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## letter from the editor

Dear CPER Readers:

Right out of the box, 2007 promises to be an exciting year! The Court of Appeal decision in *Spielbauer v. Santa Clara County*, featured in my “headliner,” has sparked keen interest in our public sector community. The case presents a thorough analysis of the constitutional privilege against self-incrimination and the application of that principle in the public employment setting. Because the court takes aim at the Supreme Court’s *Lybarger* ruling, I suspect we will hear a lot more debate on this issue in the future.

Mayor Villaraigosa’s plans to take control of the Los Angeles Unified School District ran aground last month. Superior Court Judge Dzintra Janavs — who was appointed by Governor Schwarzenegger after she failed to win re-election to the post — found fault with the legislation enacted to institute the new oversight scheme. And, she refused to allow the mayor to go forward with the planned overhaul while an appeal of her ruling is pending in the higher courts.

California prisons remain in the spotlight as efforts to reform the overcrowded correctional system slog ahead. The State Personnel Board is in the health care receiver’s sights.

California State University has been under fire for the lucrative re-employment packages bestowed on its top executives. Some reform measures were passed, but not enough to satisfy the concerns voiced by the California Faculty Association.

At U.C., increases in medical benefit premiums as well as announced plans to resume employee retirement contributions have caused alarm among the unions representing university employees. Promises to boost employee wages and to keep faculty members’ salaries competitive are being scrutinized from many flanks.

Meanwhile, the Public Employment Relations Board is experiencing a sea change. With the retirement of Fred D’Orazio, Bernie McMonigle steps up to serve as the new Chief Administrative Law Judge. And, with Bob Thompson off enjoying his retirement, Tami Bogert-Yuill recently has been selected to serve as the board’s new General Counsel.

All in all, we appear to be embarking on a year filled with a broad range of issues in all segments of the public sector. As always, we’ll do our best to keep you up to speed.

Sincerely,

Carol Vendrillo  
CPER Editor and Director

# Going Into Labor: The Birth of Trial Courts as Employers

*Tula Bogdanos and Dena Graff*

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Athena, Greek goddess of civilization and wisdom (and the key figure adorning the Great Seal of the State of California), did not begin life as an infant but leaped fully grown from the brow of her father, Zeus, already strong with the wisdom she would use to benefit civilization. And although this sounds quite traumatic for Zeus, he continued on as healthy and powerful as before, only now he had a favorite daughter. On December 31, 2000, the trial courts in California had no employees of their own.<sup>1</sup> On January 1, 2001, the trial courts sprang fully grown from the brow of the counties as full-fledged employers of almost 20,000 court workers, previously employed by the counties, in 58 trial court systems. How did the courts manage this extraordinary transformation while still balancing the scales of justice for the people of California? How did the legislature craft the plan that provides a smooth transition for trial court workers while adhering to the vision of an independent, impartial, and accessible judicial branch? Two key employment statutes provide the framework for the trial courts' new role as employers.

Over the past 10 years, several dramatic transformations have taken place within the California judicial branch. In the first of these, trial courts — historically funded, staffed, and housed by the counties — became funded primarily by the state. Soon thereafter, the voters approved Proposition 220, authorizing the voluntary consolidation of each county's superior and municipal courts into a unified trial court system.

Another key transformation is the ongoing transfer of responsibility for all the local courthouses from the counties to the state which, when completed, will be one of the largest real estate transactions consummated in modern times. Equally significant is the transformation of the employment status of the court workers in those courthouses. Six years ago, each of the 58 trial courts became the employer of its cadre of trial court workers by legislative fiat, and nearly 20,000 trial court

workers left county employment to become the first employees of the trial courts.

Two key pieces of legislation provide the framework for this change in status. The Trial Court Employment Protection and Governance Act (Trial Court Employment Act)<sup>2</sup> established trial courts as employers and created a uniform personnel system for all trial courts, transferring county employees working in the courts to employment directly by the trial courts. The Trial Court Interpreter Employment and Labor Relations Act (Interpreter Act)<sup>3</sup> created the opportunity for employment status for court interpreters, who always had performed services for the trial courts as independent contractors. The Interpreter Act not only made employment status available for the first time for court interpreters but also guided the transition from court utilization of independent contractors in providing all foreign language interpretation to a statutory preference for using court employees for these services. The legislative and the judicial branches worked together to design these statutes to provide court workers with a smooth transition to their new employment status while ensuring that the trial courts could continue to maximize access to justice and provide high-quality judicial services.

### ***Trial Court Employment Protection and Governance Act***

**History.** Since the Constitutional Convention creating the state's superior court system in 1880, each of California's 58 counties has had responsibility to fund court operations in its own county. Differences in counties' fiscal situations often resulted in disparities in the types and levels of services offered by courts in different counties. In 1997, the legislature addressed this problem with the Lockyer-Isenberg Trial Court Funding Act (Trial Court Funding Act),<sup>4</sup> establishing the state as the primary funding source for all trial court operations. By shifting fiscal responsibility from individual

counties to the state, the Trial Court Funding Act created a more stable and consistent financing system to ensure equal access to justice for all Californians, regardless of the financial condition of individual counties.

Since the trial courts were first established, individuals working in them were employees of the county in which the court was located. Personnel systems varied widely from one trial court to another because employees of each court were subject to the unique personnel system of the corresponding county. With the advent of uniform state funding of trial

courts, however, continued county management of court personnel issues — and the concomitant disparity in personnel systems among trial courts — made less sense. The legislature, judicial branch, and counties began to envision a new employment status for trial court workers, one that would recognize the state's assumption of trial court funding and the greater autonomy of the trial courts.

To that end, the Trial Court Funding Act created a task force, including representatives from the courts, counties, state, and unions, to recommend a personnel system with uniform employment status — court, county, state, or other — for all county employees working at the courts. The task force's objectives included devising a system with statewide applicability that ensured courts would maintain local authority and responsibility for managing day-to-day operations while minimizing the transitional disruption to the trial court workforce.

The task force's recommendations provided the framework for Senate Bill 2140, the Trial Court Employment Protection and Governance Act, signed by then-Governor Gray Davis in September 2000. Effective January 1, 2001, the trial courts became independent employers and county employees working at courts transitioned to employees of the trial court at which they worked. As defined by the statute, a trial court employee is a person whose salary is paid from the trial court's budget and who is subject to the trial court's right to control the manner and means of his or her work.<sup>5</sup>

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The Trial Court Employment Act establishes a uniform personnel system, authorizing trial courts to hire, set terms of employment, engage in labor relations, determine employment selection and advancement criteria, and create an employment protection system. This personnel system sets forth standards applicable to courts statewide, yet provides local flexibility to individual courts in implementation.

A key element of the stability of the new employment relationship with the courts was the requirement that existing memoranda of understanding with recognized employee organizations remain in place until expiration. As county employees, a significant majority of all trial court workers were represented in bargaining units with other county employees. As trial court employees, these workers became part of separate bargaining units while the terms of each applicable MOU continued uninterrupted until its expiration date, at which time trial courts and unions met and conferred over these terms.

**Continuation of salary and benefits.** The Trial Court Employment Act preserved the salaries and benefits of employees while facilitating the transition from county to trial court employment status. Each trial court was required to maintain the same or a comparable level of salaries and benefits as that provided to trial court employees during their county employment until the expiration of any applicable MOU. Such benefits specifically include accrued leave benefits, health insurance, retirement benefits, and deferred compensation plan benefits. After expiration of existing MOUs, trial courts began meeting and conferring directly with unions over these terms and conditions of employment.

Coupled with the counties' previous control of employee benefits, the practical effect of the continuation of employee benefits during the transition is that, even today, most courts remain under health insurance and retirement plans provided by their counties. In fact, for many courts, their counties still

control a significant portion of the fringe benefits, such as health insurance, dental insurance, long-term disability, and retirement. This can result in unique challenges for the unions and the courts in negotiations. In particular, it makes it difficult to bargain effectively because the courts do not have control over the level of benefits being offered. On the flip side, when county employees get an increase in benefits, trial court employees participating in county plans automatically do as well. As a result, courts must shoulder the costs of such increases, even though they were implemented outside court control.

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**Employment selection and advancement system.** Subject to meet-and-confer obligations, trial courts were required to adopt personnel policies governing hiring, promotion, transfer, and classification.<sup>6</sup> Trial courts have instituted formal job-related selection processes for filling positions, independent from the county processes that previously governed. Courts use open, competitive recruitment processes for hiring decisions, giving preference to internal candidates. Alleged violations of personnel policies for hiring, promotion, transfer, and classification are subject to binding arbitration under the statute.

**Employment protection system.** Trial courts implemented employment protection systems to replace the protections previously available to employees through the counties' respective civil service systems. The Trial Court Employment Act guarantees that such systems permanently include the minimum level of protections provided to employees while working for the county; in fact, initially, most courts adopted systems almost identical to ones in place in their counties. Required elements of each court's employment protection system include progressive discipline, a just cause standard for discipline, and seniority protections for layoffs for organizational necessity. In addition, each trial court established a procedure for conducting an evidentiary due process hearing to review disciplinary decisions. All of these statutory elements of the

employee protection system are subject to meet-and-confer obligations. Most of these elements have been incorporated directly into the MOUs negotiated between the courts and the unions, either by reference to the personnel policies or by express provisions that confer these protections.

**Right to inspect personnel files.** Trial court employees have the right to inspect their personnel files, and courts have adopted personnel rules to allow for access to such files. Recent legislation (Assembly Bill 1995, effective Jan. 1, 2007) amended Sec. 71660 of the statute to permit employees access to more than the “official” personnel file, i.e., to any file used to determine an employee’s qualifications for employment, promotion, additional compensation, and termination or other disciplinary action.

**Labor relations.** Continuity of labor relations with existing labor organizations is an essential feature of the statute. As noted, prior to the enactment of the Trial Court Employment Act, virtually all employees who worked in the trial courts were represented by unions, and enactment of the statutory scheme did not change this situation. Indeed, to ensure stability in labor relations, the act expressly states that it is “not intended to require changes in existing representation units, memoranda of agreement or understanding or court rules,”<sup>7</sup> and then-existing MOUs applicable to trial court employees remained in place. Thus, the fundamental relationships between unions and employees who worked at the trial courts did not change; the same unions that represented them as county employees continued to represent them as trial court employees.

What did change was the identity of the employers who were parties to existing MOUs, as the individual trial courts stepped in to take the place of the counties as employers. New bargaining units were formed consisting solely of court employees — and supervisory and confidential units formed separately — but the same unions continued to represent the same employees. Rather than being part of large countywide

units, however, most court employees are now in smaller units that can more effectively address the specific needs and interests of trial court workers.

As in the Meyers-Milias-Brown Act and the Dills Act, the scope of representation under the Trial Court Employment Act includes wages, hours, and other terms of employment for trial court employees. But the legislature recognized “the unique and special responsibilities” of the trial courts in administering justice for California citizens,

and expressly excluded from the scope of representation certain issues, including the following:

- The merits and administration of the trial court system;
- Coordination, consolidation, and merger of trial courts and support staff;
- Automation, such as fax filing, electronic recording, and implementation of information systems;
- Design, construction, and location of court facilities;
- Delivery of court services;
- Hours of operation of the trial courts; and
- Assignment and transfer of trial court employees.<sup>8</sup>

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The trial courts are free to make decisions in these areas vital to court operations, but they must, of course, meet and confer with unions over the impact of any decisions on wages, hours, and terms and conditions of employment of trial court employees.

Implementation of the Trial Court Employment Act did not affect agency shop agreements, and the statute contains provisions to ensure the continuity and vitality of existing agency shop agreements. Managerial and confidential employees may join a union if they wish, with limitations. Professional court employees, such as attorneys, mediators, and facilitators, may also engage in collective bargaining in their own separate bargaining units.

