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letter from the editor

Dear *CPER* Readers:

The Democrats' victory in the recent mid-term elections seems certain to impact the political atmosphere in Washington. Already, after capturing both houses of Congress, we have begun to hear a more vigorous debate about the war in Iraq and a renewed focus on tax cuts and the economy. Nancy Pelosi's elevation to Speaker of the House is an important milestone for women and an accomplishment some say could prove beneficial to all Californians.

Because labor played an important role in assuring the Democrats' win, it, too, is likely to reorganize national objectives and reshape public debate.

For example, unions placed minimum wage initiatives on the ballot in six states. Their success in those venues may fuel efforts to raise the federal minimum wage — now set at \$5.15 an hour, unchanged since 1997. With Representative George Miller as head of the House Committee on Education and the Workforce and Senator Ted Kennedy as leader of the Senate Labor Committee, other matters near and dear to labor may ascend to the top of the legislative agenda. Lawmakers could focus attention on the loss of pension benefits, the stagnation of low-income wages, free-trade agreements, and worker human rights.

Also likely to be hotly debated is the Senate bill dubbed the Employee Free Choice Act, that would make it easier for unions to organize workers by, among other things, increasing the penalties on companies that illegally fire employees who participate in union organizing drives. San Francisco garnered national attention as the first city in the nation to mandate paid sick leave for all employees. Mandated paid leave could be one of those "San Francisco values" replicated in other places in the country.

It is less clear what effect the national election results will have in California, where voters rejected labor's candidate, Phil Angelides, and gave Governor Schwarzenegger a sound victory. Despite that defeat, however, labor organizations in the state — particularly public sector unions — have not forgotten their success in the 2005 special election and may be ready to renew their fight for universal health care coverage.

As the country moves ahead into its recast political future, we at *CPER* are eager to continue to provide a helpful view into the exciting public sector labor relations arena.

Sincerely,



Carol Vendrillo
CPER Editor and Director

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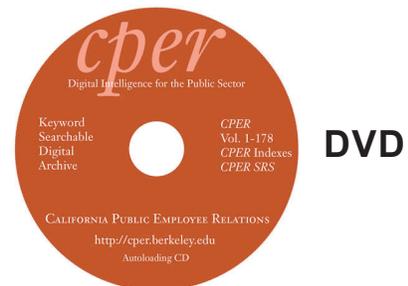
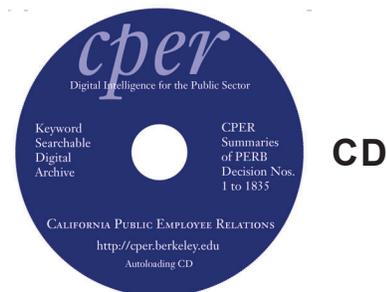
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‘Getting Religion’: Teaching About Religion in the Public Schools

Linda Lye

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For the Byron Union School District — a small district nestled in an agricultural portion of eastern Contra Costa County — the tragic events of September 11 overlapped with a seventh-grade world history class focused on Islamic history, culture, and religion. That fall, Islam suddenly dominated the headlines.

Teacher Jane Smith¹ relied on a wide variety of instructional strategies and materials to teach her students about a religion that is a required component of the seventh-grade world history curriculum in California. Students participated in a “simulation” in which they divided into groups, each named for a Middle Eastern city. They earned points by participating in art projects, classroom presentations on topics such as nomads in the desert, and a board game akin to “Trivial Pursuit.”

The following summer, two Christian families, including one student who was in Smith’s world history class, sued Byron USD and various school officials. Plaintiffs in the lawsuit, *Eklund v. Byron Union School Dist.*,² contended that students had been forced to participate in simulated Islamic religious rituals in violation of their rights under the Establishment Clause, the Free Exercise Clause, and the Due Process Clause. The District Court for the Northern District of California dismissed the Free Exercise and Due Process claims on the pleadings, and granted summary judgment for the school defendants on the Establishment Clause claim. In an unpublished memorandum opinion, the Ninth Circuit affirmed the lower court. On October 2, 2006, the Supreme Court denied the plaintiffs’ petition for a writ of certiorari.

Eklund provides a fascinating case study that raises questions about the appropriate role of religion in public education. Set in a contemporary context, the case examines public teachers’ rights and responsibilities to educate students about diverse cultures in today’s increasingly global society and to use instructional strategies that, while widely accepted in the field of education, have not yet been

the subject of much analysis by the courts. This article first will provide an overview of Establishment Clause principles and their application in the education context. Then it will discuss the facts of *Eklund* and the lessons it holds both for educators who wish to teach about religion and for school officials who may find themselves defending against constitutional challenges.³

The Establishment Clause: An Overview

The First Amendment of the Constitution prohibits the government from making any “law respecting an establishment of religion.”⁴ In its cases under the Establishment Clause, the Supreme Court has articulated differing views of the proper relationship between government and religion. Perhaps the broadest view of the clause is that, “[i]n the words of Jefferson, [it] was intended to erect ‘a wall of separation between Church and State.’”⁵ The court has simultaneously understood the clause to reflect a principle of neutrality: “That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.”⁶

And, at the other end of the spectrum, the court also has indicated that the clause reflects, or at least is compatible with, a principle of affirmative governmental acknowledgment of religion. Thus, in *Lynch v. Donnelly*, the Supreme Court upheld a town hall holiday display that included a crèche, with figures of Jesus, Joseph, Mary, and angels, as simply another example in the country’s “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”⁷

In light of these various principles, the court has articulated multiple “tests” to assess whether governmental conduct violates the Establishment Clause. The *Lemon* test

requires that state action have a secular purpose, not the principal or primary effect of advancing or inhibiting religion, and that it not foster excessive governmental entanglement with religion.⁸ The endorsement test essentially merges the first two prongs of the *Lemon* test and asks whether governmental action has the purpose or effect of endorsing religion.⁹ And the *Lee* test prohibits the government from coercing participation in a religious activity.¹⁰ Although a plurality of the court has called into question the continued vitality of the *Lemon* test,¹¹ and has not clarified the relationship of these various tests to each other,¹² a prudent governmental actor would ensure that its conduct satisfies each of the foregoing three tests.

Whether these various principles and tests can be harmonized is beyond the scope of this article, but the cases make one thing clear: The inquiry in every Establishment Clause case resists any “fixed, *per se* rule” and must instead focus on the factual context of the challenged governmental action.¹³

Given the primacy of context, the court thus has found unconstitutional the posting of the Ten Commandments in a public school classroom (*Stone v. Graham*) and a Ten Commandments display in a courthouse (*McCreary County v. ACLU*), but upheld a six-foot high monument to the Ten Commandments on the grounds of the Texas State Capitol (*Van Orden v. Perry*).¹⁴ Although, at first blush, the

divergent results in these cases seem explainable only by reference to Justice Potter Stewart’s observation about pornography, that he would know it when he saw it,¹⁵ they can be explained by more than *ad hoc* decisionmaking. As Justice Stephen Breyer, who cast the decisive fifth vote in *Van Orden*, explained, “In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct)” and/or a secular “historical message (about a historic relation between those standards and the law).”¹⁶ Thus, the heart of the inquiry is whether the

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government's conduct sends a message that is religious or secular, and the factual context is critical to making that distinction.

In *Stone v. Graham*, the posting of the Ten Commandments in the classroom “serve[d] no...educational function” because the materials were not “integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”¹⁷ Instead, the only effect of the Ten Commandments display, the court found, was “to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.”¹⁸ And in *McCreary County v. ACLU*, the courthouse display “stood alone, not part of an arguably secular display” and “at the ceremony for posting the framed Commandments...., the county executive was accompanied by his pastor, who testified to the certainty of the existence of God.”¹⁹ Given this context, the court explained, “[t]he reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments’ religious message.”²⁰

In contrast, the context of the *Van Orden* display reflected a primarily secular message: The group that donated the monument was a private civic organization that sought to “highlight the Commandments’ role in shaping civil morality as part of that organization’s efforts to combat juvenile delinquency,” and the monument sat “in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the ‘ideals’ of those who settled in Texas and of those who have lived there since that time.”²¹ Significantly, this setting did “not readily lend itself to meditation or any other religious activity. But it [did] provide a context of history and moral ideals,” thus communicating “to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State’s citizens, historically speaking, have endorsed.”²²

The results in *Stone* and *McCreary* were thus consistent with the principles underlying the Establishment Clause. Governmental action that actively celebrates religious beliefs and encourages the public (whether students or passersby in a public courthouse) to adhere to those beliefs violates principles of separation and neutrality, and goes beyond the government’s acknowledgment of the role of religion in American life. At the same time, when the government, as in

Van Orden, carries a secular message that merely bears on religion — such as the acknowledgment of the historical role of religious beliefs — and does not encourage the public to adhere to those beliefs, it violates none of the principles underlying the Establishment Clause.

Indeed, to prohibit the government from acknowledging the historical role of religion would require it to excise all references to religion from public life — including public school curricula. Such an approach would require the government to show hostility toward religion (by permitting it to acknowledge the historical role of art, politics, and other secular phenomena, but not religion, in public life) and thus turn the Establishment Clause’s principle of neutrality on its head.

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The Establishment Clause in the Public Schools

In the public schools, educators are faced with very practical questions that can be broken down into two general (and related) categories. What substantive content permissibly may be taught to students? And what types of educational activities or instructional strategies permissibly may be used to convey course content? A review of the Establishment Clause education cases — in particular, the evolution and school prayer cases — reveals the following relatively clear, workable rules.

With respect to both content and strategies, the key distinction between permissible and impermissible action is whether the classroom presentation is part of a secular

education program with secular, educational purposes, or whether it conveys a religious message that encourages students to adopt religious beliefs as their own. Thus, school officials may not endorse particular religious beliefs. In other words, they may not directly or indirectly encourage or require students to adopt certain religious beliefs as their own — either by teaching students that the tenets of a particular religion are “correct” or “true,” or by encouraging students to participate in religious activities for the purpose of affirming the students’ own religious faith.²³

At the same time, the Supreme Court has acknowledged that a well-rounded public education necessarily includes “a study of comparative religion or the history of religion and its relationship to the advancement of civilization.”²⁴ As a result, even doctrinal materials of a particular religion, such as the Bible, may be studied “for [their] literary and historic qualities” as long as they are “presented objectively as part of a secular program of education.”²⁵

To distinguish between a secular and religious educational program, the analysis must focus on the classroom context and the specific manner in which the teacher presents the written materials, classroom activities, and instructional strategies.

Course content. Cases involving science and the longstanding controversies over evolution make clear that (1) the public school curriculum may not be tailored to the religious views of particular groups,²⁶ and (2) public schools may teach students about religion *as part of a secular program of education*.²⁷ Both rules are consistent with the Establishment Clause’s neutrality principle: To tailor the curriculum according to religious tenets would be to take sides, rather than remain neutral, in a religious debate. And to prohibit students from learning about the historical role of religion in, for example, medieval European life, would show a hostility to religion completely at odds with the principle of neutrality. The Establishment Clause does not prohibit

public schools from fulfilling its educational mission of providing students with a well-rounded education.

Thus, the courts repeatedly have clarified that schools cannot ban instruction about evolution due to the Christian view that “the Book of Genesis must be the exclusive source of doctrine as to the origin of man.”²⁸ Nor may schools require the teaching of creation science because it “embodies the religious belief that a supernatural creator was responsible for the creation of humankind.”²⁹ To teach creation science as scientifically true therefore clearly would constitute encouragement that students adopt the “the religious viewpoint that a supernatural being created humankind.”³⁰

And even though religious opponents to evolution recently have sought to rename their theory, the result has been the same. In *Kitzmiller v. Dover Area School Dist.*, the U.S. District Court for the Middle District of Pennsylvania struck down a school district’s effort to encourage students in a biology class to learn about the theory of “intelligent design.”³¹ After a lengthy bench trial with extensive expert testimony, the court concluded that intelligent design

is not science, but rather “an old religious argument for the existence of God.”³²

At the same time, the “study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education,” is entirely permissible.³³ The critical point is that the information about religion must be presented as part of a secular program of education. Thus, public school teachers may use biblical excerpts or other religious texts in a history class to teach the beliefs held by Christians and other religious groups during various historical periods.

Indeed, the History-Social Science Content Standards for California Public Schools adopted by the California State Board of Education, for example, require seventh-grade students to be familiar with the development of Christianity, Islam, and Buddhism. It goes without saying, however, that

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public school teachers may not teach students that events in the Bible “actually occurred,” as one teacher in Mississippi sought to do.³⁴ In short, public schools may not teach students that matters of religious doctrine are historically or scientifically true and thus worthy of the students’ belief.

Activities and instructional strategies. With respect to permissible *content*, the case law clearly states that public schools may teach about religion but may not teach religion. With respect to permissible educational activities or instructional strategies, the case law is less well-theorized, but a clear principle nevertheless emerges from the cases: While public schools may not encourage or require students to participate in activities that force them to affirm their own belief in religion, they may encourage or require students to participate in activities that help them learn about religion.

It is beyond controversy that school-sponsored prayer is not permissible,³⁵ even if students are not required to participate in the prayer, and instead are asked only to stand passively by as their classmates participate.³⁶ This is so because prayer, as an undeniably religious activity, entails “a solemn avowal of divine faith and supplication for the blessings of the almighty.”³⁷ Indeed, even a government-mandated moment of silence in public schools can run afoul of the Establishment Clause where the government has no secular purpose in mandating the activity and its purpose is to encourage students to pray.³⁸ The unmistakable — and clearly unconstitutional — message when a school conducts prayer, or holds a moment of silence as a pretext for encouraging students to pray, is to encourage students to avow solemnly *their own* divine faith.

Although the cases are clear that school-sponsored prayer is unconstitutional, the courts have provided little guidance on precisely what constitutes prayer. Prayer, however, must involve more than the mere utterance of words from religious texts by students. An overly broad definition would preclude a teacher in a Bible as Literature class from asking students

to read aloud passages in the classroom.³⁹ Similarly, if merely uttering religious words constituted “prayer,” then a school choir would not be permitted to sing songs with religious significance. A school choir teacher, however, may have secular, pedagogical purposes for selecting a piece of choral music — such as its “unique qualities to teach a variety of vocal music skills (i.e., sight reading, intonation, harmonization, expression).”⁴⁰ Thus, courts have rejected

Establishment Clause challenges to the singing of religious songs by school choirs.⁴¹ Of course, as in any Establishment Clause case, there are no *per se* rules, and there are circumstances where a choir’s singing of a religious song might well violate the Constitution.

But this prohibition against school-sponsored prayer (or any other activity that forces students to affirm their own religious beliefs) does *not* create an absolute prohibition against schools having students actively participate in classroom activities with some connection to religion.

In *Brown v. Woodland Joint Unified School Dist.*, the Ninth Circuit Court of Appeals rejected an Establishment

Clause challenge to a school district’s use of a reading series that included “learning activities” in which students were asked “to pretend that they are witches or sorcerers,” or “to role-play these characters in certain situations.”⁴² (The parents contended that the reading materials promoted the religion of Wicca, which the court assumed, without deciding, constituted a religion within the meaning of the Establishment Clause.)⁴³ The Ninth Circuit bifurcated its analysis and distinguished between classroom activities that “involve no more than merely reading, discussing or contemplating witches, their behavior, or witchcraft,” and “student participation that is more active....”⁴⁴

The court upheld the first category of activity as the very type of literary or historic study of doctrinal religious materials that the Supreme Court has long approved.⁴⁵ The court observed, however, that under established precedent,

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“student participation in school-sponsored religious ritual,” such as prayer, “can have the primary effect of endorsing religion.” The court opined that “active participation in ‘ritual’ poses a greater risk of violating the Establishment Clause than does merely reading, discussing or thinking about religious texts.”⁴⁶

The court concluded that the “active participation” exercises in the case before it were permissible because they were not “formal religious rituals” and were only a small portion of a secular program of education designed to develop students’ reading skills.⁴⁷ Interestingly, the court noted in *dictum*:

Some student participatory activity involving school-sponsored ritual may be permissible...where the activity is used for secular pedagogical purposes. For example, having children act out a ceremonial American Indian dance for the purpose of exploring and learning about American Indian culture may be permissible even if the dance was religious ritual. Similarly, a reenactment of the Last Supper or a Passover dinner might be permissible if presented for historical or cultural purposes.⁴⁸

The Ninth Circuit’s distinction between activities like reading, discussing, and thinking, on the one hand, and those that entail more “active participation” by students, on the other, may not be a sensible pedagogical distinction. Presumably, teachers wish their students to participate actively in all classroom activities. But *Brown* signals that courts are likely to more closely scrutinize instructional strategies other than traditional reading, lecturing, and note-taking methods. *Brown* also indicates that even if courts analyze traditional and experiential classroom activities differently, the same principles govern. The court will look to the overall context of the classroom presentation to determine whether school officials impermissibly are encouraging students to adopt religious beliefs as their own or permissibly encouraging students to engage in experiential classroom activities for secular pedagogical purposes.

Although the Establishment Clause is not susceptible of fixed, *per se* rules, the general lesson of *Brown* is that where the experiential classroom activity has a secular pedagogical purpose and is not a formal religious ritual, it is less likely that it will be held unconstitutional. Where the experiential activity is an overt religious exercise, there is a greater but not certain risk of an Establishment Clause violation.

The court’s express statement was that recreation of religious ritual may be permissible if done for a secular pedagogical purpose (such as helping students learn the history or culture of a particular religion). The unexpressed intuition of the court in *Brown* was that where students are asked to perform actual religious rituals, there is a greater likelihood that the students may feel the school is encouraging them to affirm their own belief in the religious values solemnized in the ritual. But by expressly acknowledging the possibility of permissible recreations of religious rituals, the court also recognized that, in certain circumstances, students performing a religious ritual may understand that they are not being asked to affirm their own beliefs in the particular religion, but merely are being presented with a hands-on method of learning about the religious beliefs of a particular group. The court thus reserved the right of public educators to use instructional strategies that will engage students and effectively convey course content, even if that content relates to religion and even if the strategy requires the students’ “active participation.”

In short, although the case law does not expressly define prayer or delineate clear categories of permissible and impermissible classroom activities, well-settled Establishment Clause principles indicate that (1) the relevant inquiry is contextual, and (2) the fundamental question is whether the overall message of the school-sponsored activity is secular (e.g., sing this song to practice and master your singing skills; participate in this experiential activity to learn about what a particular group of people believes) or religious (e.g., sing this song or participate in this exercise to affirm your devotion to the god of this religion).

The fundamental question is whether the overall message of the school-sponsored activity is secular.

Eklund: Seventh-Grade World History in Byron USD

Throughout the 2001-02 academic year, Smith taught seventh-grade world history and used varied instructional materials and strategies. Students participated in hands-on activities and simulations while studying, for instance, the fall of Rome, China, Medieval Europe, and Islam. Smith integrated games, role-playing, and hands-on activities because she believed activities are effective ways to engage students. Indeed, as an education expert for the defense testified, "Any listing of 'best practices' for middle-school social studies emphasizes a variety of instructional approaches, particularly experiential activities....Motivating early adolescents to absorb knowledge, analyze, and reason, both practitioners and researchers have found, comes from activities that ask students to do more than sit, listen, and fill out worksheets."⁴⁹

The record before the court contained detailed and largely undisputed information regarding the manner in which Smith taught the unit on Islam. She used a variety of instructional materials: the state approved textbook for world history; a chapter from an outside text; slide lectures published by the Teachers Curriculum Institute on the geography of the Arabian Peninsula; and modified portions of a simulation entitled, "Islam: A Simulation of Islamic History and Culture," published by Interaction Publishers. She also varied her instructional strategies, integrating traditional lecture/note-taking methods with experiential activities, derived in part from the Interaction publication.

The publication lay at the heart of the controversy. It contains student handouts with information about Islamic history, culture, and religion, as well as suggested activities to help students learn the information presented. Although the plaintiffs focused on the suggested activities in isolation from how those materials were presented and from the rest of the Islam unit and world history course, both the district

court and Ninth Circuit looked at the materials and activities in the *context* in which they were taught.⁵⁰

That context included extensive, uncontroversial portions of the class, in which students learned about Islamic history, culture, and religion through an undeniably secular program of education consisting of, for example, lectures and note-taking. The following description touches only on the elements of the class with which the plaintiffs took issue, and which comprised only a few days out of a several-week unit.

Interaction's publication contained a suggested simulation to help students learn about Islamic history, culture, and religion. The simulation implemented by Smith consisted of a game in which students were divided into groups, each named for a city. The goal of the game was to "get to Mecca." Each group had a camel and, by completing activities, their camels advanced along a route posted on the classroom wall.

According to Muslim belief, there are specific rituals that devout Muslims must perform. These rituals are known as the Five Pillars of Faith. The activities in the game were thematically organized around each of the Five

Pillars. Students performed these activities in their city groups to help them learn about what Muslims believe.

The first pillar in Islam is *Shahdada*; it requires Muslims to profess their faith in God. For this activity, each student group made a banner that included the name of their city, the students' names, and their class period. Students also were asked to decorate their banners. Making banners as art projects is a common middle-school social studies class activity.

The second pillar in Islam is *Salaat*, or prayer, which requires Muslims to pray five times a day, in Arabic, according to detailed and ritualized rules. The students had learned about the steps that Muslims follow in prayer from earlier portions of the unit. For this activity, Smith asked the students to familiarize themselves with Arabic proverbs and a few lines from Muslim texts. She checked to see if students

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had performed this task by asking them to recite their lines to her as they left the classroom at the end of the period. As the plaintiff testified, he was required to learn only one line from one Muslim text. There was nothing sacred or ritualistic in the way this classroom activity was performed. The students casually said their lines on only one occasion, only to Smith, and not to the entire class. They did so one at a time and not in unison. Their bodies and hands were not in any special position. Their eyes were not closed. They were not standing or kneeling. They had not engaged in any ritual washing or removed their shoes prior to reciting the line. As one student testified, there was no resemblance between how the students said their lines to Smith and how, according to what they had learned, Muslims actually pray.

The Third Pillar is *Ramadan*, which requires Muslims to fast from dawn to dusk for the entire month of Ramadan. For this activity, students selected things to give up, such as watching television or eating candy. One student, who gave up soda, testified that “[d]oing this activity was an interesting way of learning about Muslims without just reading that information straight out of a book.... The soda activity was one activity that gave me an opportunity to look at the Muslims culture and perspective.”⁵¹

The fourth pillar is *Zakaat*, which requires that Muslims tithe a percentage of their wealth or property. It requires a payment and cannot be satisfied by performing helpful deeds. For this activity, students elected to perform community-service projects, such as picking up trash on campus. Community service is frequently a component of school activities.

The final pillar, *Hajj*, requires all Muslims to make a pilgrimage to Mecca once in their lifetime. The pilgrimage occurs at a specific time of year and involves certain rituals. For this activity, Smith’s students played a board game in which they drew cards that reinforced and tested the information they had learned.

Students in the unit also had the opportunity, but were not required, to select Arabic names as part of the game. Students also selected names as part of the simulation on Medieval Europe. Smith did not refer to students by their simulation names.

Students also prepared classroom presentations. The plaintiff’s group gave an oral presentation about the city of Jerusalem. Another group presented a play about desert nomads. Smith permitted, but did not require, students to dress in Arabic-style clothing for their presentations, just as they were allowed to dress up in connection with the simulation on Medieval Europe.

The plaintiffs argued that the simulation forced students to “become” Muslims. The plaintiff student, however, testified that he understood the simulation was just a simulation, and that he had not become a Muslim by participating in any of the classroom activities.

On this record, the district court granted summary judgment for the school defendants. It held that the role-playing activities did not violate *Lee* — which prohibits the government from coercing participation in religious exercises — because the activities were not religious exercises; nor were they performed with any devotional or religious intent.⁵² Similarly, the court — applying the *Lemon* and endorsement tests together — concluded that the role-playing activities did not have the purpose or effect of endorsing Islam. The court based this conclusion on the perspective of the reasonable observer, which, in the school context, is the reasonable student.⁵³ The district court found:

The court based its conclusion on the perspective of the reasonable observer, which, in the school context, is the reasonable student.

