County; County of San Diego, RPI [8-31-06] No. S128603, ___Cal.4th___, 2006 DJDAR 11839.) *

Engineers and Architects Association Stages Two-Day Strike

The Engineers and Architects Association staged a two-day strike in August, hoping to persuade the City of Los Angeles to improve on its final contract offer that was resoundingly rejected by the union membership. EAA, which represents about 7,500 professional, administrative, and technical employees dispersed throughout city government, has been without a contract since 2004. The city's last, best offer — zero percent in 2004, 2 percent in 2005 and 2006, and 2.25 percent January 1, 2007 — mirrors the terms of the deal accepted by other unions representing city employees.

But EAA has had its eye on the terms of the contract awarded last year to Department of Water and Power employees represented by IBEW, Local 18. The five-year contract guarantees DWP workers an annual increase of at least 3.25 percent, with a ceiling of 6 percent a year. (See *CPER* No. 174, pp. 37-38, for the complete story.) EAA also pointed to a pact between the city and the Police Protective League, awarding peace officers a salary increase of more than 10 percent over the three-year contract term.

The association hoped the strike — the first in 14 years — would garner a deal like this for its members. But, to date, the city's final offer has been implemented and EAA is contemplating further job actions. This time, it has sought strike sanctions from the Los Angeles County Federation of Labor.

Bargaining Break Down

At the end of June, the city presented its final offer to EAA members in six separate bargaining units. In addition to the wage offer, the city requested that EAA withdraw seven unfair labor practice charges it had filed with the city's Employee Relations Board. In all, 74 percent of the EAA membership cast votes in a mail ballot ratification election. Over 85 percent of those who voted rejected the city's offer. Two weeks later, in a unanimous vote, the city council opted to unilaterally impose its final offer.

By that time, strike planning already was in the works. Union Executive Director Robert Aquino, who had called on EAA members to reject the city's offer, announced plans for a two-day strike and scheduled it for August

22 and 23. In public statements and radio ads, Aquino warned that the job action would close the runways at Los Angeles airports, send sewage into Santa Monica Bay, and create citywide traffic gridlock.

The union leader also took aim at Antonio Villaraigosa, who EAA had supported in his run for mayor. Aquino accused Villaraigosa of turning his back on his labor supporters and of being preoccupied with his effort to take control of the Los Angeles Unified School District. But Villaraigosa stood his ground and announced that he

Over 85 percent of those who voted rejected the city's offer.

would cross the EAA-erected picket line — the first time ever, he said — because the city had made a fair offer and had done all its could to avoid a strike.

As the strike date approached, city officials made plans to ensure that vital services would continue to be provided to the public. To aid in this effort, at the mayor's request, the city attorney sought a temporary restraining order to prevent a walkout by employees in "essential departments." On Monday, August 21, one day before the planned strike, Superior Court Judge Dzintra

Janavs issued a TRO that barred approximately 200 employees from participating in the job action. The judge's order covered workers engaged in security operations at the airports, assigned to police emergency communication duties, and involved in sewage treatment work.

Job Action

As planned, EAA members took to the streets for two days in August. By the union's count, thousands of workers marched on the picket lines and stayed off the job. City estimates of

The city plans to pursue legal sanctions against about 20 essential employees who failed to report to work.

employee participation were lower, but by all accounts, the strike caused delays at the port, interrupted construction at the airport, blocked public access to some departments, and disabled water-quality checks. Despite these adverse impacts, however, the strike did not restart contract negotiations as the union had hoped. The city has refused to resume bargaining.

In addition, in further aftermath of the strike, the city plans to pursue legal

sanctions against about 20 employees who failed to report to work and who were on the list of essential employees barred from striking by the TRO. The city has initiated contempt of court proceedings against these individuals, but a question has arisen as to whether they were properly personally served with the court document directing them to report to work.

In the meantime, EAA's Aquino has said that new job actions may be in the offing. On September 5, he submitted a formal request to the Los Angeles Federation of Labor for an endorsement of a future strike by the association. Aquino had not sought strike sanctions from the federation for the two-day strike in August, remarking that such a move would have been futile because, in his view, Villaraigosa exerts control over the federation. Aquino subsequently backed off from that com-

ment, but in his letter to Maria Elena Durazo, the federation's new executive secretary-treasurer, Aquino chided Durazo for implying that "the EAA member's struggle to obtain a fair COLA might not be as important as maintaining a good relationship with L.A.'s Mayor."

Whether the association will rally its troops and mount a second job action — with or without the federation's blessing — remains to be seen. But, a few things are certain. EAA has shown its resolve to go head-to-head with a popular mayor it once endorsed. Villaraigosa, too, has shown he is ready to make the hard call when it comes to labor's demands. And, when the next round of contract talks begins with other unions next year, the spell may have been broken and the city may be in for more strikes by municipal employees. *

Employment or Disability Income Nixes Reinstatement

Relying on the recent California Supreme Court decision in *Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 169 CPER 27, the Second District Court of Appeal has ruled that Gov. Code Sec. 31725 does not mandate reinstatement of employees who receive vocational rehabilitation and benefits, but only those individuals who are neither employed nor receiving disability income. Section 31725 requires an

employer to reinstate an employee who has been dismissed due to disability if that employee is found by the retirement board not to be disabled. The reinstatement must be retroactive to the day following the effective date of dismissal, and include back wages and benefits.

Consta Kelly, a licensed vocational nurse II, suffered several work-related injuries during her more than 20-year

employment at a Los Angeles county hospital. The county initially was able to accommodate Kelly's injuries by providing her with data-entry duties while allowing her to retain her LVN II title and salary. Kelly was diagnosed thereafter with chronic wrist pain for which she had to undergo surgery. Because of that condition, Kelly was unable to perform data entry and there was no position available to accommodate her disabilities. Accordingly, the county noti-

*When she wasn't
found permanently
disabled,
Kelly sought
reinstatement.*

fied Kelly in writing that she was being removed from the regular payroll and put on industrial leave. The county also offered Kelly vocational training, which she accepted. At that point, Kelly did not consider herself terminated from employment.

Kelly completed her vocational rehabilitation, during which she was paid a weekly maintenance allowance in addition to workers' compensation. After finishing the program, Kelly was provided eight weeks of placement services. She sent out 18 resumes, 17 of which were part of her course work. She did not make any further efforts to so-

licit employment. This fact later proved detrimental to Kelly's case when the court determined her lack of employment income was due solely to her own inaction and was not the result of dismissal.

Two years after completing her vocational program and while continuing to receive a maintenance allowance and workers' compensation, Kelly filed a request for service-connected disability retirement with the Los Angeles County Employees Retirement Association. In her application, Kelly stated she had been on industrial leave with compensation and did not disclose that she had resigned or been terminated from her employment. LACERA concluded Kelly was able to substantially perform the duties of an LVN and denied her application accordingly. This finding was sustained on appeal, after which Kelly petitioned for a writ of mandate compelling LACERA to find Kelly permanently disabled. The petition was denied.

Unsuccessful in her endeavor to be found permanently disabled, Kelly changed tactics and filed a petition for a writ of mandate seeking reinstatement, backpay, and benefits as of March 19, 1996, the day after she was notified by the county in writing that her work duties were incompatible with her temporary work restrictions, and that she was being placed on industrial leave. Kelly based her argument on Gov. Code Sec. 31725, claiming it required the county to reinstate her, since LACERA had denied her disability application.

While Kelly's petition was pending, the county offered to reinstate her to an LVN II position that could accommodate her work restrictions. It further offered to make the position retroactive to the date the trial court upheld LACERA's decision. The county felt this mooted Kelly's petition for a writ of mandate, but Kelly disagreed. She maintained her demand for reinstatement, backpay, and benefits retroactive to the time she was placed

*The purpose of Sec.
31725 was to address
financial difficulties.*

on industrial leave. The trial court agreed with this contention, but the Second District Court of Appeal did not.

On appeal, the court found Sec. 31725 was not applicable to Kelly's case. In reaching its decision, the court looked to *Stephens*, a case with similar facts. In *Stephens*, the court determined the legislative purpose of Sec. 31725 was to address the financial difficulties of persons who have been found by their employer to be disabled, but found by the retirement board not to be so. When this occurs, the worker is left with neither employment nor disability income. Section 31725 requires reinstatement only if the employee is dismissed and Kelly, the court stated, had not been dismissed.

The court wrote, “Sec. 31725’s retroactive-reinstatement requirement is intended to act as a safety net for those employees who find themselves in limbo, having neither employment nor disability income.” Here, Kelly received a maintenance allowance as well as permanent disability indemnity benefits. Moreover, the county merely stated that Kelly’s restrictions could not be accommodated at that time and that she would be placed on leave until an accommodating position became available. The county also offered Kelly vo-

‘Section 31725 is intended as a safety net for employees in limbo.’

cational rehabilitation, exhibiting its assumption that Kelly could eventually return to work. Under the *Stephens* precedent, if an employee is separated from work due to temporary disability, and both the employer and employee assume she will return to work, there is no dismissal.

In light of the above factors, Kelly did not fall in the class of persons that Sec. 31725 was intended to protect. Therefore, she was not entitled to backpay and benefits retroactive to the date of the work restriction letter. (*Kelly v. County of Los Angeles* [7-26-06] 141 Cal.App.4th 910.) *

Bill Broadens Record Inspection Rights of Court Employees

The governor has signed legislation that will clarify the right of trial court employees to review their personnel files. Assembly Member Paul Koretz (D-Los Angeles) introduced the bill on behalf of the American Federation of State, County and Municipal Employees, which sought to more clearly define the inspection rights conveyed to employees by the Trial Court Employment Protection and Governance Act.

Specifically, Gov. Code Sec. 71660 requires each trial court to adopt personnel rules to provide trial court employees with access to their “official” personnel files. According to AFSCME, this statutory language was intended to be interpreted broadly and, consistent with general principles of California labor law, to encompass information in any personnel file.

Assembly Bill 1995 changed the language to include “any” personnel file. Section 71660(a) now directs that, upon request, an employee must be permitted to inspect “any personnel files that are used, or have been used, to determine that employee’s qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.”

In pressing for the amendment, AFSCME alleged that some court administrators in the state have been cir-

cumventing the law by placing documents pertaining to an employee’s performance or grievances in an “unofficial” personnel file. As a result of this practice, AFSCME asserted, many employees were unable to discover the reasons for the denial of a promotion or to refute any misinformation placed in an unofficial file by a supervisor.

The amendment would allow access to both files.

Proponents of the bill asserted that the amendment would stop the practice of keeping two personnel files or would allow employee access to both files with regard to material concerning employees’ qualifications, promotion, additional compensation, termination, or other disciplinary proceedings.

The State Judicial Council voiced no objection to the bill. ♦

State Employment

No Concessions by Highway Patrol Union

In a new four-year contract, California Highway Patrol officers won improvements in pay and benefits over and above the increases mandated by a pay parity statute. And health and pension entitlements will not change, even for new employees. The 6,400 officers will begin paying a portion of their employee retirement contributions next year, but the retirement contribution deductions from their paychecks will be offset by an equal percentage increase in their salaries.

Market-Rate Pay Required

The Government Code requires that compensation of CHP officers equal the average compensation of the local law enforcement officers in Los Angeles, Oakland, San Diego, and San Francisco. CHP salaries had fallen behind in the 1990s. To catch up, officers received salary increases of 7.7, 6.8, and 5.6 percent over the last three years. With a pay raise of 5.7 percent effective in July 2006, the officers' compensation now complies with the pay parity statute. The statute requires comparison of base pay, educational incentive pay, longevity pay, physical performance pay, and employer contributions to a pension plan.

Other Benefits Enhanced

In the new 2006-2010 memorandum of understanding, the California Association of Highway Patrolmen bargained additional improvements in pay and benefits. Shift differential pay for working night and swing shifts will rise. The swing shift differential will increase from 40 cents to \$1 an hour over the next two years; the night shift differential will go from 65 cents to \$1.50 an hour by July 2008. The annual uniform allowance will increase to \$920 by July 2009, and a \$25 monthly uniform cleaning allowance begins this year.

A stipend equal to 3.5 percent of base pay will be paid to compensate for donning protective gear, inspecting vehicles and weapons, and other activities performed before and after an officer's shift. The union contended this stipend was required to comply with the United States Supreme Court's ruling on "donning and doffing" under the Fair Labor Standards Act. (See story on the ruling in *CPER* No. 177, pp. 11-21.) The state agreed to the stipend to settle a grievance and a potential lawsuit.

The new contract improves death and disability benefits for officers who die or are injured before age 50. The survivors of an officer who dies before

age 50 but after 20 years of service will be entitled to the greater of the current lump sum (which varies with the number of dependents from \$750 to \$1,800) or an alternate benefit that pays a lifetime monthly allowance comparable to the retirement benefit the officer would have received if 50 years old at the time of death. If severely injured on the job, an officer under age 50 will be entitled to a disability benefit that is the greater of the current benefit (50 percent of

Any officer who recruits a new patrol officer will receive an additional 40 hours of leave.

salary) or the disability retirement benefit the officer would have been paid if age 50 at the time of disability. The benefit will not be paid for cumulative injuries, stress, or injuries that have a "mental origin."

Recruitment Incentive Offered

In an effort to boost CHP recruitment, any officer who recruits a new patrol officer will receive an additional 40 hours of leave, up to 120 hours per year. CHP offered the incentive as part of its campaign to fill 270 vacant positions and 240 new positions that were funded in the 2006-07 budget. The new

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The **new edition** of the Dills Act Pocket Guide includes recent developments relating to legislative approval of collective bargaining agreements; a discussion of new Supreme Court cases that recognize civil service law limits; and a section on PERB procedures, including recent reversals in pre-arbitration deferral law.

This **Pocket Guide** provides a thorough description of the Dills Act — how it works, its history, and how it fits in with other labor relations laws. Also included are Public Employment Relations Board enforcement procedures, the text of the act, and a summary of all key cases that interpret the act, with complete citations and references to CPER analyses. In addition, there is a summary of PERB rules and regulations, a case index, and a glossary of terms designed for Dills Act users.

Pocket Guide to the Ralph C. Dills Act

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positions come at the same time as the number of qualified applicants for the CHP academy has plummeted from 22,000 in 2002 to about 9,800 in 2005.

No Benefits Reduced

CHP officers' health and pension benefits remain the same under the new contract. The state will continue to pay 85 percent of the average employee-only premium of the four health plans with the largest enrollment and 80 percent of the premium attributable to dependents. Unlike unions representing professional employees, CAHP did not agree to reduce the 85/80 employer contribution formula. CAHP labor representative Carrie Lane told *CPER* that the union made it clear from the beginning of negotiations that retaining the formula and sharing premium increases was its top priority.

The Department of Personnel Administration, which represents the state in bargaining, did not demand "dependent vesting," even though it gained in most other contracts a two-year period of reduced employer contributions for dependent health care coverage. (See story on pp. 56-59.) Nor did DPA insist that new patrol officers receive a pension benefit formula based on the average salary of the three highest-paid consecutive years. Other unions gave up for new employees the more favorable pension calculation formula based on the single highest-paid year. "There was only so much that we expected to get," says DPA spokesperson Lynelle Jolley.

Contributions Shifted to Employees

What appears on the surface to be a union concession really is not. Many years ago, the state began to pay the officers' share of retirement contributions in lieu of a salary increase. The contributions were considered part of an officers' salary for purposes of pension calculations. Beginning next July, CHP officers will begin to have retirement contributions deducted from their pay-

checks. They will pay only a quarter of the employee share the first year, but the deduction will be offset by a salary increase. The contribution will be phased in over four years. Jolley explained that the change was made in the interest of transparency. While neither paychecks nor retirement benefits will be affected, officers' compensation will be clearer to the public and parity calculations will become simpler. *

Statute Does Not Require Equal Raises for Supervisors, Rank-and-File Employees

Supervisors of state peace officers and firefighters are not entitled to receive the same percentage salary increase as rank-and-file employees under their supervision, despite statutes that require "equivalent" compensation increases, the Court of Appeal has concluded. The California Correctional Supervisors Organization petitioned for a court order compelling the state to grant correctional supervisors the same 6.8 percent increase in 2003-04 that correctional officers in state unit 6 had bargained. The court held that the Department of Personnel Administration, which sets salaries for managers and supervisors and bargains with employee unions, has discretion to combine salary increases with other benefits to provide equivalent compensation enhancements to supervisors.

Equivalent Increases Required

In 1999, the legislature enacted a new law designed to prevent compaction of salaries. Officers in some departments were earning more than their supervisors. Government Code Sec. 19849.18 requires that employees who supervise employees in bargaining units 5 (highway patrol officers), 6 (correctional officers), and 8 (firefighters) receive "salary and benefits changes that are at least generally equivalent to the salary and benefits granted to employees they supervise." The term "salary" is defined to exclude overtime pay. The statute continues, "The benefit package shall be the economic equivalent, but the benefits need not be identical." It provides that the "specific benefits" be determined through the meet and confer process afforded to supervi-

sors in the Excluded Employees Bill of Rights Act.

The following year, the legislature passed a bill that declares, “A supervisory compensation differential is necessary to compensate state peace officer/firefighter members who are supervisors” in the correctional agency and the state Department of Mental Health. The statute provides that “the value of salaries and other economic benefits shall be considered in calculating comparative rates.”

Paid Leave Granted

During the state budget crisis in 2003-04, DPA notified excluded employees that they would not be receiving a raise that year. It offered to meet and confer regarding other forms of compensation. But CCSO contended that correctional supervisors were automatically entitled to the same 6.8 percent salary increase that their subordinates received under a collectively bargained salary formula. DPA then designated a 6.8 percent salary increase as base pay for supervisors’ retirement computation purposes but required supervisors to accept paid leave equivalent to a 5 percent compensation increase instead of the full 6.8 percent raise. However, the state increased supervisors’ paychecks by paying their 5 percent employee retirement contribution.

The next year, the paid-leave program was discontinued, and the supervisors began to receive the full value of the 6.8 percent raise in their paychecks. In addition, they received a 7.5 percent sal-

ary increase while the pay of rank-and-file officers was boosted only 5 percent.

When CCSO challenged the compensation package in court, the trial court concluded that the statutes did not require that supervisors be given the exact salary increases as those in the bargaining unit. It also found that DPA had fulfilled its obligation to maintain compensation differentials between supervisors and those they supervise. CCSO appealed.

The court found it unlikely that the legislature intended to trigger automatic salary increases.

Discretion Permitted

The appellate court rejected CCSO’s contention that Sec. 19849.18 unambiguously requires both the raises and the benefit increases that rank-and-file employees receive. The language of the statute treats “salary and benefits changes” as a package, observed the court, and the qualifying phrase “at least generally” grants DPA discretion in determining an equivalent package.

The context of Sec. 19849.18 in relation to other laws supports this interpretation, the court found. Although DPA has authority to set salaries for excluded employees, the law prohibits

DPA from granting raises that require expenditures in excess of the legislature’s salary appropriations. The court found it unlikely that the legislature, in enacting Sec. 19849.18, intended to trigger automatic salary increases without regard to appropriations. Rather than finding that the legislature repealed the appropriation requirement without expressly declaring it repealed, the court found it could harmonize the two statutes by “constru[ing] the term ‘salary and benefits changes’ as an entire package, affording DPA sufficient flexibility to maintain compensation differentials in times of penury as well as prosperity.” The language of Sec. 19849.22 that requires comparison of “the value of salaries and other economic benefits” buttresses the court’s conclusion.

In addition, observed the court, the legislative history indicates that the legislature did not intend to repeal the appropriations restriction on salary-setting. The original bill would have required economically equivalent salary and benefit changes and made an appropriation for the increases. Amendments deleted any fiscal appropriation and inserted “at least generally” before “equivalent.” The bill’s supporters represented that the bill did not affect DPA’s salary-setting authority or cause expenditures in excess of appropriations. Because the bill was watered down, the court concluded that Sec. 19849.18 was enacted to avoid salary compaction and enable recruitment and retention of supervisors, but not to provide exact or

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.

Pocket Guide to the Fair Labor Standards Act

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identical salary and benefits changes to supervisors and those they supervise. It would be unreasonable to conclude that the legislature intended to prohibit DPA from granting a compensation package instead of uniform salary increases during a fiscal crisis, the court explained.

The court turned aside CCSO’s argument that the meet and confer requirement for “specific benefits,” but not salaries, in Sec. 19849.18 indicated that the two items must be treated separately when calculating equivalence. Supervisors have meet and confer rights, the court pointed out. It is not surprising that the legislature would leave room for conferring about benefits, rather than salary increases, which are more dependent on the legislative appropriation process, the court asserted.