Individual trial courts were required to develop their own employer-employee relations rules because they were no longer subject to the county rules. For instance, trial courts



may adopt procedures to verify that a particular union represents a majority of employees in a particular unit and whether a particular unit is appropriate. Also, trial courts may develop procedures for resolving disputes between trial courts and unions, as well as rules regarding union access in the workplace. Unions may challenge any employer-employee relations rule developed by a trial court, as discussed below.

With regard to the resolution of disputes, when the Trial Court Employment Act was first enacted, disputes over violations of the statute were submitted to arbitration or an administrative tribunal. An amendment four years later, effective August 16, 2004, conferred jurisdiction over alleged violations of the statute and any employer-employee relations rules on the Public Employment Relations Board. Thus, PERB now has the authority to order and to conduct elections, and to adjudicate unfair practice charges. In the absence of existing PERB case law due to the relatively recent assumption of jurisdiction, PERB is to apply appropriate precedents from its decisions interpreting parallel provisions of other public employment statutes such as the MMBA, Dills Act, Educational Employment Relations Act, and Higher Education Employer-Employee Relations Act.

Disputes over the interpretation or violation of an MOU are not within PERB's jurisdiction but are submitted to arbitration if specified in the MOU. When the MOU is silent regarding arbitration or any party refuses to submit a dispute to arbitration, however, the Trial Court Employment Act specifies a unique procedure to resolve disputes. An aggrieved party must file an action in the superior court where the dispute arose, which is then adjudicated by a member of a special panel of appellate court justices specifically trained to hear such labor issues. The justice selected to resolve the dispute must be from another appellate district because any appeal from the justice's decision is heard by the Court of Appeal in the district where the claim arose.

The Trial Court Employment Act ushered in monumental changes in the employment status of trial court workers but also recognized the vital need to ensure continuity in labor relations between trial courts and their employees. Another significant statute, effective two-and-a-half years later, again dramatically changed the role of trial courts as employers when court interpreters working as independent contractors were given the opportunity to become employees.

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### ***Trial Court Interpreter Employment and Labor Relations Act***

According to the California Constitution, "[a] person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings."<sup>9</sup> California is the most linguistically diverse state in the nation, with approximately 224 distinct languages spoken, almost 40 percent of Californians speaking a language other than English at home, and roughly 20 percent reporting limited English proficiency.<sup>10</sup> With California's multiplicity of languages creating

challenges that dwarf those associated with the Tower of Babel, the constitutional mandate for interpreters translates<sup>11</sup> into an immediate and growing need for skilled language services in courts to provide equal access to justice in spite of language differences.

While court interpreters may provide services in both civil and criminal proceedings, a party's *right* to a spoken language interpreter arises only in criminal proceedings and some juvenile proceedings. When there is such a right, the trial court provides spoken language interpreters at no cost to the parties. California law also mandates appointment of an interpreter for hard-of-hearing witnesses and parties in all proceedings, criminal or civil, as a disability access accommodation.<sup>12</sup>

**History.** In 1993, as a result of S.B. 1304, the Judicial Council was given responsibility for certifying and

registering court interpreters and for developing a comprehensive program to ensure an available, competent pool of qualified interpreters. “Certified” interpreters are those who pass the Court Interpreter Certification Examination and fulfill Judicial Council requirements for certification in a designated language. Currently, court interpreters can be certified in 12 designated spoken languages: Arabic, Eastern Armenian, Western Armenian, Cantonese, Japanese, Korean, Mandarin, Portuguese, Russian, Spanish, Tagalog, and Vietnamese, as well as in American Sign Language. Approximately 85 percent of the 1,300 certified interpreters are certified in Spanish.<sup>13</sup> Interpreters of spoken languages for which there is no state certifying examination can become registered interpreters by passing a language proficiency exam and fulfilling certain Judicial Council requirements. Courts are required to use the services of a certified interpreter for criminal proceedings. Noncertified interpreters may be appointed for a criminal proceeding only after the court makes an express finding that the interpreter is provisionally qualified and that diligent attempts failed to locate an available certified interpreter.<sup>14</sup>

Historically, almost all court interpreters provided their services to the courts as independent contractors, working on a per diem basis and being paid for each half-day or full-day of services. Although many interpreters worked at several different courts, some worked exclusively for the same court, sometimes for decades, as independent contractors. At the time the Trial Court Employment Act was passed, a majority of court interpreters were not covered because very few of them were employees.<sup>15</sup> Nonetheless, there was, and still is, a shortage of certified and registered interpreters. When courts became the employers of other trial court workers, the legislature began to consider the possibility that making interpreters court employees might attract more skilled people to the field and enhance the stability of the pool of interpreters available to meet court needs. Employee

interpreters would have access to health insurance, pensions, and leave of absence benefits not available to independent contractors, making employment an attractive option for many interpreters.

The Trial Court Interpreter Employment and Labor Relations Act — S.B. 371 — was passed in 2002, and became effective July 1, 2003. The Interpreter Act covers all spoken language interpreters in all courts, except the courts in Solano

and Ventura counties.<sup>16</sup> The statute applies only to interpreters of spoken languages and does not apply to American Sign Language interpreters.

The stated purpose of the Interpreter Act is “to provide for the fair treatment of court interpreters, to enhance access to the court system for persons who depend upon the services of interpreters, and to promote sound court management,” and it guides the trial courts to “make an orderly transition from relying on independent contractors to using employees for interpretation services.”<sup>17</sup> A transition period of two years was provided during which the courts hired court interpreters as employees under the

classification “court interpreter pro tempore.” CIPTs were appointed to work and continued to be paid — at the same rate and on a per diem basis — as they had been as independent contractors.<sup>18</sup> Outside employment was permitted, as long as it did not present a conflict of interest.

The courts were not immediately required to provide fringe benefits such as health, pensions, or paid leave benefits. At the time the legislation was passed, no funds had been appropriated to cover the significant increase in trial court costs to pay for such benefits. In recognition of the state’s budget crisis existing at that time, the parties agreed to refrain from bargaining, including bargaining for benefits, until 2005.<sup>19</sup>

***Use of employees for interpreter services.*** The primary impact of the Interpreter Act is that courts now must use all available trial court employees to perform interpreting services before retaining the services of independent

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contractors. This is a significant change in the relationship between the trial courts and the court interpreters: the trial courts changed from exclusively using independent contractor interpreters and having no employee interpreters to giving priority to employee interpreters in most circumstances. In some instances, however, a court may use independent contractors. Courts may use independent contractors who “opted out” of employment because they were over the age of 60, or because the sum of the interpreter’s age plus years of service to the trial courts as an independent contractor added up to 70 as of January 1, 2003. To be eligible for “opt-out” status, an interpreter must have made a written request to opt out prior to June 1, 2003. This unusual “opt-out” status was created because many mature interpreters who had been providing contractual interpreting services for many years would have suffered adverse impacts on their retirement savings plans if they had been required to participate in pension plans as employees of the court. Another exception to the priority given to employee interpreters is made when an independent contractor interpreter is paid directly by the parties to a proceeding.

Many interpreters chose to become employees. However, the shortage of interpreters in Spanish and other heavily used languages, on the one hand, and the lack of sufficiently regular court need to justify steady employment for interpreters in lesser-used languages, on the other hand, combined to ensure a continuing need for the services of independent contractors. If there are no employee interpreters or opt-outs available and the court still has need for an interpreter, a non-opt-out independent contractor will be used. These independent contractors are commonly known as “100-day contractors.”

Unlike the opt-out independent contractors who may work at a particular court without limitation on the number of days, a 100-day independent contractor cannot be appointed to interpret for more than 100 court days in the same calendar year. Furthermore, some independent

contractors who have been appointed for more than 45 days in a calendar year are entitled to apply for employment in any open position for which they are qualified, and the trial court must hire them unless there is cause not to do so. If a trial court has appointed independent contractors in a particular language on more than 60 court days in the previous 180 days, the court must post an open position and offer employment to qualified applicants. Furthermore, the

court cannot provide any independent contractors with more favorable working conditions for the purpose of discouraging interpreters from applying for employment. These restrictions are intended to encourage courts to create employment positions when the need exists and to limit the use of independent contractors in favor of employees. Even with these restrictions, however, at the present time, trial courts still need the services of a significant number of independent contractors each court day.

**Cross-assignments.** A trial court interpreter employee may not be employed by more than one court simultaneously, but may accept

appointments through the employing or “home” court to provide services to another trial court, or an “away” court. This is known as cross-assignment.<sup>20</sup> The Judicial Council has established procedures governing cross-assignments, and the negotiated MOUs provide further rules. A court interpreter on cross-assignment receives the compensation, benefits, and seniority considerations from the home court and is subject to the same disciplinary provisions. The cross-assignment process of “loaning” employees among courts allows greater flexibility to use the limited available interpreter resources more fully and efficiently.

**Labor relations.** Because court interpreters were not employees of the trial courts prior to 2003, no union was recognized to represent them and no bargaining units existed. The Interpreter Act established regional bargaining, organizing the 58 trial courts (except for the courts in Solano and Ventura counties) into four regions for collective

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bargaining purposes. Each trial court in a region is a separate employer of its interpreters, so regional bargaining created, in effect, multi-employer bargaining units. This statutorily mandated multi-employer bargaining unit arrangement is the only one of its kind in the public sector in California. The regions coincide with the jurisdictions of the appellate court districts: Region 1 includes the trial courts of the Second Appellate District, consisting of Los Angeles,<sup>21</sup> Santa Barbara, and San Luis Obispo; Region 2 includes the 15 trial courts in the First and Sixth Appellate Districts, which are located in the coastal area from Monterey to Del Norte; Region 3 includes the trial courts of the Third and Fifth Appellate Districts, which are the 32 trial courts of the Central Valley north to Modoc and Siskiyou; and Region 4 includes the 6 Southern California trial courts of the Fourth Appellate District.

The trial courts in each region select a regional court interpreter employment relations committee to adopt rules and regulations for the administration of employer-employee relations and to meet and confer with the union for a single regional MOU for all the courts in the region. Under this multi-employer bargaining for a single regional MOU, the individual trial courts within the region usually are able to reach consensus on proposals and issues. If they do not reach consensus, each court has a vote, weighted by the number of interpreter employees in the particular court, to determine the region's position on a particular proposal or issue. Compensation and other terms and conditions reflected in a negotiated MOU must be uniform throughout the region. Health and welfare and pension benefits for interpreters, however, differ from court to court and are the same as those benefits provided to other employees of the interpreters' "home" court. Except as limited by law or by an MOU, each trial court controls the manner and means of the work performed by its court interpreters in accordance with the personnel rules of the court.

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Shortly after the effective date of the Interpreter Act, the California Federation of Interpreters, a new union affiliated with the Communication Workers of America, was chosen as the recognized employee organization to represent the court interpreters employed by the trial courts in each of the four regions. The Interpreter Act was effective on July 1, 2003, but negotiations did not commence until 2005 in recognition of then-Governor Davis' expressed intent reflected in his signing statement. Initial MOUs were ratified in each of the four regions between July and November 2005,

all with a term of three years. The general terms of the agreements are similar, but specific conditions of employment vary, reflecting the differing circumstances among the four regions. Until ratification of the MOUs, interpreter employees continued to be paid at the same per diem rate specified in the Judicial Council's Payment Policies for Contract Court Interpreters. Compensation, stated as an hourly rate based on the per diem rate under the payment policies, did not increase with the ratification of the initial agreements, but employee interpreters became eligible to receive health insurance, pensions, and other

employment benefits for the first time. The MOUs cover only employee interpreters, of course, and while independent contractor interpreters are still used by the courts, they are not subject to any negotiated agreements and are not subject to the courts' personnel policies.