The students participated in many role-playing exercises in their middle school years, and learned about a number of religions as well, for purely educational purposes. [Smith] also repeatedly explained to the students the nature of the Islam role-playing assignment, explained that it did not represent reality, and the students subjectively understood the distinction between the

simulation and their actual religious faith.... Given these facts, an objective review of the activities in question does not result in a finding of an endorsement of Islam.⁵⁴

The Ninth Circuit affirmed in a brief unpublished memorandum opinion, citing *Brown*. The Supreme Court recently denied plaintiffs' petition for a writ of certiorari.

The Lessons of Eklund

Although *Eklund* did not result in a published Court of Appeals decision, it holds valuable lessons for public educators.

First, it reaffirms the right of public schools to teach students about religion as part of a secular program of education. In various subtle and not-so-subtle ways, plaintiffs sought to use the Establishment Clause as a tool for eliminating any study *about* Islam from the public school curriculum. The plaintiff student admitted that his objection to the Islam unit was the fact that he is Christian and unfamiliar with the religion of Islam: "Like me, mine is Jesus. Islam is, like, the one guy I don't know."⁵⁵ And he also acknowledged that the suit was motivated by his reactions to September 11. He testified that he wanted "to get the Islam study out of the school" "[b]ecause it felt wrong doing it after the 911 thing."⁵⁶

The plaintiffs' Islam expert also testified that the Interaction publication presented a biased and distorted view because it did not depict what the expert said was the religion's violent aspects and connections to terrorism.⁵⁷ But the Establishment Clause does not require public schools to excise portions of the curriculum to accommodate the political or religious objections of students or parents. On the contrary, eliminating the study of Islamic history, culture, and religion from a world history class *because of* religious objections by some parents or students would *violate* the Establishment Clause — just as eliminating the study of

evolution from a biology class because of Christian religious objections was held by the Supreme Court to be unconstitutional.⁵⁸

Indeed, the plaintiff student's discomfort with Islam, based on his lack of familiarity with it, underscores the public schools' critical responsibility to educate students about society's increasingly diverse cultures and religions. *Eklund* strongly rejected an attempt to use the Establishment Clause to impose the curricular preferences of a few parents or students on the public school system.

Second, the district court and the Ninth Circuit — in declining to set forth any *per se* rule, either approving or disapproving of the use of experiential methods to teach about religion — reaffirmed the inherently contextual analysis of the Establishment Clause. As a matter of constitutional law, this was clearly correct. *Per se* approval of experiential methods to teach about religion could have opened a Pandora's Box, permitting pretextual uses of "simulations" that, while nominally used to teach about religion, have the purpose and effect of endorsing religion. A teacher's assertion that students simply are "simulating" prayer to learn about how a particular group of people pray should not immunize from constitutional challenge conduct that amounts to school-sponsored prayer, that is, a school's encouragement that students solemnly avow their own faith in a divine being.

Conversely, *per se* disapproval of experiential methods to teach about religion would evince a hostility to religion by preventing teachers from using recognized "best practices" — but only when they are teaching about religion, and not secular subjects. Such a result would be completely at odds with the Establishment Clause's fundamental principle of neutrality.

Third, *Eklund's* reaffirmation of the Establishment Clause's contextual approach makes good educational policy. Constitutionality in any given case turns on the specific

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manner in which the teacher uses the instructional strategies involved. While school officials initially may find the absence of bright-line rules frustrating, the law tacitly acknowledges that educators, and not judges, are vested with the primary right and responsibility for making basic educational decisions. This includes how long to spend on a unit, what instructional strategies to use, and in what combination or order. Of course, educators must respect constitutional limits, but as the Supreme Court has recognized, federal courts are not well suited “to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions.”⁵⁹

Fourth, *Eklund* also offers important lessons for school officials who must defend against an Establishment Clause challenge. It is critical that a full factual record be developed and that the defense of qualified immunity be deployed judiciously.

Defendants in *Eklund* provided the court with detailed information about the specific manner in which the objectionable role-playing activities were presented, as well as testimony about the rest of the Islam unit, other units in the world history class, other classes at the school, and the demographics of the school community. The development of a full factual record was critical to the outcome in *Eklund*. It made the court aware of how the teacher presented the challenged classroom activities in order to determine whether that presentation is secular or religious. But it also demonstrated to the court the context in which the Islamic unit was presented. School defendants were able to demonstrate that the presentation was “part of a secular program of education.”⁶⁰

To the extent, as in *Brown* and *Eklund*, the challenged portions of the class comprise only a small portion of the overall course,⁶¹ the court is much more likely to conclude that a reasonable observer would not have perceived an endorsement based on the use of a few role-playing activities.

In addition, because the defendants in *Eklund* demonstrated that games and simulations were used throughout the world history class and in other classes at the school, they could argue that a reasonable student would not have perceived anything unique from the use of such activities in the Islam unit.

Furthermore, because the Establishment Clause is concerned with governmental endorsement of a particular religion — with the danger that the government may be sending the “message to...nonadherents that they are outsiders, not full members of the political community”⁶² — the community

context is very probative of the fundamental constitutional question. The defendants in *Eklund* introduced evidence that none of the school officials was Muslim or even knew any Muslims; the student body was overwhelmingly white and Latino, with students of Middle Eastern origin accounting for less than 1 percent of students at the school; September 11 occurred close to the beginning of the unit; and, following September 11, many students used derogatory terms to describe Muslims. With this background contextual information, the district court and Ninth Circuit had no difficulty concluding that a reasonable seventh grader would not have felt like an “outsider” for failing to embrace Islam.

On a final, related note, the defense of qualified immunity, where available,⁶³ is a powerful tool for school defendants,⁶⁴ but it may well be short-sighted to invoke it to obtain a quick legal victory at the expense of a harmful constitutional ruling. Qualified immunity consists of a two-prong inquiry: first, whether there has been a deprivation of a constitutional right, and second, whether the right was clearly established at the time of the violation.⁶⁵

The Supreme Court has instructed courts evaluating claims of qualified immunity to rule on the constitutional question first.⁶⁶ Thus, school officials cannot avoid defending the merits of the constitutional claim simply by invoking the defense of qualified immunity. Particularly in Establishment

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Clause cases, where context is key, the facts necessary to show that school officials have not committed a constitutional violation are unlikely to be found in the complaint and are likely to arise only after development of a full factual record.

The general rule is that “bad facts make bad law.” In Establishment Clause cases, incomplete facts also make bad law. If a qualified immunity motion is brought based only on the facts alleged in the complaint — which ordinarily will describe only the activities the plaintiffs contend violate the Establishment Clause — a court may find the defendants committed a constitutional violation. While the court may find that the right at issue was not clearly established at the time, and thus ultimately rule for the defendants on qualified immunity grounds, such a ruling would be a pyrrhic victory. Defendants may have disposed of the litigation, but school districts elsewhere would be saddled with a potentially harmful constitutional decision in future cases. The qualified immunity defense should not be disregarded, but only used wisely. *

1 A pseudonym is being used to protect the teacher’s privacy.

2 (N.D. Cal. 2003) No. C-02-03004 PJH, 2003 U.S. Dist. LEXIS 27152; 9th Circuit Case No. 04-15032.

3 Although the plaintiffs in *Eklund* also brought claims under the Free Exercise and Due Process Clauses, this article focuses exclusively on their Establishment Clause claim, as the case did not present significant issues under either of the first two clauses. It is well-established that Free Exercise claims are meritless where, as in this case, students had the opportunity to “opt out” of being exposed to the challenged instructional unit. See *Grove v. Mead School Dist.* (9th Cir. 1985) 753 F.2d 1528, 1537. Courts also have uniformly rejected efforts to alter the school curriculum by parents invoking their “parental rights” under the Due Process Clause. See *Hooks v. Clark County School Dist.* (9th Cir. 2000) 228 F.3d 1036, 1042; *Swanson v. Guthrie Independent School Dist.* (10th Cir. 1998) 135 F.3d 694, 699; *Herndon v. Chapel Hill-Carrboro City Board of Ed.* (4th Cir. 1996) 89 F.3d 174, 178-79; *Immediato v. Rye Neck School Dist.* (2d Cir. 1996) 73 F.3d 454, 462; *Brown v. Hot, Sexy and Safer Products, Inc.* (1st Cir. 1995) 68 F.3d 525, 533-34; *Murphy v. Arkansas* (8th Cir. 1988) 852 F.2d 1039, 1044.

4 The Establishment Clause applies to the states through the Fourteenth Amendment. *Wallace v. Jaffree* (1985) 472 U.S. 38, 49-50.

5 *Everson v. Board of Education of Ewing Township* (1947) 330 U.S. 1, 16.

6 *Id.* at 17.

7 *Lynch v. Donnelly* (1984) 465 U.S. 668, 674.

8 *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-13.

9 *Lynch*, 465 U.S. at 687-94 (O’Connor, J., concurring); *County of Allegheny v. ACLU* (1989) 492 U.S. 573, 592.

10 *Lee v. Weisman* (1992) 505 U.S. 577, 594.

11 *Van Orden v. Perry* (2005) 545 U.S. 677 (plurality opinion by Rehnquist, C.J.).

12 See, e.g., *Santa Fe Independent School Dist. v. Doe* (2000) 530 U.S. 290, 307-12 (applying both endorsement and *Lee* tests, but not articulating the relationship between two tests).

13 *Lynch*, 465 U.S. at 679.

14 Compare *Stone v. Graham* (1980) 449 U.S. 39 (display in public school classroom unconstitutional); *McCreary County v. ACLU* (2005) 545 U.S. 844 (display in courthouse unconstitutional); with *Van Orden v. Perry*, *supra*. (display on Texas State Capitol grounds constitutional).

15 *Jacobellis v. Ohio* (1964) 378 U.S. 184, 197 (Stewart, J., concurring).

16 *Van Orden*, 125 S.Ct. at 2869-70 (Breyer, J., concurring in judgment).

17 *Stone*, 449 U.S. at 42.

18 *Id.*

19 *McCreary*, 125 S.Ct. at 2738.

20 *Id.*

21 *Van Orden*, 125 S.Ct. at 2870 (Breyer, J., concurring in judgment).

22 *Id.*

23 Conversely, school officials may not disapprove of particular religious beliefs, or in any way discourage students from adhering to their religious beliefs — either by teaching students that the tenets of their religion are “incorrect” or “false,” or by discouraging students from participating in religious activities.

24 *Abington v. Schempp* (1963) 374 U.S. 203, 225.

25 *Id.*

26 *Epperson v. Arkansas* (1968) 393 U.S. 97, 106.

27 *Id.*

28 *Id.* at 107; see *Id.* at 107-08 (Arkansas statute prohibiting teaching of theory of evolution unconstitutional where sole purpose of law was “religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law’s reason for existence.”).

29 *Edwards v. Aguillard* (1987) 482 U.S. 578, 592.

30 *Id.*

31 (M.D. Pa. 2005) 400 F.Supp.2d 707.

32 *Id.* at 718.

33 *Epperson*, 393 U.S. at 106.

34 *Herdahl v. Pontotoc County School Dist.* (N.D. Miss. 1996) 933 F.Supp. 582, 596.

35 See, e.g., *Abington v. Schempp* (1963) 374 U.S. 203 (Bible reading followed by students' standing recitation in unison of Lord's Prayer unconstitutional); *Engel v. Vitale* (1962) 370 U.S. 421 (prayer in public school unconstitutional). The prohibition applies with equal force to student-led prayer, where the prayer is sufficiently entangled with the school as to bear the imprimatur of school-sponsorship. See *Santa Fe Independent School Dist. v. Doe* (2000) 530 U.S. 290, 302-10.

36 *Lee v. Weisman* (1992) 505 U.S. 577.

37 *Engel*, 370 U.S. at 424.

38 *Wallace v. Jaffree* (1985) 472 U.S. 38, 59.

39 *Abington*, 374 U.S. at 225.

40 *Bauchman v. West High School* (10th Cir. 1997) 132 F.3d 542, 554.

41 *Id.*; see also *Doe v. Duncanville Independent School Dist.* (5th Cir. 1995) 70 F.3d 402.

42 (9th Cir. 1994) 27 F.3d 1373, 1377.

43 *Id.* at 1378.

44 *Id.* at 1380.

45 *Id.*

46 *Id.*

47 *Id.* at 1377, 1381-82.

48 *Id.* at 1380 n. 6.

49 Dr. Larry Cuban, Professor of Education at Stanford University, Case No. 04-15032, Excerpts of Record at 1011-12.

50 While the thrust of the plaintiffs' challenge was directed at various role-playing activities, the plaintiffs also challenged a few written statements contained in the Interaction publication, seeking to do so in isolation from the context in which the written materials were presented. To be sure, some of the written materials from the Interaction publication were, as the district court found, "non-ideally worded." (D.Ct. Op., Dec. 5, 2003, at 19). In a few instances, the materials presented Muslim beliefs but failed to identify them as Muslim beliefs. However, the record indicated that Smith always provided verbal clarifications of written materials and, where Muslim beliefs were not so identified, Smith provided oral clarification so that students understood the statement to reflect a religious belief and not historical fact. The record also showed that students were able to distinguish between statements of historical fact and statements describing Muslim beliefs. The

district court held that "[g]iven the context in which the cards were used, no objective observer could conclude that the cards endorsed Islam." (D.Ct. Op., Dec. 5, 2003, at 18.) This is not to say that written materials can never give rise to an Establishment Clause violation, merely that constitutionality depends on the teacher's presentation of those materials.

51 Excerpts of Record at 446.

52 D.Ct. Op., Dec. 5, 2003, at 13.

53 *Brown*, 27 F.3d at 1378.

54 D.Ct. Op., Dec. 5, 2003, at 15.

55 Excerpts of Record at 2109.

56 Excerpts of Record at 2044.

57 Excerpts of Record at 750, 1191-1202, 1230.

58 *Epperson*, 393 U.S. at 106.

59 *Regents of University of Michigan v. Ewing* (1985) 474 U.S. 214, 226.

60 *Abington*, 374 U.S. at 225.

61 *Brown*, 27 F.3d at 1381-82.

62 *McCreary*, 545 U.S. 844 (internal quotation marks, citation omitted).

63 The defense applies to claims against government officials for civil damages. *Wilson v. Layne* (1999) 526 U.S. 603, 609. It does not apply to claims for injunctive relief.

64 Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth* (1985) 472 U.S. 511, 526.

65 *Wilson*, 526 U.S. at 609.

66 *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 841 and n.5; see also *Saucier v. Katz* (2001) 533 U.S. 194, 201; *Wilson*, 526 U.S. at 609 (citing *Conn v. Gabbert* [1999] 526 U.S. 286, 290). The rationale for requiring courts to decide the constitutional question first is to "promote[] clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Wilson*, 526 U.S. at 609. "In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry." *Saucier*, 533 U.S. at 201. But see *Mollica v. Volker* (2d Cir. 2000) 229 F.3d 366, 371 (criticizing approach of requiring decision on constitutional question first).

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K-12 Teacher Termination Hearings: Worth the Price of Fairness

Beverly Tucker

In the previous issue of *CPER* (No. 180, October 2006), attorney Michael Blacher asks whether the “extremely costly, time-consuming, and difficult” process for terminating a permanent teacher is worth the cost. My response is to ask: Compared to what — the compensation that attorneys earn?

Blacher’s article illustrates the difficulty of making sound public policy decisions that will improve the quality of public education because, of course, viewed in a broader perspective, decreasing the cost of permanent teacher dismissal hearings will not improve the public education system. Indeed, the measures required to lower the costs might well prove counterproductive. In response to Blacher, I first will provide a framework for addressing his question and then discuss several of his specific statements.

Beverly Tucker has served as Chief Counsel and Associate Executive Director of the California Teachers Association for 18 years, managing the CTA Legal Department and the Group Legal Services Program. Previously she worked as an attorney for the United Auto Workers and as a Deputy Attorney General in the civil rights enforcement section of the State Attorney General’s Office.

The High Cost of Firing

Many reports have addressed various crises facing public education in the United States: the relatively poor performance of American pupils on standardized tests compared to other nations; the dismal performance of Latino and non-white students compared to white Anglo students; the lack of adequate and equitable funding; and the current and looming shortage of qualified teachers.¹ Most agree that the difficulty of attracting and, more significantly, retaining high-quality teachers to a profession that is almost universally underpaid, over regulated, and under appreciated is one of the most significant challenges facing U.S. public education systems.²

A recent report made the following observations about the crisis in the teaching profession:

- In a nation employing approximately 2.9 million teachers, school districts nationally will have to hire two million new teachers in the next decade to account for student enrollment increases and teacher retirement, turnover, and career change;
- Nearly half the new teachers who enter elementary and secondary classrooms will leave the profession within five years;
- Elementary and secondary school teaching is one of the nation's lowest-paid entry-level professions. Although job security and benefits are attractive, teachers with 5 or even 10 years of experience can find themselves earning less than what their classmates earned right out of college.³

Viewed through this prism, the cost of firing an individual teacher pales as a matter of public concern. This is particularly so in a country that routinely spends hundreds of thousands of dollars to prosecute minor drug offenses and in a state that will spend \$50,000 a year to incarcerate a bicycle thief for the next 25 years.

The job protections afforded to permanent teachers under California law serve several purposes: (1) making service in the public schools more appealing by providing job security; (2) promoting retention of teachers by permitting them to remediate poor performance; and (3) reducing the high attrition rate of public school teachers. Reducing the job security afforded to permanent teachers by changing the statutory dismissal procedure to make it "easier" to fire teachers would serve no purpose other than to persuade veteran teachers that they are not valued and deter some from entering the profession. The negative response of teachers to Proposition 74 on the November 2005 ballot is an indicator of how much teachers value due process protections — Prop. 74, if enacted, would have increased the probationary period from two to five years and added as a ground for termination receipt of two unsatisfactory evaluations.

Blacher complains that California law requires school districts to provide teachers with an opportunity to improve before they can be terminated. This is so at least with respect to terminations for unsatisfactory performance and unprofessional conduct.

The Education Code requires teachers to get a preliminary notice of at least 45 days in the case of "dismissal charges on the grounds of unprofessional conduct and 90 days for charges of unsatisfactory performance."⁴ The notices

must specify the nature of the charges "with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge."⁵

Actually, the Education Code mandates good personnel practices. Providing a detailed statement of deficient behavior and an opportunity for improvement is what every good manager should do to encourage better employee performance and avoid terminations. Admittedly, doing so is time consuming and inconvenient to an attorney who just wants to get on with a dismissal proceeding and not be burdened by "artificial timelines," but

it does make sense. In the case of a veteran teacher, a district may have invested thousands of dollars in training; by salvaging the teacher, the district saves not only the cost of a dismissal proceeding, but also the cost of recruiting and providing support to a new teacher.

Blacher observes that the hearing afforded a permanent teacher to challenge a dismissal is unnecessarily complex and costly, in part because the Administrative Procedure Act allows discovery, including providing the names of witnesses, depositions, and court proceedings to compel discovery.⁶ In reality, the complexity and cost of dismissal hearings are most often exacerbated by the bad behavior of school district attorneys. The fact that the APA allows depositions and other discovery does not compel an attorney to take 20 depositions in every case, nor does it require an attorney to refuse to comply with discovery requests absent a court order to compel.

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School district attorneys could decide to stipulate to uncontested facts and limit the number of depositions in the interest of efficiency. This is rarely the *modus operandi* of attorneys for school districts. Like Goliath, attorneys for school districts believe that size matters and that outspending the teacher will determine the outcome of a dismissal proceeding. The average teacher in California, who earns only \$54,000, has a tremendous incentive not to spend \$200,000 defending against a dismissal.

The Value of the Panel

Admittedly, the permanent teacher dismissal procedure is unique in its use of a panel comprised of three members — an administrative law judge, a person selected by the teacher subject to dismissal, and a person selected by the school district administration.⁷ There is no question that the requirements to serve on the panel prove challenging to both the teacher and the district at times. But requiring that the participants have a valid credential and at least five years experience in the discipline assures that the proceeding will be determined by individuals who are intimately familiar with the actual conditions in today's schools. In effect, this serves the same purpose as the constitutional requirement of a jury of one's peers. Real teachers and real administrators decide dismissal cases based not on their theories about education or their stale memories of what school was like in the 20th century, but on their understanding of current expectations of teacher behavior and performance.

Contrary to Blacher's assertion that this experience is relevant only in unsatisfactory performance cases, the actual classroom experience of panel members illuminates and raises the level of inquiry, and informs the decisionmaking in all teacher dismissal hearings. Although he believes this not relevant in a case alleging sexual harassment of students, this experience and perspective can be determinative in such cases. Having individuals who know high school students

today — the language, the demeanor, and the attire of students; what is acceptable conduct for a teacher; and what is clearly over the line — provides a much needed reality check in dismissal proceedings. As the California Supreme Court noted:

Teachers, particularly in the light of their professional expertise, will normally be able to determine what kind of conduct indicates unfitness to teach.⁸

The participation of panel members who understand the conditions of teaching in public schools is particularly important because they have broad discretion to determine what constitutes unfitness to teach and immoral conduct, and whether dismissal is the appropriate sanction.⁹

As to one matter, Blacher is dead wrong. He asserts that the three-person panel is not efficacious because "the union representative and management representative frequently vote with their constituency." First, there is no union representative. The teacher, not the union, has statutory authority to select a representative. The union has no official role. More significantly, it is not

true that most decisions are 2-to-1 votes for or against termination. Of 29 permanent teacher dismissal decisions rendered from January 1, 2000, through December 31, 2005, 22 of the 29 were unanimous and only five were decided by 2-to-1 votes. This further validates the process, and it is no more inconvenient than the requirement of a 6- or 12-person jury in court trials. We suffer the expense and inconvenience in the service of justice and fairness. Teachers deserve no less.

The Unlikely Economic Incentive of Salary

Blacher asserts that the statute requiring a school district to continue a teacher's salary pending the conclusion of a dismissal hearing "provides permanent teachers with an economic incentive to pursue a hearing regardless of its

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outcome.” He fails to point out that school districts may suspend without pay teachers who are subject to dismissal on grounds of immoral conduct, dishonesty, and persistent refusal to obey school laws and regulations.¹⁰ He also neglects to mention that in arbitrations under collective bargaining agreements, the usual practice is to award backpay to an employee who successfully challenges a termination decision based on the absence of just cause. The Education Code provision therefore is not aberrant.

Finally, it is highly unlikely that a teacher facing dismissal who earns an average of \$54,000 a year, and who must pay attorneys’ fees to defend, has an economic incentive to pursue a hearing at all costs. Our experience with California Teachers Association members belies this claim. The vast majority of teacher dismissal proceedings are settled without going to hearing, sometimes because the teacher cannot bear the stresses and strains of the process, sometimes because the teacher correctly anticipates a negative outcome, and sometimes because the teacher cannot afford to bear the cost of the proceeding. Given the high costs of hiring an attorney, the practice of continuing a teacher’s salary while a dismissal proceeding is pending provides no disincentive to settling cases that should be settled.

The \$200,000 Price Tag of School District Lawyers

Based on a School Services of California report from 1998, Blacher contends that the average cost to a school district to terminate a permanent teacher is approximately \$200,000. If this is so, it is only because school district lawyers make it so. CTA provides legal representation to every member noticed for a permanent teacher dismissal proceeding. It does not spend anything approaching \$200,000 to defend these proceedings, and it is difficult to understand why school districts do so. Nonetheless, I agree that the cost of representing school districts and teachers in dismissal

proceedings is something that could and should be reigned in. CTA would welcome proposals aimed at doing so.