CCSO argued that the court’s decision would allow DPA to make a mockery of the statute by granting no raises and increasing benefits only for supervisors. The court, however, side-stepped the argument by noting that CCSO’s hypothetical was not the issue before the court. Instead, said the court, it was up to CCSO to show that DPA failed to perform a ministerial duty. Since the statute leaves room for discretion, it must show that DPA acted arbitrarily, unreasonably, or in violation of legal standards. The court held that the statutes left room during a budget crisis for DPA’s discretion, “not to match salary increases dollar for dol-

lar, but instead to combine salary increases with other benefits in meeting the statutory objective.”

In an unpublished section of the decision, the court rejected CCSO’s contention that supervisors received only a 2.2 percent salary increase while the rank-and-file enjoyed a 10 percent raise. CCSO had argued that the paid-leave benefits could not be considered

The court held that the statutes left room during a budget crisis for DPA’s discretion.

a salary increase, but the organization had not challenged on appeal a critical finding made by the trial court. The court’s finding that the retirement contribution relief increased take-home pay by 5 percent and more than offset the loss of pay increases under the paid-leave program refuted CCSO’s suggestion that supervisors’ pay adjustments amounted to a fraction of the increased salary of the officers they supervise. (*Wirth v. State of California* [7-31-06] 142 Cal.App.4th 131.) ❁

Legislature Approves Seven More MOUs

The state reached new collective bargaining agreements with seven more unions in July and August, just in time to obtain legislative approval before the recess that began September 1. With the exception of the California Association of Highway Patrolmen pact, the contracts were variations on the theme set by the state's agreement with SEIU Local 1000 in June. While employees gained raises, the Department of Personnel Administration was able to wrest concessions on benefits. Except for the four-year CAHP contracts, the new pacts are effective from July 1, 2006, to June 30, 2008. (See CAHP story on pp. 51-53.) Only the California Correctional Peace Officers Association is still in negotiations for a new memorandum of understanding.

Similar to SEIU Contract

The California Association of Professional Scientists and the International Union of Operating Engineers agreed to terms nearly identical to the major items of the new SEIU pact. CAPS, which represents 2,700 scientists, and IUOE, which represents 900 operations and building maintenance employees, won a 3.5 percent raise for 2006-07, and a cost-of-living increase of 2 to 4 percent, depending on the Consumer Price Index, effective July 1, 2007. Equity raises will go to about 400 scientists, either by adding an ad-

ditional step or two to the top of the salary range or raising the pay of the top step by 2.5 percent. The highest-paid water and waste treatment plant operators and supervisors will receive monthly differentials. Employees who do not receive equity increases or differentials will receive a \$1,000 bonus.

Equity raises will go to about 400 scientists.

Employer health care contributions for unit 13 employees will rise effective July 1 to a flat dollar amount equal to 80 percent of the average premium of the four health plans with the largest enrollment. Increases necessary to maintain the 80 percent contribution level will occur when premiums increase in January of 2007 and 2008. CAPS' pact maintains a formula rather than flat-dollar-contribution amounts that need to be renegotiated for each premium increase. However, CAPS agreed to reduce the employer contribution to 80 percent of the weighted average premium charged by the four health care plans with the largest enrollment. During 2006, the state has been contractually required to pay 85 percent of the average employee-only premium and 80 percent of the premium attributable to dependent cover-

age. The state agreed to increase its share of dental plan premiums for both units.

Both unions agreed to reduce employer contributions for dependent health care premiums for new employees. During the first year of employment, the state will pay only half its usual dependent contribution; during the second year, 75 percent of the normal contribution will be paid.

While the state was unable to gain increased employee contributions to the Public Employees Retirement System, it did force an agreement to change the definition of final compensation for benefit calculations. The benefit formula for new employees hired on or after January 1, 2007, will be based on the average pay earned during the three consecutive years with the highest salary rather than the highest single year of pay.

UAPD and AFSCME

Contracts negotiated by the Union of American Physicians and Dentists and the American Federation of State, County and Municipal Employees are similar, minus the \$1,000 bonus. The equity increases include a boost to the top of the doctors' pay range of 5 percent on January 1, 2007; an additional maximum salary increase of 2.5 percent for physicians and 5 percent for podiatrists is effective January 1, 2008. For psychologists and occupational therapists, AFSCME garnered an increase of 5 percent to the top salary step effective January 1, 2007. The maximum salary for pharmacists will rise

10 percent on January 1, 2007, but the highest-paid pharmacists will be eligible for only a 5 percent boost at that time. They will be eligible for a merit raise of 5 percent on January 1, 2008.

Doctors are now entitled to reimbursement for continuing medical education expenses of up to \$1,000 per year instead of only \$500 to \$700. AFSCME-represented employees now may use continuing education leave for travel to and from a conference under certain conditions.

Both doctors and the professionals represented by AFSCME will be allowed to work and be paid at the applicable rate for working at an additional state job. Previously, doctors who worked at institutions with vacant positions had wanted to work four 10-hour days and take on an additional day of work during the same week, but extra pay had been blocked.

Like CAPS, both UAPD and AFSCME agreed to reduce the 85/80 formula for employer health benefit contributions to the 80/80 formula. Both unions accepted reduced dependent health care coverage for new employees.

UAPD and AFSCME agreed to a pension formula for new employees based on the average of their three highest consecutive years of salary. But AFSCME won inclusion of recruitment and retention pay differentials in salary for purposes of making retirement contributions.

CAPT Settlement Mediated

Unwilling to just go along with the deal that SEIU Local 1000 obtained, the California Association of Psychiatric Technicians forced the state to impasse and mediation in August. Even though CAPT secured 5 percent raises in 2005, due to high vacancy rates, while salaries of many other state employees remained stagnant, CAPT en-

*Like CAPS, both
UAPD and AFSCME
agreed to reduce the
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employer health benefit
contributions.*

tered bargaining determined to win large pay increases and decreased mandatory overtime work. Many psychiatric technicians are working alongside nurses and other health professionals who recently have received large pay differentials or raises as a result of lawsuits against the California prison system. Vacancy rates in psychiatric technician positions remain high. But the state refused to offer more than the cost-of-living increases agreed to by Local 1000 and other unions — 3.5 percent effective July 1, 2006, and 2 to 4 percent, depending on the Consumer Price Index, in July 2007. More upset-

ting to CAPT, those COLAs would have gone only to licensed psychiatric technicians. Unlicensed employees would have gotten smaller raises. And the state offered equity increases to the top step of the salary scale only to licensed employees who are eligible for safety retirement.

After mediation in mid-August, the parties agreed to a 2.5 percent cost-of-living increase for all unit members, effective July 1, 2006, and another 2.5 percent raise on July 1, 2007. Licensed technicians at the top of the pay range — about 65 percent of all licensed technicians in the unit — will receive another 5 percent boost on July 1, 2007. The parties will meet next spring to discuss increasing recruitment and retention bonuses and adding them to base salary.

Employer health plan premium contributions will rise in January 2007 and 2008 to amounts that equal 80 percent of the average employee-only premium of the four plans with the most enrollment and 80 percent of the average premium due to dependents. Like the other unions, CAPT agreed to reduce employer health care premium contributions for the first two years of a new hire's employment. Also, pension benefits for new employees will be based on the average of their highest three years of salary rather than the highest single-year salary.

Unscheduled CAUSE Reopener

Unlike the other unions that settled MOUs this summer, CAUSE

did not have an expired or expiring contract when it asked for more pay for bargaining unit members. In May 2005, it wrapped up negotiations for a 2005-07 MOU that gave market equity increases to dispatchers, program representatives in the Department of Consumer Affairs, criminalists and related classifications, and some game wardens and other peace officers and fire marshals in the unit. But in November, as the projections for state revenue were revised upward, CAUSE went back to DPA and demanded more money.

When DPA conducted its total compensation survey, it found that, despite the 2005 equity increases for California Highway Patrol dispatchers, their salaries remained 20 percent below the market rate. Because of vacancy rates in that and other safety positions, and an opportunity to gain health benefit and pension concessions, the state agreed to further increases, and the parties extended the MOU to June 30, 2008.

Effective July 1, 2006, all employees received a 3.5 percent cost-of-living increase. Special agents, game wardens, and park rangers received an additional 6.5 percent increase. The top of the pay range for criminalists and related classifications was boosted 5 percent in accordance with the previously negotiated agreement. Those unit members not eligible for equity increases under either the previous or new agreements received a \$1,000 bonus.

In January, in line with the previous agreement, the maximum pay for

all peace officers, including rangers, special agents, and wardens, will rise 5 percent. Dispatchers and communications operators, who already received an equity increase in July 2005, will receive a 6.5 percent raise.

Next July, unit employees — except special agents, wardens, park peace officers, and dispatchers — will receive a COLA of 2 to 4 percent, depending on the Consumer Price Index. The

The state achieved two concessions by agreeing to reopen negotiations.

maximum salary for criminalists will increase another 5 percent, and two 5-percent steps will be added to the top of the dispatchers' pay range.

In January 2008, the salary range will be expanded by two 5 percent steps for special agents, wardens, and park peace officers, and by one 5 percent step for all other peace officers and fire marshals.

The state achieved two concessions by agreeing to reopen negotiations. CAUSE agreed that the state's contributions to health benefits would be limited to an amount equal to 80 percent of the premiums rather than 85 percent of the employee-only premiums beginning January 2007. CAUSE already had agreed in the previous pact

The truth will set you free. But first, it will piss you off.

Gloria Steinem

Don't get mad, get educated! CPER's Pocket Guide gives a clear and concise explanation of the rights of public employees — which are many and varied. The Guide includes an overview of rights granted to individual employees by the U.S. and California Constitutions, and by a variety of federal and state statutes.

Portable, readable, and affordable, the Guide covers both personal rights (discrimination, wrongful termination, family and medical leave) and those that arise in the context of union representation (right to union representation and duty of fair representation).

Pocket Guide to Workplace Rights of Public Employees

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to reduced dependent coverage for new employees during the first two years of employment. In this round of negotiations, the union agreed that new employees' pensions will be based on the average of the highest three years of salary, but only for unit members who are not in sworn peace officer classifications.

As *CPER* went to press, all of the tentative agreements had been approved by the legislature and signed by the governor. The only MOUs that had not yet been ratified by union members were those of CDF Firefighters and CAUSE. ♦

most bargaining units, the state contributes 80 percent of the average premium for both the employee and dependents. DPA also has not decided whether to institute the phased-in dependent coverage for new employees that it gained in negotiations with most of the unions. Under those agreements, newly hired employees are entitled to only 50 percent of the normal state contribution for dependents during their first year of employment, and 75 percent of the normal contribution during their second year.

Excluded Employees Given 3.5 Percent Increase and Lump Sum

As usual, the Department of Personnel Administration held off on announcing the 2006-07 pay package for managers and supervisors until negotiations with the bargaining units were completed. A week after the California Association of Psychiatric Technicians tentatively agreed to a new pact, DPA announced that excluded employees would receive a 3.5 percent raise effective July 1, 2006, and a lump sum of \$1,000. The compensation package will not apply to excluded employees who received increases tied to the compensation negotiated by rank-and-file employees they supervise in bargaining units 2 (attorneys and administrative law judges), 5 (highway patrol officers), 6 (correctional officers), and 9 (professional engineers and architects).

The pay package is similar to the general increase and lump sum negotiated by SEIU Local 1000 and several other unions this summer. DPA agreed to boost by another 5 percent the sala-

ries of excluded employees in classifications in which the rank-and-file received 5 percent market-based equity increases. The state agreed to the improved salaries for classifications such as information technology workers, equipment operators, and many health-related jobs in which it has had the greatest trouble with recruitment and retention of employees. (See story in *CPER* No. 179, pp. 56-59.) Like new employees hired into other state jobs, employees hired directly into excluded positions, but not those promoted from the rank-and-file, will be subject to pension benefit calculations based on their highest three-year average salary, rather than the highest-year figure used to calculate benefits for current employees.

DPA did not, however, reduce the state's contributions to the health premiums of excluded employees. The state pays 85 percent of the premium for the employee and 80 percent of the premiums for dependent coverage. In

To ensure supervisors are paid higher than those they supervise, DPA will raise salaries of about 80 excluded employees to an amount that is 5 percent higher than the rank-and-file salary scale. A 5 percent differential is too small, according to the Association of California State Supervisors, which requested the state return to the 10 percent differential that it maintained years ago.

The 3.5 percent increase is the first boost that excluded employees have received since a 5 percent increase in July 2004. Their previous raise was 4 percent in August 2000. By contrast, state elected leaders, whose salaries have not risen in six years, will receive an 18 percent pay increase in December. And in the last days of August, the legislature passed a bill that would allow DPA to more than double the salaries of department heads — from \$123,255 to \$258,125 — and raise the cap on cabinet secretaries' salaries from \$131,412 to \$258,125. While ACSS would like to have garnered higher pay now for

supervisors and managers, Senior Labor Relations Specialist Bonnie Morris told *CPER*, “The reality is that depart-

ment heads’ salaries have to be raised so that managers and supervisors can receive higher pay.” ❁

Board Cannot Designate Second Exempt Position

The California Attorney General advised the Prison Industry Board that it could not establish an executive officer position exempt from the civil service system because it already has another exempt employee. The 11-member board wanted to create an executive officer position to provide administrative support to the board, develop issues and set agendas, provide analysis and consultation to the board, represent the board in meetings, and assist the general manager of the Prison Industry Authority.

The Attorney General recognized that the proposed position would be beneficial to the board, but emphasized that “California’s civil service encompasses every state employee and officer except those who are the subject of an exemption specified in the Constitution.” Members of boards are exempt,

as well as “[a] deputy or employee selected by each board or commission either appointed by the Governor or authorized by statute.”

The Prison Industry Board is authorized by statute and is, therefore, entitled to an exempt deputy, the Attorney General acknowledged. But, as provided in Penal Code Sec. 2808, the general manager of the Prison Industry Authority serves at the pleasure of the board and is exempt from the civil service system. Since the board already has one exempt employee, it has no authority to create a second exempt position. The Attorney General concluded that the board could not establish an exempt executive officer position. (Opinion by A.G. Bill Lockyer, Ops.Cal.Atty.Gen. No. 05-1014 [8-23-06] 2006 DJDAR 11356.) ❁

led into signing a petition for severance by representations that Local 1000 would continue to represent the employees, the union argued PERB should offset the proof of support by over 360 revocation cards. (See story in *CPER* No. 179, pp. 65-66.)

The board agent recognized that there may have been some confusion because the petitioner had to change plans when SEIU Local 1000 rejected the initial request to represent IT workers in a separate unit. But the board agent found “no evidence...that IT Bargaining Unit 22 engaged in delib-

There may have been some confusion.

erate deception or fraud in its efforts to garner proof of support.” In addition, there was no reference to Local 1000 in the support materials. The proof of support was therefore found sufficient to meet the requirements of PERB regulations.

What to do with the revocation cards? Earlier this year, in *Antelope Valley Health Care Dist.* (2006) PERB No. 1816-M, 177 *CPER* 26, PERB decided that revocation cards should be counted in a case decided under the Meyers-Miliias-Brown Act. In *Antelope Valley*, the hospital district had set a procedure for submitting revocation cards, but there are no PERB regulations governing revocation of support.

PERB Counts Revocation Cards

Information Technology Bargaining Unit 22 presented sufficient proof of support to sever 7,724 information technology workers from state bargaining unit 1 — until the Public Employ-

ment Relations Board counted revocation cards submitted by Service Employees International Union, Local 1000, which represents the unit. Claiming that some employees had been mis-

The board agent noted that the purpose of requiring proof of support is to determine whether there is sufficient employee interest in an election to justify the agency's time and the use of resources necessary to conduct an election. He surveyed the practices of the National Labor Relations Board and other states. The NLRB does not have a policy on proof of support, and most other states do not provide for consideration of revocation cards. They assume that a change of support will be reflected once an election is held. However, the Washington Public Employment Relations Commission honors revocation letters, only if submitted by individuals directly to the WPERC, in

cases where a petitioner is seeking recognition based on card check rather than an election.

The Dills Act does not authorize card check recognition of an exclusive representative, and employees who change their minds after signing a support petition have a second chance to indicate their choice of representative. Nevertheless, the board agent determined that, under *Antelope Valley*, the revocation cards should be counted against the support signatures. The result was insufficient proof of majority support for a representation election. The organizer of IT Bargaining Unit 22, Lyle Hintz, told *CPER* he intends to appeal the decision to the board. ♣

ferred from prison, where smoking is prohibited, to the hospital. In the end, however, the bill only requires the director to consider tobacco use in planning strategies to improve safety and health at the prison. Other provisions require strategies to reduce patient violence, improve the use of staff, increase local recruitment, and improve staff retention. The bill requires the director to meet with many stakeholders, including numerous employee unions, while developing the strategic plan. It will sunset in 2010.

A.B. 1708

An irate Assemblyman, Chuck DeVore (R-Irvine), introduced A.B. 1708 when he discovered that some beachside cottages in Orange County were being rented to state park employees for \$148 a month. The Department of Personnel Administration, which is required to set fair market rents for state-owned housing, estimated that in 2004, only 265 of 1,100 occupants of such housing were paying fair market prices. Apparently, DPA had delegated its responsibilities to department heads, who were short of staff and other resources. The bill requires DPA to establish rules on evaluating fair market rent. It shifts to state department heads the responsibility for complying with the rules that require charging employees the fair market rate for state-owned housing they occupy. The Association of Park Rangers was the only organization opposed to the bill. It argued that there is less vandalism,

Legislation Affects Atascadero Employees, Firefighters, Retirees, Park Rangers, and Computer Users

The legislature sent Governor Schwarzenegger bills that would expand benefits for state retirees, base firefighter pay on market rates, and prohibit the use of state computers to view obscene material. At press time, the governor had signed legislation to enhance employee safety at Atascadero State Hospital and a bill to tighten enforcement of laws regulating state-owned housing for state employees.

A.B. 1880

The governor signed legislation requiring the executive director of

Atascadero State Hospital to develop a plan to reduce violent behavior by patients, address tobacco use in the hospital, and increase employee recruitment and retention. A.B. 1880 (Blakeslee, R-San Luis Obispo) was introduced to improve safety and increase staffing at the Atascadero hospital, a maximum-security psychiatric facility. The author, at one point, amended the bill to ban smoking at the hospital, not only because bartering cigarettes among patients led to fights, but also because of fears that prison inmates would feign mental illness to be trans-

poaching, and theft at parks where rangers live.

Pending Signature

At the time *CPER* went to press, several bills remained on the governor's desk. One bill that would govern all state employees, including legislative and California State University em-

Beachside cottages were being rented to state park employees for \$148 a month.

ployees, is A.B. 546 (Garcia, R-Cathedral City). The bill would add to existing law prohibiting personal use of state computers by making it clear that it is unlawful to use a state-owned or state-leased computer to view or download obscene matter. The bill contains exceptions for legitimate use, such as conducting an administrative disciplinary investigation. It would apply to the University of California if the regents adopt it by resolution.

State retirees would gain by the signing of two bills. The Department of Personnel Administration sponsored A.B. 2242 (Torrico, D-Fremont), which would require DPA to set up a retiree vision-care program that would enable state retirees to purchase those benefits at a group rate. Several bills in past leg-

islative sessions have tried to obtain state-paid benefits for retirees, but this legislation would require retirees to pay. There is no opposition to the bill, although the California State Employees Association would have liked to gain a state contribution to the benefits.

S.B. 1168 (Chesbro, D-Arcata) would extend the Rural Health Care Equity Program from its current sunset date of January 1, 2008, to January 1, 2012. Under the current program, the state provides a \$500 subsidy to state retirees who are not Medicare recipients and a \$75 monthly subsidy for those who pay Medicare Part B premiums. Significantly, however, the bill changes the subsidy from a continuing appropriation to one that is dependent on annual legislative approval. The amount of the subsidy for rank-and-file employees is determined through collective bargaining.

State firefighters again are pushing for pay parity by legislation. A.B. 2683 (Negrete McLeod, D-Chino) would require the state to pay rank-and-file employees the "estimated average total compensation" of employees at the same rank in agencies employing at least 75 full-time firefighters in California. The calculation would be based on an annual joint survey of projected compensation on July 1, using the same methodology that the state and California Association of Highway Patrolmen use to implement a similar statute for sworn CHP officers. The bill provides that pay increases would be implemented through the collective bargain-

ing process, and the parties may agree not to implement the statute. However, if the parties are at impasse, the state would be required to comply with the parity statute. *

Higher Education

Chronicle v. U.C.: Limited Win for Newspaper, But Controversy Forces Reforms

Eric Borgerson, CPER Associate Editor

The S.F. Chronicle successfully obtained a declaratory ruling that the U.C. regents violated state open meeting laws by “taking action” in closed committees on compensation proposals for top-level executives and officers. The court ordered that future action take place in open session but found “consideration” of compensation in closed session permissible. It neither ordered past records disclosed nor future meetings tape recorded. Nevertheless, a confluence of official criticism has sparked wide-ranging internal reforms and may result in legislative action.