The labor relations provisions of the Interpreter Act parallel the provisions of the MMBA and the Dills Act, including the obligations related to the meet-and-confer process, a court employee's right to join or decline to join the union, prohibitions against interfering with employees' rights, and the agency shop provision. Like the Trial Court Employment Act, the scope of representation has certain limits "in view of the unique and special responsibilities of the trial courts."<sup>22</sup> These limits include decisions related to court facilities, merits and administration of the trial court

system, hours of court operation, and delivery of court services. The trial courts, through their assigned regions, however, have meet and confer obligations regarding the impact of such decisions.

To resolve disputes between the union and the regional committees, the Interpreter Act initially provided for a writ procedure, with a panel of appellate justices trained to hear the labor issues addressed in writ petitions brought in the trial court. This writ procedure still governs some disputes over enforcement of the terms of a negotiated agreement, but disputes alleging violations of the Interpreter Act came under the jurisdiction of PERB on August 16, 2004, the effective date of the amendments to both the Trial Court Employment Act and the Interpreter Act that gave PERB jurisdiction over certain disputes arising under these statutes. Charges may be filed with PERB against the union or against the regional committee, usually naming a specific trial court alleged to have violated the Interpreter Act. Several charges have been filed in each of PERB's three regional offices, but to date the board has not yet issued a decision under the Interpreter Act.

The independent contractor interpreters working beside employee interpreters in the courts are not subject to the courts' personnel policies, generally have lower priority in assignment scheduling, and are not eligible for benefits. Many of the PERB charges that have been filed involve allegations related to the prohibition in Government Code Sec. 71802(c)(3) against providing independent contractor interpreters "with lesser duties or more favorable working conditions than those to which a court interpreter...employed by that trial court would be subject for the purpose of discouraging interpreters from applying for...employment with the trial court."

This illustrates the singularly unique labor relations issues arising under the Interpreter Act. Bargaining units are composed of employee interpreters who worked at the same trial courts for many years but until now never were employees. In addition, the trial courts must give priority to employee interpreters while continuing to retain independent contractors to perform the same work as employees but under different terms and conditions. And, a new union was formed to represent the newly employed interpreters in negotiating the original agreements with trial court employers that have

never confronted labor relations issues with this group of workers. While trying to grasp the myriad issues emerging from this totally new relationship, all parties strive diligently to ensure that the trial courts can continue to provide the high-quality interpreter services guaranteed by the California Constitution.

Together, the Trial Court Employment Act and the Interpreter Act create the framework for California's trial courts to operate as independent employers under a common statutory scheme. The long-term impact of these structural changes on the administration of justice remains to be seen. \*

- 1 Judges are elected or appointed constitutional officers, not employees of the trial courts.
- 2 Gov. Code Secs. 71600 et seq.
- 3 Gov. Code Secs. 71800 et seq.
- 4 Gov. Code Secs. 77200 et seq.
- 5 Gov. Code Sec. 71601(l).
- 6 The selection/advancement system, as well as the employee protection system described below, applies to all employees except (1) subordinate judicial officers (i.e., defined as commissioners, referees, and judges pro tem), and (2) unless otherwise included under the trial court's own personnel policies, managerial, confidential, temporary, limited-term, and probationary employees. (Gov. Code Secs. 71643, 71650[d].)
- 7 Gov. Code Sec. 71630.
- 8 Gov. Code Secs. 71634(b), (d).
- 9 Cal. Const., Art. 1, Sec. 14. Courts may also choose to provide interpreter services in some civil matters if sufficient resources are available. (Evid. Code Sec. 755[e].) Assembly Bill 2302, vetoed in 2006, would have required courts to provide interpreters whenever needed in any civil matter, including family law and probate, or in any court-ordered or court-provided alternative dispute resolution proceeding.
- 10 See, United States Census, *Language Use and English Ability, Persons Five Years of Age and Older, by State* (2000).
- 11 Court interpreters provide simultaneous interpretation of the spoken word or American Sign Language and incidental sight translation of documents in a proceeding. Translators provide multi-language services for documents.
- 12 Evid. Code Secs. 752, 753, 754(b).

13 Master List of Certified Court Interpreters, available at [www.courtinfo.ca.gov/programs/courtinterpreters/ctintdb.cfm](http://www.courtinfo.ca.gov/programs/courtinterpreters/ctintdb.cfm).

14 Cal. Rules of Court, rule 984.2. (Note: After January 1, 2007, when the reorganization of the California Rules of Court took effect, rule 984.2 was renumbered as rule 2.893.)

15 According to the sponsors of Senate Bill 371, only 25 out of 1,150 interpreters were employees at the time the Trial Court Employment Act was drafted. (Sen. Com. on Judiciary, Analysis of S.B. No. 371 [2001-2002 Reg. Sess.] as amended Aug. 28, 2002.)

16 These two courts were expressly excluded from coverage because they already employed interpreters. The employee interpreters of these two court systems were covered by the Trial Court Employment Act and already were represented by unions in court bargaining units.

17 Gov. Code Sec. 71800, Historical and Statutory Notes.

18 Compensation for independent contractor interpreters is governed by the *Payment Policies for Contract Court Interpreters*,

promulgated by the Judicial Council. These payment policies were last updated effective February 1, 2000, well before enactment of the Interpreter Act.

19 Governor Davis issued the following signing message: "To Members of the California State Senate: I am signing Senate Bill 371. In recognition of the State's current financial pressures, I am signing this bill with the understanding that the proponents have agreed not to commence collective bargaining until 2005."

20 Cross-assignments apply only between different trial courts, such as a Mandarin interpreter employee of the Superior Court of San Francisco County being cross-assigned to provide services for a proceeding in the Superior Court of Santa Clara County. Assignments to different courthouse locations within a single court system are not considered cross-assignments.

21 Over 50 percent of all interpreters employed by the courts are employed by the Superior Court of Los Angeles County.

22 Gov. Code Sec. 71816(b).

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# Religion, Public Schools, and the Public Workplace

*Alan Hersh*

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The First Amendment of the United States Constitution provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....”<sup>1</sup> The tension between the Establishment Clause and the Free Exercise Clause has been a part of American jurisprudential history since the beginning of the Republic.

The writers of the Constitution wanted to both protect the diversity of belief and avoid any one religion or belief becoming the state religion. In 1802, President Thomas Jefferson referred to the Establishment Clause as maintaining a “wall of separation between church and state.”<sup>2</sup> The United States Supreme Court first incorporated the expression in a decision in 1878.<sup>3</sup>

This article addresses prohibitions on religious expression by public agencies with an emphasis on the public schools. The conflict between labor contract constraints and the law mandating religious accommodation also is discussed.

## ***Restraints on Religious Expression in the Public Sector***

The need to properly analyze the restraints public agencies can place on religious expression was heightened by the recent decision of the Federal Ninth Circuit Court of Appeals in *Frederick v. Morse*.<sup>4</sup> There, school administrators were not shielded by qualified governmental immunity when the court concluded they had acted improperly by requiring a student to take down a banner and disciplining him for behavior that appeared to school authorities to associate the school with religious messages.

Religion cases are fact specific. Very similar fact situations, with but one or two discrepancies, can cause a court to rule differently. In similar situations, courts have ruled both in favor of permitting religious expression or against it, depending

on such factors as whether there was a specific written agency policy prohibiting religious subject matters<sup>5</sup> or whether the religious message infringed on other policies or the rights of others.<sup>6</sup>

Courts use a “forum” analysis to evaluate restrictions on religious speech in public agency facilities. “Facilities” include any avenue for expression on public property. Courts use the forum analysis to assess virtually all religious expression attempted in the public workplace or the public school. While this includes physical facilities,<sup>7</sup> forum analysis includes more. Courts also use forum analysis to determine whether religious speech is permitted in the display of signs or Bibles at workstations,<sup>8</sup> display of signs on school baseball field fences,<sup>9</sup> community tiles in school corridors,<sup>10</sup> banners held by students at city events,<sup>11</sup> and students wearing religious t-shirts on campus.<sup>12</sup> Courts analyze the distribution of religious material at school or through school channels as a forum issue.<sup>13</sup>

The following questions are asked when courts analyze speech in public facilities: (1) What type of forum for speech has the public agency created regarding the specific facility to be used? (2) Is the agency exercising viewpoint discrimination on a topic that the agency allows others to speak on? (3) Is the agency restriction on religious speech motivated to prevent an Establishment Clause issue?

***What ‘forum’ for expression has the public agency created?*** Is the forum a public, non-public, or limited public forum? The answer depends on how the public entity has used the particular facility, room, or space. The forum’s categorization determines the standard of review used by courts when presented with public agency restrictions on religious speech.

Generally, public agency facilities are closed. Besides public and non-public forums, courts recognize a third type of forum: a “limited public forum.” This is one in which public agencies may intentionally open a non-public forum

for limited use to certain groups or for the discussion of certain topics.<sup>14</sup> In a limited public forum, the government opens a non-public forum but reserves access only for certain groups, topics, or categories of speech.<sup>15</sup> The government must intentionally open a non-traditional forum for public discourse for it to become a public or limited public forum.<sup>16</sup>

Under court standards of review, if the forum is public, then any religious restriction is subject to heightened scrutiny. In a limited public forum, restrictions are subject only to a reasonableness standard.<sup>17</sup> Government can restrict access

to a limited public forum so long as the limitations are viewpoint neutral and reasonable in light of the purpose served by the forum.<sup>18</sup>

The distinction is recognized in order to allow public agencies to provide some public access to their facilities without opening the door to every type of speech. In 1998, the U.S. Supreme Court in *Arkansas Educational Television Commission v. Forbes*<sup>19</sup> ruled: “By recognizing the distinction [between general and selective access], we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all. That this distinction turns on governmental intent does not

render it unprotective of speech. Rather, it reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers.” Even broad use of the facility for many expressive purposes does not create a public forum. Despite a public agency allowing the use of a facility for many expressive purposes, it still is considered a limited public forum. The agency can limit the subject matter and groups for which the facility is used, including religious use.<sup>20</sup>

***Is the agency exercising viewpoint discrimination?***

Unlike open public forums, the standard of review applied to regulation of speech in limited public forums is less severe. Agencies can restrict the subject matters (content) in limited

*In a limited public forum, the government opens a non-public forum but reserves access only for certain groups, topics, or categories of speech.*

public forums. Since these are restrictions on the entire subject matter, they are viewpoint neutral and permissible.<sup>21</sup> However, an agency cannot discriminate because it does not like the viewpoint expressed on topics that are permitted. Even if a public agency's practice, rules, and indices establish the forum as a limited public forum, a person asserting the right to religious expression in that limited public forum will prevail if it is shown the public agency discriminated because of the speaker's religious viewpoint on the permitted topics.<sup>22</sup> Courts must look not only at what the policy excludes from the forum but also at what the policy allows. The fact that a policy broadly excludes religion does not make its application viewpoint neutral if it discriminates on the basis of viewpoint by permitting the presentation of views dealing with the same subject and excluding those presented from a religious standpoint.<sup>23</sup>

The question is whether any discussion of the subject matter is prohibited (agencies can do this); or whether religious viewpoints on permitted subjects are prohibited while other viewpoints are not (agencies cannot do this).<sup>24</sup>

The viewpoint issue was front and center in the recent Ninth Circuit decision in *Faith Center Church Evangelistic Ministries v. Glover*.<sup>25</sup> The court held that the Contra Costa Public Library could exclude an evangelical Christian church seeking access to a public library meeting room to conduct religious worship services. The county has a written policy that its library meeting rooms "shall not be used for religious services."