Nowhere Beyond Just Cause

Blacher argues that the legal standard applied in court decisions challenging teacher dismissal decisions goes beyond a just cause standard. To the contrary, courts have appropriately construed the language of the dismissal statute to render it constitutional by requiring a showing of unfitness

to teach to justify a dismissal. In effect, the courts have limited the ability of school districts to dismiss teachers for private conduct that is wholly unrelated to their employment. In other words, they have required just cause for dismissals.¹¹ That is precisely what the court did in *Morrison v. State Board of Education*.¹² It imposed a just cause standard on what would otherwise have been an unconstitutionally vague standard of conduct:

“Immoral or unprofessional conduct” or “moral turpitude” stretch over so wide a range that they embrace an unlimited area of conduct. In using them, the Legislature surely did not

mean to endow the employing agency with the power to dismiss any employee whose personal, private conduct incurred its disapproval. Hence, the courts have consistently related the terms to the issue of whether, when applied to the performance of the employee on the job, the employee has disqualified himself. In the instant case the terms denote immoral or unprofessional conduct or moral turpitude of the teacher which indicates unfitness to teach. Without such a reasonable interpretation the terms would be susceptible to so broad an application as possibly to subject to discipline virtually every teacher in the state.¹³

The court further noted: “No person can be denied government employment because of factors unconnected with the responsibilities of that employment.”¹⁴ It delineated

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factors that a court should consider to assure that the allegedly inappropriate conduct actually did indicate that a teacher was unfit to teach. Blacher complains that courts have applied the *Morrison* factors in dismissal cases not based on charges of immoral conduct or unprofessional conduct and that this constitutes going beyond a just cause standard. However, application of the *Morrison* factors serves another purpose — providing objective factors to weigh whether charged conduct is sufficient to warrant dismissal.¹⁵

In *San Dieguito*, the court sustained the trial court's finding that evidence established cause for a teacher's dismissal based on persistent refusal to follow school district regulations where the teacher refused to provide lesson plans for substitute teachers during many absences. The Court of Appeal noted that the trial court had considered and correctly applied the *Morrison* criteria. In doing so, the trial court appropriately focused on the impact of the teacher's conduct on the students and the district's educational program. Contrary to Blacher's assertion, courts have not applied the *Morrison* criteria in a formulaic fashion. Indeed, they have approved tailoring the factors to the specific circumstances of each case as it did in *Woodland Joint Union School Dist. v. CPC*. There, the court noted that it need not follow a rigid procedure, i.e., discussing charges one by one and applying the *Morrison* factors to each one; it was appropriate to apply the factors to all of the charges in the aggregate.¹⁶

A Fair and Just Process

The statutory procedure governing the dismissal of permanent K-12 teachers provides the process that teachers are due. It assures a fundamentally fair and just process that serves both to protect the children of the state from incompetent and harmful teachers, and to protect the investment that school districts have made in training and retaining veteran teachers. What price is too high to pay for assuring fundamental fairness to members of an undervalued yet essential profession? *

- 1 "Teachers and the Uncertain American Future" (2006), Center for Innovative Thought, p. 26.
- 2 "Problems of Public Education," Guarino, C.M., Santibanéz, L., and Daley, G. "Teacher Recruitment and Retention: A Review of the Recent Empirical Literature," *Review of Educational Research* (Summer 2006), Vol. 76, No. 2, pp. 173-208; "Unraveling the Teacher Shortage Problem: Teacher Retention is the Key," A Symposium of the National Commission on Teaching and America's Future (2002).
- 3 "Teachers and the Uncertain American Future" at p. 9.
- 4 Ed. Code Sec. 44938.
- 5 *Ibid.*
- 6 Gov. Code Secs. 11500 et seq.
- 7 Ed. Code Sec. 44944(b).
- 8 *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, at 233.
- 9 *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327 at pp. 343-344.
- 10 Ed. Code Sec. 44939.
- 11 Elkouri, Frank, and Elkouri, Edna, *How Arbitration Works* (6th ed.). Wash. DC: Bureau of National Affairs (2003) (with supplements), pp. 931-941.
- 12 *Morrison*, 1 Cal.3d 214 at 224-225.
- 13 *Id.* at 234.
- 14 *Id.* at 235-236.
- 15 *San Dieguito Union High School Dist. v. Commission on Professional Competence* (1985) 174 Cal.App.3d 1179, 68 CPER 59.
- 16 *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 93 CPER 21.

Recent Developments

Local Government

New MOUs in Contra Costa County

After 16 months of negotiations, Contra Costa County and labor organizations representing nearly 6,000 employees have reached agreement on a new three-year contract, which runs from October 1, 2005, to September 30, 2008.

The labor coalition has been engaged in contentious talks and work protests by county employees, efforts at state-assisted mediation, and a one-day strike in June that largely curtailed the provision of county services. Labor leaders had hoped to win wage increases of 6.5 percent, but the deal struck in November carries two 2 percent salary increases, one effective in July 2007, the other in July 2008.

The county came to the bargaining table seeking to restrict its labor costs in the face of budget difficulties that have required it to rely on reserve funds. The unions, of course, saw things differently and sought wage increases that would allow employees to make some headway in light of inflation and cost-of-living increases in the Bay Area.

In addition to the 4 percent across-the-board increases, the pact gives employees with 10 years experience at the county a 2.5 percent longevity increase effective July 1, 2008. In addition, all employees on the county payroll as of November 1, 2006, and who did not receive a negotiated wage increase dur-

ing fiscal year 2005-06, garnered a \$1,500 bonus; this amount was prorated for part-time employees. The contract also included an additional 24 hours of paid time off.

The new agreement changes eligibility requirements for retiree health care benefits. Formerly, employees became eligible for lifetime benefits after age 50 if they worked 10 years for the county. Under the new contract, new hires will have to work for 15 years to be eligible for retiree medical benefits.

The new agreement changes eligibility requirements for retiree health care benefits.

The board of supervisors unanimously approved the new agreements on October 31. Employee organizations participating in the labor coalition and covered by the new contracts include Local No. 1; SEIU Local 535; AFSCME Locals 2700 and 512; Western Council of Engineers; and Physicians and Dentists Organization of Contra Costa. The county is still bargaining with the deputy sheriffs' and firefighters' organizations. *

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)

See back cover for price and order information

Binding Arbitration Rejected in Santa Clara

Voters in the City of Santa Clara rejected a measure that would have offered binding arbitration for unresolved bargaining disputes between the city and the Santa Clara Police Officers Association and the Santa Clara Firefighters Association. Measure B would have permitted a three-member board of arbitrators to decide each issue in dispute pertaining to wages, hours, or terms and conditions of employment.

Proponents asserted the measure would not cause elected officials to lose control.

The panel — composed of one representative of the city, one representative of the employee organization, and a third selected by the parties or from a list of seven provided by the State Mediation and Conciliation Service — would have chosen the last offer of settlement proposed by the party that most-nearly conformed to those factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment. Those fac-

tors include changes in the average consumer price index, the wages, hours, and terms of employment of other employees performing similar services, and the financial condition of the city.

The item was placed on the November ballot by the city council at the request of the two public safety organizations. The labor groups argued that binding arbitration was needed to make the bargaining process fair since the city is empowered to impose its final offer if negotiations fail, but police officers and firefighters are not permitted to strike. Proponents asserted that the local measure would not cause the city's elected officials to lose control. They noted that the arbitration component would not eliminate negotiations, mediation, or any other form of issue resolution and, once engaged in arbitration, the city council would retain the right to appoint their representative on the arbitration panel. The police and fire organizations contended that the arbitrator's decision would not impose a financial burden on the city because the arbitrator must consider the financial condition of the city in selecting from the parties' final offers.

Opponents of Measure B argued that it would take away authority from elected city officials, and that police officers and firefighters in Santa Clara already enjoy generous wages and re-

tirement benefits. Those opposed to the measure also took note that the city has never imposed a contract on the police and fire organizations. Editorials in local newspapers also took aim at Measure B, citing the experience in the nearby City of Gilroy, where an arbitrator recently awarded the firefighters a 10 percent wage increase — double the city's final offer — forcing that city to absorb the increased costs from its general fund.

Measure B was defeated by 56 percent of the voters.

Opponents argued the measure would take away authority from elected city officials.

To date, the following jurisdictions provide binding arbitration for some or all bargaining disputes: Alameda, Anaheim, Gilroy, Hayward, Modesto, Monterey, Napa, Oakland, Oroville, Palo Alto, Petaluma, Redwood City, Sacramento (city), Sacramento (county), Salinas, San Francisco, San Jose, San Leandro, San Luis Obispo, Santa Cruz, Santa Rosa, Stockton, Vallejo, and Watsonville. *

NEW EDITION

Lucky 13!

Pocket Guide to the Meyers-Milias-Brown Act

By Bonnie Bogue, Carol Vendrillo, Marla Taylor and Eric Borgerson
(13th edition, 2006) \$15

Get the latest edition of the best-selling guide to labor-management relationships in California local government: cities, counties and special districts.

An easy-to-use resource for those who need the MMBA in a nutshell; a quick guide through the tangle of cases affecting local government employee relations; the full text of the act, a glossary, table of cases, and index of terms.

The **new edition** covers three years of PERB and court rulings since jurisdiction over the MMBA was transferred to PERB; Supreme Court ruling establishing six-month limitations period for MMBA charges before PERB; changes in PERB doctrine 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.

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City Council to Scrutinize LAPD's Flexible Workweek

Five years ago, the Los Angeles City Council approved implementation of a flexible work schedule for patrol officers of the Los Angeles Police Department. The plan allows officers to work either a 3/12 or a 4/10 schedule. Officers assigned to the 3/12 shift work three days a week, 12 hours each day. Approximately 70 percent of LAPD officers work the 3/12 shift. The re-

*The report suggests
the schedule
increases officers'
response times.*

mainder of the force has the 4/10 schedule, working four days a week, 10 hours a day. The council approved the program with the understanding that it would be "cost neutral."

The flexible work schedule was adopted by the council in November 2001, when James Hahn served as the city's mayor. Hahn's candidacy was supported by the Los Angeles Police Protective League, which urged the administration to agree to the schedule change that its members now enjoy. But a study released in August by L.A. City Administrative Officer Bill Fujioka has

sparked renewed debate over the practice, suggesting that the schedule increases officers' response times, has caused overtime costs to rise, and has left some neighborhoods in the city short-staffed.

Among those speaking out against the flexible work schedule is City Councilman and former Police Chief Bernard Parks. Parks opposed the workweek change when he was chief and, in November, was able to convince enough of his colleagues on the city council to go forward with a comprehensive financial analysis of the cost implications of the flexible work schedule, including the savings projections promised by advocates of the plan when it initially was implemented.

The current mayor, Antonio Villaraigosa, opposed the schedule change when he was a member of the city council, but now stands by it as part of the officers' package of benefits. Current Police Chief Bill Bratton does not defend the policy, explaining that it was in place when he assumed the top post in the department. But, he has said that other scheduling options might work better.

The Fujioka report included findings which show that under the flexible schedules, officer response times for emergency calls has increased from 5.5 minutes to 6.4 minutes, and the number of traffic citations issued and the

number of overall arrests have declined. Overtime related to court appearances has increased by 8.5 percent. The study asserts that this factor added up to more than \$1 million annually in pay costs. The Fujioka study also revealed that other overtime hours added to an officer's shift decreased by 4.4 percent, while sick time hours increased by 7.1 percent. These increases in court overtime hours and the use of sick leave hours is believed to be related to officers' compressed schedules because officers on the 3/12 or 4/10 schedules have a shorter workweek and must be paid overtime to appear in court on their days off. Also, because officers on these schedules work longer hours each day, a greater number of hours must be paid from their sick leave banks when they are ill.

Proponents of the flexible schedules argue that they are needed as recruitment and retention tools. And, they point to the city's 40 percent drop in crime in the past four years as the best evidence that flexible schedules work.

Aside from any negative financial impact that can be attributed to the flexible schedules, critics argue that officers who work three 12-hour shifts or four 10-hour shifts are likely to be fatigued and possibly physically and mentally impaired.

The city council's analysis may well prompt renewed debate over the wisdom of the compressed schedule. However, the League is firm that any change in work shifts would have to be negotiated with the union. *

settlements down south: bargaining reports from the cities

The following is a brief summary of contract bargaining results in some cities in Los Angeles, Orange, Kern, and San Diego Counties in 2006. The information was provided to *CPER* by Robin Nahin at City Employees Associates. CEA is a labor relations consulting firm, headquartered in Long Beach.

■ Alhambra – general employees

Term: 3 years.
COLA: 3 percent July 2006; 3.5 percent July 2007;
4.5 percent July 2008.
Medical: \$75 increase in city contribution each year.
Retirement: PERS 2.7 percent at 55 (already in place).

■ Bell Gardens – general employees

Term: 3 years.
COLA: 3 percent each year.
Medical: city continues to pay 100 percent.
Retirement: upgrade to CalPERS 2.7 percent at age 55 plan.

■ California City – general employees and mid-managers

Term: 1 year.
COLA: 2.25 percent with additional increases based on merit.
Medical: city contribution increases from \$633 to \$800 a month.
Retirement: PERS 3 percent at age 55 (already in place).

■ Carson – professionals, supervisors, managers, and confidential employees

Term: one year.
COLA: 4.5 percent.
Medical: increase from \$804 to \$931 on city contribution.
Retirement: 3 percent at age 60 (already in place).

■ Claremont – maintenance employees

Term: 2 year.
Compensation: 2006: 2.5 percent plus 3 percent range adjustment; 2007: 2 percent COLA and 2 percent range adjustment.
Medical: city contribution raised to \$914 in first year, with reopener in January, 2007.
Retirement: 2.5 percent at age 55 (already in place).

■ Culver City – general employees

Term: 5 years.
COLA: 4 percent each year.
Medical: city contribution drops from 100 percent paid to 95 percent.
Retirement: 2.5 percent at age 55 (already in place).

■ Del Mar – general employees

Term: 3 years.
COLA: January 2006: 3 percent; January 2007: 3 percent; January 2008: 2.5 percent; January 2009: 2.5 percent.
Retirement: upgrade to 3 percent at age 60.

■ Downey – maintenance employees

Term: 4 years.
COLA: 4 percent each year.
Medical: city pays 100 percent.
Retirement: 2.7 percent at age 55 plan (already in place).

■ Fullerton – general employees

Term: 2 years.
COLA: 5 percent each year.
Medical: employees will pay increased portion of monthly premium starting in January 2008.

■ Fountain Valley – city hall and non-sworn police employees

COLA: average of all Orange County cities.
Medical: cap increased to \$1,008.
Retirement: upgrade to 2.7 percent at 55.

■ **Indio - police managers**

Term: 4 years.

COLA: 1.5 percent, 3 percent, 3 percent, and 1.5 percent.

Medical: city contribution of \$650; will increase by \$50 each year of contract.

Retirement: 3 percent at age 50.

■ **Los Alamitos – general employees**

Term: 3 years.

COLA: 3.75 percent in April of each year.

Medical: increase of \$50 in city contribution each year.

Retirement: 2.7 percent at age 55 (already in place).

■ **Pasadena – professional and mid-management employees**

Term: 3 years.

COLA: April 2006: 3.4 percent; April 2007: 3.2 percent; April 2008: 2.9 percent plus equity adjustments for several classes.

Medical: city contribution to cafeteria plan increased to \$747 (up from \$651).

Retirement: 2.5 percent at age 55.

■ **Seal Beach – professionals, confidentials, and supervisors**

Term: 3 years.

COLA: July 2006: 4.5 percent; July 2007: 3 percent; January 2008: 2 percent; January 2009: CPI with minimum of 3 percent and maximum of 5 percent.

Medical: city to absorb all increases in medical costs.

■ **Tustin – general employees**

Term: 1 year.

COLA: 5.5 percent.

Medical: city contribution capped at \$771.

■ **Whittier – general employees**

Term: 3 years.

Compensation: 3.4 percent increase to salary range, but “spent” on employee “purchase” of retirement upgrade; market adjustments, based on survey, to be implemented over two-year period.

Medical: city to pay all increases in medical costs.

Retirement: 2.5 percent at age 55.

■ **Yorba Linda – mid-managers**

Term: 1 year.

Salary: adjustments between 3 percent and 10 percent based on market survey.

Medical: tier 1 (more senior employees) continue at 100 percent; tier 2: city cap increase from \$700 to \$833.

Public Schools

Report of District Superintendent's Alleged Misconduct Must Be Disclosed

The report of an investigation into allegations of misconduct by a school district superintendent cannot be protected from public disclosure by an agreement between the district and the superintendent, determined the Third District Court of Appeal. In *BRV, Inc.*

The public's interest in disclosure outweighed the superintendent's interest in keeping the report confidential.

v. Superior Court, the court found that the public's interest in disclosure outweighed the superintendent's interest in keeping the report confidential under the Public Records Act's balancing test.

Factual Background

Dunsmuir Joint Union High School District received over a dozen letters complaining about the conduct of Robert Morris, superintendent of the district and principal of the high

school. The letters alleged verbal abuse of students and sexual harassment of female students.

The district's board of trustees hired private investigator Diane Davis to pursue the complaints. Davis talked to a number of people and prepared summaries of the interviews and other memoranda. At the conclusion of her investigation, she gave the board a report that consisted of a lengthy letter detailing her findings and opinions. Attached to the report were interview summaries, the additional memoranda, and her interview notes.

On July 23, 2004, Morris resigned from his positions effective December 31, 2004, conditioned on the board accepting an agreement written by Morris' lawyer and legal counsel for the district. The board accepted the terms of the agreement on July 26, 2004.

In accord with the terms of the agreement, Morris was placed on paid administrative leave from July 23 through December 31, 2004, at which time his retirement would take effect. His salary was increased by \$5,000 for the period he was on leave. The district agreed not to release any documents in Morris' personnel file without his consent or as required by law. It also agreed

to place all documents relating to the investigation in a sealed envelope in Morris' personnel file and pledged that "no information on such investigation shall be released to any third party except as required by law or in accordance with any court order or subpoena."

BRV, a newspaper publisher, filed a request with the district under the Public Records Act for documents concerning Morris, including copies of Davis' report. The district gave BRV all of the documents requested except the report, claiming it was exempt from disclosure under the act.

The general rule is that all public records are subject to disclosure.

BRV filed a petition against the district seeking disclosure of the report, but the trial court determined most of it was not subject to disclosure under the act's personnel records exception, set out in Gov. Code Sec. 6254(c). The court ordered only those portions of the report regarding complaints of Morris' verbal abuse of students be disclosed. BRV took the case to the Court of Appeal.

Court of Appeal Decision

The court began its analysis by acknowledging the general rule that all public records are subject to disclosure

unless the Public Records Act expressly provides otherwise. The trial court found two of the act's exemptions relevant. The first, set out in Sec. 6254(c), exempts from disclosure "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." The second, found at Sec. 6522, is known as the "catchall" exception. The Court of Appeal concluded a third exemption, contained in Education Code Sec. 4906, might apply, and asked the parties to submit briefs on that issue.

*The court concluded
that the report
must be disclosed
in its entirety.*

Section 4906, part of California's response to the federal Family Educational Rights and Privacy Act, provides that school districts may not allow third parties access to "pupil records" without parental consent or judicial order. After a review of the scant judicial authority interpreting the term, the court determined that the investigative report was not a "pupil record" within the meaning of Sec. 4906. Nor did it fall within the definition of "education records" under FERPA. Though these terms are to be defined broadly, the Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426, clarified

that not every school record concerning a student is an education record, noted the Court of Appeal. It similarly concluded that some parameters were appropriate for defining "pupil records" under the state statute:

Certainly the language of the statute, though broadly written does not encompass every document that relates to a student in any way and is kept by the school in any fashion. A pupil record is one that "directly relates" to a student and is "maintained" by the school. We agree with the Supreme Court that the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like.

The court determined that "the Davis report, however, does not fall within that group." It was not related to the private educational interests of the student, it was not something done in the regular course of business, and it was not the type of record that was regularly maintained in a central location, said the court.

Turning to the Public Records Act, the appellate court observed that the trial court must have applied different tests for each exemption because it would have released the entire report under the "catchall" exemption. Instead it concluded that the personnel files exemption precluded disclosure. The Court of Appeal chastised the lower

court, stating "the tests under the two statutes...are essentially the same."

Thus, under either provision, a court determining whether personnel records should be disclosed first must determine whether disclosure of the information would compromise substantial privacy interests; if privacy interests in given information are *de minimus* disclosure would not amount to a clearly unwarranted invasion of personal privacy.

Second, the court must determine whether the potential harm to privacy interests from disclosure outweighs the public interest in disclosure. In weighing the competing interests, we must determine the extent to which disclosure of the requested item of information will shed light on the public agency's performance of its duty.

In applying this test, the court noted, the exemptions must be construed narrowly. Further, the party seeking to keep the records from being disclosed "bears the burden to demonstrate a 'clear overbalance' on the side of confidentiality," said the court.

Applying the first prong of the test, the court found that Morris had a significant privacy interest in his personnel file, including the investigative report. However, the court concluded that under the second prong, i.e., balancing the potential harm to Morris' privacy interest from disclosure against the public interest in disclosure, it concluded that the report must be disclosed in its entirety.

NEW EDITION

This edition — 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.

Pocket Guide to the Educational Employment Relations Act

By Bonnie Bogue, Carol Vendrillo, David Bowen & Eric Borgerson

(Seventh edition, 2006)

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The court noted that, “without a doubt, the public has a significant interest in the professional competence and conduct of a school district superintendent and high school principal.” Further, “it also has a significant interest in knowing how the District’s Board conducts its business and, in par-

*As a public official,
Morris had ‘a
significantly reduced
expectation of
privacy.’*

ticular, how the Board responds to allegations of misconduct committed by the District’s chief administrator.”

In weighing these two competing interests, the court found that, as a public official, Morris had “a significantly reduced expectation of privacy in the matters of his public employment,” citing the seminal case of *New York Times v. Sullivan* (1964) 376 U.S. 254. “The potential injury here is to his reputation, but as a public official, he knew his performance could be the subject of public, ‘vehement, caustic, and sometimes unpleasantly sharp attacks,’” said the court.

Here, members of the public were greatly concerned about the behavior of the city’s only high school superintendent and his governing elected board in respond-

ing to their complaints. Indeed, from the public’s viewpoint, the District appeared to have entered into a “sweetheart deal” to buy out the superintendent from his employment without having to respond to the public accusations of misconduct. The public’s interest in judging how the elected board treated this situation far outweighed the Board’s or Morris’s interest in keeping the matter quiet. Because of Morris’s position of authority as a public official and the public nature of the allegations, the public’s interest in disclosure outweighed Morris’s interest in preventing disclosure of the Davis report.

The court also considered the reliability of the report, following the holding of *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041, 167 CPER 44. It

determined that, because Morris was a public official, a lesser standard of reliability applied than for a non-public official. The court “could not conclude the allegations were so unreliable the accusations could not be anything but false,” it said. Further, the report exonerated Morris of most of the serious allegations of misconduct and, therefore, “the public’s interest in understanding why Morris was exonerated and how the District treated the accusations outweighs Morris’s interest in keeping the allegations confidential.”

However, the court found that revealing the names of the pupils, parents, staff members, or faculty members listed in the report would not further the public’s interest, and it ordered them redacted. (*BRV, Inc. v. Superior Court* [9-29-06] 143 Cal.App.4th 742.) *

Hartnell College Strike Ends With a Mediator-Brokered Contract

The faculty at Hartnell College, a community college located in Salinas, ended a five-day strike on October 25, after agreeing to a contract arrived at through mediation. The Hartnell College Faculty Association, which represents 104 full-time faculty members, voted to strike October 12 by a margin of 85 percent after two years of unproductive negotiations. The faculty has been without a contract since 2003. This was the first faculty strike at a

California community college in more than 26 years. There are also 250 part-time faculty at the college, many of whom joined in the strike.

Hartnell’s faculty had gone without a salary increase for three years, and the average salary was one of the lowest of the state’s 72 community college districts. Particularly galling to the faculty was the fact that Ed Valeau, the college president, received an 83 percent increase in salary over the last six

years. At the time of the strike, Valeau was the fourth-highest-paid community college president in the state, while Hartnell was only the 68th largest community college.

The association pointed to a July factfinding report that found the administration could afford to meet the faculty members' demands. The factfinder rejected the Hartnell administration's claim that its reserve fund, totaling 13 percent of its 2004-

A factfinding report found the administration could afford to meet the faculty members' demands.

05 budget, was needed for workers' compensation claims and retirement benefits. The factfinder found that the college had \$993,000 in the fund that could be used to meet the faculty's demands. In addition, Hartnell will receive an increase of \$6.8 million in state funding this year. The administration, relying on a May report by the Fiscal Crisis Management and Assistance Team, an entity designated by the state to assist local educational institutions, argued that Hartnell could find itself with a negative balance by fiscal year 2007-08 due to declining enrollment.