For nearly a year, the *San Francisco Chronicle* has tenaciously investigated allegations that the University of California secretly gave a small class of top-level executives excessive compensation packages in violation of U.C. regents’ policies, open meeting laws, public fiduciary duties, and sound business practices. The latest chapter in this ongoing saga was staged in court, with the newspaper contending that the Board of Regents, through its committees, unlawfully discussed and made decisions about executive compensation in closed session, and improperly refused to disclose records of illegal meetings when requested by the *Chronicle*.

In partial agreement with the newspaper, Alameda County Superior Court Judge Winifred Smith ruled that the regents violated open meeting laws by taking “action” on compensation for top university officials in closed meetings. However, reports in the *Chronicle* proclaiming a resounding victory in its lawsuit against the regents appear overstated.

Although the court found the university unlawfully took action in closed session, it said the Board of Regents was not motivated by an unlawful intent. Rather, the board was acting in furtherance of its interpretation of the Education Code in an area not yet fleshed out by the courts. Moreover, the court declined to order disclosure of the improperly closed meeting records. It also avoided exercising its authority to require that future meetings on top-executive pay be tape recorded and, instead, only ordered the regents to ensure that future action on compensation take place in open session. The university prevailed on its argument that “consideration and discussion” of executive pay may be held in closed session.

Thus, the *Chronicle’s* limited victory was declaratory in nature with little tangible remedy and no successful collection of the information sought through the legal action. That result may convey more about the adequacy of existing open meeting statutes and their enforcement than it does about the regents’ alleged concealment of improper expenditures on top-executive compensation.

The court's ruling was partially at odds with a recent Legislative Counsel opinion that strongly supported the *Chronicle's* arguments. In addition, disposition of the legal dispute took place amidst a larger landscape of official audits and task-force reports sharply critical of the regents' handling of executive compensation and calling for swift and potent reforms.

Due to the judiciary's limited enforcement of existing open meeting laws, the final battlefield over whether and to what extent the public will be privy to the regents' management of executive pay likely will take place in the legislature, not the courts.

Background

In a series of investigative exposés, the *Chronicle* reported that U.C. paid 35 top-level executives unusually large compensation packages and failed to fully disclose them to the public. Those expenditures allegedly included millions of dollars in bonuses, moving expenses, housing improvement stipends, severance packages, and other perks during a period when U.C. raised student fees due to budget cuts.

In December 2005, the regents pledged to improve management of compensation policies and practices by creating a committee to provide ongoing oversight. It also launched an outside audit of senior-manager compensation and departure agreements and developed a task force composed of distinguished business, education, government, and media representatives to review U.C. compensation policies and practices, including disclosures, and make recommendations to the regents.

The Task Force on U.C. Compensation, Accountability and Transparency, appointed by Regents Chairperson Gerald Parsky, issued its report and recommendations in April 2006. In very strong language, the document concluded that the U.C. administration had failed to ensure that the university is managed "effectively and responsibly." The report stated that "trust and confidence in the administrative leadership

of the University have declined precipitously over the last six months as unsettling and troubling information became known about a number of compensation-related activities and practices."

As problems, the task force cited the failure to timely release compensation information to the public; inappropriate compensation, benefits, and perks for some executives; "inadequate attention to University compensation policies by leaders of the system and its campuses"; failure to administer compensation policies in accordance with "fundamental, common sense business and management practices"; and failure to report compensation-related information to the regents and to comply with the regents' policies.

Those problems are "all the more troubling" in light of U.C.'s history regarding compensation practices, admonished the task force. In the early 1990s, U.C. was engulfed in public controversy over compensation practices, and new policies were put in place to prevent such problems. "At least some of the current problems would not have occurred if those policy reforms had been followed and enforced by the senior administrative leadership of the University system," said the report.

Although the task-force report was preliminary, "it is already clear that the current situation is wholly unacceptable." The report further asserted:

The Task Force believes that the leadership of the University – both its senior executives and the Regents – must accept full responsibility for the problems that occurred and take whatever actions are necessary to ensure full accountability both retrospectively and in the future. To be effective – and accepted by the public whose trust and support are essential – accountability must include consequences, and the consequences must be consequential.

The court's ruling is partially at odds with a recent Legislative Counsel opinion that strongly supported the Chronicle's arguments.

An outside audit by PricewaterhouseCoopers found that some elements of the compensation packages were not properly disclosed to the public and not approved by the regents, in contravention of the regents' policies. And, a report by the California Bureau of State Audits found that U.C. frequently made exceptions to its policies when granting extra pay or benefits to top executives and violated its own policies by failing to disclose such compensation. The state audit also concluded that "some campuses circumvented and in some cases violated university policies, resulting in an overpayment to a university employee and inappropriate increases to other employees' retirement-covered compensation." Further, the audit determined that some campuses included "inappropriate forms of compensation, such as housing and auto allowances," in retirement packages.

Notwithstanding U.C.'s pledge to improve oversight, the *Chronicle* reported that upper-level executive compensation continued to be discussed, formulated, and approved in secret, with the full board merely "rubber stamping" decisions reached in closed session.

The *Chronicle's* examination of published agendas for meetings of the Board of Regents and its committees suggested the extraordinary expenditures were unlawfully formulated and approved in meetings closed to the public. In pursuit of evidence regarding that theory, the *Chronicle* sought copies of records from various regents committee meetings. U.C. refused to honor the requests, and the conflict escalated into a court action to compel disclosure before any additional meetings took place.

Chronicle's First Two Records Requests

On March 13, 2006, *Chronicle* journalist Todd Wallack wrote to the communications director for the U.C. Office of the President, requesting minutes from meetings of the regents' Committee on Finance and the Special Committee

on Compensation in November 2005 and January 2006, respectively. The items Wallack sought related to compensation for top university officers. Wallack cited the California Public Records Act, the Bagley Keene Open Meeting Act, and Ed. Code Sec. 92032(b)(7) as authority for the proposition that the university was required to disclose records of the committee meetings because discussions of compensation must take place in open session.

The university rejected Wallack's request, asserting that the meetings were properly held in closed session because discussion of compensation and formulation of recommendations to the full board are not subject to open meeting requirements. When the board took "action" on those recommendations, it properly did so in open session, contended U.C. Thus, claimed the university, none of the minutes of the committee meetings were subject to mandatory disclosure.

Wallack submitted a second request on March 17, 2006, seeking minutes from 12 meetings of the regents' Committee on Finance over a four-year period stretching from November 2001 to November 2005. Agenda entries for those meetings identified various "action items," including recommendations regarding compensation for top U.C. officials and committee votes on whether to present those recommendations to the full board.

The university again rejected Wallack's request. In its letter, counsel for U.C. asserted that meetings of the regents are not *directly* subject to the Bagley-Keene Open Meeting Act because the Board of Regents is not a "state agency" within the meaning of that statute. Rather, contended the university, Ed. Code Sec. 92030 makes the regents subject to the Bagley-Keene Act "except as otherwise provided" by the Education Code. Thus, more specific Ed. Code provisions "trump" broader Bagley-Keene provisions, contended U.C.

One such narrower Ed. Code provision, set forth at Sec. 92032(b)(7), authorizes the regents to "consider and discuss" "compensation" of 20 specified university officials in closed

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session, said counsel for the university. U.C. also cited Bagley-Keene Sec. 11126.1 as exempting minutes of closed session meetings from disclosure under the California Public Records Act. The university further asserted that the committees do not “act” on agenda items beyond deciding to make recommendations to the full board, notwithstanding informal identification of subjects on the agendas as “action items.” Only the full board is authorized to “act” within the meaning of the open meeting provisions of the statutes, said U.C.

Legislative Counsel’s Opinion

On April 28, 2006, the Legislative Counsel rendered an opinion for Senator Abel Maldonado concerning the *Chronicle’s* records requests and the university’s responses. The 12-page opinion traced the history of U.C.’s legal status and the application of open meeting laws to the university. Under Article IX, Sec. 9, of the California Constitution, U.C. was established in the 1800s as a “public trust,” and the Board of Regents was granted broad administrative powers with only limited intervention by the legislature. The university enjoys “unique constitutional status as an independent entity separate from other state agencies” with “virtual autonomy in self-governance, including establishing personnel policy,” noted the opinion.

The regents first became subject to open meeting requirements when California voters approved Proposition 5 in 1970, which added subdivision (g) to Article IX, Sec. 9, of the Constitution, stating that meetings of the Board of Regents “shall be public, with exceptions and notice requirements as may be provided by statute.” During the 1969-70 legislative session, the legislature enacted statutory provisions to implement the new constitutional language and created Ed. Code Secs. 92020 et seq.

The Legislative Counsel emphasized that Sec. 92020 specifically defines “Regents of the University of California” to mean “the Board of Regents of the University of California

and its standing and special committees or subcommittees,” and Sec. 92030 states that “all meetings of the Regents of the University of California shall except as otherwise provided by this article be subject to” the Bagley-Keene Act. The statute then carves out numerous exceptions to the applicability of the Bagley-Keene open meeting requirements. Among them is Sec. 92032(b)(7), which permits closed sessions regarding “[m]atters concerning the appointments, employment, performance, compensation, or dismissal of university officers or employees, excluding individual regents other than the president of the university.”

However, Sec. 92032(b)(7) further states that “consideration of compensation for the principal officers of the regents and the officers of the university” as listed in another provision, “shall not include action by the regents on compensation proposals. Action by the regents on those proposals shall only be in open session.” And, “compensation for the principal officers of the regents and the officers of the university shall include salary, benefits, perquisites, severance payments, ...retirement

benefits, or any other form of compensation.” The officers covered by this language are identified as the president/chancellor; chancellors/campus presidents; vice presidents of agriculture, academic affairs, budget, health, business affairs, and human resources; treasurer; assistant treasurer; general counsel; and the regents’ secretary.

“Thus,” explained the Legislative Counsel, “although Section 92032 otherwise authorizes the regents to meet in closed session to consider personnel matters for its employees and officers, including compensation, this section requires that action on compensation proposals for the specified high-ranking officers shall be in open session.” And, given the definition of “Regents” in Sec. 92020, that open meeting requirement “applies to action by committees of the Board of Regents on compensation proposals for those specified officers,” said the Legislative Counsel’s analysis.

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of the Bagley-Keene
Open Meeting Act.*

Ed. Code Secs. 92020 et seq. do not specifically define the meaning of the term “action,” observed the Legislative Counsel. However, citing principles of statutory construction, the Legislative Counsel turned to the definition of “action” in the Bagley-Keene Act. Gov. Code Sec. 11122 states:

“[A]ction taken” means a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote by the members of a state body when sitting as a body or entity upon a motion, proposal, resolution, order or similar action.

Rejecting the university’s contention that only “final action” by the full board is subject to the open meeting requirements of Sec. 92032(b)(7), the Legislative Counsel said, “the Bagley-Keene Act broadly defines ‘action taken’ to include any collective decision made by members of a state body subject to the act, and does not limit the scope of that term to only the action of a body that takes final, binding action on a matter.”

“Furthermore,” asserted the Legislative Counsel, “it is our view that the Board of Regents’ position that their committees do not take final action on a matter is incorrect, given the potentially decisive decisionmaking authority of a committee in the decisionmaking process of the board.” The regents’ bylaws grant the Committee on Finance the authority whether or not to recommend compensation packages to the board regarding the top-level officials referenced in Sec. 92032(b)(7). “Thus, if the committee votes to not recommend approval of a particular compensation proposal, that action of the committee may, in fact, be the final action as to that proposal.” Accordingly, said the opinion, actions by the finance committee are properly characterized as actions of the Board of Regents.

The Legislative Counsel reviewed Senate committee reports contemporaneous to the enactment of Sec. 92032(b)(7) and determined that, while personnel matters

may generally be held in closed session, any action on compensation of high-ranking officials must be in open session. Moreover, Article I, Sec. 3, of the California Constitution, approved by voters through Proposition 59 in 2004, states that the public has a right of access to meetings of public bodies and that open meeting laws “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.”

Summarizing its broad conclusion regarding the relevant open meeting provision, the Legislative Counsel opined, “a court would construe [Sec. 92032(b)(7)] consistent with the definition of ‘Regents’ in Article 3, to require that a committee of the Board of Regents meet in open session to consider compensation proposals of the high-ranking university officers identified under that paragraph.”

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Chronicle’s Third Records Request

After issuance of the Legislative Counsel’s opinion, Wallack followed up with a third records request on May 8, 2006, seeking documents related to executive compensation proposals identified on agendas for consideration by the full Board of Regents at meetings set for May 17 and 18, 2006.

The university rejected the requests, stating that the proposals would be developed in closed committee meetings, some of which had not yet convened, that general committee reports would be made public in normal course, and that minutes of the meetings were not subject to open meeting requirements for the reasons outlined in U.C.’s earlier letters.

U.C. characterized the Legislative Counsel’s opinion as irrelevant to Wallack’s third records request because it “does not specifically address the issue of disclosure of records related to those items in advance of the closed session meeting.” U.C. also contended that the opinion “does not appear to take issue with the authority of the Regents committees to engage in consideration or discussion of those

compensation items in closed session, as expressly authorized under the Education Code.” Accordingly, contended U.C., the opinion did not affect the university’s analysis “regarding the disclosability of records like those you have requested, in advance of the permitted consideration of those items in closed session.” The only items requiring advance disclosure are notice of the meetings and brief agendas, said the university.

U.C. also asserted that the records were precluded from release by Public Records Act Sec. 6254(c), which permits withholding personnel and similar records “the disclosure of which would constitute an unwarranted invasion of personal privacy.”

Chronicle’s Court Action

The *Chronicle* challenged U.C.’s position in court by filing a Petition for Writ of Mandate to Compel Release of Public Records and a Request for Injunctive Relief. The *Chronicle* brought the petition “to shed light on the expenditure of public funds, following admissions by the regents that they did not comply with their own policies regarding executive pay, criticism by a bi-partisan chorus of state legislators and an outside auditor for lack of oversight, and a determination by the Legislative Counsel that the Regents’ secret meetings have violated the law.”

The *Chronicle* argued that Bagley-Keene authorizes an interested party to stop or prevent violations of the act and to determine its application to past or threatened future actions. The regents’ committees fell within the definition of “Regents” in Ed. Code Sec. 92020, contended the *Chronicle*, such that committee meetings regarding top-executive compensation must be held in open session. The *Chronicle* further asserted that U.C. improperly attempted to redefine “action” to mean “final action,” which allows the board to simply “rubber stamp” decisions improperly made in closed session. U.C.’s limited definition of “actions” would allow it to circumvent open meeting act requirements because, by

the time the full board acts, the proposal would be a *fait accompli*.

The regents’ refusal to produce the minutes of the committee meetings violated the Bagley-Keene Act, the California Public Records Act, the Ed. Code, and California Constitution Article I, Sec. 3(b), according to the petition, because the committees took action on compensation for top U.C. executives.

As remedies, the petition sought disclosure of the committee meeting minutes, an order requiring that future committee meetings regarding top-executive pay be tape

recorded, and a declaration that future meetings must be held openly in public. In the alternative, the petition requested that the court review the minutes “*in camera*,” or in chambers outside the courtroom, to determine if the regents’ actions violated the laws.

The *Chronicle* also sought a temporary restraining order enjoining the alleged legal violations at future meetings, specifically the scheduled May 17, 2006, meeting at which compensation for top executives was scheduled for discussion.

Regents’ Opposition

The regents argued in opposition to the petition that existing law does not require consideration of top-executive pay take place in open session. The proper venue for presentation of the *Chronicle*’s arguments is in the legislature, contended the regents. In support of this argument, it noted that a bill is currently pending in the legislature to amend the open meeting laws to require exactly what the *Chronicle* sought by way of judicial ruling in its petition. (See sidebar on the following page.)

Consistent with its responses to Wallack’s requests, the regents contended that Ed. Code Sec. 92020 makes the Bagley-Keene Act applicable to meetings of the regents except where provisions of the Education Code specify otherwise. And, argued the regents, Ed. Code Sec. 92032(b)(7) specifically exempts the *consideration* and *discussion* of compensation for top U.C. executives.

*The Chronicle
asserted that U.C.
improperly attempted
to redefine ‘action’
within the open
meeting laws to mean
‘final action.’*

Consideration and discussion of compensation before full board “action” are not required to be held in open session, argued U.C. In support, the university cited the legislative history of Sec. 92032(b)(7), including temporary deletion, then reincorporation, of the word “compensation” among the items that could be discussed or considered in closed session. Citing U.C. regents bylaws that limit committee authority, the university argued that non-binding committee votes recommending action to the full board do not constitute “actions” that must be executed in open session. Only the full board can take “action.” The procedure in Sec. 92032(b)(7) corroborated this point, argued U.C., because it only requires prior public notice and open session for “adoption of the proposal” by the full board.

The university also argued that disclosure of records is not a proper remedy for open meeting act violations. Rather,

courts have traditionally ordered a *limited* release of records from an improperly closed meeting only after finding prior violations; ordering the public entity to cease such violations and tape future meetings; the entity disobeys that order; and the court conducts *in camera* review of the records and determines that disclosure of the records would further resolution of the litigation.

Court’s Decision

The court began by reviewing Sec. 92032.5, which sets forth prerequisites to adopting salary proposals for high-ranking officials, including public notice requirements for meetings. The public must be provided notice that the regents intend to vote on a proposal concerning compensation and be allowed to view the proposal before commencement of

bill to require open meetings regarding u.c. exec pay

As the University of California Regents endured a firestorm of criticism in newspapers, official audits, and task-force reports regarding alleged unlawful closed-door sessions granting improper and excessive compensation packages to top-level university executives, Assembly Speaker Pro Tem Leland Yee (D-San Francisco/Daly City) introduced legislation designed to moot the issue by clarifying the applicable open meeting statute.

Assembly Bill 775, originally drafted to address an unrelated subject, was amended in May to tighten open meeting requirements applicable to the regents. A.B. 775 would amend Education Code Sec. 92032 to require that discussion of, and action on, executive compensation proposals concerning high-level U.C. officials take place in open session, regardless of whether they are conducted by the full Board of Regents or any of its committees and subcommittees. Officers whose compensation would be affected are the U.C. president; campus chancellors;

vice presidents of academic affairs, administration, agriculture, budget, business affairs, health, or human resources; treasurer and assistant treasurer; general counsel; and regents’ secretary.

The statute would be further amended to state that it is the intent of the legislature in enacting the bill “to clarify existing law” by conforming Sec. 92032 to the practices of the regents with respect to “discussion of compensation of university executives at meetings of the regents” as claimed to exist by the chairperson of the regents in testimony before the Senate Education Committee in February 2006. Moreover, the bill would specify that Sec. 92032, as amended, “sets forth the policies with respect to the discussion of compensation of executive officers of the university that have applied to, and governed, all regents meetings held since 1993.”

The retroactive statement of policy and its asserted conformance with official U.C. practice would seem to undercut the

university’s argument in the *Chronicle v. U.C. Regents* case, discussed in this section, that pendency of the bill demonstrates contrary existing law. However, the court did not address the bill when issuing its decision.

Regardless of whether the bill codifies existing practice or establishes new policy, it would effectively accomplish through legislation what the *Chronicle* unsuccessfully sought to achieve through litigation: discussion and consideration of compensation proposals for top executives would be required to take place in open session.

The bill was sponsored by the California Newspaper Publishers Association. Karl Olson, attorney for the *Chronicle*, told *CPER* he does not expect much to happen with the bill this year, but believes it might make headway next year. The measure is currently in the hands of the Senate Appropriations Committee. *

the open session at which the vote is taken. Approval of the proposal and the vote of the regents must occur in open session. The statute also says that nothing “shall preclude in open session the full discussion of the contents of the motion or the reasons why it should or should not be adopted.”

The court found that “Regents of the University of California” as defined in the Ed. Code includes standing or special committees or subcommittees. And, the court acknowledged the list of affected high-ranking officers identified above.

Focusing on Sec. 92032(b)(7), the court excerpted language stating that “*consideration* of compensation for the top University officers shall not include action by the regents on compensation proposals. *Action* by the regents on those proposals shall only be in open session.” The court acknowledged language in Sec. 92032.5(a)(1)(D) to the effect that a specific proposal must be made available to the public prior to commencement of an open session at which “adoption of the proposal is to be *considered*.” Nevertheless, the court found, “it is clear from other language in this statute as well as section 92032 that consideration of compensation proposals, either by the Board of Regents or its committees, may be in closed session.”