The court noted that Faith Center engaged in protected speech when it wished to meet for religious services at the library. "The Constitution, however, does not guarantee that all forms of protected speech may be heard on government property."<sup>26</sup> The court then engaged in forum analysis. The county's purpose was to invite the community at large to use its meeting room for "expressive activity." The specific meeting room was used for many expressive purposes.<sup>27</sup>

However, that did not create a public forum, nor prevent the agency from limiting its use or enforcing its rule that the room could not be used for religious services.<sup>28</sup>

Numerous restrictions ("indices") in the county's rules demonstrated that the room was not open for indiscriminate use.<sup>29</sup> The record showed the county has consistently applied its written policy restrictions. To the court, the nature of the forum was important. A library facility is primarily for reading, writing, and quiet reflection. The policy was reasonable in preventing the library's primary function from being undermined.<sup>30</sup>

Faith Center offered examples of permitted access to the county's other library meeting rooms as grounds for support of their use of this particular room. In an interesting note, the court rejected this argument, holding that the forum analysis was directed to the particular room being sought for use by Faith Center, not the county practice as to other rooms in other libraries. "[T]he relevant forum is 'defined by the access sought by the speaker,' ...and in this case the forum is the Antioch Library meeting room."<sup>31</sup> The court held that while there was content discrimination, i.e., room use was permitted for certain subject matter, there was no viewpoint discrimination,

i.e., the speakers' views were not determinative.<sup>32</sup>

Public schools are traditionally viewed as closed forums.<sup>33</sup> Courts uphold the right of school districts to maintain school facilities as closed forums and to prohibit religious groups from meeting on campus or distributing religious literature to students during the school day.<sup>34</sup> Courts create a heightened barrier when declaring a school facility a public forum. Courts are concerned about preserving the characteristics of public education, untainted by sectarian pressures. School facilities will not be declared public forums unless school authorities have opened those facilities for indiscriminate use by the general public.<sup>35</sup>

The U.S. Supreme Court definition of the "closed forum" in the school context is broad, providing schools

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by the general public.*

with wide discretion in many areas. Schools must avoid the appearance of endorsing others' views no matter who is the speaker.<sup>36</sup> This more-generous closed forum standard, covering most matters that might appear to bear the imprimatur of the school, applies to *all* groups and individuals. A school can reasonably regulate not only the speech of students, but also that of "teachers and other members of the school community."<sup>37</sup> The U.S. Supreme Court's broad definition of school "curriculum" permits many school forums to be closed. Curriculum encompasses "school-sponsored publications, theatrical productions, and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school."<sup>38</sup>

***Is the agency restriction on religious speech imposed to prevent an Establishment Clause issue?*** School officials often are caught in a grey area. Districts want to assure an environment where students are not exposed to material that is either inappropriate for their maturity level or disruptive of the school's mission. The school also has an interest in avoiding Establishment Clause violations and ensuring that views of individual speakers are not erroneously attributed to the district. On the other hand, to the extent possible, officials strive to respect the freedom of speech and religion on the part of the school staff, students, parents, and others, as required by the First Amendment. When these goals come in conflict, something must give. Courts generally allow an agency through its practices and policies to restrict religious expression in order to avoid an Establishment Clause issue.<sup>39</sup>

### ***Considerations of Public Schools***

***Restrictions on the religious expression of teachers.*** Because of their unique status, schools are given great leeway in restricting the religious expression of teachers. "While at the high school, whether he is in the classroom or outside of it during contact time, [the teacher] is not just an ordinary

citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial."<sup>40</sup>

School officials have an affirmative duty to ensure that individual teachers are not violating the Establishment Clause. In *Roberts v. Madigan*,<sup>41</sup> a teacher had a Bible and Christian books in the classroom, along with a poster stating, "You have only to open your eyes to see the hand of God." The Bible was used solely by the teacher for personal silent reading, but the Christian books were available for students to use, if they desired. The principal made the teacher remove the Christian books, keep the Bible in, not on, the desk, and remove the poster.

Because the teacher chose to keep his Bible on his desk and read it frequently, the principal feared the teacher was setting a Christian tone in his classroom. Having formed that impression, the court held that the principal "*had a duty to take corrective steps*, and to do so in a religiously neutral manner."<sup>42</sup> The court concluded that removing materials from the classroom was acceptable because they were being used in a manner that violated Establishment Clause guarantees. The Establishment Clause focuses on *the manner of use* to which materials are put; it *does not focus on the content* of the materials per se.<sup>43</sup> School officials must be allowed, within certain bounds, to exercise discretion in determining what materials or classroom practices are being used appropriately.

***Wearing religious garb in the classroom.*** The issue of teachers wearing religious dress in the classroom has not often been litigated. In *U.S. v. Board of Education of the School District of Philadelphia*,<sup>44</sup> the Federal Third Circuit held that a state statute barring public school teachers from wearing religious garb in the classroom did not violate Title VII of

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the 1964 Civil Rights Act.<sup>45</sup> A Muslim teacher filed charges of discrimination with the Equal Employment Opportunity Commission. The federal government supported her claim, suing the school board under Title VII of the 1964 Civil Rights Act. The court was faced with both a Title VII and a First Amendment Free Exercise claim.<sup>46</sup>

The court reasoned that allowing teachers to wear religious attire while teaching would be “a significant threat to the maintenance of religious neutrality in the public school system.”<sup>47</sup> Since this was a compelling state interest, it met the test of showing there would be an undue hardship in permitting the religious attire. The court held that forcing an employer to sacrifice a compelling state interest would undeniably constitute an undue hardship.<sup>48</sup> The court held that the statute permissibly advanced a compelling interest in maintaining the appearance of religious neutrality in the classroom. Prohibiting the religious garb was permissible.

In *Cooper v. Eugene School Dist. No. 4J*,<sup>49</sup> a Sikh teacher wore white clothes and a white turban while teaching, even after being warned about Oregon statutes prohibiting religious dress while performing duties as a teacher and the authorization for suspension from employment by a school district for violation. As a result, she was suspended and her teaching certificate revoked. The Oregon Supreme Court stated that while the statute impinged on the teacher’s free exercise right, it was justified under the circumstances. The law was aimed at a compelling state interest of preserving the appearance of religious neutrality in public schools. “A rule against such religious dress is permissible to avoid the appearance of sectarian influence, favoritism, or official approval in public school.”<sup>50</sup> The U.S. Supreme Court reviewed the teacher’s writ of certiorari under the Free Exercise Clause but dismissed it for want of a substantial federal question.<sup>51</sup>

***Distribution of religious material at school.*** A school district can prohibit the distribution of religious materials in classrooms because of the captive nature of the audience

and the unique entrustment to school officials of children’s education.<sup>52</sup> However, distribution of literature before and after school, or for students to take home, becomes a more difficult forum issue. Groups can distribute religious material after school in classrooms to which they have access for meetings.<sup>53</sup> Several federal courts in other circuits have held that if a school permits groups to distribute political or artistic literature on school grounds before school begins, the school also must permit distribution of religious information at that time.<sup>54</sup>

The Federal Ninth Circuit has held that if a school district allows outside groups to distribute brochures or other promotional literature to students, they cannot prohibit distribution of religious material but can restrict the messages in the material. In *Hills v. Scottsdale Unified School Dist.*,<sup>55</sup> school policy allowed that brochures either be made available for students to pick up or be placed in teachers’ in-house mailboxes and then distributed by teachers to their students. Brochures promoted summer camps, art classes, sports leagues, artistic performances, YMCA, and scouting activities. The Ninth Circuit held that a school district could not refuse to

distribute literature advertising a summer camp program with underlying religious content, where it allowed distribution of literature for secular camps. Since the forum purpose allowed summer camps to advertise, prohibiting advertisements of religious camps would be viewpoint discrimination. However, the school was not obligated to distribute literature that, in the guise of announcing an event, contained proselytizing language or direct exhortations to religious observance. The school could insist on the group deleting such material.<sup>56</sup>

The school policy in *Scottsdale* did not appear to require teachers to distribute the religious summer camp information in their classrooms. The policy permitted either that brochures be available for students to pick up or that teachers distribute them. Just two years earlier, in *Culbertson*

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approval.*

*v. Oakridge School Dist. No. 76*,<sup>57</sup> the Ninth Circuit held that while a school district cannot ban religious groups from after-school meetings when it had opened the school as a community center to all groups, teachers were not required to distribute to students the necessary parental permission slips to attend the meetings, despite doing so for other after-school groups. Such a requirement would put teachers at the service of the religious club, conveying the impression that the school endorsed the club.<sup>58</sup>

***Mailing information home to parents.*** In *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*,<sup>59</sup> the Federal Fourth Circuit Court of Appeals reviewed a case in which Maryland school officials had refused to allow Child Evangelism Fellowship to advertise its after-school Good News Club programs. The court held that a school board cannot restrict religious and other non-curricular material from being sent home in school information packets when there were no guidelines as to criteria for rejection. Without guidelines, the school district officials had “unlimited and unbridled discretion” in determining whether to approve or reject materials sent home in informational packets. In response to the court decision, the school board initially announced that it would ban all informational flyers, including those from the Boy Scouts and the PTA. Days later, in response to anger from PTA members, it announced it would send home PTA flyers, but would curb distributions from all other groups.<sup>60</sup>

***Labor contract constraints vs. mandated religious accommodation law.*** Labor contract language can prevail over religious expression in certain circumstances. Despite the detailed analysis one might undertake to determine the forum created and whether the Establishment Clause has been violated, if there is a collective bargaining agreement in place, agency conduct that would otherwise be improper religious discrimination may be permitted. Employees who are denied workplace religious accommodations typically sue for discrimination under Title VII of the Civil Rights Act of 1964.<sup>61</sup> But Title VII gives specific deference to

seniority provisions of collective bargaining agreements in reasonable accommodation claims.<sup>62</sup>

Under Title VII, “seniority systems are a valid method of providing different levels of compensation and privileges, even if they have a discriminatory impact on employees.”<sup>63</sup> “Quite plainly this language means that no other provision in Title VII can transform an otherwise valid seniority system into an illegal employment practice.”<sup>64</sup> The importance of this cannot be overemphasized. Collective bargaining agreements have many clauses in which seniority controls.

These include transfers, reassignments, promotions, shift swapping and changes in hours, days, shifts, call back to work for emergencies, and vacation priority.

In *Trans World Airlines v. Hardison*,<sup>65</sup> the employer and union had a collective bargaining agreement that gave priority in work schedules based on seniority. When Hardison, an employee with lower seniority, refused to work on Saturdays, which was his Sabbath, he was discharged for insubordination. He sued for religious discrimination under Title VII. The U.S. Supreme Court

concluded that the employer was not required to violate the collective bargaining agreement in order to provide him with a religious accommodation.<sup>66</sup> “TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison meet his religious obligations.”<sup>67</sup> The court stressed the strong national labor policy favoring enforcement of collective bargaining agreements.<sup>68</sup> Title VII “did not require some employees to be deprived of their shift and job preferences in order to accommodate or prefer the religious needs of others....”<sup>69</sup> To do so would constitute “unequal treatment” of employees not contemplated by Title VII. TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison meet his religious obligations.<sup>70</sup> The U.S. Supreme Court has continued to uphold this rational.<sup>71</sup>

The court accepted TWA’s claim that there was no accommodation it could make which would not violate the collective bargaining agreement without imposing

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considerable cost. The employer was not required to pay premium overtime to other workers to replace the plaintiff on a Saturday shift. The court made it clear that even if there were an accommodation that did not violate the labor agreement, “to require [the employer] to bear more than a *de minimis* cost in order to [accommodate the employee’s religious practice] was an undue hardship.”<sup>72</sup>

In *Balint v. Carson City, Nevada*,<sup>73</sup> the Ninth Circuit clarified its understanding of *Hardison*. A prospective employee sued under Title VII for religious discrimination. Her job application to a county sheriff’s office was rejected when she indicated she could not work on her religion’s Saturday Sabbath. The Ninth Circuit interpreted *Hardison* as holding that Title VII provisions for religious accommodation and its seniority system protection “coexist in the statute” and are not mutually exclusive.<sup>74</sup> Seniority provisions in a collective bargaining agreement are not a defense if reasonable accommodation can be made without impact on the seniority system and with no more than a *de minimis* cost to the agency.