It also was concerned about having to reopen the 2004-05 contracts covering the classified employees and maintenance staff if the teachers ended up with a better contract.

The last administration offer before the strike was for a three-year contract that included a 3 percent recurring salary increase for full- and part-time faculty for 2004-05; a 0.73 percent increase and a one-time-only 3 percent increase for full- and part-time faculty for 2005-06; and a 5 percent recurring increase to full-time faculty for 2006-07, with a 6.23 to 6.71 percent salary increase to part-time faculty. The college also offered a \$12,000 annual per person contribution toward health care benefits for full-time faculty in 2004-05, \$13,200 in 2005-06, and \$14,400 in 2006-07. The union was holding out for at least a 4.6 percent recurring increase in 2005-06 and full health care coverage.

Resolutions of support for the faculty were passed by the Salinas City Council and the faculty unions of a number of surrounding community colleges such as Gailan, Monterey Peninsula, and Cabrillo. Strikers also received the support of students, the Monterey Bay Central Labor Council, the California School Employees Association and its Chapter 470, and local teamsters who refused to cross picket lines to make deliveries to the college. Letters of support were received from the National Education Association, with which the Hartnell Faculty Association is affiliated, and the

California Faculty Association. The State Council of Education, the representative association of the California Teachers Association, passed a resolution pledging full support and resources to the strikers. Members of the council also individually contributed \$4,200 for the striking faculty.

On the first day of the strike, the college accepted the association's request for mediation by the California State Mediation and Conciliation Ser-

The administration argued that Hartnell could have a negative balance by fiscal year 2007-08.

vice. The strike continued while the parties met with mediator Paul Roose. Mediation was successful, and agreement was reached on a proposed four-year contract that includes 3 percent increases for both 2004-05 and 2005-06, and a 5 percent increase for 2006-07. A raise equal to the increase in the cost of living for 2007-08 also was part of the agreement. Starting at \$12,000 per person per year in 2004-05, the health benefits cap increases \$1,200 per year. The contract was approved by a majority of the union members on October 24 and was ratified by the administration two days later. *

Pocket Guide to K-12 Certificated Employee Classification and Dismissal

By Dale Brodsky

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

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

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

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No Conflict of Interest if Community College Board Member Excluded From Negotiating Process

The Office of the Attorney General has determined that the governing board of a community college may renegotiate the amount of health benefits under a collective bargaining agreement so long as a financially interested board member does not participate in the decisionmaking process.

In the situation considered by the attorney general, the renegotiation of a collective bargaining agreement between the governing board and its faculty members was anticipated to involve the level of health benefits. One of the governing board members was a retired faculty member and received health benefits equal in amount to those provided to current faculty members. The question was whether the governing board may renegotiate health benefits and, if so, whether the board member may participate in board discussions, negotiations, and decisions affecting the benefits.

The attorney general's opinion primarily focused on Government Code Sec. 1090, which precludes the board of a public agency from entering into a contract in which one of its members has a personal financial interest. "The statute is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the

best interests of their public agencies," said Attorney General Bill Lockyer. "A contract that violates section 1090 is void, and a public official who willfully violates the statute is subject to criminal prosecution."

A collective bargaining agreement is a contract within the meaning of Sec. 1090, concluded the attorney general,

*A financial interest in
the amount of the
health benefits subject
to negotiation comes
within Sec. 1090.*

citing prior A. G. opinions which determined that the modification of a collective bargaining agreement by a school district's governing board constitutes the making of a contract within the meaning of the code section. In this situation, even though the terms of the agreement do not by themselves apply to the financially interested board member, a prior collective bargaining agreement mandates that his benefits are equal to those provided to current faculty members. "Such a financial interest in the amount of the health ben-

efits subject to negotiation comes within the general language of section 1090," opined the attorney general.

As to whether the problem could be cured by the non-participation of the affected board member, the attorney general said, "As a general rule, the prohibition of section 1090 cannot be avoided by having the financially interested member of the legislative body abstain from participating in executing the agreement: instead, the entire body is precluded from entering into the contract." The attorney general recognized that the legislature had created some statutory exceptions to the rule where the financial matter involved is determined to be a "remote interest," as contemplated by Sec. 1091, or a "non-interest," covered by Sec. 1091.5. The A.G. found that neither exception applied to this case.

However, in prior opinions the attorney general had allowed the making of a contract otherwise prohibited by Sec. 1090 by application of a limited "rule of necessity." Under that rule, "a governing board may perform essential and necessary functions, including renegotiating a collective bargaining agreement with the board's employees, as long as the board member with the financial conflict does not participate in the decision-making process," instructed the attorney general. The rule of necessity was applied in the situation where a school board was the only entity empowered to contract with teachers on behalf of the school district.

“It follows,” said the attorney general, “that the governing board of a community college district may renegotiate the amount of health benefits for its faculty members so long as the financially interested board member refrains from participating in any discussions, negotiations, or decisions regarding the agreement.”

The attorney general determined that the conflict-of-interest provisions of the Political Reform Act of 1974

were inapplicable because the Fair Political Practices Commission, which administers that act, had determined that retirement benefits are a form of “salary” which, if received from a state, local, or federal government agency, are excluded from the prohibitions of the act. (*Opinion of Bill Lockyer, Attorney General*, Ops.Cal.Atty.Gen. No. 05-1006 [10-03-06], 2006 DJDAR 13425.) *

New Law Aims to Ease Teacher Shortage

Another piece of legislation authored by Senator Scott was also signed by Governor Schwarzenegger. Scott’s S.B. 1209 offers a \$6,000 bonus to veteran teachers willing to work as

S.B. 1209 is meant to address the looming teacher shortage.

Legislative Developments

Governor Signs S.B. 1655 and S.B. 1133

Two pieces of legislation were signed into law by Governor Schwarzenegger after the last issue of *CPER* went to press.

As reported in *CPER* No. 180 (pp. 35-36), Senate Bill 1655, authored by Senator Jack Scott (D-Pasadena), prohibits future labor contracts with teachers from containing a provision that requires a principal of a low-scoring school to accept for open positions veteran teachers who have been forced out of other schools in the district so long as the teacher agreed to leave voluntarily. The new legislation, described in Education Code Sec. 35036, stipulates that principals in higher scoring schools now have to give preference to veteran teachers only until April 15; they no longer must keep the position open throughout the summer. The California Teachers Association and the

California Federation of Teachers strongly opposed the legislation. But advocacy groups for poor and minority students believe the new law will help close the teacher-quality gap between low- and high-scoring schools.

S.B. 1133, known as the Quality Education and Investment Act, authored by Senator Tom Torlakson (D-Antioch), requires the state to spend \$2.9 billion over the next seven years to reduce class size, improve teacher training, and add counselors at approximately 500 schools in the lowest-two ranks of the state’s Academic Performance Index. State education officials estimate that an additional 2,000 to 3,000 teachers will need to be hired to implement the act. (See *CPER* No. 180, pp. 33-35 for a complete description of the bill.)

mentors to new teachers in troubled schools. It also makes it easier for out-of-state teachers with two years’ experience and good reviews to become credentialed in California. The new law is meant to address the looming teacher shortage, which experts warn could rise to 100,000 because one-third of the state’s current teachers are set to retire over the next 10 years.

Teacher Database to be Developed

S.B. 1614, carried by Senator S. Joseph Simitrian (D-Palo Alto), establishes a statewide teacher data system to be known as the California Longitudinal Pupil Achievement Data System. The purpose of the system is “to serve as the central state repository of information regarding the teacher workforce in the state for purposes of developing and reviewing state policy, identifying workforce trends, and identifying future needs regarding that workforce.” The bill specifically pro-

hibits use of the system for employment decisions affecting individual teachers and inclusion of certain personal information regarding individual teachers. Governor Schwarzenegger signed the legislation but cautioned that the exclusion of certain individual teacher information will result in additional costs to modify the existing data bases

of other state agencies. "Therefore," he said, "I am signing this measure, with the expectation that the Legislature will pass cleanup legislation in the next session that addresses this issue to ensure that this database is created without the unnecessary, excessive cost identified." *

teacher absence rate...its liability must be found upon proof, not mere possibilities." Evidence supporting the association's claim may include literature, speeches, or meetings that link GEA to the sickout, but statistical correlation is not enough to prove the association planned and/or authorized the sickout.

The district also alleged that GEA may have "implicitly condoned" the sickout. In response to this assertion, the R.A. wrote that "a union cannot be held liable for its failure to renounce [a] sickout, or to urge employees to return to work unless there are contractual provisions" that require the union to renounce the action or urge the re-

Statistical Evidence Not Enough to Prove Union Planned Sickout

In a precedent-setting decision, PERB recently found that statistical evidence is not enough to prove that a union planned a sickout. Nor can union liability be found solely on the ground that it implicitly condoned the sickout. Instead, the charging party must prove that the union "ratified, investigated, encouraged, condoned, or in any way directed the sickout."

The Grossmont Union High School District brought an unfair practice charge against the Grossmont Education Association, claiming that it violated EERA by staging a sickout while the parties were engaged in impasse resolution procedures.

Specifically, the charge against the association alleged that approximately 300 of its members called in sick on April 25, 2005, and that the association had either planned, organized, or implicitly condoned the sickout in violation of EERA Sec. 3543.6(d). This

section prohibits an employee organization from refusing to participate in impasse procedures in good faith.

Under Sec. 3543.6(d), the district must show that a sickout occurred, that it occurred before the impasse procedures were exhausted, and that the association planned and/or authorized the sickout. The B.A. found it plausible that the first two elements were present given the disproportionately large number of members who called in sick while the parties were still engaged in impasse procedures. However, the B.A. continued, the district's evidence demonstrating that the association targeted 5 of 13 high schools in the district, and that association bargaining team members were employed at the five targeted schools but not at the others, failed to clearly establish the third element: "Although the statistics provide some correlation between the presence of GEA bargaining team members and the high

The district's evidence failed to clearly establish the third element.

turn of employees. In this case, the district did not provide such evidence, and the association's liability could not be found only on the ground that it implicitly condoned the sickout.

The B.A. therefore dismissed the claim for failure to state a prima facie case, and the board upheld the B.A.'s ruling as the decision of the board itself. (*Grossmont Union High School Dist. v. Grossmont Education Assn.* [9-19-06] PERB Dec. No. 1859.) *

Higher Education

Nurses Reach Agreement With U.C. on Reopener Issues

After months of tense negotiations, the University of California and the California Nurses Association, representing 9,000 U.C. nurses at five medical centers and five student health centers, reached agreement on four reopener issues: raises, health insurance, retiree health benefits, and coverage for meals and breaks. The issues were selected by U.C. and CNA negotiators when they reached agreement on their contract last December.

Hundreds of nurses picketed at each medical center for several weeks.

The parties met at four scheduled bargaining sessions beginning in April and ending in June, but no agreement was reached. When bargaining stalled, the parties asked the Public Employment Relations Board to certify they were at impasse, which it did.

The parties proceeded to mediation with the assistance of a state-appointed neutral, Jeff Schrader. Hundreds of nurses picketed at each medical center for sev-

eral weeks. A tentative agreement was reached in October and, with the endorsement of the union, the contract was ratified by the nurses at the U.C. campuses on October 20. The new terms will remain in effect through the duration of the existing contract, set to expire June 30, 2007.

On the issue of salary increases, U.C.'s initial position was that there should be no increase because the university either led or was at the market average for RN wages in most locations. It argued that it already had agreed to an average 13.5 percent university-wide salary increase for nurses in 2005 and asserted that raises were not needed to stay competitive, as evidenced by low vacancy and turnover rates. U.C. also argued that it provides more than the market average of paid holidays and exceeds important competitors in retirement benefits.

CNA, on the other hand, demanded wage increases ranging from 10 to 19 percent, depending on location, starting July 2006. The union's wage demand was intended to close the gap between U.C. facilities and nearby hospitals, and between the free-standing student centers and the closest U.C. medical centers.

The final agreement provides for raises ranging from 2 to 20 percent, depending on location and job classification, effective in October 2006, with additional raises in some locations early next year. Most of the initial raises cluster in the 3 to 6 percent range, with an additional 2 to 3 percent due in 2007. For example, clinical nurses at Davis, UCLA, and Irvine received raises of 3 percent in October and will receive an

The agreement provides for raises ranging from 2 to 20 percent, depending on location and job classification.

additional 2 percent in the first part of 2007. Nurses in the same classification will receive a 6 percent raise at UCSF and UCSD in October; and those at UCSF will receive an additional 3 percent in March 2007.

CNA did not make any gains on the issue of health insurance. Nurses have the same health care plans as faculty, environmental services staff, management, and other health care professionals at U.C. The union had hoped to get a better deal than other U.C. employees, demanding one free, family HMO option for nurses. It also proposed that U.C. keep all current health plans at the same cost through next year.

U.C.'s goal was to provide the same benefits to all employees. It argued that providing special benefits for nurses would result in either U.C. paying more for their benefits than it pays for other employees, or other employees subsidizing health care costs for nurses. The final agreement provides that nurses will continue to be part of the U.C. health care program and receive the same medical benefits as other university employees. Increased rates will go into effect in 2007.

CNA did not make any gains on the issue of health insurance.

Regarding retiree health benefits, CNA was successful in securing the university's commitment to make no change to health benefits offered to current retirees through June 2007. Prior to the start of negotiations, CNA learned that U.C. had discussed with the faculty plans to severely cut all U.C. employees' retiree health coverage and increase the eligibility requirement for the retiree health benefit.

Under the current contract, nurses are entitled to 75 minutes of lunch and rest breaks per shift. CNA claimed that nurses were missing meals and rest breaks because, without relief coverage, they could not leave their patients without violating the nurse-to-patient ratios established by law. The union de-

manded that U.C. provide relief coverage with scheduled relief staff and that it grant penalty pay to nurses who are unable to take their meals or breaks. U.C. denied that nurses were missing meals and breaks, and proposed enforcement of a rigid break schedule. The issue was resolved by inclusion of a provision that requires compensation when a requested and offered break is not provided.

The agreement also specifies that U.C. will withdraw unfair practice charges it filed with PERB against the union alleging that CNA had engaged in unfair practices and bad faith negotiating tactics during bargaining. In the first charge, U.C. alleged that CNA had insisted on introducing issues not previously agreed on by the parties to be part of the reopener negotiations. This was viewed by U.C. as a unilateral change in the agreement. In the second charge, U.C. alleged that the union's efforts at the bargaining table were superficial: that it was only "going through the motions" of bargaining so it could strike.

These were not the first unfair practice charges filed by the parties. In 2005, during negotiations for the current contract, CNA filed an unfair practice charge against U.C., alleging, among other things, that it refused to bargain over staffing, misrepresented its level of compliance with staffing regulations, and refused to provide information on its patient classification systems. It also accused the university of conditioning its approval of the agreement on the

union's acceptance of a provision banning sympathy strikes. After filing the charge, CNA gave U.C. notice of a one-day strike, planned for July 21, 2005. In response, the university filed an unfair practice charge with PERB and requested injunctive relief to prevent the strike. PERB filed an application with the court, and a temporary restraining order was issued prior to the strike, followed by a preliminary injunction. (For a complete discussion, see *CPER* No. 174, pp. 53-56.)

Compensation is required when a requested and offered break is not provided.

U.C.'s 2005 unfair practice charge currently is pending before PERB. U.C. claims that CNA's call for a strike prior to impasse was an unlawful attempt to influence bargaining and caused it to incur millions of dollars in costs to prepare for the strike, including cancelling and rescheduling surgeries and hiring additional staff at all nine campuses. CNA counters that the strike was based on the university's unfair practices, including U.C.'s refusal to bargain about staffing ratios. It is anticipated that PERB will conclude the hearing on the charge in December. *

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U.C. Unions Bargaining Jointly to Fight Pension Contributions

The University of California and three unions representing five bargaining units have reopened their contracts on the touchy subject of restarting pension contributions that have been suspended for both U.C. and its employees since 1991, when the University of California Retirement System had a huge surplus. The unions argue that their wages already are subpar without retirement contribution deductions and that the plan is still nearly 110 percent funded. U.C. contends that waiting for the dwindling surplus to be exhausted before restarting contributions will be expensive and traumatic. The actuaries for each side characterize the other's report as flawed. Meanwhile, the regents have decided that contributions for unrepresented employees will start July 1, 2007. Subject to funding and the budget process, the initial employee contribution will be the amount that, since 1991, has been placed into a defined contribution plan rather than into the pension plan.

Surplus Dwindling

U.C. and its employees ceased contributing to the defined pension system in 1990, when the fund had 40 percent more assets than liabilities. Although the funded ratio dipped to less than 110 percent in 1994, it soon began to climb again, and exceeded 150 percent in 2000.

For the past two years, as the surplus shrank, U.C. has been studying when to begin contributions and how to share the cost of retirement benefits with employees. In consultation with the Academic Senate, the faculty governance organization, the university has decided to phase in both employee and employer contributions beginning July 1, 2007, subject to collective bargaining for represented employees.

The university initially floated a plan to share equally the cost of benefits.

The university initially floated a plan to share equally the cost of benefits, now nearly 16 percent of payroll. But the University Committee for Faculty Welfare, an Academic Senate committee, has suggested that U.C. eventually contribute 10 percent of payroll and that employees contribute 6 percent of their pay. Before the suspension of contributions, U.C. paid 4 to 16 percent of payroll, and most employees contributed 2 to 3 percent of wages into the retirement system.

Unions Alarmed

In early 2005, unions representing U.C.'s employees first heard of the move to restart contributions and possibly to restructure retirement plans, and the subject has overshadowed recent contract negotiations. (See story in *CPER* No. 173, pp. 35-37.) While several contracts forbid retirement contribution changes until July 2007, that date is rapidly approaching.

In preparation for negotiations, a coalition of unions consulted an actuarial and benefit firm, Venuti and Associates, for a second opinion on the need for contributions. The Venuti firm concluded that the university had made its decisions on the basis of incomplete information and had employed overly conservative assumptions when it predicted that the fund's surplus would be exhausted by 2010. (See story in *CPER* No. 179, pp. 51-54.)

Venuti Report 'Severely Flawed'

Venuti's was not the last word. In an August letter to Randolph Scott, executive director of policy and program design for U.C., the university's actuarial consulting firm, Segal and Co., took Venuti to task for ignoring U.C.'s goal of avoiding a sudden spike in contributions, using overly optimistic assumptions, and making unsupported accusations about the incomplete nature of U.C.'s analysis.

Venuti did not discuss with the union coalition the advantages of starting contributions before exhaustion of the pension fund's surplus, charged

Segal. Starting contributions before the surplus disappears will allow U.C. and its employees to plan and to negotiate with represented employees. In addition, early contributions will extend the surplus and delay the need to pay full costs. It also is more equitable, Segal asserted, to distribute the costs among all members now rather than only among newer members, who would have to pay more in the future.

The Venuti report did not dispute the assertion that contributions soon will be needed, Segal noted. Because Venuti ignored the U.C. regents' policy decision to phase in contributions for a "soft landing," the Venuti report focused on short-term actuarial assumptions and analytical tools that are designed to pinpoint only when the surplus will run out. It would have been better to help the unions plan how best to transition to the full contribution rates and when to schedule bargaining cycles, chided Segal.

The university's actuarial consultant characterized Venuti's discussion of future investment returns as misleading. U.C. has assumed since 1994 that its long-term investment return would be 7.5 percent, knowing that short-term investments may be higher or lower. Segal faulted Venuti for introducing an "upward bias" into the discussion by noting that a 10 percent return would sustain the surplus, and that the 3-year and 20-year average investment returns have been over 12 percent. Not only does Venuti ignore that the 5-, 6-, 7-, and 8-year returns are under 7 percent,

Segal charged, actuarial standards of practice caution against giving undue weight to recent experience when setting actuarial assumptions. Other California public retirement systems assume a rate of return between 7 and 8.5 percent, Segal pointed out, and the consensus among investment consultants is that returns will be under 7.5 percent for the next several years.

Venuti ignored the fact that the 5-, 6-, 7-, and 8-year investment returns are under 7 percent, Segal charged.

Segal criticized Venuti's conclusion that U.C. assumed an unduly high inflation rate that leads to a more negative funding picture. Governmental Accounting Standards require consistency in assumptions so that lower inflation hinders both salary increases and investment performance, a combination that affects funding negatively, according to Segal.

Segal deflected criticism of its own analyses. U.C. disclosed a single-point estimate of investment return that the actuary used, rather than a range of estimates, because disclosure of the estimate is required by Governmental Ac-

counting Standards, it pointed out. Calculating the possible variations in the date the surplus might be exhausted and using stochastic analyses to determine the probability of various scenarios was not necessary since the regents want to start contributions before the surplus disappears, Segal asserted. "Restarting contributions will involve budgeting and collective bargaining definite amounts over multiple years. These decisions cannot be made in probabilistic or 'what if' terms. Ultimately they must be based on the Regents' prudent best estimate of future experience."

Bargaining Begins

In its letter, Segal emphasized that U.C. continues to revisit its decisions based on periodic valuations which reflect actual events. In fact, in the actuarial valuation for the year ending June 30, 2006, that was presented at the November meeting of the Board of Regents, Segal reported a 7.2 percent net investment return rate. The funded ratio based on the market value of assets in 2006 fell to 108 percent. The ratio the regents use, which is based on the value of assets smoothed over the last five years, is 104 percent.

The unions, however, remain adamant that the university has not shown a need for retirement contributions. CUE's chief negotiator, Amatullah Alaji-Sabrie, told *CPER* that the university has not performed an experience study within the last three years, as the UCRP plan document requires, to analyze the appropriateness of demo-

graphic assumptions. The last experience study was based on July 2002 data; the next report, based on July 2006 data, is scheduled to be released in the spring.

The underlying fear of employees is that future retirement contributions and increases in health benefit contributions will swallow up any raises. Employees earning annual salaries under \$80,000 already are going to see their health contributions increase by at least 25 percent on January 1. Con-

The university demanded that the unions waive the right to negotiate future changes to employee retirement contribution rates.

tributions for some plans will increase nearly 80 percent. Most employees received no general raises in 2003 and 2004, and 2 to 3.5 percent boosts last year. While the regents announced a policy last November to bring all employees' wages to market rates within 10 years, wages increased only 2 to 3.25 percent for most employees for the 2006-07 year.

The first bargaining session on October 25 did not go well. Representatives of the Coalition of University

Employees, the University Professional and Technical Employees, and Local 3299 of the American Federation of State, County and Municipal Employees repeated a claim that proper notice was not given to the public concerning the negotiations. They questioned the methodology of the university's reports. U.C. proposed that the amount employees pay into their defined contribution plans begin to be directed back to the pension fund on July 1, 2007. The university told *CPER* that it also is seeking union agreement to treat union employees the same as non-union employees. Essentially, the unions retorted, the university demanded that the unions waive the right to negotiate future changes to employee retirement contribution rates.

U.C. Community Watching

On Friday, November 3, retired Berkeley professor Charles Schwarz, student groups, and community organizations filed unfair practice charges

against U.C., claiming that the university did not sunshine its negotiations proposals on pensions. The unions cancelled the planned November 9 bargaining session.

Unrepresented groups are watching the pension negotiations closely. Salaries for academic employees have risen only 2 percent each of the last two years and are far behind salaries at competitor institutions. Most academic employees are eligible for merit increases only every three years. The Academic Senate has urged the university to increase salaries at least as much as pension contributions. And it has emphasized that employee contributions need to be the same for all employees. As Academic Council Chair John Oakley wrote in a May 25 memorandum to faculty, "Otherwise, represented employees making reduced contributions for the same UCRP benefits would be subsidized by the higher contributions of non-represented employees, which would be unacceptable." *

CSU and CSU Employees Union Reach Tentative Accord

On November 14, the administration of the California State University and the California State University Employees Union reached a tentative agreement on a new three-year contract. If ratified by union members and the CSU Board of Trustees, this pact

will bring closure to bargaining that got underway this past February. The terms of the parties' prior agreement, which was originally scheduled to expire on June 30, 2006, was extended and continued in effect during the recent talks. CSUEU represents about 15,000 em-

employees in four bargaining units: health care, operations, clerical/administrative, and technical support.