Section 92032.5(a)(1)(D) requires that the compensation proposal must be acted on by the regents as the final open session item, but Sec. 92032.5(a)(2) states that nothing shall preclude discussion of reasons for or against the proposal in open session. Read together, said the court, “the ‘full discussion,’ or consideration, of the compensation of the top University officers may be in closed session, but ‘action’ on the compensation proposals must be in open session.” Such a reading is consistent with Sec. 92032, observed the court, which allows “consideration” of compensation in closed session but requires “action” in open session.

The court found the legislative history of Sec. 92032 persuasive, specifically the temporary deletion but ultimate inclusion of the word “compensation” in the list of matters

that could be discussed in closed session. Other legislative history was in accord, found the court. The court distinguished contrary case law cited by the *Chronicle* interpreting the Brown Act provisions applicable to local governments because they involved different statutory language and circumstances.

Based on the foregoing, the court determined that “consideration” of compensation for the top U.C. officials may take place in closed session, but “action” on compensation proposals must take place in open session.

Given the definition of “regents” in Sec. 92020, committees can take action, said the court, rejecting U.C.’s argument that only the regents can take action within the meaning of the open meeting provisions. Finding no definition of “action” in Secs. 92020 et seq., the court relied on the definition in the Bagley-Keene Act, as discussed in the Legislative Counsel’s opinion. The court agreed with the university that U.C. is not a “state body” within the meaning of the Bagley-Keene Act. Nevertheless, reliance on the Bagley-Keene language was appropriate because it is made applicable to U.C. and incorporated via Ed. Code Sec. 92020, except as otherwise provided by

statute. Guided by Bagley-Keene, the court discerned that “action” means “a collective decision, a collective commitment or promise to make a positive or negative decision or an actual vote upon a motion, proposal, resolution, order or similar action.”

The correctness of that approach was corroborated by the regents’ own policies, found the court, which repeatedly distinguish between “discussion” and “action.” Moreover, any ambiguity must be liberally construed in favor of disclosure, said the court, citing California Constitution Article I, Sec. 3(b)(2).

Accordingly, the court ruled that *committees* may *discuss* compensation in session but can and must take *action* in open session. The *Chronicle* had argued that discussion of compensation must take place in open session, and U.C. had

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‘consideration’ of
compensation may be
in closed session, but
‘action’ must be in
open session.*

argued that committees are not authorized to take “action” within the meaning of the relevant statutes. Thus, the court’s analysis gave something to each party and rejected part of each party’s contentions.

Turning to the *Chronicle’s* quest for disclosure of the committees’ meeting minutes, the court ruled that the Public Records Act did not apply and neither the Education Code nor the Bagley-Keene Act provides for disclosure of records. The Ed. Code does not address remedies for violation of the open session requirements. Bagley-Keene Sec. 11126.1 expressly states that minutes of a closed session are not a “public record” subject to the Public Records Act and that they “shall be kept confidential.”

Section 11126.1 allows *in camera* review of meeting documents by a court if there is an alleged violation of the Bagley-Keene Act, but it does not authorize disclosure if the court finds a violation, said the present court. This clear statutory mandate evinces a legislative intent to allow limited disclosure to the courts for review when determining whether to grant declaratory or injunctive relief, reasoned the court.

Bagley-Keene Sec. 11130(a), which permits a court to award declaratory or injunctive relief, “does not allow for disclosure to the public upon initial violation of the Act,” said the court. Rather, if a court finds a violation, the statute allows the court to order that future meetings be tape recorded. And, public disclosure of the tape recordings of the future meetings may be ordered only if the court (1) finds there is good cause to believe another violation has occurred; (2) determines that *in camera* review of the tapes is warranted; and, (3) concludes that disclosure of “some of the tape recordings would be likely to materially assist in the resolution of the litigation.” The Brown Act has been similarly interpreted, said the court.

The court rejected the *Chronicle’s* argument that previous litigation against the university by the Coalition of University Employees, in which disclosure of records was ordered, should be given “collateral estoppel” effect in the current

litigation, precluding U.C.’s arguments against disclosure. The earlier litigation involved different parties and different circumstances, said the court, so it was not entitled to preclusive effect in the *Chronicle’s* litigation.

Accordingly, the court found that the *Chronicle* was not entitled to disclosure of the committees’ meeting minutes “even if a portion of those meetings were improperly closed under the Court’s construction of Education Code section 92032.” Further, because the records were not subject to disclosure under the Public Records Act, the court found “there is no need for *in camera* review under this Act.”

Ruling in favor of the *Chronicle* on its substantive claim, the court stated, “[The university] concedes that the committees have voted on recommendations concerning compensation of top University officers in closed session. Because the committees have taken ‘action’ in closed session, [the university] has violated Education Code section 92032.” However, given that admission and its dispositive implications, the court found it unnecessary to conduct *in camera* review of the records under Bagley-Keene Sec. 11126.1 to determine if the open meeting requirements had been violated

The court issued its declaratory and injunctive ruling in favor of the *Chronicle* as follows:

Under Government Code section 11130, Petitioner is entitled to declaratory and injunctive relief prohibiting the Committee on Finance, the Special Committee on Compensation, and any other committee at which compensation of the top University officers is discussed, from meeting in closed session when they take “action” — defined as “a collective decision, a collective commitment or promise to make a positive or negative decision, or an actual vote upon a motion, proposal, resolution, order or similar action” — on compensation proposals.

*Bagley-Keene
does not allow for
disclosure to the public
upon initial violation
of the act, said
the court.*

Finally, the court declined to exercise its discretion under Bagley-Keene Sec. 11130 to order U.C. to tape record future committee meetings. The university “did not hold meetings in closed session in bad faith, knowing that they should have been in open session. Rather, they held them in closed session based on their construction of the Education Code,” explained the court. (*San Francisco Chronicle v. Regents of the University of California* [8-1-06] Ala.Co.Sup. Ct. RG06 269541.)

Reactions

The *Chronicle's* coverage of the court's ruling characterized it as a victory, focusing on the court's determination that U.C. violated open meeting laws by taking action on top-executive compensation in closed session and its order that future such meetings take place openly.

However, it is significant that the court did not order disclosure of the records, did not conduct *in camera* review of them, and did not order that future meetings be tape recorded in anticipation of a future need for *in camera* review should additional violations be alleged.

Christopher Patti, of the U.C. Office of the General Counsel, told *CPER* that the university is “pleased with the ruling because it preserves the authority of the regents to conduct discussions regarding sensitive personnel matters in private.” The court's ruling “only requires that votes on compensation for a handful of university officers be held in open session,” he said. “We prevailed on the issues that really mattered and won about 90 percent of the case,” commented Patti. “We are pleased that formal discussions regarding the performance and compensation of top-level university officers and executives can continue to take place in closed session.”

Although the court granted an extension of time for the parties to challenge the ruling, Patti said he did not anticipate an appeal from either party.

Chronicle attorney Ken Olson told *CPER* he was pleased with the court's finding that the university violated the open

meeting laws by taking action on compensation packages for top-level executives and officers in closed session. The *Chronicle* also was specifically satisfied with the court's determination that committees can take action within the meaning of the statutes and must do so openly. “We were disappointed with some aspects of the decision,” Olson acknowledged. The *Chronicle* was displeased that the court declined to order disclosure of the committee meeting minutes or even conduct an *in camera* review of the meeting documents.

In addition, Olson noted that he was involved in earlier litigation in which CUE obtained a court order requiring the university to release minutes of improperly closed meetings. “After that case, the regents stopped taping meetings,” he said. “I don't think it's any coincidence.” Olson also said “the regents have a habit of being resistant to open meeting laws and public records requirements. The court could have taken that history into consideration, but opted not to.”

Nevertheless, Olson said the *Chronicle* will not appeal the decision. “I have great respect for Judge Smith. She worked very hard to grapple with the legal issues, and I think she called them the way she saw them.”

So, as things stand now, it is up to the regents to self-police and ensure their compliance with the injunction when meetings take place regarding action on top-level executive compensation. As *CPER* went to press, Regents Chairperson Parsky publicly announced a renewed commitment by the regents to fulfill their obligation to the public to keep actions “open and accessible.” Meanwhile, in the wake of the audits casting doubt on the legitimacy of many compensation packages implemented without proper review and approval by the regents, the Board of Regents unanimously voted to approve retroactively six million dollars in pay and perks for 140 university employees. Further review of the challenged committee and campus administrators' actions is expected in the next few months. *

The court found the university held closed meetings based on their construction of the Ed. Code.

u.c. launches new compensation reforms

Facing a mounting gauntlet of adverse official reports regarding secret payment of controversial compensation packages to high-level officials, University of California President Robert C. Dynes announced a new set of reform initiatives designed to restore wavering trust in the U.C. top administration.

Dynes said the reforms “signal the university’s commitment to public accountability and to correcting the administrative deficiencies noted by the reviews.” Dynes stressed that the reports did not identify any excessive compensation levels, but, rather, “pointed to a variety of operational shortcomings in the way senior management compensation, benefits and related matters are approved, monitored and reported.”

The wide ranging reforms include promulgation of a new policy regarding approval of exceptions to general compensation policies. Exceptions must now be documented, reasons for them must be specified, and they are to be regularly reported to a newly established “vice president/chief compliance and audit officer.” That individual will review the exceptions, and report to the president and the regents any that do not meet “appropriate standards.”

The reforms also include a new presidential policy for public disclosure of compensation, which will require, to the extent it does not constitute an “unwarranted invasion of personal privacy,” the release of a long list of details regarding employee compensation.

That list includes specific employee identification information, as well as a detailed breakdown of salary; stipends; bonuses; incentive compensation; individual payment agreements; standard, senior, supplemental, or extraordinary benefits; automobile allowances; various kinds of insurance; home loans; housing; relocation allowances; moving expenses; exceptional educational expenses; post-retirement employment agreements; consultation or independent contractor agreements; severance or settlement agreements; sabbatical or administrative leave; administrative fund allocation; corporate board service; and, employment of family and other personally related individuals as part of an employment agreement.

The reforms will include a new annual electronic report of compensation for *all* U.C. employees, including name, date of hire or separation, position title and organizational unit assignment, base salary, and status of appointment. The report will also include a section devoted to *total* executive compensation. Quarterly reports will identify recent hires, separations, and raises of executives and staff whose earning level requires approval by the regents.

Compensation actions by the regents at regularly scheduled meetings will be posted immediately, and actions taken between regular meetings will be posted within one week. Press releases regarding all regent-approved appointments now will include total compensation, including base salary and a list of other approved

elements of compensation. For appointments not approved by the regents, press releases will include base salary with an offer to make other compensation information available on request.

The compensation reforms also include a competitive bidding process. An external consultant will “assist in the development of a comprehensive policy framework and the development of new and revised policies and procedures in compensation, benefits, and related areas.” Those new policies will include guidelines regarding outside professional activities by executives, containing limitations on outside activity, consolidation and clarification of existing policies, and strengthening of pre-approval and reporting requirements. Also on the drafting table are clarifications regarding sabbatical leave and prohibitions against payment of cash in lieu of administrative leave.

Dynes also announced the planned development of new benchmarks for measuring whether U.C. is competitively compensating employees. Further reforms include improved oversight, clarified policies, and improved training regarding travel and entertainment expenditures; development of an improved human resources information system to track, manage, and report compensation data; and a new definition of “total compensation” for uniform systemic use.

A clearer statement of consequences for violation of compensation policies also is needed, said Dynes. He recommends the

following language for addition to the 1993 Principles for Review of Executive Compensation:

Any serious violation of these principles or any University policy relating to compensation may, depending on the facts and circumstances, result in adverse employment action, including without limitation, censure, counseling, suspension, loss of pay and/or dismissal from the employ of the University. The Vice President — Chief Compliance and Audit Officer shall provide an annual summary to the Board with respect to findings of serious wrongdoing, including the status of personnel actions proposed or taken.

The announced reforms include proposed changes to the regents' bylaws to clarify and simplify authority and responsibility among the regents and the president to make compensation decisions.

Lastly, Dynes recommended that the regents retain direct authority to approve compensation for the president, all vice presidents, the university auditor, principal officers of the regents, chancellors and vice chancellors, directors and deputy directors of the Lawrence Berkeley National Laboratory, medical center chief executive officers, and professional school deans. *

Psychiatric Injuries Cannot Be Parsed for Compensability

The First District Court of Appeal has overturned a police dispatcher's workers' compensation claim for psychiatric injuries resulting in "cumulative trauma" that were incurred during her employment by the Sonoma State University. Although the dispatcher suffered from an "adjustment disorder" that was entirely work-induced, her overall psychiatric disability, which included other diagnosed problems, was only 35 percent attributable to her employment.

Overturing the Workers' Compensation Appeals Board, the court ruled that individual psychological diagnoses cannot be parsed up for purposes of assessing whether the workplace was the predominate cause of a mental disability. The cluster of problems must be assessed as a whole to determine whether the disability is attributable to work-related injuries.

Mental Injury Claim

Lesley Hunton started working as a police dispatcher for Sonoma State in 1986. In 2000, she filed a workers' compensation claim alleging that she had suffered injury to her psyche resulting from cumulative trauma arising out of, and in the course of, her employment. An Agreed Medical Examiner (AME) evaluated Hunton. The claimant informed the AME that her main work-related complaint was the fre-

quent and unexpected sounding of false fire and burglar alarms at the workplace, which caused her to suffer stress and anxiety. However, there were other stressors in Hunton's life that contributed to her overall psychological condition.

The AME concluded that Hunton's psychological disability was 65 percent attributable to non-work-related factors and 35 percent attributable to factors related to her job at the university. He also stated that Hunton would have suffered a psychological disability even if she had never worked for the university.

A workers' compensation judge found that Hunton had met her burden of establishing that her psychological injury was predominately caused by actual employment-related events. The Workers' Compensation Appeals Board upheld that determination on the grounds that, although only 35 percent of Hunton's overall psychiatric disability was attributable to her work, her diagnosed adjustment disorder was 100 percent industrially caused.

Court of Appeal Reversal

Labor Code Sec. 3208.3(b)(1) provides that an employee seeking compensation for a psychiatric injury must demonstrate "by a preponderance of the evidence that actual events of employment were predominant as to all causes

combined of the psychiatric injury." The courts have interpreted this to mean that the claimant must prove that more than 50 percent of the injury's causation is work-related.

Sonoma State and its workers' compensation insurer argued that Hunton failed to meet her burden of proof because only 35 percent of her overall psychiatric disability was industrially caused. The WCAB agreed with Hunton that she met her burden by establishing that one of her diagnosable disorders was 100 percent attributable to her work.

The Court of Appeal identified the

The dispositive legal issue centered on the statute's definition of 'psychiatric injury.'

dispositive legal issue as centering on the definition of "psychiatric injury" in the statute. There were no judicial decisions resolving this issue, so the court turned to the statute and principles of statutory construction.

The statute defined a "psychiatric injury" as "a mental disorder which causes disability or need for medical treatment...diagnosed pursuant to the terminology and diagnostic criteria of psychiatric diagnostic manuals generally approved and accepted nationally

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by practitioners in the field of psychiatric medicine.” That definition could accommodate either Hunton’s or Sonoma State’s arguments, observed the court.

For further assistance, the court turned to the legislative history of amendments to Sec. 3208.3 in 1993, and noted that the new language was enacted to remedy and prevent “suspected fraud and widespread abuses” in the workers’ compensation system, particularly “the

The Labor Code definition could accommodate either Hunton’s or Sonoma State’s arguments.

proliferation of workers’ compensation cases with claims for psychiatric injuries.” In an unusual step, the legislature went so far as to codify its purpose in adopting the statute, stating, “It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for psychiatric injury under this division.” Thus, any interpretation that would lead to more or broader claims should be suspect, noted the court.

Section 3208.3 originally allowed compensation for work-related psychiatric injuries that were 10 percent attributable to industrial factors. Inser-

tion of the requirement that a claimant prove the conditions of employment were “predominant as to all causes combined of the psychiatric injury” was intended to save money “by tightening the standard for stress claims in the system, the fastest growing type of claim in workers’ compensation,” said the court, citing earlier judicial rulings interpreting that section.

The court observed the First District earlier had overturned a WCAB policy of favoring psychiatric claims that arose out of a physical injury. The court in that case reversed because “such an interpretation could not be squared with the Legislature’s intent to take aim primarily at phony stress claims.” Similarly, allowing Hunton’s claim would undermine, rather than further, the legislature’s purpose in amending Sec. 3208.3, said the court.

“Allowing each diagnosable psychological disorder to be analyzed separately for compensability would create a lower rather than a higher threshold for obtaining compensation, would result in more rather than fewer stress claims, and would provide more rather than less potential for fraud,” said the court.

Moreover, noted the court, the WCAB’s approach would produce absurd results, causing the outcome of psychiatrically based workers’ comp claims to turn on whether psychiatric examiners chose to view a psychological disability in toto or in separate diagnosable parts. “This interpretation would award compensation to those applicants whose experts are prompted

to parse the psychological injuries into separate diagnoses even though the work-induced components are de-minimis, while precluding compensation for employees whose work was a substantial factor in causing their injuries but whose experts did not or could not make compartmentalized diagnoses.”

Satisfied that the legislature could not have intended such a result, the court held that “a claimant’s psychiatric injury satisfies the standard for com-

The WCAB’s approach would produce absurd results.

pensability set forth in section 3208.3 only if it is proven that events of employment were predominant as to all causes combined of the psychiatric disability taken as a whole.” (*Sonoma State University and Octagon Risk Services v. Workers’ Compensation Appeals Board and Hunton* [8-29-06] 142 Cal.App.4th 500.) *

Discrimination

McRae Court of Appeal Not Dissuaded by Supreme Court's Ruling in *Yanowitz*

Ordered to vacate and reconsider its decision in *McRae v. Department of Corrections* (2005) 127 Cal.App.4th 779, 172 CPER 79, in light of the California Supreme Court's decisions in *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 174 CPER 23, and *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, the First District Court of Appeal has modified its analysis, but not its conclusion. In both decisions, the appellate court held that McRae failed to prove retaliation under California's Fair Employment and Housing Act, though the reasons underlying the two decisions differed.

Factual Background

Dr. Margie McRae, a surgeon, worked for the California Department of Corrections at the California Medical Facility in Vacaville. In 1995, when she was not selected for a position at the state prison in Solano, McRae filed a complaint with the Department of Fair Employment and Housing, alleging that she was denied the job because of her race, African-American.

In 1997, McRae was issued a letter of instruction following a report that she had left her position in the emergency room unattended. McRae again filed a complaint with the DFEH al-

leging that the letter of instruction was issued in retaliation for having filed the first DFEH complaint.

McRae filed a second retaliation complaint with DFEH concerning an internal investigation into reports that she had refused to provide medical information that would have facilitated a patient's transfer to hospice and that she had incorrectly delayed the administration of antibiotics to another patient.

In 1998, while McRae was out on nonindustrial disability leave following a confrontation with two nurses, she was informed that when her disability leave expired, she should report to the Solano prison rather than CMF. She did not report to Solano as directed, and she filed another complaint with DFEH alleging that her transfer to Solano was retaliatory.

McRae resigned from her job and filed a lawsuit alleging discrimination and retaliation. After a trial, the jury returned a verdict against McRae for discrimination but awarded her \$75,000 on her claim of retaliation. Both sides appealed.

Court of Appeal Decision

In the first *McRae* decision, the appellate court said that, in order to prove retaliation under the FEHA, an em-

ployee must show the employer's retaliatory actions constituted an adverse employment action, meaning one causing "substantial and tangible harm, such as, but not limited to, a material change in the terms and conditions" of employment. The employer's actions must be shown to have had "a detrimental and substantial effect" on her employment. The court also held that an aggrieved employee can seek the assistance of the courts only for "final employment actions," not those subject to reversal or modification through an internal review process.

Because there was no evidence that either the letter of instruction or the transfer resulted in any loss of pay, status, or job responsibilities to McRae, or in any other materially adverse consequence, the court found no retaliation. The court also rejected McRae's contention that even if no single action of the department was an adverse employment action, taken together they established a pattern of conduct that would qualify as one. It found her complaints reflected "isolated incidents of unpleasantness," rather than the "kind of severe and pervasive harassment that permits recovery."

The Supreme Court granted McRae's petition for review and sent the case back to the appellate court to reconsider in light of its decisions in *Yanowitz* and *Schifando*.