“No damage is done to seniority systems by requiring reasonable accommodation of religious beliefs. Employers need not transgress upon their seniority systems to make accommodations, but they are required to attempt accommodations that are consistent with their seniority systems and that impose no more than a *de minimis* cost.”<sup>75</sup>

Courts look to see if the worksite practices belie a claim that the contract forbids the accommodation. For example, courts inquire if voluntary shift trading between employees or shift-splitting systems usually are allowed. If practices are permitted for non-religious reasons despite the contract language, but are denied to the employee seeking a religious accommodation, the contract’s seniority clause is no defense.

The U.S. Supreme Court has indicated it will allow labor agreement language to prevail in a religious Title VII school case that did not involve seniority. In *Ansonia Board of Education v. Philbrook*,<sup>76</sup> a school employer, pursuant to a

collective bargaining agreement, allowed an employee three days leave annually for religious observance, but was prohibited by the contract from allowing the employee “personal days” for additional religious observance due to the contract language defining “personal days.” The employee was forced to take the additional time off without pay. The court reiterated its holding in *Hardison* that whenever an employer-selected accommodation results in more than a *de minimis* cost to the employer, the employer is excused from providing a religious accommodation because it causes “undue hardship.”

Once the school district determines how it wishes to accommodate the employee, without cost to itself, the courts are not permitted to second guess the district by requiring it to choose a different accommodation, even one suggested by the employee. Nor is the school district required to “prove” that any other accommodation would have been a “hardship” for it to implement.<sup>77</sup> However, while the court declared that the school district appeared to have met its obligation to provide a reasonable accommodation when it allowed the employee unpaid leave, the question still remained whether the unpaid leave

was in fact a reasonable accommodation in light of how personal days were applied for non-religious purposes.<sup>78</sup> Again, the question is, what was the actual practice?

### **Conclusion**

As court records attest, on a daily basis, public administrators on the front line are called on to make difficult decisions involving the permissible limits of religious expression under the Constitution. Each decision must weigh avoiding Establishment Clause problems while respecting the Free Speech Clause, and each decision will certainly please some and bring displeasure to others. \*

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1 U.S. Constitution, First Amendment.

2 Letter from President Jefferson to the Danbury Baptist Association in 1802.

3 *Reynolds v. United States* (1878) 98 U.S. 145. The California Constitution also contains provisions simultaneously prohibiting an establishment of religion and guaranteeing the free exercise thereof. (Article 1, section 4; Article IX, section 8; Article XVI, section 5.) However, most litigation over the establishment of religion or its free exercise has occurred in federal courts. The California provisions have not been relied on as often.

4 (9th Cir. 2006) 439 F.3d 1114, 1124 -1125 (writ of certiorari pending) (school could not prevent student [Frederick] from displaying banner “Bong-Hits 4 Jesus,” on public street, during city parade, nor impose discipline for such conduct, even though students were given time during school day to attend, and despite the school’s anti-drug position. The court concluded that the law was “so clear and well settled that no reasonable government official could have believed the censorship and punishment of Frederick’s speech to be lawful. In fact, there is nothing in the authorities that justifies what the school did, and no reasonable official could conclude otherwise.”).

5 Compare *Faith Center Church Evangelistic Ministries v. Glover* (9th Cir. 2006) 462 F.3d 1194 (county library’s specific written policy prohibiting use of meeting room for religious services upheld with *Culbertson v. Oakridge School Dist. No. 76* [9th Cir. 2001] 258 F.3d 1061. School’s written policy that school district buildings were community centers and that after-school use of its buildings for community, educational, and recreational purposes was permitted, did not contain specific language excluding religious subject matters and did not clearly define the policy’s parameters).

6 Compare *Harper v. Poway Unified School Dist.* (9th Cir. 2006) 445 F.3d 1166 (writ of certiorari pending) (school could prevent student from wearing t-shirt with religious message that God condemned homosexuals because public schools can restrict student speech that intrudes on the rights of other students or incites hatred) with *Frederick v. Morse, supra*, 439 F.3d 1114 (writ of certiorari pending) (school could not prevent student from displaying banner “Bong-Hits 4 Jesus”).

7 *Berry v. Department of Social Services* (9th Cir. 2006) 447 F.3d 642 (prohibition on use of department room for religious services, upheld); *Faith Center Church Evangelistic Ministries v. Glover, supra*, 462 F.3d 1194 (library’s prohibition on use of public library meeting room for religious services upheld); *Roberts v. Madigan* (10th Cir. 1990) 921 F.2d 1047, cert. den. (1992) 505 U.S. 1218 (school’s prohibition of teacher having Bible and Christian books on his desk and in classroom, and a classroom poster stating, “You have only to open your eyes to see the hand of God,” upheld).

8 *Berry v. Department of Social Services, supra*, 447 F.3d 642 (court upholds department refusal to allow display of sign at work area reading “Happy Birthday Jesus,” Bible displayed on work desk, or use of room for services).

9 *DiLoreto v. Downy Unified School Dist.* (9th Cir. 1999) 196 F.3d 958 (school district prohibition of commercial advertisement on high school baseball fence containing the text of the Ten Commandments upheld).

10 *Seidman v. Paradise Valley Unified School Dist., No. 69* (D.Ariz. 2004) 327 F.Supp.2d 1098 (given the types of statements permitted on tiles by school and lack of written policy, placement of community tiles in school corridor with some religious overtone permitted).

11 *Frederick v. Morse, supra*, 439 F.3d 1114 (writ of certiorari pending).

12 *Harper v. Poway Unified School Dist., supra*, 445 F.3d 1166 (writ of certiorari pending) (religious t-shirt language condemning homosexuality conflicted with policy against hate messages, collided with rights of other students; school restrictions upheld. In California, numerous Education Code sections proscribe hate speech and hostile work environments, applicable to employees and students. See Ed. Code Secs. 201 et. seq., 201, 220, 233.5 [California Schools Hate Violence Reduction Act] 48907, 48950).

13 *Hills v. Scottsdale Unified School Dist.* (9th Cir. 2003) 329 F.3d 1044, cert. den. (2004) 540 U.S.1149 (school district that sends home flyers on summer camps cannot discriminate against brochure for religious summer camp. If school districts have policy that allows outside groups to distribute or display brochures or other promotional literature to students, they cannot discriminate based on material’s viewpoint); *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools* (4th Cir. 2006) 457 F.3d 375 (school board cannot restrict religious material advertising after-school religious program from being sent home in school information packets with other after-school program advertisements, when no guidelines exist as to criteria for rejection).

14 462 F.3d at 1202, citing *DiLoreto, supra*, 196 F.3d at 965.

15 *Faith Center Church Evangelistic Ministries v. Glover, supra*, 462 F.3d 1194, citing *Hopper v. City of Pasco* (9th Cir. 2001) 241 F.3d 1067, 1074-75.

16 *Faith Center Church Evangelistic Ministries v. Glover, supra*, 462 F.3d 1194, 1203, citing *Cornelius v. NAACP Legal Defense and Education Fund* (1985) 473 U.S. 788. “When the government intentionally opens a nontraditional forum for public discourse it creates a designated public forum.” *DiLoreto v. Downy Unified School Dist. supra*, 196 F.3d at 964. See also *Children of the Rosary v. City of Phoenix* (9th Cir. 1998) 154 F.3d 972, cert. denied (1999) 143 L. Ed.2d 1008, 119 S.Ct. 1804.



- 17 *DiLoreto v. Downy Unified School Dist.* *supra*, 196 F.3d 958, 965; *Faith Center Church Evangelistic Ministries v. Glover*, *supra*, 462 F.3d at 1203.
- 18 *Ibid.*
- 19 523 U.S. 666, 679.
- 20 *Faith Center Church Evangelistic Ministries v. Glover*, *supra*, 462 F.3d 1194; *Rosenberg v. Rector & Visitors of the University of Virginia* (1995) 515 U.S. 819.
- 21 *DiLoreto v. Downy Unified School Dist.*, *supra*, 196 F.3d. at 965. See also *Rosenberg v. Rector & Visitors of the University of Virginia*, *supra*, 515 U.S. 819; *Lamb's Chapel v. Center Moriches Union Free School* (1993) 508 U.S. 384.
- 22 *Faith Center Church Evangelistic Ministries v. Glover*, *supra*, 462 F.3d 1194, 1207-9; *Giebel v. Sylvester* (2001 9th Cir.) 244 F.3d 1182, 1188.
- 23 *Lamb's Chapel v. Center Moriches Union Free School Dist.*, *supra*, 508 U.S. 384, 385; *Hills v. Scottsdale*, *supra*, 329 F.3d at 1051.
- 24 "Content discrimination occurs when the government chooses the subjects that may be discussed, while viewpoint discrimination occurs when the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject." *Giebel v. Sylvester*, *supra*, 244 F.3d at 1188; see also *Hills v. Scottsdale*, *supra*, 329 F.3d at 1044, 1051.
- 25 *Supra*, 462 F.3d 1194.
- 26 *Faith Center Church Evangelistic Ministries v. Glover*, *supra*, 462 F.3d 1194, 1202.
- 27 The room was used by the Sierra Club for letter writing, by Narcotics Anonymous for a recovery meeting, and by the East Contra Costa Democratic Club to educate people about Democratic candidates and issues. *Id.* at 1204.
- 28 "A policy with a broad purpose however is not dispositive of an intent to create a public forum by designation." *Ibid.*
- 29 *Id.* at 1205. Schools were excluded from using the rooms for instructional purposes as a regular part of the curriculum. Organizations could not use the rooms for religious services. Any group wishing to use the room had to submit an application describing the intended use and the identification of the applicant. The application was reviewed and approved in advance by the county. "Requiring prior permission for access to the forum demonstrates that a public forum has not been created by designation." The policy required an applicant to pay a fee for certain proposed uses. "By charging a fee in certain circumstances, the County has demonstrated its desire to limit access to the library meeting room for certain purposes and speakers." See also *Cornelius v. NAACP Legal Defense and Education Fund*, *supra*, 473 U.S. 788, 803, for a discussion of indices of a limited public forum.
- 30 *Supra*, 462 F.3d at 1205.
- 31 *Id.* at 1209, n. 9.
- 32 *Id.* at 1209.
- 33 There is no viewpoint neutrality requirement when the public agency, such as a school district, is itself the speaker, i.e. the content of a school program or course. *Downs v. Los Angeles Unified School Dist.* (9th Cir.2000) 228 F.3d 1003, 1011 n. 9, 1013.
- 34 *Perumal v. Saddleback Valley Unified School Dist.* (1988) 198 Cal.App.3d 64. See also *Berger v. Rensselaer Central School Corp.* (7th Cir. 1993) 982 F.2d 1160, cert.den. (1993) 508 U.S. 911 (school district classrooms are not open forums for community speech. Schools can prohibit Gideon company from distributing Bibles in public school classrooms [auditorium] during school day where students are a captive audience); *Meltzer v. Board of Public Instruction of Orange County* (5th Cir. 1978) 577 F.2d 311, cert. den. (1979) 439 U.S. 1089.
- 35 *Hazelwood School Dist. v. Kuhlmeier* (1988) 484 U.S. 260, 267. See also *DiLoreto v. Downy Unified School Dist.*, *supra*, 196 F.3 at 966.
- 36 Courts recognizes a school's unique "pedagogical concerns, such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission, and avoiding the appearance of endorsing views, no matter who the speaker is." *DiLoreto v. Downy Unified School Dist.*, *supra*, 196 F.3 at 966; *Planned Parenthood v. Clark County School Dist.* (9th Cir. 1991) 941 F.2d 817, 827 (en banc).
- 37 *Hazelwood School Dist. v. Kuhlmeier*, *supra*, 484 U.S. at 269; *Planned Parenthood v. Clark County School Dist.*, *supra*, 941 F.2d 817, 827.
- 38 *Hazelwood School Dist. v. Kuhlmeier*, *supra*, 484 U.S. at 270-271; *Burch v. Barker* (9th Cir.1988) 861 F.2d 1149, 1158); *Planned Parenthood v. Clark County School Dist.*, *supra*, 941 F.2d at 828-829.
- 39 *Lamb's Chapel v. Center Moriches Union Free School*, *supra*, 508 U.S. 384, 394; *Widmar v. Vincent* (1981) 454 U.S. 263, 271; *Berry v. Department of Social Services*, *supra*, 447 F.3d at 650; *Pelozo v. Capistrano Unified School Dist.* (9th Cir. 1994) 37 F.3d 517 (high school teacher's challenge to restriction barring him from discussing religion with students. School district interest in avoiding an Establishment Clause violation trumped teacher's right to talk to students); "We have said that a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination." *Good News Club v. Milford Cent. School* (2001) 533 U.S. 98, 112.
- 40 *Pelozo v. Capistrano Unified School Dist.*, *supra*, 37 F.3d at 522.
- 41 (10th Cir. 1990) 921 F.2d 1047, cert. den. (1992) 505 U.S. 1218.
- 42 *Id.* at 1055-56. (Emphasis added.)