The tentative agreement calls for a 3 percent general salary increase and a market salary adjustment pool of .324 percent, both effective this past August. In addition, the parties agreed to a 1 percent service salary increase for eligible employees and a 5 percent increase to the SSI maximum. The parties established, but did not fund, the

The tentative agreement calls for a 3 percent general salary increase.

service salary increase program in their 2004-05 reopener negotiations (see story in *CPER* No. 168, pp. 60-62). Employees who receive no service salary increase or an SSI of less than 1 percent due to the SSI maximum will receive a \$1,588 bonus. Employees who work fewer than four hours during shifts between 6 p.m. and 6 a.m. will receive a shift differential. The university also agreed to increase the rural health care stipend from \$500 to \$750.

If CSU is able to obtain state funding of an additional 1 percent for salaries, employees in fiscal year 2007-08 will receive a 3.696 percent general salary increase effective July 2007 and a market salary adjustment pool of .992

percent, with distribution and timing to be negotiated in the future. A service salary increase of 1 percent will be provided to eligible employees and an additional 5 percent increase to the SSI maximum will take effect. The rural health care stipend will rise from \$750 to \$1,000 during the second year of the proposed contract.

In fiscal year 2008-09, if CSU obtains funding for an additional 1 percent for salaries, employees will garner a 3.942 percent general salary increase; a market salary adjustment pool of 1.21 percent also is part of the tentative agreement, with distribution and timing to be negotiated. Eligible employees will receive an additional 1 percent SSI, and the SSI maximum will increase by another 5 percent. The rural health care stipend will increase during the third year to \$1,500.

If budget contingencies are not met in either of the last two years of the contract, the parties will reopen their agreement on salary only.

In general, employees who are denied a service salary increase will be provided reasons for the denial in advance of the effective date of the SSI payment whenever possible. Before bonus awards are issued, performance criteria must be written and made known to employees. Employees may request in-range progressions, but must not submit a request more frequently than once every 12 months. Salary stipends must be at least 3 percent and no more than 10 percent.

The parties' tentative agreement addresses parking fees. Effective January 1, 2007, parking fees will equal those paid by students, but not exceed a monthly increase of \$3. In September 2007, parking fees will be raised to equal student rates, but not to exceed an increase of \$6 a month. In September 2008, parking fees will increase to equal student fees, but will be capped at a \$9 monthly increase. In addition, in a side letter, the parties agreed that in the first year of the next contract, parking fees will equal those paid by students.

The new agreement also addresses the grievance procedure, employee shift transfers, probation, requests for classification review, performance evaluations, personnel files, vacation requests, leaves of absence with and without pay, overtime, professional development, and health and safety training and committees. *

State Employment

Unions Say Governor's Emergency Proclamation Violates Constitutional Civil Service Rights

The governor's concerns about health and safety and other risks from prison overcrowding are insufficient to skirt the civil service provisions in the Constitution, assert the California Correctional Peace Officers Association and Service Employees International Union, Local 1000. The unions represent a variety of employees of the California Department of Corrections and Rehabilitation, including correctional officers, prison teachers, nurses, and medical technical assistants. They claim the governor's declaration of a state of emergency to justify the decision to send inmates to out-of-state private prisons fails to comply with the Emergency Services Act and violates prohibitions against contracting out state services. The unions failed to obtain a temporary restraining order in early November because the court found the unions would not be harmed while waiting for it to consider fully the legal questions in the case.

Extreme Peril

In October, Governor Schwarzenegger declared a state of emergency due to prison overcrowding. All 33 of California's prisons are filled to overcapacity, and 29 are so overcrowded that

inmates are triple-bunked or are housed in day rooms, gyms, or other areas that pose safety risks. In his proclamation, the governor related a myriad of security and health problems that arise from overcrowded prisons — risks of violence due to cancelled educational and vocational programs, risks of fires and disease from overburdened electrical,

The governor related a myriad of security and health problems that arise from overcrowded prisons.

sewer, and wastewater systems, and inadequate mental health and medical care. He proclaimed that "conditions of extreme peril to persons and property" exist in the 29 prisons, and that "the magnitude of the circumstances exceeds the capabilities of the services, personnel, equipment, and facilities of any geographical area in this state."

The state has tried to alleviate some of the overcrowding by asking counties to house prisoners, but county

jails, themselves, have become overcrowded, resulting in the early releases of inmates in some cases, the governor asserted. He tried three times in 2006 to pass legislation that would address the overcrowded prisons, the proclamation noted, but each time, the legislature did not act.

The governor therefore directed the CDCR to contract with out-of-state prisons for constitutionally adequate housing, care, and programming of California inmates. Although he instructed CDCR to evaluate cost-effectiveness of out-of-state transfers, he suspended for the duration of the emergency the applicable sections of the Government Code and Public Contracts Code that would delay or hinder entering into contracts for inmate transportation and screening, or for the services of qualified personnel.

Incomplete Legislative Opinion

The CDCR's plans to transfer inmates to private prisons in Tennessee and three other states in November resulted in a flurry of legal briefs and opinions. Senator Gloria Romero asked the Legislative Counsel's Office for an opinion whether Section 1 of Article VII of the California Constitution would be violated by the state entering into contracts with private entities for public safety services traditionally performed by CDCR.

The legislative counsel opinion reiterated the established law that the Constitution implicitly restricts the state from contracting out services that

civil service employees traditionally have performed. It explained the exceptions to the general rule against contracting out, such as when the services provide a new state function or when civil service employees cannot adequately or competently perform the services.

Predictably, the legislative counsel's conclusion was that, in the absence of facts which would bring a contract within one of the exceptions, the state would violate Article 7 of the Constitution by contracting with private companies for public safety services that CDCR traditionally has performed.

Courts have upheld contracts for services in emergencies or for urgent, temporary, and occasional work.

But, lacking a more specific request, the legislative counsel did not address the effect of the emergency proclamation except in general terms. The opinion cautioned that the counsel was not making any conclusions about contracts resulting from the governor's proclamation. The counsel pointed out, however, that courts have upheld contracts for services in emergencies or for urgent, temporary, and occasional work. For example, in *People*

ex rel. Dept. of Fish and Game v. Attransco, Inc. (1996) 50 Cal. App.4th 1926, contracts with private lawyers for complex litigation were upheld where the delay involved in hiring attorneys through the civil service process would have frustrated the purpose of hiring them.

'Emergency' Disputed

CCPOA and SEIU Local 1000, however, did not ignore the overarching question. In early November, they petitioned for an injunction to prevent the inmate transfers and payment to the contractors. The unions asserted the governor's proclamation did not comply with the Emergency Services Act, which gives the governor the power to suspend statutes when strict compliance with their requirements would hinder or delay an effective response to an emergency.

The unions pointed out that the state's prisons have been at or above their operational capacity for at least a year, but that the legislature has "declined to treat the situation as an 'emergency' or indeed to take any action...proposed by the executive branch." Invoking the separation of powers doctrine, the unions contended that the proclamation "constitutes an end-run around the Legislature."

In their application for a temporary restraining order and preliminary injunction, union counsel asserted the proclamation did not recite the minimum factual findings that are required to claim a state of emergency. The proclamation refers to two of the necessary

findings — conditions of extreme peril and circumstances beyond the control of any city or county, the unions acknowledged. But the governor did not make any reference to the third requirement, that "the combined forces of a mutual aid region or regions" are needed to respond to the dangerous conditions, they argued.

The state's response to the application for a temporary restraining order did not contend that the services of prison guards, teachers, and other employees were subject to contracting out under normal circumstances. Instead, the state's attorneys insisted that the

Unions asserted the governor's proclamation did not comply with the Emergency Services Act.

governor's action was justified by emergency conditions and that it complied with the Emergency Services Act.

The state turned the CCPOA's own legislative testimony and rhetoric against the employee organization. In August, CCPOA President Mike Jimenez testified before a state Senate committee, "[W]e are facing a crisis within the prison system. California as a whole is on the verge of a public safety

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disaster.” He also informed the committee, “We are highly skeptical of the feasibility of adding 15,000 more inmate beds to existing facilities. We currently can’t attract the staff to the outlying areas; we can’t attract either custody or ancillary medical, psychological, [or] teaching staff.”

The union’s argument that the prison problem is not new is meritless, the state contended. In a previous case involving the Med-fly infestation, the California Supreme Court rejected an argument that the state’s knowledge and inaction over a 10-year period rendered the governor powerless to declare an emergency, the state’s lawyers pointed out.

In addition, the state asserted, the legislature’s failure to act on any of the governor’s proposals does not mean that there is no emergency. “[T]o the contrary, [the facts] demonstrate that despite the Governor’s persistence to obtain a legislative solution, no measures were forthcoming to remedy the ongoing and increasing problem and it was necessary for the Governor to take measures to stem the very real and acknowledged threat,” the state argued.

In an attempt to avoid a TRO or injunction before the legal questions were fully presented and considered by the judge, the state argued that waiting for full consideration of the case would not harm employees irreparably. It contended that transferring inmates would improve employees’ jobs by reducing the prison population, mitigating dangerous housing situations, and eliminating overtime.

In early November, the judge determined that a TRO was not appropriate since the unions had not shown that employees would be irreparably harmed by waiting for the court to consider the full arguments of the parties.

A hearing to resolve the questions concerning the governor’s compliance with the Emergency Services Act and the validity of contracting out was set for November 22. *

DPA Welcomes Prison Receiver’s Pay Raise Recommendations

With no objection from the Department of Personnel Administration, a federal judge granted the prison health care receiver’s motion to waive state salary and labor laws and raise wages of correctional medical personnel. DPA acknowledged that collective bargaining law and statutes which require like salaries for comparable work inhibit its ability to raise pay enough to remedy high staff vacancy rates in the prison’s medical care system. The federal court found last year that understaffing is a major cause of medical neglect and malpractice in the prisons, which violates the Constitution’s prohibition against cruel and unusual punishment.

Vacancies Remain

In *Plata v. Schwarzenegger*, the Prison Law Office and the state stipulated to an injunction calling for revised policies and procedures that would produce a minimally adequate level of medical care in California prisons. In October 2005, Judge Thelton

Henderson determined that little progress had been made and decided to appoint a receiver to reform the correctional system’s medical program. In December 2005, before finding a qualified receiver, the court followed its expert’s recommendation to order pay differentials of 10 to 18 percent to nurses and physicians to attract applicants for the numerous vacancies. (See story in *CPER* No. 176, pp. 40-42.)

Since the pay increases, the vacancy rate for registered nurses has fallen from 35 percent to 15 percent statewide, although 51 percent of positions in Bay Area prisons still are unfilled. But the 15 percent vacancy rate statewide has remained steady since March, indicating that further recruitment incentives are necessary. The average vacancy rate for physicians, nurse practitioners, and physician assistants is still 20 percent. In addition, medical classifications that did not receive pay differentials last December are suffering from a lack of qualified applicants. Sixty-three percent of clinical dietitian positions, 44

percent of x-ray technician positions, and 42 percent of pharmacist positions are vacant.

Despite court-ordered pay differentials for prison employees and recent collective bargaining on pay, salaries for many state health care classifications remain below market rates. Pharmacists' pay is about half of what other pharmacists receive, and clinical dietitians are paid less than half of the market rate. In his motion to the court to

DPA hesitated to invoke the emergency exception to its duty to bargain.

waive state laws relating to salary determinations, Receiver Robert Sillen asserted that "salary increases are necessary as an initial step to begin to correct the health care delivery crisis in California's prisons."

DPA's Hands Tied

Before asking the court to waive state laws, Sillen consulted with DPA about the feasibility of his proposed salary increases, since the department sets salaries for unrepresented employees and represents the state in collective bargaining for the wages of represented employees. Among his suggestions were raises of up to 63 percent for prison pharmacists and 35 percent for registered nurses in the Bay Area. The

objective is to bring salaries close to the pay for comparable positions at University of California hospitals. In his August 15 letter to the Receiver's Office, DPA Legal Counsel Paul Starkey did not object to the size of the proposed pay increases but did claim that DPA could not implement the recommended raises without a court order.

Starkey pointed out that salaries for represented employees could not be changed without collective bargaining, "absent waiver by the exclusive representative or emergency." While DPA recognized the urgent need to raise salaries for medical personnel in the prisons, it hesitated to invoke the emergency exception to its duty to bargain. "[A]t this time, without a court order, it is uncertain whether implementation of increased salaries constitutes an 'emergency' within the meaning of the Dills Act," Starkey wrote. The department asserted the obligation to bargain would prevent it from providing raises in a speedy manner.

Starkey also cited the statutory scheme for setting salaries as an impediment to implementing the receiver's proposed raises. State law requires a classification plan that groups employees with similar duties, knowledge, education, and abilities if the "same schedule of compensation can be made to apply with equity." It also mandates, "The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities." Because of bargaining obligations and the require-

ment for a statewide pay system, Starkey concluded that a court order would be "appropriate and necessary to remove statutory barriers" to DPAs implementation of the proposed raises, which are significantly above the salary ranges in the current classification plan.

The receiver was skeptical that the state was unable to maneuver around state laws to provide a timely pay raise. There was no evidence that DPA had made any attempt to obtain waivers

State law requires that like salaries be paid for comparable duties and responsibilities.

from the unions, the receiver pointed out. The receiver's chief of staff consulted the governor's legal affairs secretary, Andrea Hoch, about the emergency exception and an exception that allows different compensation within a classification for positions with "unusual conditions or hours of work." Hoch backed up Starkey. Neither exception has been construed in the appellate courts, she asserted in an August 25 letter.

The court was not sidetracked by skepticism. The critical consideration, Henderson said, is that the state has taken the position that it cannot raise salaries quickly and that it has not in

fact raised them. The court was emphatic that it could not “permit the State to attempt to address the issue of inadequate salaries through normal collective bargaining channels — which would take months if not years — when lives are unnecessarily being lost.” The court castigated the state for failing to raise salaries when it had the opportunity to agree to pay increases in recent

The court castigated the state for failing to raise salaries when it had the opportunity.

negotiations. “[D]espite a CDCR study finding pharmacy salaries 43% below the public sector market, it recently concluded an agreement that raised pharmacy position salaries by only 3.5%,” the court fumed.

Dills Act Sections Waived

The court ordered the state to cooperate with the receiver to implement pay increases. To pave the way, Henderson waived the requirements of specified sections of the California Code of Regulations and the Government Code, including sections of the Dills Act, “for the sole purpose of enabling the Receiver to direct the implementation...and administration of the proposed salaries and structural changes to the pay system.” But, he

emphasized, the waiver “is not intended to relieve...the State of any of [its] duties and responsibilities under California law, including the obligation to collectively bargain regarding salaries.”

Not only was this action invited by the state, the court observed, but there was no adequate alternative. The state’s heavy reliance on short-term contract personnel to alleviate understaffing “has been an abject failure...and a costly exercise.” For example, Henderson noted, the state has been paying \$67 an hour for contract nurses and \$170 for contract doctors, while the cost of pay and benefits for civil service nurses and physicians is \$49 an hour and \$80 an hour, respectively.

The court declined to waive the statutes indefinitely. If the receiver finds that additional pay changes are necessary, the receiver will have to try to reach a stipulation that the statutes should be waived again or file with the court another motion for waiver of state law.

Financial Fallout

The monetary impact of the court’s order is mixed. On one hand, if the higher salaries result in filling all vacancies, the receiver predicts CDCR will spend \$24 million on increased payroll in the first year, which began September 1, 2006. But, since the department spends nearly four times that amount — \$90 million in 2005-06 — for contract medical personnel to alleviate staff shortages, the department may save money overall.

Make everything as simple as possible, but not simpler.

Albert Einstein

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Pocket Guide to the Fair Labor Standards Act

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In addition, the receiver will hire licensed vocational nurses to replace medical technical assistants, who are peace officers represented by the California Correctional Peace Officers Association. LVN pay will range from approximately \$40,000 to over \$55,000 for those in the Bay Area; but these wages are lower than what MTAs earn, and the state's pension contributions will be less than for expensive peace officer pensions.

The Department of Finance is concerned, however, that medical employees from state agencies outside CDCR will attempt to transfer into the correctional agency to take advantage of the higher pay which applies only within the prisons. In particular, the Department of Finance is worried that employees will transfer for a single year only to boost their pensions, which are based on the highest consecutive 12 months of salary.

The court gave short shrift to this concern. It directed the receiver to try to screen out applicants that appear to want to transfer into the prisons for only a year. With respect to the deleterious effects on other state agencies that may lose medical personnel, the court suggested a legislative remedy.

The finance department's concerns are not far-fetched. After the December 2005 pay differentials, nurses in the Division of Juvenile Justice and the Department of Mental Health began to agitate for extension of the 18 percent increases. Some nurses transferred to prison jobs. As a result, effective Feb-

ruary 1, both nurses and physicians in the Department of Mental Health and the Division of Juvenile Justice were accorded the same recruitment and retention differentials that were being paid at the prisons.

Raises for medical personnel in the prisons heighten the pressure for the state to pay higher wages to other prison workers in similar jobs. For example, LVNs in the prison will be paid at least 25 percent more than those in other

*Raises for medical
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state departments. Psychiatric technicians are nursing employees comparable to LVNs whose education emphasizes behavioral health. The California Association of Psychiatric Technicians has been pushing for significant raises since last December. Although CAPT was unsuccessful in bargaining, where it won only a 2.5 percent increase for this year, it may be more successful in the legal arena. The day after the judge issued his most recent order, CAPT informed the 230 psychiatric technicians who work in prisons that

their pay soon would be boosted by a special master in a separate lawsuit which targets the correctional mental health system.

Bargaining Unpredictable

DPA spokesperson Lynelle Jolley was reluctant to comment on many aspects of the receiver's motion and the judge's order, but she did explain some of the difficulties of negotiating raises. Even if DPA offers a large raise, it may not be accepted. In August 2005, she pointed out, DPA offered registered nurses an 18 percent increase — the raise eventually ordered by the court. But, as the union explained at the time, SEIU Local 1000 declined the raise because the offer did not address its additional objectives, such as limitations on mandatory overtime work and elimination of pay inequities.

In addition, as Legal Affairs Secretary Hoch pointed out, DPA must inform the legislature of any modification of an existing agreement that will cost more than \$250,000 in salary and benefits. The legislature then determines whether the modification is within the parameters of the previously ratified agreement, and if not, whether to ratify the modification. The court's order waiving DPA's legal obligation to meet and confer over the proposed raises eliminates the time-consuming steps of the collective bargaining process. *

Prison Liable for Inmates' Sexual Harassment of Guard, But May Skate on First Amendment

Prisons have to try to prevent sexual harassment of female employees, even if the harassment is perpetrated by inmates, the Ninth Circuit Court of Appeals held in *Freitag v. Ayers*. The court upheld a jury finding that the California Department of Corrections and Rehabilitation made insufficient efforts to correct a hostile work environment. The jury also found that the department retaliated against Freitag for her com-

Her lieutenant asserted, 'It's only sex.'

plaints by referring her for a psychiatric examination and terminating her. However, since her internal complaints about the harassment may not be protected speech under *Garcetti v. Ceballos* (2006) ___U.S.___, 126 S.Ct. 1951, 179 CPER 21, the court asked the trial court to determine whether the jury's consideration of the internal complaints as part of her First Amendment claim was harmful error.

Exhibitionism at Pelican Bay

Deanna Freitag was a correctional officer at Pelican Bay State Prison, a

maximum security facility where some of the state's most violent prisoners are housed. While on duty, she witnessed inmates who masturbated outside their cells. When she ordered a naked prisoner masturbating in the exercise yard to return to his cell, he screamed sexually derogatory obscenities at her and threatened to kill her. Her supervisor told her not to document the incident, but she completed a disciplinary report charging that the inmate had threatened her. Several months later, she filed forms charging the same prisoner with indecent exposure after more occurrences. In one case, administrators delayed processing the paperwork after the inmate pled guilty, and he was not punished with forfeiture of "goodtime" credit. In another instance, her supervisor changed the charge to the lesser offense of willful delay of a peace officer.

Freitag also filled out disciplinary reports on another inmate who refused to comply with her order to stop masturbating in the prison yard. After a second incident, she charged him with indecent exposure, but her supervisor declined her recommendation for discipline. She filed a disciplinary report against a third inmate who masturbated in the shower while looking at her and shouting her name. Her lieutenant discarded the disciplinary report. Saying

that she was the only person who had problems with the inmate, he asserted, "It's only sex."

Complaints of Inaction

Because of her supervisors' dismissive conduct, Freitag sent letters to a higher-level manager and the warden, Robert Ayers, advising them that her complaints were being denied or thrown away. She also notified the associate warden, Teresa Schwartz, that her supervisors were procrastinating instead of responding to the sexually abusive behavior. She recommended enforcement of the CDCR policy of

They relieved her from duty pending a psychiatric fitness evaluation because of her 'incoherent' memoranda.

referring repeat offenders to the district attorney for prosecution. She complained that she was being used as "a sexual favor" to gain the offending inmates' cooperation. A week later, she wrote to the department director about the hostile worksite and lack of action on her reports.

Eight days later, the manager and Schwartz informed Freitag that they were relieving her from duty pending a

psychiatric fitness evaluation because of her “incoherent” memoranda regarding inmate harassment. Schwartz also threatened to terminate her.

When Freitag returned to duty following the evaluation, she filed indecent exposure charges against an offending prisoner. A week later, she wrote to Warden Ayers requesting additional training for officers because of an incident in which another officer slammed a prison door on the hand of the same inmate who was refusing to be handcuffed.

The department argued that prisons are inherently hostile places.

Eleven days later, Ayers initiated an internal affairs investigation against Freitag because of alleged inaccuracies in her letter about the handling of the prisoner. A second internal affairs investigation charged that she was making “slanderous accusations against staff” when she alleged that her supervisors were destroying her reports.

After the investigations began, Freitag filed a charge with the Department of Fair Employment and Housing and sent two letters to California State Senator Richard Polanco. She informed the senator that she and other female officers were being subjected to

sexually abusive behavior and that supervisors were ignoring her reports or procrastinating on implementing punishment. A copy of the second letter was sent to the corrections department director. Following the DFEH charge and the first letter to the senator, Ayers initiated another internal affairs investigation against Freitag for using state equipment to pursue her complaints.

Based on a request from Senator Polanco, the Office of the Inspector General began an investigation. During this time, Freitag received a notice of adverse action charging her with falsification of the report about slamming a door on an inmate’s hand. A month later, she was notified of her termination for falsifying another report in which she complained that a fellow officer contaminated an inmate’s food. She was terminated before issuance of the inspector general’s report.

The IG found that Pelican Bay inmates regularly subjected female officers to lewd exhibitionism and masturbation, and that supervisors and administrators had not responded appropriately. It confirmed that the administration was not using the available prisoner disciplinary process or other legal sanctions, had stopped referring exhibitionist masturbation cases to the district attorney, and had not taken any definitive action to address the problem. In addition, the IG reported that the prison’s equal employment opportunity coordinator had said that the inmates “hit on” the female officers because they were lesbians.

Jury Award

Freitag sued the department for sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964. She sued Ayers, Schwartz, and several supervisors and managers for violation of her First Amendment rights. At trial, Freitag’s expert testified that Pelican Bay was unique in its exhibitionist masturbation problem. He described several measures that could have been used to correct or alleviate the hostile environment. The

Federal case law established that employers are liable when they fail to take corrective action.

jury found the department liable for the Title VII claims and held Ayers, Schwartz, and the EEO coordinator liable for retaliation in violation of First Amendment rights. The district court judge, Thelton Henderson, also issued an injunction against the department and its officers and employees. He referred to a special master the authority to develop a remedial plan and monitor compliance with the injunction.

The department, Ayers, Schwartz, and Lopez appealed.

Prisons Liable for Environment

The department argued on appeal that prisons cannot, as a matter of law, be held liable for a sexually hostile work environment caused by inmate misconduct because prisons are inherently hostile places. Chiding the department for failing to cite any authority in support of its novel claim of immunity from Title VII claims, the court rejected the contention.