In *Yanowitz*, decided after the first *McRae* decision, the court held that an "adverse employment action" for purposes of a retaliation claim under the

FEHA is not limited to ultimate employment actions such as termination or demotion, “but also the entire spectrum of employment actions that are likely to adversely affect an employee’s job performance or opportunity for advancement in his or her career.” The

The court again found no retaliation, but this time based on a different rationale.

high court also found no requirement in the FEHA “that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries.”

In its most recent *McRae* decision, the Court of Appeal again found no retaliation, but this time it based that determination on a different rationale:

[W]e conclude that the jury’s verdict is not supported by substantial evidence. Our conclusion is based in part on our finding that what Dr. McRae contended was a continuous course of conduct was in fact a series of events, each bearing little relationship to the others, and at least some of which clearly were not the result of unlawful retaliation. We also find that much of which Dr. McRae complains, whether considered piecemeal or as part of a continuous course of conduct, does not and cannot rise to the level of an actionable adverse action. Finally, we find that the De-

partment stated valid, nondiscriminatory reasons for its actions, and that Dr. McRae did not meet her burden of establishing that the Department’s asserted reasons were pretextual.

Specifically, the court found that McRae made no showing whatsoever that either the request for an investigation or the confrontation with the nurses was triggered by an intent to retaliate. It also found that the actions of which she complained could not be viewed as a process of progressive discipline because they involved different issues. There was also no reason to believe that the complained-of actions all were engineered by McRae’s supervisor as part of a plan to discredit or injure her. “The evidence is too thin and too speculative to support such a theory, particularly when it is considered that [her supervisor] is supposed to have engaged in such a complicated and uncertain course of conduct in order to punish Dr. McRae for complaining about discrimination at another institution,” said the court.

The court distinguished this case from *Yanowitz*, where “all of the allegedly wrongful acts were engaged in by the plaintiff’s immediate supervisor and his supervisor, and all were taken in response to a single protected act by the plaintiff.” “Here,” said the court, “the allegedly wrongful acts were taken by many different persons, for different reasons, some of which indisputably had nothing to do with Dr. McRae’s protected conduct.” And, noted the court, there was no showing that McRae

was forced to work in a hostile work environment, as was Yanowitz.

As it did in the first case, the court again found no adverse employment action. It held that the letter of instruction did not have any effect on the terms and conditions of McRae’s employment

The actions could not be viewed as a process of progressive discipline.

other than to require her to remain at her post. Although “a transfer can be an adverse employment action when it results in substantial and tangible harm,” McRae’s transfer did not result in any such harm. “The transfer of Dr. McRae from CMF to Solano Prison did not entail a demotion, reduction in pay or loss of benefits,” said the court. “It did not involve a change in status or a less distinguished title. There is no evidence that it involved any significant change in job responsibilities, or, except for on-call duty, in work hours or commute time.”

McRae’s personal beliefs that Solano had a reputation among physicians as one of the worst facilities in the system and that physicians were sent there before they were dismissed was not supported by the evidence, noted the court. Her complaints that at Solano she did not receive a lab coat, was not assigned a specific workplace, and did not receive an orientation

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Gloria Steinem

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within the two-and-one-half weeks that she worked there were insignificant, the court found. McRae's claim that when on call she was expected to arrive at the Solano facility within 30 minutes of being notified was not supported by the evidence. There also was insufficient evidence to support McRae's allegation that Solano was a more dangerous work setting than CMF. This claim was undercut by the fact that she actively

The transfer 'had every reasonable appearance of being a reasonable management decision.'

sought employment at Solano in 1995, said the court.

In addition, the employer proffered a compelling reason for transferring McRae from CMF to Solano, the court concluded. "Her relationship with other CMF employees had so deteriorated that she had sought a restraining order against two nurses, had taken nonindustrial leave, and had not returned to work until nearly a year later." The court determined that, under these circumstances, the transfer "had every reasonable appearance of being a reasonable management decision." The burden, therefore, shifted to McRae to

prove that the employer's proffered reason for the transfer was pretextual, which she did not do. She made no showing that the department ever had punished employees for filing FEHA complaints by transferring them nor could she show that it had no legitimate reason for her transfer, according to the court. Instead, she argued that the department should have taken some other action to alleviate her problems at CMF, such as disciplining or transferring the nurses or her supervisor. "That some other action also might have addressed the Department's concerns does not establish that the Department's stated reasons for the transfer were pretextual, particularly when the other action would have created its own set of problems or would have provided cause for complaint by other employees," reasoned the court.

The court concluded that there was no substantial evidence to support the jury verdict. "Giving full credence to Dr. McRae's testimony, all it proved was her belief that the defendants had retaliated against her and were lying about their motivation; however, to sustain a judgment in an employer retaliation case the plaintiff must produce substantial evidence from which the jury can find that the defendants' reasons for their actions are false or pretextual," said the court. "Dr. McRae's beliefs are not substantial evidence of the defendants' motivation."

In a footnote, the appellate court side-stepped the Supreme Court's order that it reconsider its decision in light of *Schifando*, stating:

[*Schifando*]...held that an employee is entitled to seek relief through the FEHA without first exhausting internal remedies available to the employee through the administrative process. While our earlier opinion did not specifically discuss the right to sue, it did suggest that as a general rule a disciplinary employment action will not ripen into an actionable adverse action while the employee retains the power to contest and correct it through internal grievance procedures. That discussion is not necessary to our decision, and we do not repeat it here.

Stephen Schear, one of the attorneys for McRae, told *CPER* that they are requesting a rehearing before the Court of Appeal. If that request is denied, they will file another petition for review with the Supreme Court. (*McRae v. Department of Corrections* [8-29-06] Nos. A098073, A100745, A104701, A0098330, A098910 [1st Dist.] 142 Cal.App.4th 377.) *

rules of statutory construction the words of a statute must be given their plain and commonsense meaning, "text is not to be interpreted in isolation." "Rather, we must look to the entire substance of the statute...in order to determine the scope and purpose of the provision." Using this test, the court concluded that the California legislature intended to incorporate into the two acts only those provisions of the

California's Unruh Act and Disabled Persons Act Do Not Include ADA Protections

The Ninth Circuit Court of Appeals has ruled that California's Unruh Civil Rights Act and Disabled Persons Act cannot be read to include the protections of the federal Americans With Disabilities Act.

In *Bass v. County of Butte*, three employees alleged that the county's failure to reasonably accommodate work-related injuries violated the Unruh Act and the DPA, on the theory that the two state laws incorporated Title I of the ADA. In support, they pointed to the following statement included in both laws by amendments enacted by the California legislature in 1992 and 1996: "A violation of the right of any individual under the Americans with Disabilities Act of 1990 shall also constitute a violation of this section." The employees argued that the plain mean-

ing of the amendments required a finding that the ADA had been incorporated in its entirety into the Unruh Act and the DPA.

The Court of Appeals was not persuaded. Both the Unruh Act and the DPA focus on access to public businesses for people with disabilities. They do not address access to employment and, noted the court, California courts have historically rejected attempts to expand the scope of the Unruh Act to include employment claims, citing *Alcorn v. Anbro Engineering* (1970) 2 Cal.3d 493, and *Rojo v. Kliger* (1990) 52 Cal.3d 65, 88 CPER 49. The employees' argued that the amendments, enacted after these cases were decided, expanded the subject matter of the two acts. The court responded by saying that, although it is true that under the

The legislature intended to incorporate only those provisions 'germane to the original scope of those two laws.'

ADA "germane to the original scope of those two laws." "The amendments merely incorporate any otherwise relevant ADA standards as a 'floor' under state law," said the court.

The court pointed to the context and purpose of the amendments as further support for its interpretation. It noted that the 1992 amendment adjusted a number of state laws in an attempt to create conformity between California's anti-discrimination provisions and the ADA, including California's Fair Employment and Housing Act. "If the legislature intended to transform the Unruh Act into

an all inclusive anti-discrimination law, then its simultaneous strengthening of the FEHA would have been unnecessary and anomalous,” reasoned the court. In addition, adoption of the employees’ interpretation of the amendments would create a significant disharmony between the Unruh Act and the DPA on the one hand, and the FEHA on the other, said the court. The FEHA provides an administrative scheme to process claims of employment and housing discrimination. It requires that a claimant exhaust the administrative remedies provided in the FEHA before filing a lawsuit. “Plaintiffs’ attempt to expand the subject matter scope of [the Unruh Act and the DPA] to incorporate Title I of the ADA would create an end run around the administrative procedures of FEHA solely for disability-discrimination claimants,” the court said.

The Ninth Circuit also noted that its decision is consistent with its own precedent, citing *Stoother v. So. California Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859, and *Sprewell v. Golden State Warriors* (9th Cir. 2001) 266 F.3d 979. Both cases applied the rule of *Rojo* holding that employment claims are excluded from the Unruh Act. (*Bass v. County of Butte* [9th Cir. 8-15-06] 458 F.3d 978.) ❁

General

California Supreme Court Confirms At-Will Contract

Settling a conflict in the Courts of Appeal, the California Supreme Court ruled that inclusion of the words “at will” in an employment contract, without more, means that the employee may be terminated without cause. The court in *Dore v. Arnold Worldwide, Inc.*, overruling the Second District Court of

Dore argued that an implied-in-fact contract provided he could not be discharged except for cause.

Appeal, found the employee could not establish the existence of either an express or an implied-in-fact agreement that his employment was terminable only for cause.

Brook Dore applied for a management supervisory position with Arnold Worldwide, Inc., in 1999. During the interview, he was told that AWI had landed a new account and needed someone to handle it on a long-term basis. He was told that the company was look-

ing for a “long-term fix, not a Band-Aid,” and that AWI personnel were treated “like family.” He also learned that the two people previously holding the position had been terminated for cause.

After being offered, and accepting, the position, Dore received a letter from the senior vice-president informing him that he would have a 90-day assessment period during which time he would work with his supervisor to set objectives against which he would be evaluated at the time of his annual review. The letter also stated, “Brook, please know that as with all of our company employees, your employment with [AWI] is at will. This simply means that [AWI] has the right to terminate your employment at any time just as you have the right to terminate your employment with [AWI] at any time.” Dore signed the letter as requested. He was terminated after two years, and filed a lawsuit alleging breach of contract and other related claims.

Dore argued that the representations made at the oral interview, the fact that prior employees had been fired for cause, and the language in the letter referring to an annual review led him to understand that there existed between

the company and himself an implied-in-fact contract which provided he could not be discharged except for cause.

He also argued, and the Court of Appeal agreed, that the letter was not clear and unambiguous with respect to cause for termination because, by defining the term “at will” to mean that the company had the right to terminate Dore “at any time,” the company impliedly relinquished the right to terminate him without cause.

The Supreme Court noted that “the Courts of Appeal are in conflict over whether a provision in an employ-

The court found the letter ‘plainly states that Dore’s employment with AWI was at will.’

ment contract providing for termination ‘at any time’ or upon specified notice is, without more, reasonably susceptible to an interpretation allowing for the existence of an implied-in-fact agreement that termination will occur only for cause.” The court put the conflict to rest by an express finding that “the language of the parties’ written agreement is unambiguous,” in that the letter “plainly states that Dore’s employment with AWI was at will.” “That

AWI's letter went on to define at-will employment as employment that may be terminated at any time did not introduce ambiguity rendering the letter susceptible of being interpreted as allowing for an implied agreement that Dore could be terminated only for cause," it explained.

The court pointed out that the language used in the letter was similar to Labor Code Sec. 2922, which says an "employment, having no specified term, may be terminated at the will of either party on notice to the other." The court reasoned that for the parties to specify in the letter that Dore's employment was at will "would make no sense if their true meaning was that his employment could be terminated only for cause."

Accordingly, the court reversed the Court of Appeal decision and dismissed the case. (*Dore v. Arnold Worldwide, Inc.* [8-3-06] 39 Cal.4th 384.) ❁

Public Sector Arbitration

Parties Alleging Constitutional Violations Must Exhaust Administrative Remedies Before Filing Suit

The Third District Court of Appeal has concluded that if a collective bargaining agreement provides for arbitration in the settlement of disputes, a party must exhaust these remedies before filing suit in court.

The contract between the state and SEIU Loc. 1000 required that the parties resolve disputes by following four steps culminating in binding arbitration. SEIU bypassed these steps and filed a civil action against the state, claiming that it violated the First Amendment when it prevented the union from communicating with its members. The trial court held that the union was required to arbitrate its claim before filing suit, and it therefore dismissed the case. The Court of Appeal affirmed this ruling.

The contract between SEIU and the state allowed the union to distribute certain materials, literature, and information at worksites, but stated that any literature posted or distributed could not be of a “partisan political nature.” The union attempted to distribute literature supporting Proposition 72 — an initiative that would require certain employers to buy health insurance for workers and their families — but was prohibited by the state from doing so. The union argued that

this prohibition was a prior restraint of communication with its members. It additionally argued that literature of a “partisan political nature” referred only to communications expressly endorsing or urging the defeat of candidates for partisan political office, and did not extend to support of propositions.

Because the charge alleged violation of First Amendment rights, the union argued that “the Constitution trump[ed] the contract,” and it could therefore bypass administrative remedies. Arbitration was too slow a process when constitutional rights were at issue, the union argued, thus, the exhaustion requirement must be excused to avoid “irreparable injury” to free speech.

The state argued in response that the dispute was contractual, not constitutional, and, pursuant to the parties’ contract, interpretation of the agreement must be arbitrated. Analogizing to both contractual cases and those involving exhaustion of administrative remedies, the court agreed with the state’s position.

Citing extensively to *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888, the court noted that as a matter of public policy,

contractual arbitration is a highly favored means of dispute resolution. Thus, a strong presumption in favor of arbitrability applies and all doubts must be resolved in favor of this process. A party to an agreement containing an express grievance and arbitration provision can bypass arbitration only if “the clause is not susceptible to an interpretation that covers the asserted dispute.” This is true, the court held, even when resort to the courts is ultimately inevitable. The court further stated that the exhaustion requirement rarely has been excused based on assertions of irreparable injury.

The court agreed that the dispute was contractual, not constitutional.

The court analogized the union’s claim to *Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, a case in which sign owners challenged in court the constitutionality of a city sign ordinance before seeking a variance. The sign owners argued that exhaustion of administrative remedies is not required when the challenge is to the constitutionality of a government action. The court dismissed this argument, reasoning that if the owners applied for a variance and were denied relief, they could

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Molly Ivans

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thereafter challenge the constitutionality of the ordinance.

Addressing the union's claim that "partisan political" refers only to specific candidates for partisan political office, the court stated that it was the responsibility of the arbitrator, not the courts, to define the term. If the arbitrator were to render a decision at odds with the union's constitutional rights, the court reasoned, the union could seek judicial review.

The court summarized its holding, explaining that public policy favors arbitration, that constitutional questions should be avoided where other grounds are available, and that the union had not presented "rare and egregious facts" that would compel the court to excuse its failure to exhaust negotiated remedies. (*SEIU, Loc. 1000 v. Dept. of Personnel Administration* [9-1-06] C049936 [3d Dist.] ___ Cal.App.4th ___, 2006 DJDAR 11992.) *

Judicial Review Barred Unless Provided for in Arbitration Agreement

In a case arising from a claim of wrongful termination, the Second District Court of Appeal reiterated that unless specifically provided for in the arbitration agreement, arbitrators' decisions are not reviewable for errors of fact or law.

Pursuant to their agreement, the parties to a wrongful termination action submitted their dispute to binding arbitration. The arbitrator ruled in favor of the former employee, Jeffrey Baize. The employer, The Eastridge Companies, moved to vacate the award, claiming that the parties' agreement required the arbitrator to apply only California law, and that the arbitrator had applied the law incorrectly. The trial court ruled that it lacked jurisdiction to review the decision and upheld the award. TEC appealed.

To begin its discussion, the court cited *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, in which the California Supreme Court held that arbitrators' decisions are not generally reviewable for errors of fact or law. In *Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, a Court of Appeal elaborated on *Moncharsh*, concluding that judicial review of an arbitrator's award is barred unless the arbitration agreement specifically provides for expanded judicial review. *Pacific Gas* was upheld in *Marsch v. Williams* (1994) 23 Cal.App.4th 238.

In this case, the court concluded that while the parties' arbitration agreement specified that the arbitrator was required to apply California law, it did not expressly expand the scope of judicial review. The court found no sug-

gestion in the record that the arbitrator purported to apply any law other than that of California, and TEC claimed only that the arbitrator did not apply California law correctly. The court held that it could not “endorse such an end

run around the clear limitations set out in *Moncharsh*. Therefore, the rule of *Moncharsh* applies, and the arbitrator’s decision is not reviewable.” (*Baize v. Eastridge Co.* [8-25-06] B188433 [2d Dist.], 2006 DJDAR 11430.) *

tended, was a case of unilateral manipulation of benefits in favor of the district and to the detriment of employees.

Section 12.5.5 of the parties’ bargaining agreement provides that the district may take accumulated sick leave only in amounts that, when added to temporary disability benefits, result in a payment of not more than 100 percent of daily wage. The district did not disagree with the reading of this section but did disagree with its application to the grievant’s case. The district noted that Sec. 12.5.5 is specific to accumulated sick leave and, according to a 2001 settlement agreement, half-day leave does not accumulate. The union

Workers’ Compensation Is for Workers, Not Employers

Workers’ compensation is supposed to be just that: compensation for workers, found arbitrator Paul Staudohar in a recent decision. Staudohar explained to Sacramento City Unified School District that using employee sick leave in half-day increments resulted in the district recouping more than the difference between leave funded by workers’ compensation and an employee’s full pay. This improperly reduced employee sick-leave time and bolstered the district’s own coffers.

Under the workers’ compensation scheme, an injured employee receives 100 percent of pay for the first 60 days on leave. After 60 days, the employee continues to receive a full wage; workers’ compensation covers two-thirds of the pay, and the rest is filled in from accrued employee leave. In the case at hand, SCUSD deviated from this scheme in a move that violated the parties’ bargaining agreement as well as the Education Code.

For each new school year, district employees are credited with a total of not less than 100 half-days and 12 regu-

lar days of sick leave. Regular sick leave can accumulate over the years and is exclusive of other types of paid leave. Half-day leave does not accumulate and can be used only after regular, full-pay leave has been exhausted.

The grievant, a fiscal services technician, was involved in an industrial accident for which she received sick leave credits in addition to workers’ compensation. After exhausting her accumulated regular-day sick leave, she used almost all of her half-day leave. During this time, the grievant received 100 percent of her salary, but the union argued the money with which she was paid was not issued in the appropriate manner. Instead, the union alleged, SCUSD deducted full half-day pay from the employee’s allowance and, since the employee cannot receive more than 100 percent of a day’s pay, deposited the surplus workers’ compensation monies into its own workers’ compensation fund. This resulted not only in a windfall for the employer, but it also exhausted more quickly the grievant’s 100-day leave. This, the union con-

countered by citing Sec. 12.5.7 of the bargaining agreement, which states that an employee may elect to use “other available leave” according to the provisions set forth in 12.5.5, meaning, using only as much of it as needed to reach 100 percent of pay when added to disability pay. Although half-day leave did not accumulate, it was “other available leave,” and thus, the union argued, the district’s practice of using sick leave credits and depositing workers’ compensation funds into its own account violated the bargaining agree-

*The district
improperly reduced
employee sick-leave
time.*

ment. The union further alleged that the district violated Ed. Code Sec. 45192 — which sets forth the same calculations for leave and workers' compensation pay as does Sec. 12.5.5 — when it provided itself with an illegal partial refund of workers' compensation benefits.

Staudohar rejected Sec. 12.5.5 alone as a viable basis for the union's argument, agreeing with the district's contention that half-day leave did not "accumulate," and therefore could not be fractionalized. However, Staudohar found Sec. 12.5.7 was applicable and dispositive in favor of the union. This section, he wrote, refers to a situation where sick leave benefits are exhausted and workers' compensation is still being received. When this occurs, an employee may use any "other available leave" with the same provisions for reductions in benefits as set forth in Sec. 12.5.5. Since the district did not abide by these provisions, Staudohar found it in violation of the parties' bargaining agreement. He also agreed with the union's argument that the district violated Ed. Code Sec. Code 45192 when it retained an illegal partial refund of employee pay.