43 “...We are particularly mindful, as was the district court, that there is a ‘difference between teaching *about* religion, which is acceptable, and teaching religion, which is not.’” *Id.* at 1055.

44 (3d Cir. 1990) 911 F.2d 882.

45 The state statute banned all religious attire. The teacher was a devout Muslim with a religiously held conviction that Muslim women should, when in public, cover their entire body save face and hands. Principals in three schools where she was a substitute teacher refused to let her teach, citing the Pennsylvania statute. She was given the opportunity to go home and change, but refused.

46 *Supra*, 911 F.2d at 889, fn 6.

47 *Id.* at 894.

48 *Id.* at 890. “The Supreme Court’s opinion in [*Trans World Airlines v. Hardison* (1977) 432 U.S. 63] strongly suggests that the undue hardship test is not a difficult threshold to pass; at the very least, undue hardship is a lower standard than compelling state interest.” See discussion of *Hardison*, *infra*.

49 (1986) 301 Or. 358, 723 P.2d 298, appeal dismissed, (1987) 480 U.S. 942.

50 723 P.2d at 308.

51 *Supra*, 480 U.S. 942.

52 *Berger v. Rensselaer Central School Corp.*, *supra*, 982 F.2d 1160, cert.den. (1993) 508 U.S. 911 (cannot distribute Bibles in public school classrooms [auditorium] during school day); *Meltzer v. Board of Public Instruction of Orange County*, *supra*, 577 F.2d 311, cert. den. (1979) 439 U.S. 1089 (school district classrooms are not an open forum for community speech since they are not open to all).

53 *Widmar v. Vincent* (1981) 454 U.S. 263.

54 *Hedges v. Wauconda Community School Dist. No. 118* (7th Cir. 1993) 9 F.3d 1295 (student allowed to distribute religious material outside of school before school day starts. The school district can not prohibit students from handing out religious materials at the same times and places it permits other students to pass out literature with political or artistic themes); *Johnston-Loehner V. O’Brian* (M.D.Fla. 1994) 859 F.Supp. 575 (school policy unconstitutional that required prior superintendent approval before distributing material on school grounds).

55 (9th Cir. 2003) 329 F.3d 1044, cert. den. (2004) 540 U.S.1149.

56 *Id.* at 1052-1053. “Thus, for example, we believe the district’s policy could validly exclude a ‘religious tract’ aimed at converting students to a particular belief, because the school’s forum was never opened for pure discourse.”

57 *Supra*, 258 F.3d 1061.

58 *Id.* at 1065.

59 *Supra*, 457 F.3d 375.

60 *Washington Post*, August 24, 2006, Metro Section, p. B.5.

61 42 USC Secs. 2000 et. seq.

62 Secs. 2000e-2(h); *U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 402-403 (seniority provision in CBA generally will trump ADA and require interpretation that the accommodation in contravention to the CBA is not a “reasonable” one).

63 *Balint v. Carson City, Nevada* (9th Cir. 1999) 180 F.3 1047 at 1051-1052.

64 *Ibid.*

65 *Supra*, 432 U.S. 63.

66 *Id.* at 79.

67 *Id.* at 83.

68 *Id.* at 79.

69 *Id.* at 81.

70 *Id.* at 83.

71 *U.S. Airways, Inc. v. Barnett*, *supra*, 535 U.S. 391, 402-403 (seniority provision in CBA generally will trump ADA and require interpretation that the accommodation in contravention to the CBA is not a “reasonable” one. The case provides a good description of reasons CBA provisions should be respected).

72 *Trans World Airlines v. Hardison*, *supra*, 432 U.S. at 84.

73 *Supra*, 180 F.3 1047.

74 *Id.* at 1053.

75 *Ibid.*

76 (1986) 479 U.S. 60.

77 *Id.* at 67-70.

78 *Id.* at 70-71. “But unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones.” *Id.* at 71. (Emphasis in original.)

# Public Employees May ‘Stand Mute’ in Interrogations Absent Immunity Grant

*Carol Vendrillo, CPER Editor*

***In Spielbauer v. County of Santa Clara, the Sixth District Court of Appeal has made the case that a public employee may not be disciplined for insubordination for refusing to answer questions without an express grant of immunity. Reliance on the exclusionary rule is not sufficient, the court said.***

In a lengthy opinion that reads like a scholarly law review article, the Sixth District Court of Appeal has announced that a public agency cannot penalize one of its employees for refusing to answer incriminating questions unless the employer first grants or offers the employee immunity — a binding pledge not to use the employee’s answers in any criminal prosecution. Relying extensively on federal constitutional authority, including the U.S. Supreme Court’s decision in *Lefkowitz v. Turley* (1973) U.S. 70, the court found that the Fifth Amendment constitutional privilege against compelled self-incrimination allows a public employee to rightfully refuse to answer questions from his superiors unless the employer first grants the employee protection against the use of the compelled answers in any later criminal prosecution.

Once an employee is provided immunity from criminal prosecution, the court cautioned, he can be compelled to answer questions, and if the answers furnish grounds for adverse action, they may form the basis for discipline.

The court also took pains to differentiate the public employee’s right to stand mute during an interrogation until after he has received a grant of immunity and the operation of the exclusionary rule to preclude from evidence in any future prosecution the answers the employee was compelled to give. Making this distinction, the district court was critical of the California Supreme Court’s ruling in *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 67X CPER 1, for erroneously relying on the exclusionary rule to remedy an unlawful abridgement of the right to remain silent.

## ***Factual Background***

At the center of this case is Thomas Spielbauer, a Santa Clara County public defender who, in 2003, was the attorney representing Michael Dignan, an

individual charged with possessing ammunition while a convicted felon. In defense of Dignan, Spielbauer hoped to offer into evidence at Dignan's trial a hearsay statement made by Troy Boyd. When questioned by police, Boyd said that his parents owned the house where the ammunition was found and that he had been renting the residence for years. Spielbauer wanted to introduce Boyd's statement in order to raise doubts in the jury's mind that Dignan had been in control of the premises where the ammunition was found.

In motions prior to the trial, however, the prosecutor argued that Boyd's statements to the police were inadmissible hearsay. In response, Spielbauer told the judge that Boyd was an unavailable witness and, therefore, his statements fell within an exception to the hearsay rule. In support of this assertion, Spielbauer said that although he had not sent an investigator out to look for Boyd, there was a warrant out for his arrest and he was avoiding contact with anyone connected to the judicial system. Despite the prosecutor's contention that Spielbauer had failed to establish Boyd's unavailability, the judge ruled that it would allow Boyd's hearsay statements regarding ownership and residence in the house where the ammunition was found.

What Spielbauer failed to tell the judge was that the day before the hearing, he had encountered Boyd at his residence watching a football game with a group of friends. Spielbauer claimed he had no obligation to tell the court of his meeting with Boyd because it was part of the attorney "work product" shielded from discovery.

A few months later, Chief Assistant Public Defender David Mann learned about the matter and initiated an internal investigation. Spielbauer was interviewed by Joe Guzman, supervisor of the felony division, and was asked to describe his meeting with Boyd. Spielbauer declined to answer. Initially, Guzman informed Spielbauer that, while he had a right to remain silent, his silence could be deemed insubordination and result in discipline. He then told Spielbauer that any statement he made during the interview

could not be used against him in any subsequent criminal proceeding and that any statements Spielbauer made would not be shared with the district attorney's office. Guzman then gave Spielbauer a direct order to answer the questions and told him that his refusal to do so would constitute insubordination. In a subsequent meeting, Guzman told Spielbauer that he had no right to refuse to answer questions because the investigation concerned an internal employer-employee investigation. Spielbauer continued to invoke his right not to answer the questions.

Thereafter, Mann recommended that Spielbauer's employment be terminated for his insubordinate refusal to answer his supervisor's questions, for unbecoming conduct that discredited the county, and for violating ethical rules prohibiting an attorney from seeking to mislead a judge.

A *Skelly* hearing officer sustained the recommended disciplinary action and the county personnel board upheld the action. Spielbauer sought to overturn the administrative ruling, but the trial court upheld his termination

and rejected his argument that he was entitled to receive a grant of immunity before he could be punished for refusing to answer potentially incriminating questions. The Court of Appeal reached a contrary conclusion, holding that in the absence of a formal grant of immunity, Spielbauer could not be guilty of insubordination for failing to answer incriminating questions.

### ***Legal Analysis***

The Court of Appeal first recognized the existence of a privilege against compelled self-incrimination in public employment. Quoting *Turley*, the court explained that the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." The "basic

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rule,” said the court, is that a witness who is protected by the privilege against self-incrimination “may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.” And, said the court, the state cannot lawfully penalize an employee for such refusal without first affording him such protection. This prohibition extends to demands for information by the state in its role as employer. “Thus,” said the court, “a state agency cannot compel its employees to answer incriminating questions over a Fifth Amendment objection unless it first grants them protection against the use of their compelled answers, and evidence derived from those answers, in any later criminal prosecution.”

The court clarified that the aim of the Fifth Amendment is only to protect individuals against the use of their compelled disclosures to convict them of a crime. “It does not protect [an employee] from other adverse effects of disclosure. Thus, an interrogatee can be compelled to answer, and punished for refusing to do so, if he is granted adequate protection against the penal use of his statements.”

After an extensive review of federal constitutional case law, the Court of Appeal announced:

In sum, the state cannot compel any person, including one of its employees, to furnish information that may contribute to the imposition of criminal penalties on that person. If the threat of criminal penalties has been removed, however, the state *can* require the person to answer, and if the answers furnish grounds for other adverse actions, the erstwhile risk of incrimination poses no impediment to those actions.