The court retraced federal case law and Equal Employment Opportunity Commission regulations which established that employers are liable when they ratify or fail to take corrective action against third parties who harass employees. The court acknowledged that several courts have discussed the socially deviant behavior of prisoners and the difficulty of controlling them. However, even in a case cited by the department — *Slayton v. Ohio Department of Youth Services* (6th Cir. 2000) 206 F.3d 669 — a prison was held liable because it failed to take action to remedy or prevent the inmates' behavior. In a second case, *Powell v. Morris* (S.D. Ohio, 1999) 37 F.Supp.2d 1011, the court had instructed:

Courts have repeatedly declined to impose sexual harassment liability upon correctional institutions for the sexually offensive conduct of inmates, as long as the defendant institution took proper preventative and remedial steps with regard to inmate behavior.

The appellate court found no persuasive reason to exempt prisons from liability for sexual harassment under Title VII. Nothing in the law suggests immunity for prisons. And, following the district court's reasoning, the court held that an employer cannot be excused from making a workplace as safe as possible, even if the workplace is inherently unsafe.

The court had no trouble finding substantial evidence in support of the jury's sexual harassment verdict for

The court found no persuasive reason to exempt prisons from liability for sexual harassment.

Freitag. It rejected the department's argument that the conduct was not unwelcome to Freitag because she accepted a job in the area of the prison with the highest-risk inmates. Although Freitag might have expected inmate misbehavior, the court said, it was reasonable for her to expect administrators to try to control what the court termed "a constant barrage of sexual abuse." The court turned aside the contention that the incidents were not severe or pervasive enough to violate the law. The court also found plenty of evi-

dence that the department failed to take appropriate corrective action.

The court rejected the department's contention that it could not have retaliated if it did not know that Freitag was opposing a violation of Title VII. The court observed that Freitag had sent letters about the hostile worksite and filed a discrimination complaint. To the extent that the department thought it was unreasonable for her to believe that its inaction was unlawful, its opinion of the law was erroneous, the court remarked.

Question of Protected Speech

The court declared there could be "no serious dispute" that the evidence supported the jury's findings. It was clear the department took adverse action against Freitag and that her speech was a "substantial or motivating factor" in the internal affairs investigation requests and discipline. But the recent *Ceballos* decision raised a question whether all the incidents of speech that the jury considered in reaching its verdict were protected by the First Amendment and whether, if the jury considered unprotected speech, it was harmless error.

In *Ceballos*, the United States Supreme Court first held that speech made pursuant to a public employee's job duties is not protected by the First Amendment. It distinguished that speech from that of a public employee's speech as a citizen, which is protected if it addresses a matter of public concern.

Because the jury trial was held prior to the *Ceballos* decision, the trial court

had instructed that protected speech included making formal and informal reports to the department, documenting the department's action, sending a letter to the director, sending letters to the senator, reporting the sexual conduct and department inaction to the inspector general, and cooperating in the IG's investigation.

The appellate court rejected the individual defendants' contention that Freitag never spoke as a citizen. It found that Freitag acted as a citizen

The court remanded the issue of whether the letter to the director was protected by the First Amendment.

when she communicated with the IG and sent letters to Senator Polanco. The court emphasized, "Freitag does not lose her right to speak as a citizen simply because she initiated the communications while at work or because they concerned...her employment." It was not part of her duties as an officer to write the senator or the IG, said the court. Instead, it was her "responsibility as a citizen to expose such official malfeasance."

The court also disagreed with the argument that Freitag's complaints did not relate to matters of public concern.

Her reports would bear on the public's evaluation of the prison's performance. There was evidence that the inmates' conduct made it difficult for female guards to do their duties and that the environment eroded the prison's authority over the inmates. In addition, because prisoners reenter society, it is a concern that the state condones sexually abusive behavior, the court noted.

Although the communications with the senator and inspector general were protected speech, the court was troubled that the jury believed other reports also were protected. Freitag completed the internal forms about inmate sexual misconduct as part of her job duties, the court observed. But it was less sure about whether Freitag's communications to the director were similarly part of her duties. With a reference to Judge Henderson's experience in cases relating to the Pelican Bay prison, the court remanded the issue of whether the letter to the director was protected by the First Amendment. The trial judge also was instructed to determine whether the jury instruction containing erroneous examples of protected speech was likely to have been harmless.

Because of uncertainty whether the jury's award of \$600,000 was based on her Title VII harassment and retaliation claims or her First Amendment claim, the court remanded the question of whether the damages award remained valid.

Injunction Upheld

The trial court's injunction prohibited the department from employment practices that maintain a sexually hostile work environment, that discriminate on the basis of sex, or that are retaliatory. As Freitag was no longer employed as an officer at the time of the trial, the department argued that the injunction could not benefit her and was improper.

The appellate court pointed out that, at the time the injunction was issued, the administrative appeal of Freitag's discharge was pending. The court acknowledged that it was uncertain whether she would be reinstated to her job. However, the court observed, *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 27 CPER 37, gives Freitag a property interest in her employment that continues after her termination until final resolution of the administrative process. The court ruled that, because the administrative process was not concluded, Freitag had sufficient standing to seek the injunction, and the injunction was not an abuse of discretion. (*Freitag v. Ayers* [11-03-06] 03-16702, 03-17184, 03-17398 [9th Cir.] ___ F.3d ___, 2006 DJDAR 14635 [pet. for rehearing den.]) *

Discrimination

UPS Cannot Discriminate Against Deaf Truck Driver Applicants

In *Bates v. United Parcel Service*, a unanimous three-judge panel of the Ninth Circuit Court of Appeals has upheld the district court's ruling prohibiting United Parcel Service from categorically excluding from employment as "package-car drivers" individuals who cannot pass a Department of Transportation hearing test. The appellate court agreed that UPS' conduct violated the Americans with Disabilities Act and California's Fair Employment and Housing Act, but reversed the lower court's finding that the conduct also violated California's Unruh Civil Rights Act.

Factual Background

In order to qualify for the position of "package-car driver" an applicant must, among other things, be employed by UPS in a qualifying position, have a "clean driving record," and pass a DOT physical exam that includes a hearing test. Though UPS requires that *all* drivers take and pass the exam, the DOT requires the test only for those individuals driving trucks with a gross vehicle weight of over 10,001 pounds. The UPS fleet contains thousands of vehicles with a GVW of less than 10,001 pounds.

A class action lawsuit was filed in which the class, represented by several individuals including Eric Bates, contended that UPS may not lawfully exclude deaf individuals for positions which require them to drive only vehicles whose GVW is less than 10,001 pounds. The trial court agreed, and this appeal followed.

Court of Appeal Decision

Burden of proof. On appeal, UPS argued that the class had failed to establish a prima facie case of employment discrimination because it did not show that there was a named member of the class who satisfied all job requirements, including that he or she could drive "safely." The court noted, "UPS suggests that *beyond* compliance with prerequisites unconnected to the DOT standard, Bates also bears the burden of proving that at least one individual in the class was a 'qualified individual with a disability' in the sense of being able to perform the 'essential function' of driving 'safely.'"

The court found UPS' position inconsistent with the language of the ADA. Section 12112(a) of the act provides that an employer "shall not discriminate against a qualified individual with a disability because of a disabil-

ity...." Section 12112(b)(6) specifies that the term "discriminate" as used in subsection (a) includes "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, unless the standard, test or other selection criteria...is shown to be job-related for the position in question and is consistent with business necessity." The court found that "UPS's hear-

The word 'unless' suggests that UPS bears the burden of establishing that the standard is job-related.

ing standard is clearly a 'qualification standard' which screens out individuals with disabilities from consideration for driving positions and violates the act unless UPS can show that it is job-related. "The word 'unless' suggests that UPS bears the burden under [Sec.] 12112(b)(6) of establishing that the standard is job-related and consistent with business necessity," the court reasoned.

UPS argued that, even if this were so, the plaintiffs had the burden of first establishing that the standard excludes individuals who can perform the "es-

sential function” of driving “safely,” pointing to Sec. 12112(a)’s use of the term “qualified individual with a disability.” That term, as defined in Sec. 12111(8), means “an individual ... who, with or without reasonable accommodation, can perform the essential functions of the employment position,” maintained UPS. The company also relied on Ninth Circuit cases holding that plaintiffs ordinarily must establish that they are “qualified individuals with disabilities.”

UPS failed to meet either prong of the business necessity defense.

The court recognized, “if UPS were correct, then, as a practical matter, the plaintiff would bear the burden of proving that a categorical and specific safety qualification is *not* valid under the statute.” Such a result would be incompatible with the statutory scheme, said the court.

Stating that “Section 12112(a) does not stand alone in the ADA,” the court refused to incorporate the definition of “qualified individuals” of Sec. 12111(8) into Sec. 12112(b). “Critically, [Sec.] 12112(b)(6) and its parallel affirmative defense, [Sec.] 12113(a), apply where ‘an individual with a disability,’ *not* a ‘quali-

fied individual with a disability,’ is excluded,” instructed the court. “Plaintiffs thus do not bear the burden under [Sec.] 12112(b)(6) of proving that individuals who cannot meet the qualification standard nevertheless are ‘qualified’ with regard to the essential job function the standard addresses — here, safety,” it said. The court also cited legislative history in support of its position, quoting several reports that used the term “persons with disabilities” rather than “qualified persons with disabilities” when discussing the use of qualification standards.

The court distinguished decisions cited by UPS requiring that ADA plaintiffs bear the burden of establishing that they are “qualified individuals with disabilities.” “These cases... have, for the most part, not concerned challenges to a categorical qualification standard under [Sec.] 12112(b)(6) and [Sec.] 12113(a) and thus do not take account of how plaintiffs’ burdens are different when those provisions apply.” It pointed instead to two of its cases that did consider qualifications standards, *Morton v. United Parcel Service, Inc.* (9th Cir. 2001) 272 F.3d 1249, which also involved a deaf applicant for the package-car position, and *Cripes v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 150 CPER 66, finding that they are consistent with the approach adopted in this case.

The court summarized its holding on the burden of proof as follows:

Argue for your limitations, and sure enough they’re yours.

Richard Bach

Expand your knowledge of both the federal Family and Medical Leave Act and the California Family Rights Act. CPER’s clear and concise guide is useful to employees who are eligible for benefits, union officials questioned about employee entitlements, and labor relations managers charged with implementing the act. Useful as a training tool or for resolving practical, day-to-day questions.

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[W]hen a plaintiff challenges a categorical “qualification standard,” the plaintiff does not have the burden of establishing that *that* qualification standard excludes “qualified individuals with disabilities.” Rather, to establish statutory standing, the plaintiff has the burden of establishing that she meets *other* qualifications, unrelated to the challenged standard. In addition, the plaintiff has the burden to prove that the challenged qualification standard “screens out or tends to screen out an individual with a disability or a class of individuals with disabilities.”....The burden then shifts to the employer to establish the business necessity defense.

Business necessity defense. According to the court, UPS had the burden of establishing either of the two prongs of the business necessity defense set out in *Morton*: that substantially all deaf drivers present a higher risk of accidents than non-deaf drivers, or that there are no practical criteria for determining which deaf drivers present a heightened risk and which do not. The district court found UPS failed to meet either prong, and the Court of Appeals upheld the lower court’s ruling.

The trial court determined that the evidence presented by UPS in support of the first prong failed to establish that deaf drivers present a higher risk of accidents than hearing drivers. It found that UPS’ “crash risk studies” suffered from methodological flaws and yielded conflicting results. UPS’ human factors study’s conclusion that “hearing is both important and necessary for the safe operation of commercial vehicles” was not persuasive, said the district court,

because it was based in part on the subjective beliefs of hearing drivers. And the lower court was not convinced by UPS’ expert’s opinion that he had “very strong doubts” that providing deaf drivers with technological devices, such as visual warnings of sirens, could be effective. “Very strong doubts” did not meet UPS’ burden, found the court, and the expert’s doubts were not grounded in any empirical evidence. The district court concluded that “the evidence is inconclusive as to whether deaf drivers pose an increased risk compared with hearing drivers,” and, as a result, UPS had not met its burden.

UPS failed to meet either prong of the business necessity defense.

The Court of Appeals concluded that “the district court did not clearly err” in its determination that the evidence presented did not establish the first prong. “[E]vidence that a hearing driver is generally safer than a deaf driver with similar skills and characteristics — i.e., evidence of the sort that UPS presented to the district court — still does not address the question of whether there are *some* deaf drivers who are as safe or safer than some or all of the hearing drivers that UPS employs,” said the court. “It is this latter comparison that is key,” it instructed.

The concept of risk, in other words, is an individual, not an aggregate, one, albeit one calculated by averaging out overall risk: How likely is it that the individual driver will get into an accident? If there is, for example, a one percent chance that hearing drivers who have had two prior accidents will get into an accident, yet UPS hires them, and a one percent chance that deaf drivers generally will get into an accident, then excluding deaf drivers generally is excluding a subgroup no less safe than another subgroup not excluded, and is therefore discriminatory.

Turning to the second prong, the Court of Appeals specified it was UPS’ burden to establish “(1) that there exist no practical criteria for determining which deaf drivers are safe, or (2) that there exists no empirical evidence from which to derive criteria for determining which deaf drivers are safe.” The district court found UPS failed to prove that it could not modify its existing training and assessment program to determine which deaf drivers are safe. In fact, said the district court, “UPS has never tried to train a deaf driver, nor has it ever investigated ways in which it might do so.” UPS did not introduce any evidence tending to show that there are no practical or effective criteria for determining which deaf drivers are safe. Both the trial court and the Court of Appeals pointed to obvious criteria, such as the applicant’s driving record, or the driving tests and training that UPS gives to other applicants, and noted that UPS presented no evidence as to why similar checks of driving records, tests, and training would not help assess which

deaf applicants could not drive safely. The Court of Appeals noted:

Of particular significance in these regards is that deaf drivers are licensed to drive passenger cars in every state and do, including vehicles as large as the smaller UPS package cars. There is therefore no legal impediment to addressing and training deaf drivers, and both driving and accident-rate records for deaf drivers seeking UPS driving jobs are obtainable.

UPS argued that it must be given the benefit of the doubt in the face of uncertainty regarding whether deaf drivers are less safe than hearing drivers. The Ninth Circuit agreed, saying “the second prong of the business ne-

Deaf drivers are licensed to drive passenger cars in every state.

cessity defense in *Morton* does give employers the benefit of the doubt in cases of uncertainty, but only when the employers introduce persuasive evidence supporting the conclusion that the answers to the questions at hand truly are uncertain.” UPS did not do that here.

UPS also failed in its challenge to the district court’s injunction prohibiting it from using the DOT standard to screen applicants for the package-car position and requiring it to employ an individualized assessment. UPS argued

that the injunction unlawfully required it to use a new “specially designed” test, “invented by the court,” having “no basis in evidence.” The Court of Appeals responded that no particular test was required by the injunction, only that UPS use some form of individualized assessment.

Finally, the Ninth Circuit overruled the district court’s finding that

UPS also had violated the Unruh Act, pointing to the recent case of *Bass v. County of Butte* (9th Cir. 2006) 458 F.3d 978, 180 CPER 81, in which it held that the Unruh Act cannot be read to include the protections of the ADA. (*Bates et al. v. United Parcel Service* [9th Cir. 10-10-06] 465 F.3d 1069. *

No Family Rights Act Claim Where Employee Fired for Cause

California’s Family Rights Act was not violated when an employee was fired the same day she returned to work after an extended leave, ruled the First District Court of Appeal in *Neisendorf v. Levi Strauss*. The CFRA’s requirement that an employer reinstate an employee returning from leave did not apply because the employee was not able to return to work at the expiration of the act’s 12-week-maximum leave time and was not entitled to reasonable accommodation. Further, the employee was terminated for unsatisfactory performance, having nothing to do with the leave or her disability, said the court. It also rejected the employee’s claim that she was entitled to bonus payments under the company’s annual incentive plan.

Factual Background

Barbara Neisendorf was hired as an at-will employee by Levi. During

the course of her two-year employment, her supervisor and her subordinates criticized her performance, culminating in a written mid-year review pinpointing several concerns. Neisendorf

The employee was terminated for unsatisfactory performance, having nothing to do with the leave or her disability.

refused to acknowledge or accept the criticisms. She offered to resign and requested a \$1.7 million separation package. Shortly after learning that she was not eligible for the package, she took a four-week disability leave, which

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Gloria Steinem

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later was extended. She was diagnosed with neurodermatitis, irritable bowel, muscle spasm, and a panic disorder. She was released to return to work after eight weeks, but only if she got specific accommodations including a neutral external job coach, a job redesign, and a reporting relationship to someone other than her previous supervisor, for a period of at least three months.

Levi denied Neisendorf was legally disabled but agreed to work with her on accommodations and did so over the next several weeks. During this time, Neisendorf was told repeatedly that her return was conditioned on her willingness to accept and address her performance deficiencies. The company and Neisendorf agreed to specific accommodations, and she returned to work, but not until two weeks after the expiration of the 12 weeks allowed by the CFRA. At a meeting held the day of her return, Neisendorf refused to acknowledge the performance problems identified in the mid-year review and was terminated.

Neisendorf filed a lawsuit alleging a number of causes of action. Most of her claims were dismissed prior to trial. On the two remaining issues, the jury found that Neisendorf was not terminated because she took CFRA leave and that she was not a disabled person under the Fair Employment and Housing Act. On appeal, Neisendorf did not challenge the jury's verdict. Instead, she argued that the court was wrong to dismiss her claim for violation of the CFRA on the ground that she failed to

produce evidence that she was able to perform the essential job functions of her position within the 12-week CFRA protected period. She disputed the court's finding that she was also not entitled to unpaid bonuses.

Court of Appeal Decision

The Court of Appeal agreed with the trial court's conclusion that Neisendorf's CFRA claim should be dismissed because she was not released to work without accommodations within the 12-week leave period. It noted that there is no provision in the

No provision in the CFRA requires an employer to provide reasonable accommodation.

CFRA requiring an employer to provide reasonable accommodation to an employee returning from CFRA leave. The court found substantial support for the trial court's ruling in cases decided under the federal Family and Medical Leave Act. It cited cases holding that an employer does not violate the FMLA when it fires an employee who is unable to return to work at the conclusion of the statutorily mandated 12-week leave period and said:

To the extent Neisendorf argues that LS&Co. should have reinstated her to her previous position after 12 weeks, such an argument ignores the critical fact that Neisendorf was never released to return to work without restrictions. There is no obligation under the CFRA that an employer provide accommodations to an employee in order to allow the employee to return to work within the 12-week period.

The court noted that Levi did agree to provide Neisendorf accommodations and did reinstate her to her job although it was under no obligation to do either. The jury rejected Neisendorf's claim that she was terminated in retaliation for asserting her CFRA rights. The evidence showed, said the court, that "her employment was promptly terminated the day she returned to work when it became clear that she still could not commit to working on the unacknowledged performance issues."

Neisendorf did not challenge these points, said the court, but instead argued that the question to be determined by the jury was, "when the employer engages in the Interactive Process [to discuss reasonable accommodation] starting during the 12-week CFRA period and extending beyond that period, does the CFRA right of reinstatement continue beyond the 12 weeks?" The court dismissed this as a legitimate issue, stating, "In attempting to generate some sort of jury question under the CFRA, Neisendorf cannot overcome the legitimate, nondiscriminatory reason for LS&Co.'s decision to terminate

her employment." Again, it found support for this position in cases interpreting the FMLA. The courts in *Arban v. West Publishing Corp.* (6th Cir. 2003) 345 F.3d 390, and *Throneberry v. McGehee Desha County Hosp.* (8th Cir. 2003) 403 F.3d 972, held that an employee may be dismissed even if the dismissal prevents him or her from exercising rights under the FMLA, where the reason for the dismissal is unrelated to the employee's exercise of those

*Neisendorf cannot
overcome the
legitimate,
nondiscriminatory
reason to
terminate her.*

rights. "Consequently," held the First District, "because LS&Co.'s legitimate nondiscriminatory reason for terminating Neisendorf's employment eliminated any obligation LS&Co. might have had to reinstate her, the [trial] court correctly held she could not state a valid claim under the CFRA."

Neisendorf also appealed the trial court's denial of her claim of entitlement to bonus payments paid out after her termination. She acknowledged that she was not eligible under the terms of the bonus plans, both of which re-

quired that she be an active employee on the date that the bonuses were paid. However, she argued, this provision violated the public policy inherent in Labor Code Sec. 200 requiring certainty in wage provisions. The bonuses were part of her bargained-for compensation, and she was employed during the period of profits upon which the bonuses were based.

"Essentially," said the court, "Neisendorf contends that forfeiture of the bonus payments in this case was akin to illegal withholding or depriving her of wages that she had earned." The court was not persuaded: "We find nothing in the public policy of this state concerning wages that transforms Neisendorf's contingent expectation of receiving bonuses into an entitlement." The court held that Neisendorf was bound by the specific terms of the bonus plans. (*Neisendorf v. Levi Strauss & Co.* [9-28-06] 143 Cal.App.4th 509.) *

General

High Court to Review Agency Fee Case

The United States Supreme Court has agreed to hear a challenge to the constitutionality of a Washington State law that requires unions to obtain consent from each non-union member before it can use any agency fees for political purposes. The Washington law was enacted in 1992 as part of a voter initiative. It requires the union to get nonmembers' affirmative authorization to use the agency fees, rather than to allow the union to use the fees unless a nonmember utilizes the opt-out procedure to prevent their use.

Following a complaint by the Evergreen Freedom Foundation, the state attorney general sued the Washington Education Association, alleging that the union violated the law between 1996 and 2000. In addition, a group of five nonmember teachers sued the union, seeking refunds of agency fees used for political expenditures.

A trial court found the provision constitutional and ordered WEA to pay fines and attorneys' fees. But in June 2003, the Washington Court of Appeals consolidated the two cases and ruled that the law was unconstitutional because the affirmative authorization requirement unduly burdens unions by requiring them "to protect nonmem-

bers who disagree with a union's political expenditures but are unwilling to voice their objections."

The Washington Supreme Court affirmed the lower court ruling in March 2006, concluding that the state statute's "opt-in procedure is not narrowly tailored to advance the State's interest in protecting dissenters' rights" and that the opt-out procedure used by the union is constitutionally permissible and less restrictive. The court declared the state law established a "presumption of dissent" in violation of the First Amendment rights of free speech and association.

In their requests for review by the U.S. Supreme Court, the petitioners argued that Washington's high court mistakenly believed that nonmembers' constitutional rights are adequately protected by the statutorily created opt-out provisions. "WEA's right to receive agency fees from nonmembers comes from state statutes that permit collective bargaining agreements to contain a union security provision. It is not a First Amendment right," the state argued.

WEA opposed the petitions, asserting that the Washington Supreme Court was on solid ground and in

conformity with U.S. Supreme Court precedent requiring that nonmembers be permitted to object and not pay for nonrepresentational expenses.

Both sides in the political debate will have their eye on the court's decision. Last year, California voters defeated a provision similar to the Washington State law under examination by the high court.

The case will be argued in December or January. (*Davenport v. Washington Education Assn.*, No. 05-1589, and *Washington v. Washington Education Assn.*, No. 05-1657, cert. granted 9-26-06.) *

Public Sector Arbitration

Employer Cannot Compel Arbitration When Nonwaivable, Statutory Right Is Involved

The Second District Court of Appeal recently held that “where nonnegotiable, nonwaivable, minimum statutory labor standards are at issue, plaintiffs are not precluded from vindication of these individual rights in court,” and arbitration cannot be compelled.

A former employee of Scott Brothers Dairy filed a class action against the business, claiming that it denied him and other employees statutorily required rest breaks and properly itemized wage statements. This, the plaintiffs argued, was in violation of the Labor Code as well as Industrial Welfare Commission wage orders. Labor Code Sec. 226 and 226.7, respectively, state that no employer shall require any employee to work during any meal or rest period mandated by the Industrial Welfare Commission, and that employers shall furnish each employee with an accurate itemized statement showing wages earned and hours worked.