This finding was assuredly a victory for the grievant, but the remedy may have been disappointing. Staudohar decided that the district was to make whole the grievant and other affected employees but not beyond 20 days prior to the filing of the grievance, as is provided for in the parties' bargaining agreement. (*Sacramento City*

Unified School Dist. and SEIU, Loc 790 [5-26-06] 14 pp. *Representatives:* Anne I. Yen, Esq. [Weinberg, Roger & Rosenfeld], for the union; Martin H. Kresse, Esq., and Eduard E. Erslovase, Esq. [Ruiz and Sparrow], for the district. *Arbitrator:* Paul D. Staudohar [CSMCS Case No. ARB-04-3125].) ❁

Arbitration Log

- Layoffs
- Salaries
- Merit Rules

Sonoma County Superintendent of Schools and SEIU, Loc. 707, AFL-CIO (2-17-05; 14 pp.). *Representatives:* Anne I. Yen, Esq. (Weinberg, Roger & Rosenfeld), for the union; Arthur A. Wick, Esq. (School and College Legal Services), for the county. *Arbitrator:* Jerilou Cossack (CSMCS No. ARB-04-2468).

Issue: Did the county violate either the collective bargaining agreement or merit rules when it laid off the grievant without attempting to place her in a vacant position?

Union's position: (1) The grievant had been a library/media technician with the county since 1993. The decision to eliminate her position was made on February 17, 2004. She was notified informally of the layoff on March 8, and formally on March 12, 2004.

(2) On March 9, the grievant requested to move into the lower-class legal receptionist position, which was vacant between February 17 and 26. The county responded by stating an offer of employment had been made prior to the grievant's request, and that the legal receptionist classification was a higher-level position than that occupied by the grievant.

(3) According to the agreement, the county has a duty to avoid layoff whenever possible and to make an ef-

fort to place employees identified for layoff in a vacant position for which the employee is qualified. The employee may request a voluntary demotion to a vacant position in a lower classification or a transfer to an equal vacant classification.

(4) The position of legal receptionist is not a higher classification than library/media technician. Classification levels are determined according to the salary schedule. In 2002, an additional \$852 a month was added to the salary schedule of the confidential unit. This increase, known as "PERS-up," served to fund employee retirement benefits and had no relationship to the market value of the work performed.

(5) Pay rates of classifications are determined based on market-value-related factors; therefore, the PERS-up increase should not change a demotion into a promotion.

(6) The PERS-up is similar to cash in lieu of benefits. The cash in lieu of benefits provision increases monetary compensation and is counted in the total gross compensation for calculating retirement allowances, but is not in-

cluded in the salary schedule. The PERS-up increase also should not be included in the salary schedule.

(7) It is immaterial that the union did not raise the subject of PERS-up when it was adopted. At the time, there was no SEIU member trying to transition into a position affected by the increase.

(8) The absence of specific authorization in the merit rules to disregard the PERS-up amount is not a bar to doing so.

County's position: (1) The union has not met its burden of proof and persuasion. The superintendent has the authority to set salary schedules. The union has presented no evidence that the PERS-up contribution to the salary schedule was illegal or illegitimate.

(2) The merit rules are clear. Whether a change in assignment constitutes a demotion or promotion depends solely on the maximum salary range. There is nothing in the merit rules or bargaining agreement that would permit or require ignoring a portion of a classification's salary.

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(3) Cash in lieu of benefits is applied on an individual basis to a select few of SEIU unit members. The PERS-up benefit applies to all classified employees. Therefore, the two are not substantially similar and the PERS-up benefit is properly included in the salary rate for the position.

(4) The union did not raise the issue of the PERS-up increase when it was implemented. The failure of the SEIU representative to foresee its impact on layoffs is not a reason to ignore the increase.

(5) The contract provides that the county will make an effort to place an employee identified for layoff in a vacant position, not that the county is required to do so.

(6) The legal receptionist position was not vacant when the grievant requested the transfer. On February 26, an offer of employment was made to an outside candidate.

Arbitrator's decision: The grievance is denied.

Arbitrator's reasoning: (1) The agreement obliges the county to "make an effort" to place employees identified for layoff in a vacant position. This effort is to be made within the parameters of the merit rules.

(2) The merit rules allow an employee slated for layoff to request a demotion or transfer to a vacant position. The merit rules define demotion as a change to a position in a class with a lower maximum salary rate.

(3) There is nothing in the agreement or merit rules that suggests a portion of salary may be ignored. Under the clear and unambiguous language of the

merit rules, the grievant was not eligible for the legal receptionist position.

(4) Cash in lieu of benefits is not applicable to every unit member, but the PERS-up money is. Therefore, the two are not substantially similar and the position of legal receptionist has a higher maximum salary rate than the position from which the grievant was laid off.

(Binding Grievance Arbitration)

- Dress Codes
- Contract Interpretation
- Uniform Policy

CDF Firefighters, Bargaining Unit 8, and State of California, Dept. of Forestry and Fire Protection (2-20-06; 29 pp.). *Representatives:* Ronald Yank, Esq. (Carroll, Burdick & McDonough), for the union; Christopher E. Thomas, Esq. (labor relations counsel), for the Department of Personnel Administration. *Arbitrator:* Katherine J. Thomson.

Issue: Did the department violate the parties' agreement concerning the T-shirt policy?

Union's position: (1) The parties' agreement states the time, place, and circumstances under which firefighters must wear uniforms. Firefighters may wear an approved T-shirt in exceptional circumstances. Company officers and chief officers have the responsibility to decide when and where the T-shirts may be worn in lieu of the dress or work uniforms.

(2) The T-shirt policy was discussed in 2004, when Governor Schwarzenegger threatened not to fund compensation increases called for in the

parties' MOU. The union consented to meet with the department to discuss monetary issues and, as a quid pro quo, proposed negotiating a T-shirt policy.

(3) The policy permits exceptions to the usual rule of professional appearance. The T-shirts may be worn at stations and base camps, regardless of temperature, when there is little likelihood of public contact, or when public contact will be incidental and will not impart a negative perception.

(4) T-shirts are also permitted to protect the comfort, health, and safety of the firefighters. The policy allows T-shirts when the comfort of the rank-and-file firefighter, not the chief, is an issue. Air-conditioning was not discussed at the bargaining table as a factor relevant to this determination. Moreover, the potential for public contact has no bearing on the exception for comfort, health, and safety.

(5) Although it is true that firefighters are trained to handle heat exposure, they bargained the T-shirt policy in exchange for lower compensation.

(6) If T-shirts cannot be worn when someone can see into the cab of an engine on a public road, then the agreement is meaningless. This also is true if the presence of vendors or the press — both of whom are often present at an incident base — means T-shirts cannot be worn.

(7) The policy directs company officers and chief officers to determine on a case-by-case basis when T-shirts may be worn. However, battalion chiefs are not allowing them to do so, but instead are announcing bright-line rules.

(8) The policy does not require the union or an employee to complain before the officers decide what shirt can be worn.

(9) The department should act in a consistent manner, but different rules are being applied in different fire houses.

(10) The arbitrator's decision should accomplish the following: should grant prospective relief that gives guidelines and requires education of the department; direct that no officer at or above the rank of captain is to give orders regarding the T-shirts unless that officer is present to judge the working conditions; order all supervisors to make decisions without requests or complaints; instruct that the comfort portion of the policy does not require consideration of public contact; and instruct that T-shirts may be worn all day in the back of stations or in fire camps unless the employee is assigned to work with the public.

Department's position: (1) The department did not violate the policy. The work-response uniform is short-sleeved and not too warm for a person paid and trained to work in hot situations.

(2) Firefighters need to look professional. Failure to do so imparts a negative public perception.

(3) The parties intended that the agreement not prescribe hard and fast rules. It gives company and chief officers the discretion to decide when T-shirts should be worn.

(4) Chiefs need not be present to determine when it is appropriate to wear the T-shirt; they know what an air-conditioned vehicle is like. If no one complains, the chiefs have no reason to know that someone is uncomfortable.

(5) An award in this grievance will undermine the authority and discretion of the battalion chiefs in the field. A remedy that allows T-shirts always to be worn in certain situations would essentially write an addendum to the contract, which is beyond the scope of the arbitrator's authority.

Arbitrator's decision: The grievance is sustained.

Arbitrator's reasoning: (1) There is no indication that the parties intended that T-shirts always be allowed during strike-team drives. As such, the policy allows chiefs to prohibit wearing T-shirts on strike-team drives when it is not hot.

(2) A complaint is not necessary to trigger the right to wear a T-shirt.

(3) It makes no difference that firefighters are trained to work in heat. The policy considers firefighters' comfort when it is not necessary to withstand hot conditions.

(4) The policy language indicates that the weather-induced health, comfort, and safety exception is one that applies even when there is contact with the public.

(5) The possibility that employees will be seen by the public or vendors is not sufficient to disallow T-shirts. Vendors are likely to be present at any incident base, and the mere likelihood that vendors might be present would defeat the incident-base exception, rendering it meaningless. There will be, however, times at an incident base when it is appropriate to disallow T-shirts.

(6) A chief's general instruction that T-shirts are not allowed in any place at any station violates the policy.

(7) It is ambiguous whether chief officers or company officers should make the T-shirt determination, but the intent of the parties was that all employees look uniform. Thus, when a battalion chief is in charge of a group that is traveling or working together, that chief has the responsibility to provide instructions on whether the T-shirt may be worn. However, when firefighters are in separate stations, the need for uniformity no longer exists and the officer in charge should decide what shirt should be worn. Bright-line rules from battalion chiefs prevent case-by-case application of the policy.

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(8) A directive that T-shirts cannot be worn while on the road, even in hot weather, violates the policy because it does not leave room for fire captains to consider the comfort of firefighters in specific circumstances.

(9) Any order disallowing T-shirts while driving to a station would violate the policy if the weather conditions caused employees to be uncomfortably hot. The presence of air-conditioning is not dispositive if there is evidence that it still is uncomfortably hot in the cab.

(10) The department shall train or orally educate company officers and battalion chiefs on the terms of the policy and its interpretation provided in this award.

(Binding Grievance Arbitration)

- Layoffs
- Bargaining Unit Work

City and County of San Francisco and SEIU, Loc. 790 (3-31-06; 18 pp.). *Representatives:* Anne I. Yen, Esq. (Weinberg, Roger & Rosenfeld), for the union; Thornton C. Bunch, Jr., Esq. (deputy city attorney), for the city. *Arbitrator:* Frank Silver.

Issue: Did the city violate the parties' agreement by using employees from non-SEIU bargaining units to participate in citation walks?

Union's position: (1) The environmental control officer (ECO) class specification entails enforcing compliance with litter and environmental municipal codes, including educating the public and performing anti-litter enforcement work.

(2) During the 2003-04 fiscal year, the city laid off several ECOs. In Janu-

ary 2005, the city eliminated the remaining ECO positions. Although the parties met and conferred regarding the layoff, those discussions did not include the anti-littering campaign that was announced by the mayor on February 17, 2005.

(3) Prior to the 2005 elimination of their positions, ECOs were the only employees who regularly performed anti-litter enforcement and education. Although the managers had occasionally issued litter citations in the past, according to PERB precedent, if there are overlapping job duties with non-bargaining unit personnel, a unilateral transfer that causes employees in the unit to cease performing the work in question is a violation of the labor organization's right.

(4) Although the city refers to those on the walks as "volunteers," the employees were on paid city time and had the permission and cooperation of their respective departments. Additionally, the mayor's letter stated training for the walks was "mandatory," and that the walkers would be "assigned" to scheduled walks. Thus, bargaining unit work was assigned to others within the meaning of the agreement.

(5) That the city did not discipline those who did not participate does not change the fact that the work was assigned. The walks proceeded in regular, systematic fashion, and anti-litter enforcement and education work has gone forward while ECOs have lost their jobs.

(6) The city failed to meet and confer prior to implementing the anti-littering campaign, and the unilateral ac-

tion caused economic harm to the ECOs as well as erosion of the bargaining unit.

(7) When the mayor announced the anti-littering campaign, he directed all employees who were authorized to issue monetary citations for littering to attend training in preparation for their assignment and organization into teams that would walk throughout the city issuing litter citations.

(8) The city's reliance on Police Code Sec. 38 is misplaced. Although that section has always given various classes the authority to write litter citations, that work has been limited by the union's contractual and collective bargaining rights.

(9) The city should be ordered to cease and desist from assigning ECO work to employees in other bargaining units, and should reinstate affected ECOs with backpay and interest.

City's position: (1) Since 1987, the authority to issue litter citations has been vested in job classifications beyond those represented by SEIU. As such, the union cannot claim that the duty of issuing litter citations is exclusive to the bargaining unit.

(2) Fiscal problems caused the city to eliminate the ECO positions and address littering through citation walks that would effect "behavioral change." This occurred one month prior to the initiation of the anti-littering campaign. Therefore, there was no bargaining unit work confined to SEIU employees at the time the program was implemented, and the city properly relied on the police ordinance that was in effect.

(3) The city met its obligation to meet and confer on the layoff and job elimination issues.

(4) The city has the contractual and legal right to lay off employees and to eliminate jobs within its civil service system. Only the civil service commission has the authority to restore job classifications once they have been eliminated.

Arbitrator's decision: The grievance is sustained.

Arbitrator's reasoning: (1) Whether the employees were required to participate in the walks under penalty of discipline is not determinative of whether their participation represents a job assignment. They were acting as paid city employees and with the cooperation of their respective departments. Therefore, the walks represented a job assignment.

(2) Until January 2005, anti-litter enforcement had been the province of ECOs. Although the format of the walks is different than the independent, day-to-day work of ECOs, the basic job functions are the same.

(3) The citations written by public works managers and supervisors during the walks represent a distinct assignment of that work to them. By leading the walks, the supervisors and managers engaged in "patrolling," a primary job duty of the ECOs. Therefore, the assignment of new citation-writing duties to those employees represents an assignment of work to other bargaining units.

(4) The parameters of bargaining unit work arise out of collective bargaining and past practice. In the ab-

sence of evidence that litter code enforcement regularly has been assigned to other classifications, it must be concluded that the walks are bargaining unit work.

(5) Although the ECOs had been laid off and were not currently performing anti-litter enforcement work, there is no evidence that the civil service classification had been rescinded.

(6) The ECOs were laid off only one month before the organization of the walks. This temporal proximity satisfies the requirement that the work was currently being performed by SEIU-represented employees.

(7) It is no defense that the city met and conferred with the union about the impact of the layoff. The city has the right to lay off employees, but this right is limited by a prohibition from assigning current bargaining unit work to non-SEIU-represented employees.

(8) The matter must be remanded to the parties to consider the number and identity of ECOs whose work has been displaced by the walks and who are therefore entitled to be reinstated and made whole.

(Binding grievance arbitration)

• Contract Interpretation

SEIU, Loc. 4988, and Calaveras County Water Dist. (5-18-06; 8 pp.). *Representatives:* Matthew J. Gauger, Esq. (Weinberg, Roger and Rosenfeld), for the union; Jennifer R. Madden, Esq. (Downey Brand), for the district. *Arbitrator:* Alan R. Rothstein (CSMCS No. ARB-04-3067).

Issue: Did the district violate the parties' agreement when it failed to increase the pay of certain classifications?

Union's position: (1) During negotiations for the current contract, the parties' attempts to reach agreement on job class descriptions and pay were hampered by a lack of objective data. In 2003, the district agreed to fund a survey intended to develop a total compensation study.

(2) The district agreed that, after the study was complete, it would reopen the MOU to negotiate compensation and benefits, including issues tabled as a result of the compensation survey. Now that the study is complete, all affected classifications must be increased, in accordance with the study recommendations. The district must meet and confer on this issue.

(3) The district's contention that neither side is compelled to accept the report and its recommendations is erroneous. The arbitrator should either order the parties to negotiate and find that the district did not negotiate in good faith, order the district to immediately implement changes based on the report, or determine that no impasse exists and require the parties to implement the study recommendations.

County's position: (1) The language of the agreement plainly and unambiguously states that neither the district nor the union is compelled to accept the report and its recommendations.

(2) The agreement merely requires negotiations after publication of the study report. Neither party is compelled to accept any increases.

(3) The district has negotiated in good faith for over a year. There have been at least seven different bargaining sessions.

(4) The union seeks to require implementation of select portions of the study that benefit its members; its demand wholly omits the fact that the district has taken under consideration many of the study's recommendations, has reclassified employee positions, and has provided raises.

(5) The study was flawed because the subject agencies were not truly comparable or were irrelevant, and the union provided false information to the study evaluators.

(6) The arbitrator should rule that the district has met its obligation to negotiate and no further negotiations are required pursuant to the agreement.

Arbitrator's decision: Both parties violated the agreement.

Arbitrator's reasoning: (1) The language of the agreement unambiguously states that neither party is compelled to accept the findings of the study. It is equally unambiguous that the parties were to reopen negotiations after the study was complete.

(2) The negotiations did occur, but the district made no meaningful proposals to the union, and the union took a "hard-line" position in negotiations. Therefore, neither party bargained in good faith, and the good-faith negotiations mandated by the contract have not taken place.

(3) The parties shall meet and confer to discuss alignment of job classifications, how to acquire comparative

data, and identification of overpaid and underpaid classifications so that they may reach an agreement on these matters.

(4) The arbitrator retains jurisdiction over implementation of the award. *(Binding Grievance Arbitration)*

- Arbitrability
- Demotion
- Waiver

Victor Valley Union High School Dist. and CSEA, Loc. 243 (6-11-06; 11 pp.). *Representatives:* Lacy L. Gillespie (labor relations representative), for the union; Brian D. Bock, Esq. (Atkinson, Andelson, Loya, Ruud & Romo), for the district. *Arbitrator:* Joseph F. Gentile.

Issue: Did the grievant relinquish her permanency when she accepted a demotion and thereby relinquish her right to arbitrate her dismissal?

Union's position: (1) The grievant has permanency by virtue of her position as a classified employee.

(2) The grievant did not relinquish her right to permanency when she accepted a demotion from the position of administrative assistant I to office assistant III, and she is entitled to arbitrate her grievance.

District's position: (1) The agreement covering the grievant's demotion clearly and unambiguously designates the grievant as a probationary employee.

(2) Prior to completion of her probationary period, the grievant is not entitled to file a grievance.

Arbitrator's decision: The grievance cannot proceed to a hearing on the merits because it is not arbitratable.

Arbitrator's reasoning: (1) The grievant held the position of administrative assistant I. She voluntarily moved from this position to that of office assistance III. This move was a voluntary demotion.

(2) To effectuate this demotion, the grievant signed an agreement that stated she relinquished all rights to the entitlements of her previous position and that she must serve a six-month probationary period before becoming permanent in her new position.

(3) According to the terms of the agreement, the grievant was a probationary employee, her dismissal was within the time line established by the agreement, and there was nothing in the agreement to bring into question management's determination that the grievant should be dismissed from her position.

(4) The agreement mandates that questions of arbitrability will be heard and a decision reached on this issue prior to further proceedings, should such proceedings be found in order.

(5) According to the terms of the MOU, the right to arbitrate is given to employees only after they have served their probationary period.

(6) Because the grievant had not served her probationary period, the matter is not arbitrable and may not proceed.

(Binding Grievance Arbitration)

Resources

New Developments in the Public Sector

So far in 2006, CPER has updated four Pocket Guides to keep you current on developments in public sector employment relations.

The 7th edition of the **Pocket Guide to the Educational Employment Relations Act** — packed with five years of new legal developments — covers reinstatement of the doctrine of equitable tolling, PERB's return to its pre-*Lake Elsinore* arbitration deferral policy, clarification of the rules regarding the establishment of a prima facie case, and an updated chapter on pertinent case law.

The 13th edition of the **Pocket Guide to the Meyers-Milias-Brown Act** catches up on three years of PERB and court rulings since jurisdiction over the act was transferred to PERB; the Supreme Court ruling establishing a six-month limitations period for MMBA charges before PERB; changes in PERB precedent, including a return to the Board's pre-*Lake Elsinore* arbitration deferral standard and reinstatement of the doctrine of equitable tolling; new federal court developments in the constitutional rules governing agency fees; and more.

Last published in 1996, the latest edition of the **Pocket Guide to the Ralph C. Dills Act** (2nd edition) includes recent developments relating to legislative approval of collective bargaining agreements; discussion of new Supreme Court cases that recognize civil service law limits; and a new section on PERB procedures, including recent reversals in pre-arbitration deferral law.

The newest edition of the **Pocket Guide to Unfair Practices** details important developments in California's public sector labor law, including the Board's new arbitration deferral standard, restoration of the doctrine of equitable tolling, and the addition of three new statutes to PERB's jurisdiction: Trial Court Employment Protection and Governance Act, which governs labor relations between California state trial courts and their employees; Trial Court Interpreter Employment and Labor Relations Act, which governs labor relations between the trial courts and court interpreters; and Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee

Relations Act, which covers supervisory employees of the transit agency.

For more information and to order, go to the CPER website, <http://cper.berkeley.edu/>.