The appellate court’s analysis went further to distinguish this immunity rule — the privilege to stand moot unless and until immunity is granted — and the exclusionary rule also recognized in federal constitutional law cases that precludes the use of admissions that were made in violation of the

individual’s right to remain silent. Again, after the court embarked on a thorough review of relevant case law, it concluded:

In sum, federal cases contemplate two distinct shields, which become available at different stages of a prospective or actual prosecution. The first arises in any official *interrogation*, and entitles the interrogatee to *refuse to answer incriminating questions unless immunity is granted*. The second arises at the time of a criminal *trial*, and entitles the defendant to *exclude from evidence* any incriminating statement, or evidence derived from a statement, that was extracted in violation of the first privilege. The interrogational privilege *preserves* the right to remain silent; the exclusionary rule *remedies a breach* of that right. These rights coexist because any attempt to compel incriminating disclosures places the interrogatee between the rock and the whirlpool.

*The law strives to  
vindicate the  
employee’s right to  
remain silent.*

In either case, the court explained, the law strives to vindicate the employee’s right to remain silent. The first preservative and protective right operates by setting aside any adverse consequences for standing mute. The second remedial right operates by excluding from evidence wrongfully compelled statements.

In this case, when Spielbauer asserted his right to remain silent, his supervisor told him he had to answer or be subject to discharge for insubordination. “Although the supervisor stated that [Spielbauer’s] answers could not be admitted in a criminal prosecution — an apparent allusion to the rule of exclusion — he never granted or offered *immunity*,” the court observed. Under federal case law, said the court, “the failure to offer immunity was fatal to any attempt to discipline [Spielbauer] for remaining silent.” Therefore, the court concluded, the personnel board’s finding of insubordination “cannot survive.”

### ***Conflicts With California Precedent***

Continuing its careful and complete analysis, the court found fault with California decisions for failing to note the “dual nature of the federal protection and the need for an offer or grant of immunity as a predicate for lawfully compelled answers.” For example, it rejected the county’s reliance on *Kelly v. State Personnel Board* (1979) 94 Cal.App.3d 905, which cites *Turley* as authority for the proposition that a public employee may be forced to answer questions relative to his fitness for employment if his answers cannot be used against him in a subsequent criminal prosecution. “But *Turley* does not say that an employee may be compelled to answer whenever his answers cannot be used against him,” noted the court. “It says he can be compelled to answer when *granted immunity* coextensive with the privilege.”

*Lybarger v. City of Los Angeles* likewise drew criticism from the Court of Appeal for failing to note “the critical role of immunity as a prerequisite to compelled disclosures.” In *Lybarger*, the court held that interrogators had not complied with the statutory requirements imposed by the Public Safety Officers Procedural Bill of Rights Act by failing to tell a police officer that any statement he made under the compulsion of the threat of discipline could not be used against him in any subsequent criminal proceeding. The *Lybarger* decision came under fire by the Court of Appeal because of its statement, said to be based on *Turley*, that the officer had no constitutional right to remain silent because “his self-incrimination rights are deemed adequately protected by precluding any use of his statements at a subsequent criminal proceeding.” *Turley* stands for the interrogatee’s right “to insist on *immunity* as a precondition for any such compulsion.” The court pointed out that “although the term ‘immunity’ never appears in *Lybarger*, it appears 26 times in *Turley*.” Accordingly, the court said, the United States Supreme Court “has directly repudiated the suggestion that the anticipated operation of

the exclusionary rule supplies a substitute for a grant of immunity, justifying a compulsion to answer.”

Acknowledging that it must follow the holdings of the California Supreme Court, the court was careful to observe that the actual holding in *Lybarger* was that the officer’s interrogation violated the Bill of Rights Act requirement that public safety officers must be advised of their constitutional rights. Therefore, while the high court construed the Bill of Rights Act to require advisement of the

exclusionary rule, that statute has no application to Spielbauer’s case, noted the court, because he is not a public safety officer. Moreover, the court added, the issue of the interrogational privilege — the right to stand mute absent a grant of immunity — was never argued or considered by the *Lybarger* court. Therefore, reasoned the court, the statement in *Lybarger* that the police officer had no right to remain silent was dictum and is not binding precedent.

That said, the Court of Appeal went on to admit that it was “unable to reconcile the dictum with paramount federal authority, which plainly declares that a public employee cannot be

compelled to give incriminating answers until *after* he has received a grant of immunity.”

The court also asserted that reliance on the exclusionary rule as a substitute for the interrogational immunity “suffers from severe logical difficulty” and “generates a classic paradox.” The court explained:

The exclusionary rule is premised upon the supposition that the answers sought to be excluded were obtained *unlawfully*, i.e., were compelled in violation of the interrogatee’s right to remain silent. But *Lybarger* relies on the future operation of the exclusionary rule to justify, i.e., make lawful, a present compulsion to answer. If the compulsion to answer is lawful, the predicate for the exclusionary rule disappears, and the answers may be introduced in a criminal trial. But if the answers will be admissible in a criminal trial, the employee cannot be compelled to give them.

*Lybarger drew criticism for failing to note ‘the critical role of immunity as a prerequisite to compelled disclosures.’*

The court elaborated further, charging that *Lybarger* and other California cases are based on the “Epimenidean Paradox,” referring to a statement attributed to the Cretan philosopher Epimenides, “All Cretans are liars.” Such a statement, explained the court, is often called the “Liar’s Paradox” because it produces an “endlessly oscillating cycle of self-contradiction” because it cannot be declared true without making itself false, which in turn makes it true, and makes it false, *ad infinitum*. The court explained: “Here, the federal exclusionary rule bars from evidence a statement that has been *unlawfully* compelled; but *Lybarger* relies on this prospective exclusion to make the compulsion *lawful*, a result which (if sound) would prevent operation of the exclusionary rule, which would (again) make the compulsion unlawful, *ad infinitum*.”

Again, the court summed up:

Here the United States Supreme Court has squarely held, not once but repeatedly, that the Fifth Amendment privilege deflects any official compulsion to answer incriminating questions until *after immunity has been granted*. We decline to perpetuate the supposition, which we consider erroneous, that this rule has been superseded by the federal exclusionary rule that remedies an unlawful abridgement of the right to remain silent.

The paradox relied on in *Lybarger* could be resolved by enacting a state law providing immunity to answers compelled from public employees by the threat of discharge. In fact, said the court, in *People v. Gwillim* (1990) 223 Cal.App.3d 1254, the appellate court interpreted *Lybarger* as having created just such a scheme with respect to peace officers based on confidentiality protections conveyed by the Penal Code. *Gwillim* is important, said the court, because it recognizes that federal cases do not permit a public employer to punish an employee for refusing to answer incriminating questions unless he has received a grant of immunity. “*Gwillim* rescued *Lybarger* from its seeming incompatibility with this rule by reading it to *create*, as a matter of state law, an immunity

arising automatically whenever a police department orders one of its officers to respond to incriminating questions while admonishing him that refusal to answer may lead to discipline and that his answers cannot be used to prosecute him.”

The *Gwillim* court’s reading of *Lybarger* “has the comparative virtue” of conforming *Lybarger* to federal constitutional authority, said the court, but it is “unsatisfactory” for a number of reasons. First, *Lybarger* had no intention of creating a new rule of immunity. It never

mentioned immunity and never acknowledged any requirement that immunity be conferred. “Therefore,” said the court, “*Gwillim*, while valiantly trying to save the dictum in *Lybarger*, does so by attributing an intent that the court showed no sign of entertaining.”

Second, the court questioned the wisdom of adopting an automatic judicially created grant of immunity that would impinge on the legislative power to define and prescribe punishments for crimes. “If applied universally,” said the court, “*Lybarger*/*Gwillim* immunity would empower any supervisor of public employees to

immunize their answers merely by threatening discipline for failure to answer.” After citing numerous cases discussing the risks associated with the broad dispensation of the right to immunize disclosures, the court remarked:

As these cases and *Gwillim* illustrate, vindication of the criminal laws can be hindered, and in extreme cases thwarted altogether, not only by the prosecutor’s *own* exposure to immunized disclosures and evidence arguably derived from them, but by the exposure of *other witnesses* to tainted evidence during the course of the investigation or proceeding. It requires little imagination to discern a substantial risk that supervisors clothed with the power to peremptorily immunize the disclosures of their subordinates could quickly entangle a potential criminal prosecution in such Gordian complexities that no prosecutor could carry the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.

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Drawing this point out further, the court noted that requiring a clear grant of immunity provides better protection to prosecutorial interests because it blocks other officials from unilaterally compelling statements that may taint later prosecutions. “If an official wants to compel incriminating disclosures, he will have to secure immunity; if he fails to do so, the employee is entitled to stand on his right of silence without fear of repercussions. If the employee does this, no tainted disclosures will be made, and no prosecutor will be required to overcome a later claim that his case has been poisoned. To be sure,” the court underscored, “the employee’s assertion of this right may pose impediments to disciplinary investigations, but surely it is not for the courts to solve that problem with a blanket regime of automatic immunity.”

The court also pointed out that reliance on the exclusionary rule or an automatic grant of immunity will fail to provide employees adequate assurance against penal consequences if he complies and answers incriminating questions. “The interrogator may tell him so, as plaintiff’s supervisor Guzman did here, but it is not the interrogator’s opinion that matters — it is the opinion of the prosecutor, and ultimately a judge in some future trial.”

Based on this extensive legal analysis, the court concluded that because no immunity had been offered or granted to Spielbauer, he could not be compelled to answer the potentially incriminating questions posed by Guzman and his refusal to do so could not form the basis for discipline. Therefore, the court found that the charge of insubordination could not be sustained.

The court reached contrary conclusions with regard to the charges that Spielbauer tried to mislead the court concerning Boyd’s whereabouts and exhibited conduct unbecoming a county employee. The court found that by his statements to the court, Spielbauer hoped to persuade the trial court judge that Boyd was unavailable and, thus, that his hearsay statements could be admitted. This was an effort to deceive the trial judge. The court also found substantial evidence in support of the fact that Spielbauer engaged in conduct unbecoming a county employee and tending to discredit his office. Based on these factual findings, the court remanded the matter to the county personnel board to determine whether to sustain the termination of Spielbauer absent reliance on the claim of insubordination. (*Spielbauer v. County of Santa Clara* [1-12-07] H029345 [6th Dist.] \_\_\_Cal.App.4th\_\_\_, 2007 DJDAR 591.) . \*



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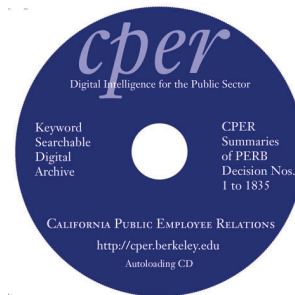
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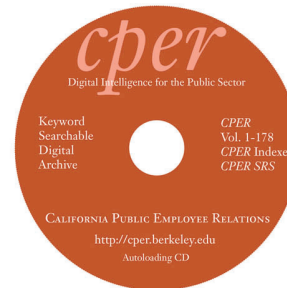
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## Recent Developments

# *Public Schools*

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### **Villaraigosa's Plan to Reform LAUSD Runs Into Roadblocks**

Los Angeles Mayor Antonio Villaraigosa's plan to reform the Los Angeles Unified School District, which was enacted into law last September, has encountered a major obstacle. A.B. 1381, known as the Gloria Romero Educational Reform Act of 2006, provides for a council of mayors to participate in the selection of the district's superintendent and to have an advisory role in determining the budget. It also gives the mayor direct control over three high schools and their feeder schools. (For a complete description of the plan and the struggle to make it law, see stories in *CPER* No. 179, pp. 43-47, and No. 180, pp. 32-33.)