Specifically, the plaintiffs alleged that the dairy violated the Labor Code when it consistently failed to provide hourly employees with rest periods of at least 10 minutes every four hours worked, and failed to pay employees one hour of pay for each workday that rest periods were not provided. In re-

sponse to the plaintiffs’ allegations, the dairy moved to compel arbitration, arguing that the employees, represented by the Chino Valley Products Dairy and Teamsters Local 63, operate under a collective bargaining agreement which states, “all disputes or controversies arising under the agreement” are subject to arbitration. The contract provided for wage-stub itemization and coffee breaks. Therefore, the dairy argued, the allegations were subject to arbitration. The dairy further argued that the union previously had grieved the same rest-period issue and the matter had been resolved. The trial court rejected these arguments, and the dairy appealed.

The Court of Appeal began by noting that rest periods and itemized wage stubs are codified in the Labor Code, and are state-mandated minimum labor standards. An employer who violates Sec. 226 is guilty of a misdemeanor and is subject to fines or imprisonment. Most importantly, the court wrote, the legislature declared in Labor Code Sec. 210 that Sec. 226 cannot be contravened or set aside by a private agreement. Thus, the question at hand — whether the parties agreed to resolve statutory labor claims by arbi-

tration — was irrelevant. Even if the parties had so agreed, the clause could not be binding because the union could not waive the plaintiffs’ right to bring statutory labor claims in court.

This reasoning was first articulated by the Supreme Court in *Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728, a case in which the parties’ collective bargaining agreement stated, “any controversy which might arise” must be arbitrated. The Supreme Court

Sec. 226 cannot be contravened or set aside by a private agreement.

held that while courts should defer to the arbitration process, “different considerations apply where the employee’s claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.” Statutory rights “are independent of the collective bargaining process” and cannot be waived in the way that rights which apply to employees as individual workers, not as members of a union, can. The Ninth Circuit reached the same conclusion in *Valles v. Ivy Hill Corp.* (9th Cir. 2005) 410 F.3d 1071; the California Third District Court of Appeal similarly concluded in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949.

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

Molly Ivans

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Following this precedent, the court denied the dairy's motion to compel arbitration.

Although the union previously had grieved similar issues, the court noted that prior submission of statutory claims to arbitration does not bar a subsequent lawsuit where the employees have not waived their statutorily protected right to judicial resolution. In a concise summation of the issue, the court wrote that

"although certainly plaintiffs could have and did grieve their rest-break claim under the CBA,...where nonnegotiable, nonwaivable, minimum statutory labor standards are at issues, plaintiffs are not precluded from vindicating all of these individual rights in court." (*Zavala v. Scott Brothers Dairy* [9-28-06] B184547 [2d Dist.] ___ Cal.App.4th ___, 2006 DJDAR 13130.) ❁

Restricted Review of Arbitration Award Maintained

Since the California Supreme Court decided *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, it has been thought well-established that — subject to narrow exceptions — a court cannot review an arbitrator's decision for errors of fact or law. However, in *Cable Connection, Inc. v. DIRECTV*, DIRECTV attempted to compel judicial review by placing a term in the parties' contract that stated, "arbitrators shall not have the power to commit errors of law." This wording was an attempt to force the parties' contract into an exception to the general rule that provides for judicial review of an award if arbitrators exceed their powers. The court deemed this move an "end run" around *Moncharsh* that it could not allow.

Cable Connection was a dealer that sold and installed DIRECTV services and products. Dealers were required to enter into two agreements with DIRECTV, both of which con-

tained provisions requiring arbitration of disputes arising out of the agreement. Both contracts were silent, however, on the issues of class action lawsuits and classwide arbitration. When DIRECTV dealers brought a class action against the company, DIRECTV argued that because the contract was silent on this issue, class action suits were barred. A three-person arbitration panel reasoned otherwise and allowed the claim. DIRECTV sought to vacate this decision. It argued that the contract specifically withheld from arbitrators the power to make errors of law, and the arbitrators erred by writing terms into the parties' agreement.

Section 1286.2(a)(4) of the Code of Civil Procedure states that an arbitration award may be vacated if "the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." Be-

cause the legislature in this section specifically empowered courts to vacate awards if the arbitrators exceeded their powers, DIRECTV wrote into its contract, “The arbitrators shall apply California substantive law to the proceeding, except to the extent Federal substantive law would apply.... The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.” Such a provision was allowed under *Moncharsh*, DIRECTV argued, and overrode the usual rule of no judicial review. DIRECTV additionally argued that while *Moncharsh* set forth a general rule that arbitrators’ decisions cannot be reviewed for errors of fact or law, it also recognized that arbitration agreements are contracts and that parties to a contract may determine the terms of their agreement.

The court stated that while that may be true, the court in *Moncharsh* also instructed that the legislature placed limits on the availability of judicial review of arbitration awards. It set forth various grounds for vacation and correction of such awards, and did not include error of law as one of those grounds. A contrary holding would “permit the exception to swallow the rule of limited judicial review; a litigant could always contend the arbitrator erred and thus exceeded his powers.” Thus, the court wrote, the provision in the contract between DIRECTV and its dealers had no ef-

fect on the availability of judicial review for errors of law. This decision was in accord with *Pacific Gas and Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, *Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, and *Crowell v. Downey Community Hospital Fdn.* (2002) 95 Cal.App.4th 730, 153 CPER 65, in which the appellate courts similarly concluded that parties “cannot contractually expand the jurisdiction of the trial courts to permit review of arbitration awards for legal error.”

The legislature placed limits on the availability of judicial review of arbitration awards.

The court disregarded, however, the suggestion made in *Baize v. Eastridge Co.* (2006) 142 Cal.App.4th 293, 180 CPER 86, which considered a similar issue. In *Baize*, the court wrote in a footnote that tension existed between the holding in *Crowell* — which challenged the idea that parties could set restrictions on the scope of the arbitrator’s power — and the Supreme Court’s holding that limited judicial review of arbitration awards arises from the premise that the parties could, in their arbitration agreement, set restrictions on the scope of the arbitrator’s

powers. The court in *Baize* wrote, “if *Crowell* is correct, it would appear to raise a basis for a reconsideration of the rule of *Moncharsh*. As the Supreme Court has not yet spoken on this issue, we regard the question as an open one.”

The *DIRECTV* court reasoned otherwise. Its understanding of *Moncharsh* was that parties to an arbitration agreement may alter the scope of the arbitrator’s powers, but that judicial review “may not be expanded beyond the statutory grounds set forth by the legislature.” The court further noted that the *Baize* court’s comment on *Crowell* constituted dicta and that *Baize* explicitly stated the court had no need to express an opinion on the viability of the conclusion in *Crowell*.

The court also disagreed with DIRECTV’s contention that because the Federal Arbitration Act governed the arbitration proceedings, it was constrained to enforce the arbitration agreement according to its terms, including the provision that allows for judicial review of legal error. DIRECTV relied on *Volt Sciences v. Leland Stanford Jr. Univ.* (1989) 489 U.S. 468, as authority for its proposition that the primary purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms. In response to this argument, the court quoted the Ninth Circuit’s holding in *Kyocera Corp. v. Prudential-Bache* (9th Cir. 2003) 341 F.3d 987, stating that “because the Constitution reserves to congress the power to determine the standards by which

federal courts render decision, and because congress has specified the exclusive standard by which federal courts may review an arbitrator's decision, private parties may not contractually impose their own standard on the court." Further, "private parties' freedom to fashion their own arbitration process has no bearing whatsoever on their inability to amend the statutorily prescribed standards governing federal court review." The court in *DIRECTV* agreed with this reasoning, holding that just as the FAA does not compel federal courts to enforce attempts to contractually expand limited powers, it also does not compel California courts to enforce such attempts. Thus, the court

was not required by the FAA to enforce the arbitration agreement according to its terms, and the arbitration was subject only to the limited judicial review described by the Supreme Court in *Moncharsh*.

While several appellate decisions such as *Baize* and *Pacific Gas & Electric* have theorized that the parties could expand judicial review, the courts that have faced the question directly have held that parties cannot expand the jurisdiction of the court — which derives from statute — through contracted language. (*Cable Connection, Inc. v. DIRECTV, Inc.* [9-22-06] B188278 [2d Dist.] ___ Cal.App.4th ___, 2006 DJDAR 12921.) ❁

an argument ensued. During the argument, the grievant abruptly made bodily contact with both the customer and her sister-in-law, mimicking the driver's action in an effort to show that no battery had occurred. Despite the grievant's belief that no crime had taken place, he did take an official complaint. He also spoke with the truck driver who confirmed that he indeed had made physical contact with the customer.

Although the complaint against the driver later was dropped, the grievant was not so lucky. The alleged victim and her sister-in-law filed a complaint against the grievant for arguing with and physically touching them. The Internal Affairs Department opened an investigation into the incident. The grievant admitted his behavior, and the complaint was labeled as a charge of "unbecoming conduct." It then was assigned to the grievant's first-level supervisor for recommended discipline.

The supervisor found that the grievant violated the department's "courtesy rule," and suggested he be issued a counseling slip, which is an informal disciplinary measure. This recommendation then wended its way through the chain of command. Initially, the third-level supervisor agreed with the proposed action. But about a week later, the third-level supervisor overturned this proposal and instead issued the grievant a written reprimand. This is a formal disciplinary measure that may affect a deputy's eligibility for bonuses as well as other benefits. The supervisor did so "in light of the

Officer Engages in Unnecessary Drama, Mimics Assault to Victim

Arbitrator Walter Kaufman recently confirmed that it is not appropriate for a police officer to physically recreate a crime scene by mimicking an alleged assault. A deputy for the Sheriff's Department of San Diego County, however, did just that, and accordingly, was issued a formal reprimand. Given his unblemished record, the grievant was surprised such strict discipline was imposed, and questioned the department's discipline procedure.

The deputy's offending actions arose when he was called to the scene of an alleged assault. This call was

made when a propane company truck driver shut off the service of a customer whose bill was overdue. The customer claimed she had paid the bill, and advised the driver that he could not stop her service. She attempted to block the driver's path, and he pushed her out of the way, shut off the propane, and left. The woman then called her husband and the police, claiming she had been battered. Shortly after the incident occurred, the customer's sister-in-law and the grievant arrived at the scene.

The grievant felt strongly that a criminal battery had not occurred, and

[grievant's] demonstrative touching or slight moving of the complainant and her sister."

The grievant twice appealed this action to his fourth-level supervisor, but both times the supervisor upheld the written reprimand. The officer then filed a grievance, arguing that the department violated Gov. Code Sec. 3303(g) of the Public Safety Officers Procedural Bill of Rights Act and Sec. 3.3 of the department's policy and procedure manual.

Section 3303(g) states that officers shall be entitled to transcribed copies of any notes, reports, or complaints made by investigators or others regarding complaints against them. Relying on *San Diego Police Officers Assn. v. City of San Diego* (2002) 98 Cal.App.4th 779, 155 CPER 29, the grievant argued that the act requires the department to provide the officer, prior to the disciplinary appeal, all material on which discipline is based. In the present case, the grievant argued, this had not been done. Nor had the rationale for the increase in disciplinary measures been explained to him. Therefore, the grievant argued, the written reprimand should be rescinded.

Kaufman disagreed. The grievant had not claimed that written material was withheld; rather, he claimed that the department did not explain to him the rationale for an increase in discipline. Kaufman noted that the rationale for the disciplinary measure was stated in an interview at which the grievant was present, and that the written ratio-

nale conformed substantially to the verbal statement. Similarly, the internal affairs report, which the grievant saw, supported the rationale for issuing a written reprimand, contrary to the grievant's argument that it did not. Specifically, the rationale was founded in the grievant's admission that he reacted in anger to the complainant and her sister-in-law. Therefore, wrote Kaufman, there was no violation of Sec. 3303(g).

Kaufman also found the department did not violate Sec. 3.3 of the policy and procedure manual. The manual states that prior to recommending discipline, the second-level supervisor must prepare a report for the third-level supervisor documenting the pre-recommendation discussion and proposed discipline. The manual also states, however, that this is required for discipline "other than counseling." In this instance, the second-level supervisor proposed only a counseling slip, and therefore there was no reason to provide the grievant a written report. Once the decision was made to recommend formal discipline, the department followed protocol by issuing such a report. The grievant's argument that the report failed to state a reason for increased discipline failed, as the report communicated displeasure with the grievant's conduct.

Further, that the ultimate discipline was not communicated to the grievant during the meeting with his first-level supervisor is irrelevant. Section 3.3 does not prevent the increase of any discipline discussed at the pre-

disciplinary meeting. Indeed, that section states that the third-level supervisor may make modifications to the proposed discipline.

Accordingly, Kaufman denied the grievance and the written reprimand was upheld. (*Grievant and County of San Diego Sheriff's Dept.* [4-17-06] 16 pp. *Representatives:* Donovan J. Jacobs, for the grievant; Lynette Mercado, for the county. *Arbitrator:* Walter N. Kaufman.) *

Arbitration Log

- **Discipline — Dishonesty**
- **Sick leave**

Deputy Sheriff and Alameda County (1-7-05; 19 pp.). *Representatives*. Steven W. Welty, Esq. (Mastagni, Holstedt & Amick), for the appellant; Rose M. Kwiatkowski, for the county. *Hearing officer*: William E. Riker.

Issue: Did the county properly terminate the appellant from his position?

County's position: (1) The appellant, a deputy sheriff, was under investigation for the assault and rape of his girlfriend. Formal complaints were not filed because of a lack of evidence. After this investigation was brought to the attention of the county, it conducted an investigation into the matter and interviewed several witnesses, including the appellant.

(2) During this interview, the appellant informed the internal affairs officer that he had called in sick when he actually was not. He further disclosed that he went to the park with his girlfriend on a day he had called in sick.

(3) The appellant also failed to disclose to his supervisor that he was the subject of a criminal investigation.

(4) These actions demonstrate the appellant's dishonesty and incompatibility with the role of a deputy sheriff. The actions also were in violation of civil service and department rules.

(5) Neither the appellant's assumption that his supervisor knew of the in-

vestigation nor his embarrassment at telling his supervisor mitigate his affirmative duty to report that he was under criminal investigation.

(6) A law enforcement officer is held to a higher standard of honesty because of the trust the public places in him. An officer's duties include testifying in court and writing official reports. If an officer lies in any official capacity, he lacks credibility. And this can be an issue at any proceeding in which he testifies. Thus, the appellant no longer possesses the essential credibility of a police officer and may no longer serve as one.

Appellant's position: (1) The county has failed to prove by a preponderance of the evidence that the complained-of actions rise to the level of dishonesty.

(2) Employees often call in sick when they are not. The county's files demonstrate that many employees have done so, and although they were reprimanded, they were not terminated.

(3) The county has similarly failed to prove by a preponderance of the evi-

dence that the appellant's failure to notify his supervisor of his contact with the Sacramento police department warrants termination.

(4) The appellant thought his supervisor already knew of the criminal investigation.

(5) The appellant has been employed as a sheriff's deputy for almost nine years, during which time he never has been subject to discipline and his evaluations have been more than acceptable.

Hearing officer's recommendation: The appeal should be denied.

Hearing officer's reasoning: (1) The record is clear that the appellant knew the applicable rules and regulations governing his employment, and that the appellant was cognizant of his actions when he violated these rules.

(2) The issue to be considered is not whether violations occurred, but whether there were mitigating circumstances which would warrant a recommendation that the penalty imposed is too severe.

(3) Although the appellant has had an exemplary record prior to this occurrence, and although typically a less severe punishment is imposed for a first offense, the county has clearly demon-

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strated that the sheriff considers certain acts incompatible with an officer's duty such that future employment is no longer an option.

(4) To excuse the appellant because other deputies abuse the system does not stand the test of acceptable conduct for an officer. Similarly, the appellant had a duty to disclose the criminal investigation, even if he was embarrassed.

(5) The appellant's integrity has been irreparably damaged, and he therefore can no longer serve as an officer.

(Civil Service Commission Hearing)

- **Contract Interpretation**

- **Contracting Out**

San Francisco Bay Area Rapid Transit Dist. and SEIU, Loc. 790 (9-20-05; 11 pp.). *Representatives:* Anne I. Yen, Esq. (Weinberg, Roger & Rosenfeld), for the union; Matthew Burrows, for the district. *Arbitrator:* Philip Tamoush.

Issue: Did the district follow proper notification procedures before contracting out work? Was the grievance timely filed?

Union's position: (1) Sec. 1.8 of the parties' contract requires notice to the union before contracting out work. Pursuant to management protocol, this traditionally is done by completing a contract notification form sent by facsimile to the union president.

(2) The district decided to contract out work to fix broken antennas. This work could have been performed by technicians who are employees of the district and represented by the union.

(3) The district faxed the form to the wrong number, therefore the union did not receive a copy of the notice within the time line provided for in the contract. The time line requires that the union have five working days to comment on the notification form before the district sends it to the procurement department.

(4) The union ultimately received a copy of the notification, but only after it had been approved by procurement and human resources.

(5) A grievance must be filed within 10 working days of the occurrence of the disputed event or 10 working days from such time as the employee or union could have been aware of the occurrence. The union received the contract notification on August 3, and discussions of the notification occurred until September 2. On this date, it was clear the district was committed to having outside contractors perform the work. Thus, the grievance filed on September 8 was filed in a timely manner.

(6) The contract notification form itself is not the triggering event that runs the grievance procedure 10-day time limit. It is only after discussions of the notification occur that grievance action might be necessary.

(7) The district violated the contract when it did not send the notification form prior to deciding on contracting out. By the time the union filed a grievance, procurement and human resources already had signed off on the contract and the matter had been advertised for bidding.

District's position: (1) The union did not file the grievance in a timely manner.

(2) The union received the notification on July 14, and did not submit its grievance within 10 days of this date.

(3) No time extension was requested or agreed to.

(4) The district is not prohibited from contracting out, but only must offer to consult with the union before doing so.

(5) The union cannot dictate what work will be kept in-house and what will be contracted out.

(6) The union's request for a monetary award is inappropriate as the district would be required to pay twice as much for the same work. It would be similarly inappropriate to order that the work not be contracted out in the future since the parties have not negotiated a restriction on the district's right to contract out work.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) The union conformed to the time lines in a substantial manner.

(2) The contract requires faxing a copy of the notification prior to the procurement and human resources departments reviewing the form.

(3) Here, the notification already had been signed by procurement and human resources, and therefore was a *fait accompli*.

(4) Even assuming that the properly faxed notification conformed to contract requirements, it is not unreasonable that the union have time to talk

with management before the 10-day grievance time line begins to run.

(5) The errors made by the district were made in good faith, but the defects in notification invalidated any opportunity for the union to participate in the process of comment and consultation.

(6) The parties cannot return to the status quo because the work already has been completed.

(7) There is no evidence that the employees lost work. Nor is there a guarantee that had the union received the notice, management would have changed positions regarding subcontracting.

(8) The remedy will not include a make-whole order that requires the district to pay employees for work not performed.

(9) Nor will the remedy include a cease-and-desist order. The district retains its right to take action consistent with what it believes the agreement requires, with the understanding of the jeopardy that attaches, including potential financial penalties.

(Binding Grievance Arbitration)

• **Employer Indemnification**

• **Scope of Employment**

Dept. of Corrections and Rehabilitation (CCI, Tehachapi) and California Correctional Peace Officers Assn. (11-7-05; 17 pp.). *Representatives:* Karen A. Joelson, for the union; Barrett McInerney, for the department. *Arbitrator:* Bonnie Bogue.

Issue: Did the department violate the contract when it denied the grievant legal representation?

Union's position: (1) The grievant, a correctional officer, was involved in an incident with an inmate during which he sprayed the inmate in the face with pepper spray. A departmental investigation found this action was not warranted, and criminal and civil charges were filed against the grievant.

(2) The grievant requested that the department defend him in the lawsuits, and the department refused.

(3) The department has a mandatory duty under Gov. Code Sec. 995 and the parties' contract, which mirrors the language of Sec. 995, to provide representation in any proceeding brought against the employee for action taken within the scope of his employment.

(4) The department has failed to establish that any exception to Sec. 995 was present in this case.

(5) The grievant was acting within the scope of his employment when he used pepper spray against the inmate, and the grievant's plea of nolo contendere to the criminal charge is irrelevant.

(6) It is foreseeable that a correctional officer might abuse his authority or exceed the permissible level of force allowed when dealing with an inmate. Therefore, the grievant's actions were within the scope of employment.

(7) The department is estopped from asserting that the grievant acted with actual malice, an exception to Sec. 995, because it characterized the action as negligent in its disciplinary investigation.

(8) The department has offered no evidence that any conflict of interest would result from providing the grievant with a defense to the lawsuit.

Department's position: (1) The department properly considered the grievant's nolo contendere plea when it decided not to offer him indemnification and defense for his illegal act. Similarly, that the grievant de facto admitted the allegations is evidence that his conduct was outside the scope of employment.

(2) A departmental disciplinary hearing was held regarding the grievant's action. The hearing resulted in adverse disciplinary action against the grievant and is evidence that his assault of the inmate was not within the scope of his employment.

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(3) The criminal conviction of the grievant is clear evidence that he acted with actual malice, and thus the department is not required to represent him under either the Government Code or the contract.

(4) To expend tax money to indemnify and defend the criminal act of an employee would constitute bad public policy.

Arbitrator's decision: The grievance was sustained.

Arbitrator's reasoning: (1) Gov. Code Sec. 995 requires a public employer to provide representation for a charge brought against an employee for action undertaken in the scope of employment.

(2) An employer is exempted from this requirement if the act was not within the scope of employment or if the employee acted with actual malice.

(3) Here, it was foreseeable that the grievant might exceed permissible force or abuse his authority. According to *Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 922, a foreseeable action is within the scope of employment.

(4) That the grievant accepted the department's disciplinary action and pled nolo contendere to the criminal charge merely shows he accepted that his use of force was not acceptable under department rules or the Penal Code. It does not change the fact that his inappropriate action was a foreseeable consequence of his job duties. Nor does it prove actual malice.

(5) According to *Allen v. City of Los Angeles* (9th Cir. 1997) 92 F.3d 842, to prove actual malice, the employer must

show the employee had "personal animosity, malevolence, ill will, or deliberate wrongful intent," which it has failed to do.

(6) The department characterized the grievant's action as negligent, therefore the department now is estopped from claiming that the grievant acted with actual malice.

(7) The public policy of *respondent superior* has been set by the legislature in Sec. 995 and never has been amended. Thus, public policy supports employer-provided representation when a charge against an employee arises as a result of an action taken in the scope of employment.

(Binding Grievance Arbitration)

- **Continuing Violation**

- **Out-of-Class Pay**

Los Angeles Police Protective League and Los Angeles Police Dept. (5-15-06; 13 pp.). *Representatives:* Corina Lee, for the union; Sergeant William Carter, for the department. *Arbitrator:* Martin Henner.

Issue: Did the department violate the grievant's rights when it failed to compensate him at the sergeant II pay rate? Was the grievance timely filed?

Union's position: (1) The department violated the grievant's rights when it failed to advance him to the pay rate of sergeant II after he performed the duties of the classification for more than 56 days.

(2) Officers from a lower paygrade position may be temporarily assigned to a position of an advanced paygrade for a period of time not to exceed 56

consecutive days, and will continue to maintain the salary level held prior to the temporary assignment. After 56 days, the officer shall be removed from the position for a minimum of two deployment periods.

(3) The grievant assumed the responsibilities and performed the duties of a sergeant II for more than 56 days and therefore was entitled to receive compensation at the sergeant II paygrade.

(4) That the department did not have budgetary authority for a sergeant II position does not relieve the department of its obligation to pay for out-of-paygrade work.

Department's position: (1) The grievance was untimely filed.

(2) The grievant claims he was working out of paygrade for two years prior to filing this grievance.

(3) An employee working out of paygrade is entitled to compensation after 56 days. As such, the 20-day window for filing the grievance began on the 57th day he held the position, or June 2, 2002.

(4) This grievance was not filed until April 2004.

(5) Even if the substantive aspects of the grievance are considered, the evidence shows that there was no funded sergeant II position in the unit, and that the grievant was not working at a higher-level grade but was performing only normal sergeant I duties.

Arbitrator's decision: Although it was timely filed, the grievance was denied.

Arbitrator's reasoning: (1) Arbitrators do not favor the dismissal of cases

on procedural grounds such as lack of timeliness. The parties are better served when a decision on the merits can be reached.