Breaking the Work/Family Mold

Society's separation of work and family is no longer a tenable model for employees or the organizations that employ them, argues author Lotte Bailyn. Unless American employers are willing to radically rethink some of their basic assumptions about work, career paths, and time, both employee and employer will suffer in today's intensely competitive work environment. Bailyn's message was bold when this book was originally published in 1993. Now thoroughly updated to reflect the latest developments in the organization of work, the demography of the workforce, and attitudes toward the integration of work and personal life, this second edition is equally compelling.

Bailyn finds that implementation of policies designed to allow "flexibility" is rarely smooth and often results in gender inequity. Using real-life cases, the author illustrates the problems employees encounter in coordinating work and private life, details how employers generally handle these problems, and suggests models for innovation.

Breaking the Mold: Redesigning Work for Productive and Satisfying Lives, by Lotte Bailyn (2006) 208 pp. Cornell ILR Press, <http://www.ilr.cornell.edu/ilrpress/>. Hardcover \$49.95; softcover \$17.95.

Los Angeles Labor Negotiations Study

Thirty-five years ago, the City of Los Angeles adopted its Employee Relations Ordinance and is now in the process of evaluation and modernization. A recent study addresses the challenges of labor negotiations with city employees. Los Angeles is one of the largest employers in the state with over 45,000 workers. The majority are represented by 25 unions in 40 bargaining units. The results of the study led to recommendations to make the negotiating process more efficient and effective.

The study's objectives were to review negotiations conducted within the last three years for "lessons learned," as well as to review bargaining currently underway; to evaluate and "map" the city's current collective bargaining process; to conduct a nationwide search for promising practices the city could incorporate into the collective bargaining process; to evaluate the fiscal impacts of labor negotiations; to examine the role of, and incentives for, each party in the process; to evaluate the labor-management relationships outside of the bargaining process; and to identify opportunities for improving labor-management relations.

The full 92-page text of the **Los Angeles Labor Relations Study** can be accessed online by going to the website of the Los Angeles City Controller, <http://www.lacity.org/ctr/audits/>.

Econ. 101

Since economic information can, at times, be difficult for the non-economist to find and understand, the Federal Reserve Bank of St. Louis Research Library has created an economic information portal designed with university and government document librarians, students, and the general public in mind. Entitled "Liber8," the site provides a single point of access to the economic information that the Federal Reserve System, other government agencies, and data providers have to offer. International, national and regional sources are available, as well as the IES (International Economic Statistics) Database and more. Sources were specifically selected to be non-technical, simple to use, and easy to understand

Liber8: An Economic Information Portal, <http://liber8.stlouisfed.org/>.

Women Get Organized

Recognizing that women now comprise close to one-half of the American workforce, a new report, "Women Organizing Women: How Do We Rock the Boat Without Getting Thrown Overboard?" is a call to action. Unions must organize large numbers of women to stem the current de-

cline in membership, and it cannot do so with an overwhelmingly male force of organizers

The study was conducted last fall by the Berger-Marks Foundation, a group dedicated to organizing women into unions. The report highlights the experiences and insights of skilled women union organizers brought together for a retreat. Participants identified several major challenges they face as organizers and obstacles they believe prevent other women from entering the field of union organizing. Time demands and travel associated with union organizing figured most prominently among them. Because most unions still undervalue organizing as a whole and undervalue the role of women organizers, many participants view themselves as "second class among the second class."

The report includes participants' recommendations for improving the position of union organizer and sets a roadmap for the foundation as it looks ahead.

The full report, **Women Organizing Women: How Do We Rock the Boat Without Getting Thrown Overboard**, is available at <http://www.bergermarks.org/>, or a hard copy can be ordered by emailing info@bergermarks.org/.

Early Childhood Care and Education Update

A groundbreaking California Early Care and Education Workforce Study — a collaboration between the Center for the Study of Child Care Employment (Institute of Industrial Relations, University of California at Berkeley) and the California Child Care Resource and Referral Network — is available online.

The study is the result of telephone surveys conducted with a randomly selected sample of 1,800 licensed child care center directors and 1,800 licensed family child care home providers in four regions throughout California. The survey identified the number of home-based and center-based staff working in licensed early care and education (ECE) positions; the educational qualifications of this workforce, analyzed by age, languages spoken, and ethnic background; and wages and tenure of those working in licensed facilities.

The study showed important progress in the ECE field, including an ethnically diverse workforce that more closely reflects the diversity of young children than do K-12 public school teachers, and that often exceeds education levels required by law. Although California does not require college degrees of its ECE workforce, 25 percent of center-based teachers currently hold a B.A. degree or higher, and 28 percent hold an A.A. degree. But the study also found an ongoing pattern of low salaries and high turnover as well as an aging workforce of teachers and providers. This decade, as California's population of children ages 0 to 5 is projected to increase by 15 percent, one-quarter of center teachers with B.A. degrees or higher will be age 50 or older and approaching retirement.

Statewide and countywide reports on licensed childcare centers and family care providers, as well as study highlights, can be found on the website of the **Center for the Study of Child Care Employment**, <http://www.iir.berkeley.edu/cscce/>.

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

Exclusive representatives are not expected to satisfy all unit members: UAPD.

(*Meenakshi v. Union of American Physicians and Dentists*, No. 1846-S, 5-24-06; 2 pp. + 8 pp. R.A. dec. By Member McKeag, with Chairperson Duncan and Member Neuwald.)

Holding: Because exclusive representatives enjoy considerable bargaining latitude and are not expected to satisfy all unit members, the charge was dismissed for failure to state a prima facie case.

Case summary: The charging parties, psychiatrists and members of the Union of American Physicians and Dentists, alleged that UAPD violated the Dills Act by failing to negotiate specific gains for psychiatrists.

The claim arose when the charging parties began lobbying for union support of a bargaining proposal to address psychiatric staffing shortages. The psychiatrists wished to alleviate the problem by increasing recruitment and retention incentives. The union responded to this proposal by stating it could not justify increasing R and R incentives only for psychiatrists, especially since there were staffing shortages to consider in other departments. The union decided that it would bargain for increased R and R incentives for all of its members, a strategy that had been successful in the past

for achieving gains for psychiatrists. The charging parties felt that this bargaining position failed to effectively address their increased workloads and the shortage of psychiatrists. They maintained that any proposal including an across-the-board raise would unnecessarily sacrifice any chance the psychiatrists had of gaining an increase. The charging parties therefore alleged violations of the duty of fair representation, interference with protected rights, and a failure to meet and confer in good faith.

As an initial matter, the R.A. noted that individual unit members do not have standing to allege failure to meet and confer violations, and therefore she dismissed this charge. With regard to the remaining allegations, the R.A. cited the proposition set forth in *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, that exclusive representatives have considerable discretion to negotiate and are not expected or required to satisfy all unit members. In addition, the duty of fair representation does not bar a representative from making an agreement that may have an unfavorable effect on some members; nor is the representative obligated to bargain a particular item benefiting certain unit members.

Moreover, the strategy proposed by the union previously had been successful in gaining a larger differential for psychiatrists. Thus, the union's rationale for pursuing this

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

strategy was not undertaken in bad faith and was within the scope of its discretion. The R.A. stated that because the union “refuses to adopt a bargaining stance that could result in greater gains for psychiatrists (at the possible expense of other bargaining unit members), does not establish that the union has breached its duty of fair representation.”

The board upheld the R.A.’s decision as the decision of the board itself and dismissed the charge without leave to amend.

Improper request to negotiate leads to dismissal of charge: Dept. of Corrections.

(California Correctional Peace Officers Assn. v. State of California [Dept. of Corrections], No. 1848-S, 8-9-06; 2 pp. + 8 pp. R.A. dec. By Member Neuwald, with Chairperson Duncan and Member Shek.)

Holding: Because the union did not demand to bargain the effects of a non-negotiable decision, the charge was dismissed for failure to state a prima facie case.

Case summary: CCPOA filed an unfair practice charge alleging the Department of Corrections engaged in bad faith bargaining, unilaterally changed staffing levels, and refused to provide requested information.

The charge arose from the temporary relocation of the North Kern State Prison infirmary. The parties bargained the impacts of the temporary relocation, and CCPOA later demanded to bargain the impact of returning the infirmary to its original site. In the later bargaining session, the department representative was removed from the table and, the union alleged, the “entire day of negotiations was lost.” Nonetheless, the parties managed to reach 21 tentative agreements.

In a subsequent bargaining session, the department’s labor relations officer rejected all 21 previously reached tentative agreements. Claiming they were not budgeted, the officer also discontinued an agreement relating to staffing levels and eliminated a portion of staffing that had existed prior to the infirmary’s relocation. This resulted in an increase in safety concerns for correctional officers. In response, the union requested budgetary documents, which the department refused to provide. The department further rejected without

comment or discussion all union proposals and agreed only to proposals initiated by the department.

The R.A. found that the above allegations failed to state a prima facie case under the “per se test” for an unfair practice. In explanation, the R.A. stated that staffing levels are not within the scope of representation, though safety issues are. However, the burden was on the union to request to bargain the effects of these issues, which the union did not do. Instead, the union based its charge on the modified staffing levels, a decision outside the scope of bargaining. Additionally, the charge did not establish that the department refused to negotiate the effects of changing staff levels. The R.A. dismissed the charges accordingly.

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

EERA Cases

Unfair Practice Rulings

Refund procedure for non-chargeable expenses is allowed: Kern High Faculty Assn., CTA/NEA.

(Maaskant v. Kern High Faculty Assn., CTA/NEA, No. 1844, 5-19-06; 8 pp. + 7 pp. R.A. dec. By Member McKeag, with Chairperson Duncan; Member Shek concurring.)

Holding: Although CTA was required to rebate non-chargeable expenses, the charging party failed to avail himself of the rebate procedure and the claim was dismissed for failure to state a prima facie case.

Case summary: The charging party, a teacher for the Kern High School District and a non-member of the teachers union, had an ongoing objection to the union’s collection and subsequent rebate of non-member fees.

CTA follows a deduction-escrow-refund procedure that consists in part of the union rebating to agency fee payers funds not used for collective bargaining. These funds are referred to as non-chargeable expenses. The fees can be deducted in monthly increments from the employee’s paycheck or the employee can choose to pay upfront in a lump sum to

avoid payroll deductions. If agency fee payers do not pay the lump sum or if they do not object to the union's calculation of fees, they receive the rebate for the entire year by December 7.

Because the charging party consistently objected to the fee collection and rebate procedure, the union proposed that he pay a lump sum minus the non-chargeable amount to avoid waiting for a rebate. The charging party did not respond to this proposal, but instead went to the union office and wrote a check for the non-chargeable amount, writing across the front of the check "request that undisputed agency fee rebate be deducted DENIED." The union did not cash the check.

The charging party alleged that CTA's collection and rebate procedure was unlawful. He further alleged that CTA's offer to make special accommodations for him was discriminatory. The R.A. dismissed the charging party's claims, citing *O'Malley v. California Nurses Assn.* (2004) No. 1673-H, 169 CPER 80. In *O'Malley*, the board held that when a union has not taken fees from a non-member, there is no need to afford the non-member the procedural guarantees to challenge the use or amount of fees. Because CTA had not cashed the charging party's check, the R.A. held that the union had not accepted the fees and, as a result, the charging party did not have standing to challenge the use or amount of fees.

The R.A. also cited *Novato Unified School Dist.* (1982) No. 210, 54 CPER 43, which established that evidence of adverse action is required to support a claim of discrimination. Here, the charging party did not respond to CTA's offer to pay the lump sum minus the non-chargeable amount. He instead wrote a check to the union for the full amount, writing on the check that the union's offer was denied. The union did not cash the check. The R.A. held that this did not constitute an adverse action and dismissed the claim for failure to state a prima facie case.

The board upheld the dismissal, but on different grounds. The board ruled that the test for standing is whether the union accepted the employee's agency fee payment. Here, the union's acceptance of the check was enough to constitute collection of fees, even though the union did not cash the

check. Further, there was no evidence to support the proposition that CTA did not intend to accept fees from the charging party. To dispossess the charging party of standing, the union would have had to take an affirmative act to completely relieve the employee of agency fee payer status, which was not the case here. The charging party therefore did have standing to bring the claim. Nonetheless, the board held that he failed to state a prima facie case.

Under *San Ramon Valley Education Assn. CTA/NEA (Abbot and Caeron)* (1990) No. 802, 84X CPER 7, CTA's procedure of initially collecting the entire annual amount of dues and later rebating the non-chargeable expenses is allowed. In accordance with this holding, the board found the charging party's assertion that the procedure was prohibited to be without merit. Under the circumstances present in this case, CTA would be required to rebate the non-chargeable expenses. The charging party, however, failed to avail himself of CTA's rebate procedure. Consequently, the board dismissed the claim.

Member Shek concurred with this opinion, writing that the charging party's standing did not arise because the union accepted his fees, but instead because he was required to pay fees at all.

Duty of fair representation does not extend to appeals process before PERB: Teamsters Loc. 228.

(*Cardoso v. Teamsters, Loc. 228*, No. 1845, 5-19-06; 4 pp. + 5 pp. R.A. dec. By Chairperson Duncan, with Members Shek and Neuwald.)

Holding: Because the union was not obligated to assist the charging party in filing an unfair practice charge with PERB, the claim was dismissed for failure to state a prima facie case.

Case summary: The charging party, a custodian for the Alum Rock Union Elementary School District, dislocated his shoulder and suffered extreme pain that hindered his work performance. The charging party's supervisor requested that he relinquish his work keys, and the charging party complied. Subsequent to this meeting, the district sent a letter to the charging party, claiming that he had voluntarily terminated his employment when he surrendered the keys.

As a result, the charging party filed an unfair practice charge against the district. The charge was dismissed. The charging party subsequently filed another unfair practice charge, this time alleging that the union violated its duty of fair representation by failing to assist him in his charge against the district.

Relying on *California State Employees Assn. (Sandberg)* (2004) No. 1694, 171 CPER 90, the R.A. held that the duty of fair representation does not extend to the appeals process before the board, and she dismissed the charge for failure to state a prima facie case. The board upheld the R.A.'s decision but disagreed that *Sandberg* controlled.

In *Sandberg*, the board held that the duty of fair representation does not extend to the appeals process before the State Personnel Board, but did not specifically extend its ruling to unfair practice charges before PERB. Instead, the *Sandberg* board explained, *California School Employees Assn. (Mrvichin)* (1998) Nos. 660 and 661, 77 CPER 86, and *Los Rios College Federation of Teachers, Loc. 2279 (Deglow)* (2003) No. 1515, 160 CPER 76, controlled. In *Mrvichin* and *Deglow*, the board held that the duty of fair representation does not extend to the filing of, or assistance in filing, an unfair practice charge before PERB. In accord with these decisions, the present board dismissed the charging party's charge for failure to state a prima facie case.

Sending response to incorrect office excuses untimely filing: CTA/NEA.

(*Newark Teachers Assn., CTA/NEA v. Newark Unified School Dist.*, No. Ad-354, 6-23-06; 3 pp. dec. By Chairperson Duncan, with Members McKeag and Neuwald.)

Holding: A delay in filing caused by mailing a response to a PERB regional office instead of headquarters does not render the filing untimely.

Case summary: CTA/NEA attempted to file a response to the district's exceptions to an administrative law judge's proposed decision. This response was to be filed at the PERB headquarters in Sacramento; however, CTA/NEA mailed the response to the PERB regional office in Oakland. The Oakland office forwarded the response to headquarters,

but it arrived 11 days past the filing deadline. CTA/NEA was notified by the appeals assistant that the response was untimely and would not be accepted. Relying on *Allan Hancock JCCD* (2004) No. Ad-340, 170 CPER 98, and *North Orange County Regional Occupational Program* (1990) No. 807, 85 CPER 67, CTA/NEA appealed this determination.

In both *Hancock* and *North Orange County*, a filing was timely except that it was sent to a regional office instead of to headquarters. Based on the precedent established in those cases, as well as CTA/NEA's diligence in making its request and addressing the clerical error that resulted in filing at the incorrect office, the board granted the appeal and accepted the late-filed response.

Unlawful interrogation found, but not retaliation: Contra Costa CCD.

(*Pitner v. Contra Costa Community College Dist.*; No. 1852, 8-21-06; 6 pp. + 24 pp. ALJ dec. By Member Shek, with Member Neuwald; with Chairperson Duncan dissenting in part.)

Holding: The compliant was dismissed because the charging party failed to demonstrate retaliation for engaging in protected activities. The district did violate EERA by asking interview questions influenced by unlawful animus.

Case summary: This case arose when the charging party, a part-time instructor at Diablo Valley College, refused to side with management in a dispute resulting in a "no confidence" vote against one of the college presidents.

The charging party and another college instructor applied for a full-time faculty position. At the time of application, the charging party had been an instructor at the college for 12 to 13 years. The other applicant, who eventually received the position, had worked at the college for two years. During the application process, a widely publicized controversy arose over the implementation of a districtwide reorganization plan. Faculty members, including the charging party, informed the college president that if he persisted with the reorganization plan they would call for a vote of "no confidence." When the president did not relent, the faculty conducted such a vote.

Subsequent to the vote, the charging party and his co-worker were interviewed for the available full-time faculty position. The college president and vice president of academic affairs used a set of scripted questions to interview both candidates. The president stated he was concerned mainly with the personality of the candidate, what kind of college community member the candidate would be, and how the candidate would grow and develop in the position.

In deviation from the script, the president asked the charging party several questions regarding the campus climate; he did not ask these questions of the other candidate. The charging party felt the questions were related to the “no confidence” vote.

After the interviews, the candidates were rated by both administrative and faculty committees, with the charging party ranking last in the administrative vote and first in the faculty vote. Because no consensus was reached, both recommendations were forwarded to the chancellor pursuant to the parties’ bargaining agreement. The charging party was not offered the job, and he claimed this was in retaliation for his involvement with the “no confidence” vote.

The charging party argued that because he was strongly supported by the faculty, and because he failed in his interview to come across as loyal to the administration, he was passed over in favor of the candidate who demonstrated such loyalty. The district claimed this was not so, and that the chancellor, not the administrative committee, made the final decision. There was no evidence, the district maintained, that the chancellor was aware of the charging party’s involvement in the “no confidence” vote, that the questions were related to the charging party’s protected activity, or that a reasonable person could construe them to be related. The district further argued that it would not have found the charging party to be the most-qualified candidate, regardless of his answers to the non-scripted questions, and that even if the questions were found unlawful, that finding would be rendered moot by the chancellor’s independent decision.

The ALJ found that the questions asked demonstrated unlawful animus based on the charging party’s exercise of protected activities. The ALJ also found, however, that based

on the candidates’ personalities reflected in the interviews and in their teaching styles, the district had reason to find the charging party was not the best candidate for the job. In addition, the ALJ held that the chancellor’s decision not to hire the charging party was not influenced by the “no confidence” vote or the non-scripted questions. Accordingly, the ALJ found the evidence insufficient to demonstrate that the charging party would have been awarded the position but for the questions about faculty allegiances. He therefore dismissed the claim that the district retaliated against the charging party because of his involvement in protected activity.

The ALJ also amended the charging party’s complaint to include an unalleged charge of unlawful interrogation, and found that the district violated EERA Sec. 3543.5(a) by asking the charging party about protected activities. The board adopted the ALJ’s decision as the decision of the board itself.

Chairperson Duncan dissented from the board’s holding. He concluded that the complaint should have been dismissed because no reasonable person could have understood the questions to be in relation to the charging party’s allegiance to faculty or management. Nor, in his view, did the questions rise to the level of unlawful interrogation. Additionally, Duncan stated, the ALJ should not have expanded the complaint as there was “no compelling reason to entertain unalleged violations.” Nor did the ALJ clearly articulate his reasoning for entertaining the unalleged violations.

HEERA Cases

Unfair Practice Rulings

Where conscientious effort is made to timely file, good cause may exist: CSU.

(*California Faculty Assn. v. Trustees of the California State University*, No. Ad-355-H, 8-9-06; 4 pp. dec. By Member McKeag, with Chairperson Duncan and Member Neuwald.)

Holding: Where a party makes a conscientious effort to timely file, and the delay in filing did not cause prejudice to any party, good cause may exist to excuse late filing.

Case summary: The California Faculty Association filed an unfair practice charge alleging CSU unilaterally and unlawfully increased the contracting out of work. After a formal hearing, a proposed decision was served on the parties. May 1, 2006, was the original deadline for CFA to file a statement of exceptions to the decision. Both parties agreed to extend this deadline to May 15.