(2) The MOU requires that a grievance be brought within 20 days following the date that the offending event occurred. That event would be the grievant's receipt of pay for the period that included his 57th day of out-of-class work.

(3) A party who does not properly raise procedural objections has waived the right to do so.

(4) Here, the department processed the grievance without objection. At no time was any reason given by the department for denial of the grievance other than no funded sergeant II position existed.

(5) A violation is deemed continuing when the agreement is violated anew on a regular basis.

(6) Therefore, if an employee discovered he was not being given proper benefits or compensation, each new pay period would constitute a new violation. Thus, a grievance could be timely filed on each new pay period.

(7) If the continuing violation doctrine is not followed, employees could find themselves in the same position as someone who had promptly filed a grievance. This creates poor personnel practices and inequitable treatment of similarly situated workers.

(8) The continuing violation doctrine is consistent with the parties' MOU.

(9) However, a grievant should not be permitted to receive a remedy retro-

active to the beginning of the violation. This would allow an employee to profit by "sleeping on his rights."

(10) Whether the sergeant II position existed and was funded is irrelevant.

(11) Past practice shows that officers directed to perform higher-level duties for extended time periods had been able to file grievances and receive compensation whether or not a vacant position existed.

(12) The duties of a sergeant I and a sergeant II are substantially similar and the evidence is conflicting on whether the grievant assumed sergeant II duties. The grievant therefore has failed to provide sufficient evidence to prove his case.

(Binding Grievance Arbitration)

- **Evaluations**
- **Past Practice**
- **Contract Interpretation**

San Francisco Unified School Dist. and United Educators of San Francisco (8-30-06; 10 pp.). *Representatives:* Vincent A. Harrington, Jr., Esq. (Weinberg, Roger and Rosenfeld), for the union; William M. Quinn, Jr., Esq., for the district. *Arbitrator:* Paul Staudohar (AAA No. 74-390-00182-06).

Issue: Did the district violate the contract by performing supplemental performance evaluations of permanent paraprofessional employees?

Union's position: (1) The contract requires that child care paraprofessionals have an annual performance evaluation.

(2) Supplemental performance evaluations were requested and con-

ducted for eight permanent paraprofessional employees after they received "needs improvement" or "unsatisfactory" ratings on their annual appraisals.

(3) The contract calls for only an annual evaluation; supplemental evaluations have not been given in the past.

(4) The union does not receive copies of annual or supplemental evaluations. Nor does it receive the list that requests supplemental evaluations. Therefore, the union has no active knowledge, participation, or acquiescence in this practice.

(5) The contract states that when employees receive a rating of "needs improvement" or "unsatisfactory," they must have a conference with the evaluator. The contract makes no mention of employees being subject to supplemental evaluations.

District's position: (1) The evidence shows that supplemental evaluations have been performed in the past, and there has been no prior complaint from the union regarding this practice.

(2) Nothing in the contract expressly prohibits supplemental evaluations of employees who receive a "less than satisfactory" annual rating.

(3) The annual evaluation is a minimum requirement. The district may perform more frequent evaluations if it chooses.

(4) The district has demonstrated a uniform and unbroken past practice spanning a decade-and-a-half. Thus, the standards of generality and duration required for establishing past practice have been met.

Arbitrator's decision: The grievance was denied.

Arbitrator's reasoning: (1) An arbitrator may consider past practice when the contract language is ambiguous. Here, there is more than one reasonable interpretation of the contract language and past practice may be considered.

(2) When the union filed the grievance, it believed supplemental evaluations had not been used previously; however, the practice has existed for over a decade.

(3) The evidence demonstrates that numerous employees have received supplemental evaluations, and leaves no doubt that a past practice exists.

(4) A supplemental evaluation does not conflict with the contract language. Supplemental evaluations and conferences with the evaluator are not mutually exclusive.

(Binding Grievance Arbitration)

Public Employment Relations Board

Orders & Decisions

Summarized below are all decisions issued by PERB in cases appealed from proposed decisions of administrative law judges and other board agents. ALJ decisions that become final because no exceptions are filed are not included, as they have no precedent value. Cases are arranged by statute – the Dills Act, EERA, HEERA, MMBA, TEERA, the Trial Court Act, and the Court Interpreter Act – and subdivided by type of case. In-depth reports on significant board rulings and ALJ decisions appear in news sections above.

Dills Act Cases

Unfair Practice Rulings

Representation was not denied: Dept. of Forestry and Fire Protection.

(*Magner v. Dept. of Forestry and Fire Protection*, No. 1862-S, 10-4-06; 2 pp. + 5 pp. R.A. dec. By Chairperson Duncan, with Members Shek and Neuwald.)

Holding: The charge failed to state a prima facie case because there was no evidence the charging party was denied representation at an investigatory interview.

Case summary: The charging party alleged that the department violated his *Weingarten* rights by denying him representation at an investigatory interview.

At the beginning of the interview, a department representative informed the charging party that he was being questioned as part of a formal investigation and that he was entitled to representation. The charging party stated he wished to exercise this right. The interview therefore was recessed until representation could be obtained.

Because there was no evidence that the charging party was denied representation at an investigatory interview, the R.A. dismissed the charge for failure to state a prima facie case. The board upheld the R.A.'s decision as the decision of the board itself.

EERA Cases

Unfair Practice Rulings

Charge dismissed for failure to state claim with specificity: CSEA, Chap. 198.

(*Bruce v. California School Employees Assn.*, Chap. 198, No. 1858, 9-7-06; 3 pp. + 7 pp. R.A. dec. By Chairperson Duncan, with Members Shek and Neuwald.)

Holding: Because the grievant did not follow PERB regulations in filing her charge, and because the facts alleged did not state a prima facie case, the charge was dismissed.

Case summary: The grievant, a food service assistant for the Moreland School District, brought an unfair practice charge against CSEA, alleging it failed to adequately represent her interest in retaining her position. The charge alleged that the union representative did not sufficiently question witnesses at the grievant's hearing, did not use the evidence suggested by the grievant, and urged the grievant to accept a settlement she found unsatisfactory.

The R.A. found that the charge failed to state a prima facie case. The grievant did not establish that the union representative's conduct was arbitrary, discriminatory, or in

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bad faith, as is necessary in an unfair practice charge. According to *United Teachers-Los Angeles (Farrar)* (1990) No. 797, 84X CPER 21, and *University of California (Comstock)* (1989) No. 781-H, 83X CPER 16, the representative is not required to call all witnesses or present evidence the grievant deems necessary, and may decline to continue representation if the grievant rejects a settlement offer the union deems acceptable. As such, the R.A. dismissed the charge.

On appeal to the board, CSEA responded by claiming the grievant's appeal did not meet the requirements of PERB Reg. 32635, which requires an appeal to the board to set forth the elements of the charge with specificity. The board agreed the grievant's appeal did not comply with Reg. 32635, nor did it state a prima facie case. The board upheld the R.A.'s decision and dismissed the claim without leave to amend.

Statistical evidence not enough to prove union planned sickout: Grossmont Education Assn.

(*Grossmont Union High School Dist. v. Grossmont Education Assn.*, No. 1859, 9-19-06; 2 pp. + 5 pp. B.A. dec. By Member Neuwald, with Chairperson Duncan and Member Shek.)

Holding: Because the district failed to clearly allege that the association planned and/or organized a sickout, the case was dismissed for failure to state a prima facie case.

Case summary: See Public Schools section for story.

Settlement reached and appeal withdrawn: West Hills Faculty Assn.

(*West Hills Community College v. West Hills Faculty Assn.*, No. 1861, 9-29-06; 2 pp. dec. By Member Shek, with Members McKeag and Neuwald.)

Holding: Because the parties mutually reached a settlement, the board found the withdrawal of the appeal in the best interests of the parties.

Case summary: West Hills Community College District appealed a board agent's partial dismissal of its unfair practice charge. The charge alleged the West Hills Faculty Association violated EERA Sec. 3543.5(c) by failing

and refusing to negotiate in good faith over a period of 18 months.

The district withdrew its appeal and notified the board that the matter had been resolved. The board found the withdrawal to be in the best interests of the parties and allowed the withdrawal.

Settlement reached and appeal withdrawn: Calexico Teachers Assn.

(*Calexico Unified School Dist. v. Calexico Teachers Assn.*, No. 1860, 9-29-06; 2 pp. dec. By Member McKeag, with Chairperson Duncan and Member Shek.)

Holding: Because the parties mutually reached a settlement, the board found the withdrawal of the appeal in the best interests of the parties.

Case summary: Calexico Unified School District appealed a board agent's dismissal of its unfair practice charge. The charge alleged the Calexico Teachers Association violated EERA Secs. 3543.6(c) and (d) when it orchestrated a one-day sickout before exhaustion of statutory impasse procedures.

The district withdrew its appeal and notified the board that the matter had been resolved. The board found the withdrawal to be in the best interests of the party, and accordingly allowed the withdrawal.

Activity Reports

ALJ Proposed Decisions (By Region), July 1-October 31, 2006

Sacramento Regional Office — Final Decisions

No proposed decisions.

San Francisco Regional Office — Final Decisions

No proposed decisions.

Los Angeles Regional Office — Final Decisions

Teamsters Loc. 381 v. City of Solvang, Case LA-CE-248-M. ALJ Ann Weinman. (Issued 9-12-06; final 10-13-06; HO-U-907-M.) The city breached its duty to bargain when it transferred bargaining unit work out of the unit, where the city presented no specific evidence that non-unit employees performed the work previously, and a comparison of job descriptions showed a high degree of carryover from the unit to non-unit position. The city's claim that an employee in the new position spends only 20 percent of time on unit duties was rejected, even though the impact of the decision may be de minimus.

Sacramento Regional Office — Decisions Not Final

South Placer Fire Administrative Officers Assn. v. South Placer Fire Protection Dist., Case SA-CE-380-M. ALJ Fred D'Orazio. (Issued 10-26-06; exceptions due 11-20-06.) The district unlawfully reclassified the position of fire marshal, a bargaining unit position, to assistant chief, a non-unit position, and thereby removed a position and bargaining unit work from the unit. The MOU contains a zipper clause that expressly includes fire marshal in the unit, and the fire marshal performs at least some unit work. To reclassify a unit position and remove it from the unit during the life of an MOU, the district has the burden to file a unit modification petition and establish that a community of interest no longer exists, and that changed circumstances warrant removal of the position from the unit.

San Francisco Regional Office — Decisions Not Final

Roseland Educators Assn., CTA/NEA v. Roseland School Dist., Case SF-CE-2334-E. ALJ Donn Ginoza. (Issued 10-

31-06; exceptions due 11-27-06.) The district did not retaliate against a long-time association activist and teacher for protected activity when it gave her poor evaluations and re-assigned her to a new teaching position, where the teacher established a prima facie case that union animus was at least one motivating factor in the decisions, but the district responded with evidence of valid educational reasons for its decisions.

SEIU Loc. 715 v. El Camino Hospital Dist., Case SF-CE-309-M. ALJ Donn Ginoza. (Issued 8-30-06; exceptions filed 9-22-06.) The hospital acted unlawfully during successor negotiations when it refused to amend a maintenance of membership provision to add agency fees for non-members and later refused to participate in an agency fee election, contending it was within MMBA jurisdiction. A jurisdictional claim was rejected, where the hospital was found to be an employer covered by the MMBA under single-employer and alter-ego doctrines; where the hospital created a non-profit corporation to serve the same business purpose as the hospital, pooled capital resources for that purpose; and where the entities have common control over interlocking directorships.

Union of American Physicians and Dentists v. State of California (Dept. of Corrections), Case SF-CE-228-S. ALJ Fred D'Orazio. (Issued 9-1-06; exceptions filed 9-26-06.) The state had no duty to bargain about the decision to contract with an independent entity to evaluate the competency of physicians, where evidence showed the level of health care was below constitutionally acceptable standards and options to assess competency on a large scale were limited. Although the decision impacted wages, hours, and other terms and conditions of employment, the primary reason for the decision was to provide an essential public service and constitutionally required health care in the prison system. The state's need for unfettered decision-making outweighs the benefits to be derived from collective bargaining. The state's motion to defer to arbitration was rejected as untimely, where deferral was found to be an affirmative defense and the motion was not raised until the day of the hearing.

Maureillo v. Bay Area Air Quality Management Dist., Case SF-CE-336-M. ALJ Fred D'Orazio. (Issued 9-14-06; ex-

ceptions filed 10-13-06.) The claim that the district retaliated against a terminated employee for successfully filing a grievance and proceeding to arbitration was rejected as premature, where the arbitrator reinstated the employee and the retaliation claim was based on the district's refusal to reinstate the employee to his prior position and to otherwise comply with the award. Because the arbitrator retained jurisdiction over claims relating to compliance with his award, the unfair practice charge was dismissed and may be restated at the end of the arbitration proceeding under a repugnancy theory.

Los Angeles Regional Office — Decisions Not Final

AFSCME Loc. 1117 v. City of Torrance, Case LA-CE-232-M. ALJ Bernard McMonigle. (Issued 10-31-06; exceptions due 11-27-06.) The city changed the longstanding practice of permitting employees to take a vehicle home over the weekend without affording the union notice and opportunity to negotiate. The decision impacted wages, hours, and other benefits such as a mileage.

AFSCME Loc. 575 v. Los Angeles Superior Court, Case LA-CE-2-C. ALJ Donn Ginoza. (Issued 7-17-06; exceptions filed 9-8-06.) Although the right of access is not expressly included in the Trial Court Employment Protection and Governance Act, that right is implied because of the statute's purpose to promote communications about labor relations matters. Right of access to "other means of communication," as that term is used in EERA and HEERA, includes a union's right to use the employer's email system. Defenses based on operational necessity and the employer's need for exclusive use of email for official communication were rejected, where use of email was not disruptive and was subject to reasonable regulation. The court unlawfully disciplined the union president for use of email. The court unlawfully disciplined the union president for reserving a courtroom for a union meeting, where the courtroom is used for other purposes and application of the policy therefore was discriminatory.

Victor Valley College Faculty Assn., CTA/NEA v. Victor Valley Community College Dist., Case LA-CE-4852-E. ALJ Ann Weinman. (Issued 7-21-06; withdrawal pending.) The dis-

trict increased summer contract hours covered by a collective bargaining agreement without giving the association an opportunity to negotiate. The district's waiver defense was rejected, where the association clearly objected to the change as unacceptable. The district's defense that it made a "mistake" in agreeing to the collective bargaining agreement was rejected.

Baprawski v. Los Angeles Community College Dist., Case LA-CE-4883-E. ALJ Ann Weinman. (Issued 8-23-06; exceptions filed 9-11-06.) The unfair practice charge alleging retaliation for protected conduct was untimely. The statute of limitations is tolled during grievance processing under the collective bargaining agreement, but tolling stopped after the union decided not to proceed to the next step of the grievance procedure. The statute of limitations also was tolled under the theory of equitable tolling while the charging party processed a related unfair practice charge before PERB. The statute of limitations began to run again when PERB dismissed the charge and deferred it to arbitration. The statute of limitations was not tolled while the charging party attempted to convince the union to proceed to arbitration, where the union gave no indication it would proceed. The total time elapsed, excluding the time tolled, exceeded eight months.

Ventura County Professional Peace Officers Assn. v. County of Ventura, Case LA-CE-231-M. ALJ Tom Allen. (Issued 9-14-06; exceptions filed 10-10-06.) The county unlawfully changed its overtime policy and refused to process a grievance contesting the requirement that employees work 88-hour biweekly shifts, where the MOU includes a provision that employees not work more than 80-hour biweekly shifts and defines a grievance as "a dispute by an employee or group of employees."

Teamsters Loc. 542 v. County of Imperial, Case LA-CE-293-M. ALJ Ann Weinman. (Issued 10-13-06; exceptions due 11-2-06.) A local rule requiring that a majority of unit employees have to cast a ballot for a representation election to be valid was found to violate MMBA Sec. 3507.1(a) and Sec. 3507(a). Where the Teamsters won a majority of votes cast in an election that the majority of employees in the unit did not participate in, the election was validated, the local

rule was struck as unlawful, and the Teamsters were certified as the exclusive representative.

Report of the Office of the General Counsel

Injunctive Relief Cases

Two requests for injunctive relief were filed between July 1 and October 31, 2006.

Alhambra Firefighters Assn., Loc. 1578 v. City of Alhambra, IR No. 508, Case LA-CE-310-M. Issue: Should the board seek an injunction requiring the city to restore the hearing procedures of the Civil Service Commission. On 8-10-06, Local 1578 filed a UPC and a request for injunctive relief. On 8-21-06, the board denied the request for injunctive relief without prejudice.

Alhambra Firefighters Assn., Loc. 1578 v. City of Alhambra, IR No. 509, Case LA-CE-311-M. Issue: Should the board seek an injunction requiring the city to restore the hearing procedures of the Civil Service Commission. On 8-10-06, Local 1578 filed a UPC and a request for injunctive relief. On 8-21-06, the board denied the request for injunctive relief without prejudice.

Litigation Activity

Nine litigation cases were opened between July 1 and October 31, 2006.

International Association of Fire Fighters, Loc. 188, AFL-CIO v. Public Employment Relations Board, 1st DCA, Case No. A114959, Contra Costa Superior Court Case No. N05-0232 (PERB Case SF-CE-157-M). Issue: Firefighters are appealing the Contra Costa Superior Court's judgment entered on 7-19-06. On 7-31-06, IAFF filed a notice of appeal to the order denying a petition for writ of mandate that was signed 6-19-06.

County of Contra Costa v. Public Employees Union Local One et al., 1st DCA, Case No. A115095, Contra Costa Superior Court Case No. MSC06-01228 (PERB Case SF-LT-5-M.). Issue: PERB is appealing the Contra Costa Superior Court decision entered on 6-23-06, denying PERB's juris-

diction over strike conduct. On 8-11-06, PERB filed a notice of appeal. Public Employees Union Local One also filed a notice of appeal on 8-11-06. On 9-25-06, PERB filed a motion to consolidate this case with *County of Contra Costa v. California Nurses Assn.* On 10-23-06, the court granted the motion to consolidate.

County of Contra Costa v. California Nurses Assn., 1st DCA, Case No. A115118, Contra Costa Superior Court, Case No.: MSC06-01227 (PERB Case SF-LT-6-M.). Issue: PERB is appealing the Contra Costa Superior Court decision entered on 6-23-06, denying PERB's jurisdiction over strike conduct. On 8-18-06, PERB filed a notice of appeal. On 9-25-06, PERB filed a motion to consolidate this case with *County of Contra Costa v. Public Employees Union Local One*. On 10-23-06, the court granted the motion to consolidate.

County of Sacramento v. AFSCME Loc. 146 et al., Sacramento Superior Court Case No. 06AS03704 (PERB Case SA-LT-2-M.). Issue: Does PERB have jurisdiction over a strike by essential employees? On 8-31-06, the county filed an ex parte application for TRO to enjoin specified employees from participating in a strike. On 9-1-06, the Court denied PERB's jurisdiction and granted the county's request for TRO. On 10-25-06, PERB filed a notice of appeal.

County of Sacramento v. AFSCME Loc. 146 et al., Sacramento Superior Court Case No. 06AS03790 (PERB Case SA-LT-3-M.). Issue: Does PERB have jurisdiction over a strike by essential employees? On 9-7-06, the county filed an ex parte application for TRO to enjoin additional employees from participating in a strike. On 9-11-06, the court denied PERB's jurisdiction and granted the county's TRO. On 10-25-06, PERB filed a notice of appeal.

Contra Costa Community College Dist. v. Public Employment Relations Board/ Pitner, 1st DCA, Case No. A115195 (PERB Case SA-CE-2292-E; No. 1852). Issue: Did PERB err in Dec. No. 1852? On 9-13-06, the petitioner filed a petition for writ of extraordinary relief. On 10-24-06, PERB filed the administrative record.

County of Santa Clara v. SEIU Loc. 535 et al., Santa Clara Superior Court Case No. 1-06-CV-072226 (PERB Case SF-LT-4-M). Issue: Does PERB have jurisdiction over a strike

by essential employees? On 10-3-06, the county filed an ex parte application for TRO. On 10-4-06, the court denied PERB's jurisdiction and granted the TRO.

County of Sacramento v. AFSCME Loc. 146 et al., 3d DCA, Case No. Unassigned, Sacramento Superior Court Case No. 06AS03704 (PERB Case SA-LT-2-M). Issue: PERB is appealing the TRO dated 9-1-06 and the order granting preliminary injunction dated 9-15-06. On 10-25-06, PERB filed a notice of appeal.

County of Sacramento v. AFSCME Loc. 146, et al., 3rd DCA, Case No. Unassigned, Sacramento Superior Case No. 06AS03790 (PERB Case SA-LT-3-M). Issue: PERB is appealing the TRO dated 9-12-06 and the order granting preliminary injunction dated 9-29-06. On 10-25-06, PERB filed a notice of appeal.

Report of the Representation Division

Selected Representation Decisions and Determinations
(by Board Agents)

State of California (Dept. of Personnel Administration), Case SA-SV-165-S. (Issued 8-25-06; appealed 9-26-06.) Labor Relations Specialist Roger Smith. A petition to sever a unit of information technology employees from State Bargaining Unit 1 was dismissed pursuant to a finding that the petitioner lacked majority support after revocation cards were included in the calculation. Various issues, including employee organization status, timeliness of the petition, fraud allegations regarding the gathering of the proof of support, revocation of signatures, and the appropriateness of the petitioned-for unit, were raised in responses to the petition.

The board agent found that the petitioner, IT Bargaining Unit 22, met the definition of an employee organization under the statute since its central purpose was the representation of employees. The petition was not barred by the new agreement reached by the exclusive representative and the state because the agreement required ratification by union members and the state legislature before becoming effective, neither of which had occurred prior to the filing of the severance petition. While confusion may have arisen because the petitioner originally had focused on maintaining

the exclusive representative, albeit in a separate IT unit, there was no evidence provided that the petitioner engaged in a campaign of deliberate deception or fraud to garner proof of support. The board agent rendered a detailed analysis on the issue of revocation, including a review of the Dills Act's requirements, references to the NLRB's treatment of the issue, the board's finding in *Antelope Valley Health Care Dist.* (2006) PERB Dec. No. 1816-M, and guidance offered by other states with public sector laws. Having decided that the revocation cards submitted were valid, the petitioner's proof of support was not sufficient to support the severance petition. Since the petition did not evidence majority support, the myriad of unit appropriateness issues were moot.

Personnel Changes

PERB General Counsel Robert Thompson retired from state service effective August 1, 2006, after 26-plus years of distinguished service with the board. Thompson began working for PERB in 1980 as a legal adviser to then-Chair Harry Gluck. He also worked as a regional attorney and deputy general counsel prior to his appointment as general counsel. Prior to coming to PERB, Thompson worked for the United Farm Workers and, while doing so, read law (in lieu of attending law school) in preparation for the State Bar examination. His contributions to PERB and the labor relations community include the development of current processes used to investigate unfair practice charges, an increased emphasis on mediation and settlement of disputes, and productivity improvements that helped PERB maintain its timelines, efficiency, and professionalism despite budget cutbacks and growth in jurisdictional coverage.

On October 12, 2006, the governor announced the appointment of Chairman Duncan's new legal advisor, Christine Lovely. Since 1996, Lovely served as counsel for the law firm of Atkinson, Andelson, Loya, Ruud and Romo where she specialized in education law dealing with disability matters and personnel issues. From 1995 to 1996, Lovely was a law clerk for the Department of Personnel Administration. She is a member of the California State Bar and Eastern Alameda County Bar Association.

On October 25, 2006, the governor announced the appointment of Member Shek's new legal advisor, Jean C. Fung. Since 2005, Fung has served as a contract attorney specializing in environmental and land use matters for the law firm of Best, Best and Krieger. From 2004 to 2006, Fung was a contract attorney with the Kirk Law Firm. Prior to that, she was an associate with the law firms of Murtha Cullina and Fitzgerald, Abbot and Beardsley. Fung received undergraduate degrees in Civil Engineering and English from Stanford University, and her J.D. degree from Boalt Hall School of Law, U.C. Berkeley.