PERB Reg. 32310 provides that a response to a statement of exceptions must be filed within 20 days following the date of service of the statement. According to this regulation, had CFA filed on May 15 as agreed upon, CSU's deadline for filing a response would have been June 9. CFA, however, filed on May 11, which, according to Reg. 32310, shortened CSU's deadline to June 5. CSU nonetheless filed on June 9, asserting that when the parties agreed to extend CFA's deadline to May 15, they also agreed that the opposition would be due on June 9. CFA denied recollection of such an agreement.

The board has discretion to excuse late filings upon a showing of good cause. Precedential PERB decisions *United Teachers of Los Angeles (Kestin)* (2003) No. Ad-325, 162 CPER 82, and *Barstow Unified School Dist.* (1996) No. Ad-277, 119 CPER 80, have reasoned that good cause is a flexible standard, defined and constrained by considerations of fairness, reasonableness, and honesty in mistake. The board has additionally ruled that good cause exists only when the party makes a conscientious effort to timely file and the delay did not cause prejudice. Here, the board found it clear the parties discussed filing the opposition on June 9. It therefore was reasonable for CSU to believe the deadline was June 9, and it made a conscientious effort to file on what it believed was the proper date. The board noted that CFA had not claimed prejudice due to the late filing, and indeed, that CFA would have granted a request for an extension had one been requested. Because of the above, the board found good cause to excuse the late filing.

No violation when adverse action taken two months after protected activity: U.C. Regents.

(*Coalition of University Employees v. Regents of the University of California*, No. 1851-H, 8-21-06; 3 pp. + 6 pp. R.A. dec. By Member Neuwald, with Chairperson Duncan and Member McKeag.)

Holding: Because there was neither disparate treatment nor a nexus between the adverse action and protected activity, the claim was dismissed for failure to state a prima facie case.

Case summary: This case came before the board on appeal from the dismissal of an unfair practice charge. In its claim, CUE alleged that the university retaliated against a union member for engaging in protected activities.

The employee was a clerical worker for the university, as well as a prior CUE local-chapter vice president. In 2004, the employee demonstrated support for an AFSCME strike. Shortly thereafter, the university issued the employee a "meets or exceeds expectations" evaluation in which it downgraded him for his participation in the strike. The employee appealed the negative evaluation, and the university deleted reference to the strike and upgraded the evaluation. Two months later, the employee's supervisor issued a counseling memo to the employee, claiming he was behaving disrespectfully. CUE contended the supervisor issued the counseling memorandum in retaliation against the employee for appealing his earlier performance evaluation, an action that is protected by HEERA.

The R.A. found that these facts did not establish a prima facie case. The employee did engage in a protected activity, but two months had passed between this activity and the issuance of the counseling memo. Thus, the facts did not demonstrate the requisite nexus between the protected activity and the adverse action. In addition, CUE failed to show the university disparately treated the employee or deviated from established procedures. The R.A. dismissed the case accordingly.

On appeal, CUE claimed it had not received the board agent's warning letter stating the deadline for an amended claim, and it therefore had good cause to offer new evidence

on appeal. The board disagreed, relying on *State of California (Dept. of Corrections)* (2006) No. 1806, 77 CPER 78, in which it stated that a letter correctly addressed and mailed is presumed to have been received. In addition to this finding, the board upheld the R.A.'s decision as the decision of the board itself, and dismissed the charge without leave to amend.

PERB refuses to intervene in internal union affairs: CUE.

(*Higgins v. Coalition of University Employees*, No. 1855-H, 8-29-06; 2 pp. + 7 pp. R.A. dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: The charge was dismissed because there was no showing of a substantial impact on the relationship between the charging party and her employer.

Case summary: The charging party, a former state-wide president of CUE, alleged that CUE violated HEERA by removing her from her position as president.

A member of CUE's executive board filed charges against the charging party, alleging 15 separate charges of misconduct. The executive board found reasonable cause for the allegations and ordered a hearing on the matter. The judicial panel found the charging party guilty of 8 of the 15 counts, and removed her from office. The charging party was not fined or suspended from union membership.

Internal union affairs are immune from PERB review unless they substantially impact the relationship between unit members and their employer, and thus implicate a duty of fair representation. The R.A. cited PERB decisions establishing this precedent, including *California State Employees Assn. (Hackett)* (1993) No. 1012-S, 102 CPER 37, and *California State Employees Assn. (Garcia)* (1993) No. 1014-S, 102 CPER 55. The R.A. also listed examples where the board had intervened in internal union affairs, such as *California Union of Safety Employees (Coelho)* (1994) No. 1032-S, 105 CPER 70, in which the union filed a citizen's complaint with a unit member's employer and then refused to represent the member in the resulting investigation. In *Coelho*, the board found a violation did exist because the union's conduct directly impacted the unit member's relationship with his employer.

Such was not the case here. The R.A. found that the charging party failed to present any evidence that the union's conduct substantially impacted her relationship with the university. The board upheld the R.A.'s decision as the decision of the board itself, and dismissed the charge without leave to amend.

No employer interference found when union acted outside scope of agreement: U.C. Regents.

(*Coalition of University Employees, Loc. 6 v. Regents of the University of California*; No. 1854-H, 8-29-06; 2 pp. + 7 pp. R.A. dec. By Member Neuwald, with Chairperson Duncan and Member McKeag.)

Holding: Because the union posted flyers beyond the bargained-for area, the charge was dismissed for failure to state a prima facie case.

Case summary: In a charge relating to union-access rights, CUE claimed that the university violated HEERA when it removed union flyers from campus bulletin boards.

The parties' bargaining agreement provided that CUE would have access to and use of general-purpose bulletin boards. CUE representatives posted flyers on bulletin boards at the university's Mount Zion campus. The bulletin boards were not general purpose, and university security removed the flyers at the request of the San Francisco fire marshall.

In order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's action caused harm to employee rights and that HEERA provides the claimed rights. In this instance, the parties bargained over union access rights, including the posting of union notices. The union, however, posted the notices outside of the bargained-for area. As such, the university's removal was not unlawful.

In light of the above facts, the R.A. dismissed the charges against the university. The board upheld the R.A.'s decision as the decision of the board itself, and dismissed the charge without leave to amend.

Right to representation exists only in limited circumstances: CSU.

(*California State University v. Trustees of the California State University*, No. 1853-H, 8-29-06; 2 pp. + 11 pp. B.A. dec. By Member McKeag, with Chairperson Duncan and Member Shek.)

Holding: Because the union failed to establish a nexus between the alleged adverse action and protected activity, the claim was dismissed for failure to state a prima facie case.

Case summary: The union filed an unfair practice charge against CSU, alleging that it had retaliated against a unit member, Dan Necochea, for engaging in protected activities; had made unilateral changes to the terms and conditions of employment; and had failed to provide the union with requested information.

The affected employee worked for San Diego State's physical plant department in its materials and services warehouse. The university notified MSW employees that it intended to contract out MSW work to a private company and, as a result, MSW employees would be reassigned. The university and the union met and conferred over the impact of this action; Necochea was a member of the bargaining team.

After implementation of the contracting out, Necochea was assigned to a different position, after which he complained of health problems and was placed on administrative leave. The union expressed concern that the university had unilaterally altered Necochea's work assignment. In response, the university provided the union with a description of Necochea's position, which showed no changes from his previous assignment.

After returning from leave, Necochea again was reassigned, this time to the basement of a campus parking structure. Necochea expressed his displeasure to the assistant director of the physical plant, calling the job "horse shit." The day after Necochea made this comment, he was asked to report to the assistant director. The union was concerned the meeting was disciplinary in nature and requested that a union steward be present. The university maintained the meeting was not disciplinary. At the meeting, Necochea was issued a letter of reprimand regarding his comment.

Following his reassignment to the basement, Necochea once again suffered respiratory health problems and went on administrative leave. The university asked Necochea to attend a meeting regarding his injured-worker status. Necochea requested union representation but was told no representative would be allowed since the meeting was not disciplinary in nature. Necochea felt the meeting was an indication he would soon be put on medical retirement, and he felt union representation would have helped him understand his choices.

Citing the above facts, the union claimed CSU violated Necochea's rights by retaliating against him, denying him union representation, and unilaterally changing his work assignment.

The R.A. found that the union demonstrated two of the three elements necessary for retaliation. Necochea was a member of the union and the adverse action occurred in close proximity to his exercise of protected conduct. Necochea failed, however, to establish a nexus between the adverse action and the protected conduct. In addition, the union did not demonstrate the university had disparately treated Necochea or deviated from past practice when it transferred him. The R.A. found this also true of the written reprimand. Mere participation in union activities, the R.A. wrote, does not insulate an employee from disciplinary action.

The R.A. further found that under the *Weingarten* rule, Necochea was not entitled to representation. *Weingarten* established that the right to representation applies only when the employee has a reasonable basis to believe discipline may result from a meeting or when highly unusual circumstances exist. PERB precedent has established that if the purpose of a meeting is to present a final disciplinary memo, no right to representation exists. With regard to the charge of unilateral change, the R.A. found the university was not obligated to negotiate work assignments that are reasonably comprehended within the scope of existing duties.

The R.A. dismissed the union's claim, finding it failed to state a prima facie case. The board agreed and adopted the R.A.'s position as the position of the board itself and dismissed the case without leave to amend.

MMBA Cases

Unfair Practice Rulings

Untimely filing: SEIU Loc. 790.

(*Paez v. SEIU Loc. 790*, No. Ad-356-M, 8-10-06; 2 pp. dec. By Member Neuwald, with Chairperson Duncan and Member Shek.)

Holding: The appeal was dismissed as untimely filed.

Case summary: The charging party appealed an administrative determination that his request for reconsideration was untimely. A request for reconsideration must be filed within 20 days of service of the final decision. The charging party filed his request nearly six months after service of the final decision and did not state good cause for the delay. As such, his request was untimely, and the board denied his appeal.

Asserted facts fail to show violation of MMBA: County of Santa Cruz.

(*Health Services Agency Physicians Assn. v. County of Santa Cruz*, No. 1849-M, 8-16-06; 2 pp. + 16 pp. R.A. dec. By Chairperson Duncan, with Members Shek and Neuwald.)

Holding: The charge was dismissed for failure to state a prima facie case because the charging party could not demonstrate violation of the MMBA.

Case summary: The association alleged that the county violated the MMBA and local rules by making unilateral changes to the MOU, denying requests for information, bypassing the union to deal directly with unit members, and discriminating against unit members who engaged in protected activities.

This unfair practice charge arose when the charging party was certified as the exclusive representative of a unit of clinic physicians and psychiatrists. Employees in the unit were previously represented by SEIU Loc. 415, and the change of representative required the parties to meet and negotiate an initial MOU.

During negotiations, the county refused to consider extra-help employees as part of the union's bargaining unit.

The county also discussed altering work hours but ultimately decided not to do so. One month after negotiations began, the charging party obtained a copy of the county's budget, which proposed layoffs for 1.55 FTE positions. The budget later was amended to include the elimination of an unfunded and vacant physician position.

The charging party requested a seniority list for the positions in its unit, as well as the specific numeric codes for the positions recommended for layoff. After a second request, the county provided the seniority list but was unable to provide position codes until the board approved the budget. SEIU requested that the county send out a letter to its bargaining unit employees in departments and classifications identified for cuts. The county did so, but it was not a layoff notice nor was it required by the MOU. The county did not send this letter to the association's unit members.

Two months into negotiations, an employee who was not the least-senior was notified that he was scheduled for layoff. This notice came shortly after he testified on behalf of a coworker in a PERS hearing regarding seniority credits. The coworker for whom the PERS hearing was held also was slated for layoff; he was the least-senior unit member.

Based on the above facts, the union alleged the county made unilateral changes to the MOU, denied requests for information, bypassed the union to deal directly with unit members, and discriminated against unit members for engaging in protected activities. The R.A., however, disagreed, and found that the charging party failed to establish a prima facie case for any of its charges.

To establish a case of unilateral change, the charging party must show that the employer implemented, without notice or opportunity for negotiation, a change in policy concerning a matter within the scope of representation. That was not the case here. Extra-help employees were not permanent positions and thus were not part of the bargaining unit; the county only considered changing work hours but did not do so; the county had no obligation to provide the association's unit members with letters similar to those sent to SEIU; and the county did meet with the union regarding layoffs. Further, the county complied with the union's re-

quest for a seniority list. There was a delay in providing position codes, but the information was provided to the union as soon as it became available.

In regard to the union's charge of discrimination against unit members who participated in protected actions, the R.A. found that the requisite nexus between the protected activity and the layoffs was not present. The county laid off the least-senior physician, an action consistent with the prior SEIU/county MOU and past practice. The charging party did not provide identifying information for the not-least-senior unit employee who was laid off, and thus there was insufficient information to support a charge of discrimination for engaging in protected activities.

The R.A. dismissed all of the charges against the county for failure to state a prima facie case. The board upheld this decision and adopted the R.A.'s decision as the decision of the board itself.

Non-unit member lacks standing: Modesto Irrigation Dist.

(*Tacke v. Modesto Irrigation Dist.*, No. 1856-M, 9-1-06; 3 pp. + 6 pp. R.A. dec. By Member McKeag, with Chairperson Duncan and Member Shek.)

Holding: Because the charging party was not a member of the class he alleged was harmed, he did not have standing to bring a claim and the case was dismissed.

Case summary: The charging party, a senior electrical engineer for the Modesto Irrigation District, brought an unfair practice charge against the district, alleging it interfered with protected employee rights.

The charging party claimed that the interference occurred during an election that would allow members of the utility service maintenance unit to decide whether to approve an agency shop arrangement and impose an agency fee on non-union members of the unit.

Thirteen days before the election, the district posted flyers stating when the election would be held, and listed the voting locations and times during which unit members could vote. No other means of notifying USM bargaining unit members was provided, although the district previously had

communicated with its employees by email, memorandum, or letter regarding other employment-related matters.

The charging party expressed concern to the state mediator that the flyers provided inadequate notice of the election. The state mediator told the charging party the notices were sufficient. She further indicated that she had encouraged the district to issue a communication to unit members by whatever method it thought appropriate, including email, although it ultimately did not do so.

The charging party alleged that the posted notices were insufficient and interfered with employees' protected rights to vote in the election.

The R.A. ruled that the facts provided did not state a prima facie case. The charging party was not a member of the USM bargaining unit; thus, he was not a member of the class he alleged had been harmed, and he did not have standing to bring a claim. Moreover, the R.A. stated, even if the charging party had standing, the charge did not provide sufficient evidence to state a prima facie case. Relying on *Chaffey Joint Union High School Dist.* (1988) No. 669, 78 CPER 56, in which the board considered whether an employer interfered with employees' rights in the conduct of an agency fee election, the R.A. applied a totality of circumstances test. He concluded that the charge alleged only that the district did not utilize additional methods of communicating with employees, not that the district failed to adequately maintain posted notices. Further, there were no specific examples demonstrating that employees were unable to reach the polling locations during voting hours. Thus, there was insufficient evidence to establish a prima facie case of interference, and the R.A. dismissed the claim.

On appeal, the board did not consider the district's response as it was untimely filed. The district requested acceptance of its late-filed response, claiming good cause. The district argued that it waited to file because it expected to receive an additional notice from the board regarding time lines, and because a key district employee had injured his back and was unable to "craft a complete response." The board rejected these arguments, ruling that neither stated

good cause. The board upheld the R.A.'s decision as the decision of the board itself and dismissed the case.

Duty of Fair Representation Rulings

No duty of fair representation exists in extra-contractual forums: CTA.

Welch v. California Teachers Assn. and Oakland Education Assn., No. 1850, 8-17-06; 2 pp. + 9 pp. R.A. dec. By Member Neuwald, with Chairperson Duncan and Member Shek.)

Holding: Because CTA had no duty to represent the charging party in a court of law, the charge was dismissed for failure to state a prima facie case.

Case summary: The charging party, a former intern teacher for the Oakland Unified School District, claimed that CTA breached its duty of fair representation by failing to adequately represent her regarding her termination.

One month after she was hired as an intern teacher, the charging party filed a claim with CalOSHA, complaining that her classroom was contaminated with asbestos and dangerous levels of mold. Shortly after the charging party filed her complaint, the district transferred her to a school where she was attacked, beaten, and injured by a group of students. The charging party subsequently claimed she did not feel safe at the school and was afraid to teach there. Corresponding with this event was a false allegation against the charging party, accusing her of erratic and abusive behavior towards the students. The charging party later was exonerated of these accusations but nonetheless was terminated from her position.

After her termination, the charging party sought assistance from OEA, which referred her to CTA. CTA stated that it would provide the charging party with legal representation only if she withdrew complaints she had filed with CalOSHA and the Equal Employment Opportunity Commission. The charging party complied with this request, later finding that CTA allegedly was interested primarily in using her case to establish precedent recognizing that temporary teachers are entitled to the rights and protections of probationary teachers. CTA refused to assist her with com-

plaints regarding negligence, safety violations, defamation, and retaliation for whistleblowing, but it assured her she would be reinstated and at that time could raise these issues. The district, however, did not reinstate the charging party but instead sent her a letter stating she was non-reelected for the 2001-02 school year, pending the outcome of her case.

A Court of Appeal ultimately upheld CTA's charge that temporary teachers are entitled to the rights of probationary teachers and ordered that the charging party be reinstated to her position. CTA urged the court to publish its decision, and when the charging party finally read it, she found that the decision contained false allegations against her that CTA had never moved to strike.

After the Court of Appeal issued its ruling, the charging party asked CTA to seek enforcement of the reinstatement order. CTA first refused, but later complied on the condition that it be allowed to seek a second legal opinion defining "reinstatement." CTA filed the new suit but refused to challenge the validity of the district's letter of non-reelection. Because CTA did not issue a challenge, the court upheld the letter's validity, a decision CTA refused to appeal. Due to these actions, the charging party alleged CTA deliberately prevented her reinstatement in order to pursue the second legal precedent.

The R.A. found that CTA did not have a duty to represent the charging party in a court of law, and thus the above facts did not prove a prima facie case. The charging party filed her charge against CTA rather than OEA. Because OEA is designated as the exclusive representative of certified employees, it alone has the duty to fairly represent bargaining unit members. The R.A. further found that the duty of fair representation applies only to contract negotiations, administration of the bargaining agreement, and the handling of grievances. Accordingly, while a union may voluntarily represent employees in extra-contractual forums, it has no duty to do so.

On appeal, the charging party included OEA in the charge, arguing that it should have taken the grievance to arbitration rather than refer the case to CTA. The R.A. found this action by OEA was not arbitrary, discriminatory, or made

in bad faith, the showing of which is necessary for a prima facie case. Moreover, as was the case with CTA, OEA had no duty to represent the charging party in an extra-contractual forum.

The charging party also included in the amended charge a claim that, under *Lane v. IUOE Stationary Engineers, Loc. 39* (1989) 212 Cal.App.3d 164, 82 CPER 22, the duty of fair representation attached once OEA volunteered to represent her in an extra-contractual forum. The R.A. disagreed, noting that PERB has not adopted this theory, but instead has ruled that the view articulated in *Lane* can be pursued only in state court.

In accordance with the above findings, the R.A. dismissed the charges. The board adopted the R.A.'s decision as the decision of the board itself, and dismissed the charge without leave to amend.

Non-unit member lacks standing: IBEW Loc. 1245.

(*Tacke v. IBEW Loc. 1245*, No. 1857-M, 9-1-06; 2 pp. + 6 pp. R.A. dec. By Member McKeag, with Chairperson Duncan and Member Shek.)

Holding: Because the charging party was not a member of the class he alleged was harmed, he did not have standing to bring a claim and the case was dismissed.

Case summary: Based on the same set of facts detailed in *Tacke v. Modesto Irrigation Dist.*, above, the charging party brought an unfair practice charge against IBEW Loc. 1245, alleging it breached its duty of fair representation and interfered with protected employee rights by entering into an election agreement that was biased against non-union members. The charging party claimed that the interference occurred during an election that would allow members of the utility service maintenance unit, which is exclusively represented by IBEW, to decide whether to approve an agency shop arrangement and impose an agency fee on non-union members of the unit.

The R.A. ruled that the facts provided did not state a prima facie case. The charging party was not a member of the USM unit; thus, he was not a member of the class he alleged had been harmed and did not have standing to bring

a claim. Moreover, the R.A. stated, even if the charging party had standing, the charge did not provide sufficient evidence to state a prima facie case. The R.A. found that there was insufficient evidence to show the union selectively informed only union members of the election or otherwise interfered with unit members learning about the election. Further, the R.A. found no evidence or specific examples demonstrating that employees were unable to reach the polling locations during voting hours. Thus, there was insufficient evidence to establish a prima facie case, and the R.A. dismissed the claim. The board upheld the R.A.'s decision as the decision of the board itself.