On December 21, 2006, 10 days before the law was to go into effect, Los Angeles Superior Court Judge Dzintra Janavs ruled that A.B. 1381 was unconstitutional. In her 20-page decision, Janavs said that the law "makes drastic changes in local governance of the [Los Angeles Unified School District], giving the mayor a role that is unprecedented in California," and added that it "completely deprives the LAUSD governing board of any ability to control or influence the actions or decisions" in those schools controlled by the mayor. She pointed to a 1946 con-

stitutional amendment that, she said "specifically removed municipal authority over school districts and appears to reflect the people's determination to separate municipal functions from school functions due to the variety of conflicts that arise between their respective interests." The California Constitution requires that schools be governed only by "public school systems," and the City Charter calls for an elected board to run the schools. "The Mayor of Los Angeles [and] the members of the Council of Mayors...are not 'authorities' within the Public School System or 'officers of the public schools,'" wrote the judge.

Janavs invalidated the entire law, stating "there is substantial evidence that [the law's] passage was the result of political compromise and that its provisions are so interconnected...that no single provision would have been enacted or should be given effect without the whole." She ordered the mayor and other public officials "to refrain from enforcing or implementing" any part of the act.

The lawsuit was filed by the LAUSD board, several parents groups, and some individuals soon after the bill was signed into law by Governor

Schwarzenegger. At the hearing held prior to the court's ruling, attorneys for the city argued that the legislature had broad powers under the California Constitution to designate authority over school systems. But Janavs was not persuaded. She asked counsel what would stop the legislature from naming anyone to run the schools? "Maybe we should get the police chief into a partnership," she said. "Or maybe the district attorney. Where should the line be drawn?" Villaraigosa's legal team argued that the judge did not need to go that far, but Janavs returned repeat-

### *Judge Dzintra Janavs ruled that A.B. 1381 was unconstitutional.*

edly to their argument, questioning the position that the legislature's discretion had no apparent limits. The district's attorneys pressed the point, stating that the mayor's argument, taken to its logical conclusion, would mean that a "dog catcher" or "Jiffy Lube" could be designated to run the schools.

The day following the court's ruling, Villaraigosa's legal team filed an appeal, and the Second District Court of Appeal has granted an expedited hearing, meaning that a decision could be issued within the next few months. The mayor also asked the California Supreme Court to hear the appeal di-

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rectly, skipping the Court of Appeal; the school board joined in the request. There was no word from the high court as of press time.

Villaraigosa's attorneys went back to Judge Janavs with a request that she stay her ruling pending appeal, allowing him to move forward with his plans. At the January 11 hearing, however, Janavs rejected that request, dismissing

*The district's attorneys said the mayor's argument would mean that a 'dog catcher' or 'Jiffy Lube' could run the schools.*

the argument that legal precedent mandated that she grant a stay. She agreed with the district's attorneys who argued that a stay is triggered only when a judge's order requires affirmative action, whereas her order only prohibited the act from being implemented. Villaraigosa's attorneys then asked the judge to at least allow the mayor to proceed with his preparations for the takeover of the three high schools and their feeder schools, arguing that the delay during an appeal would mean that the plan could not be implemented by the beginning of the next school year.

Janavs refused, saying that the takeover provision was "one of the more serious aspects of unconstitutionality" contained in the law. To allow the mayor to move forward would cause the district "considerable interruption and interference," she said. The mayor is expected to ask the Court of Appeal for a stay of Janavs' original order.

The court's rulings have raised the stakes for the March school board elections.

Four of the seven seats are in contention. Villaraigosa is fighting hard and raising money for candidates that support his reform efforts, and opposing those who did not support A.B. 1381. United Teachers Los Angeles is also actively involved, and has endorsed two incumbents who opposed the mayor's plans for reform. In the race for the District Three seat in San Fernando Valley, Villaraigosa has endorsed prosecutor Tamar Galatzan who is running against incumbent Jon M. Lauritzen, a staunch UTLA supporter endorsed by the union. Lauritzen voted to oppose A.B. 1381 and to file the lawsuit to overturn it. In the fight for the District One seat, covering much of South Los Angeles, the union has endorsed Marguerite Poindexter LaMotte, who also opposes the mayor's plans and voted in support of the lawsuit. Villaraigosa has not endorsed her opponent, charter school founder Jonathan Williams, because to do so would alienate most of the black political establishment. In the District Five race, Bennett Kayser's bid for union

endorsement failed. Kayser is running against Yolie Flores Aguilar, who is endorsed by Villaraigosa. The candidates running for the District Seven seat have not yet been endorsed by either the mayor or the union.

If both Lauritzen and LaMotte win reelection, the mayor again will face a board dominated by his opponents. Though the union leadership joined with Villaraigosa in crafting and en-

*Janavs said that the takeover provision was 'one of the more serious aspects of unconstitutionality.'*

dorsing A.B. 1381, union membership voted to withdraw support for the bill after its passage.

In the meantime, contract talks between the union and the district remain stalled, with union leadership focused on winning a favorable contract that includes the demand for an 8 percent pay increase for teachers. (See the following story.) With its eye on a broader set of goals that have been stymied by stalled bargaining talks, the union is choosing to support sympathetic candidates irrespective of their positions on the mayor's fight over control of the district. \*

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## UTLA Schedules Strike Vote

United Teachers Los Angeles President A.J. Duffy has rejected the latest offer by the Los Angeles Unified School District and has scheduled a strike authorization vote for the middle of this month. The call for a strike vote comes after months of negotiations that began last summer.

The district's latest offer currently is for a 6 percent raise, including health benefits. Had it been accepted, the average pay for a teacher would be \$62,869, according to district officials. Starting pay would be \$44,991, and the maximum base pay would increase to \$79,160. The district claims that the health benefits package costs \$11,387 for each employee. The proposal also

includes three professional development "buy back days." It also provides for extra days of training and \$210 million to address the issue of reduced class size.

The union's counteroffer seeks an 8 percent salary increase. "There is a lack of seriousness to come up with a pay raise that will encourage teachers to stay in the profession and for others to come in," said Duffy.

If union members vote to strike, a walkout would take place in the spring, Duffy said. "We would shut the place down," he predicted. "Then the district would get a sense of what it's like to not have a teaching staff."

The last time LAUSD teachers walked out was in 1989; it lasted for nine days. \*

percent. However, noted the report, "for the school year that begins in late summer 2007, [the NCLB] will prevent more than 8,000 of California's underprepared teachers from continuing to teach unless they obtain a preliminary teaching credential or an intern credential."

The 10 California counties with the highest percentage of unprepared teachers, according to the report, are: Imperial (12.5 percent); San Joaquin (10.1 percent); Merced (9.5 percent); Los Angeles (8.5 percent); Lassen (8.3 percent); Napa (7.6 percent); Yuba (7.3 percent); Contra Costa (7.1 percent); San Bernardino (6.9 percent), and San Mateo (6.4 percent).

Students' test scores have risen as teachers have become more prepared, but slowly, said the report. Less than half of all public school students score at grade level in math and English, with the percentages at between 20 and 30 percent for African American and Latino students. The NCLB requires that all students be proficient in reading and math by 2014.

The report notes that the roots of the current problem can be traced to the reduction in class size instituted approximately a decade ago. The demand for teachers increased dramatically at a time when they were already in short supply. In order to meet the need, the state issued thousands of "emergency permits" and "preliminary teaching credentials." As a result, tens of thousands of teachers entered the schools without a teaching credential,

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## California Unlikely to Meet Federal Deadlines for Qualified Teachers

Though the state has reduced significantly the number of underqualified teachers in its public schools, it is unlikely that California will be able to have only "highly qualified" teachers in all classrooms in time for the deadline required by the federal No Child Left Behind Act, according to the latest status report by the Center for the Future of Teaching and Learning. And, it is almost certain that there will not be a credentialed, experienced teacher

in each classroom with low-income students of color, as required by a 2004 legal settlement and the NCLB.

According to the report, entitled "California's Teaching Force 2006: Key Issues and Trends," the number of unqualified instructors, defined as those who have yet to obtain a preliminary California teaching credential, has dropped by more than half since 2000-01, from 42,427 to 17,839 in 2005-06, or from 14 percent of all teachers to 6

with the majority going to schools with the poorest children and lowest academic achievement.

The results of the study show that students from the state's lowest achieving schools — which are also those with the highest proportion of minority and poor students — are more likely to have unprepared teachers several times during their school careers than are students in higher performing schools. "For example," said the report, "a sixth grader in the state's lowest-achieving quarter of schools has a four in 10 chance of already having had an underprepared teacher and a one in four chance of having had more than one such teacher." But," it continued, "a sixth grader in the state's highest-achieving quarter of schools has only a one in 10 chance of having had an underprepared teacher and a one in 50 chance of having had more than one underprepared teacher."

And, the problem does not stop there. According to the center, "rookies" or first- and second-year teachers, were nearly twice as likely to be working in the lowest-achieving schools as those with more experience. "Good teaching requires skill and knowledge acquired through experience," it said. "But in too many of our highest-need schools, the density of novice teachers overwhelms the capacity of veteran faculty members to provide the kind of mentoring that novices need to succeed."

The report emphasized, however, that California's teaching problems are not found only in poor communities.

"Across the state — not just in low-achieving schools — far too many fully credentialed high school teachers are teaching subjects in which they have not been trained," it said. "In math, one in every eight teachers is teaching out of field; in physical science, one in every five teachers is out of field."

The center commended the legislature on its work last year to take steps to reverse the trend, saying it was "headed in the right direction." Funding was added to math and reading programs and to four others. Legislation was passed to make it easier to become a teacher, assist new teachers, and provide incentives to experienced teachers to work in poor-performing schools. The report also applauded the enactment of S.B. 1655, authored by Senator Jack Scott (D-Pasadena), intended to stop the "dance of the lemons," whereby the worst teachers were ending up in the worst schools. (See stories about legislation in *CPER* No. 180, pp. 33-36, and No. 181, pp. 37-38.)

But the center urged policymakers to continue to move forward in the up-

coming year "to ensure that every California student is taught by a well-prepared and effective teacher." It listed a number of warning signs on the horizon, including the fact that about 100,000 teachers will be retiring in the next decade and that the production of new teachers has declined in the past year. The demand for teachers is uneven, it cautioned, with student enrollment going down along the coast and increasing rapidly in the inland portion of the state, where the biggest teacher shortages are likely to occur. It pointed to an increased need for teachers resulting from the \$2.9 billion settlement of the lawsuit between the California Teachers Association and the governor, calling for further class-size reductions in the lowest-performing schools. The center also notes that there continues to be a severe shortage of special education teachers, and there is no current state policy to produce large numbers of new math and science teachers or to expand the capacity of current teachers in these areas. \*

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## Teachers' Salaries Hit Relative Low-Point

A recent survey conducted by the American Federation of Teachers reveals that the average teacher salary increased by only \$1,000 from 1994 to 2004, much less than the average increase for other professionals. In 2004, the last year for which data was avail-

able, the average annual salary for teachers nationwide was \$46,597, significantly lower than full professors at \$95,000, computer system analysts at \$90,000, lawyers at \$78,000, engineers at \$72,000, accountants at \$55,000, and assistant professors at \$50,000. For the

# Pocket Guide to K-12 Certificated Employee Classification and Dismissal

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first time since 1982, teacher salaries were less than the average earnings of government workers.

The state with the highest average teacher salary was Connecticut at \$56,516. The lowest was \$33,236 in South Dakota. The largest increase

from 1994 to 2004 was in Georgia, and the largest decrease was in Alaska.

The AFT found that one-third of teachers who leave the profession within the first 10 years of teaching cite low salaries as a reason. \*

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## Classifying Teachers as Temporary Employees Based Only on Certification Invalid

The Bakersfield City School District's policy of classifying teachers and counselors solely on the basis of their certification is invalid, held the Fifth District Court of Appeal in a lawsuit brought by the Bakersfield Elementary Teachers Association. The district had classified as temporary employees all those teachers and counselors holding anything less than a regular credential. This included all those working under an internship credential, a pre-intern certificate, an emergency teaching permit, or a credential waiver.

The court found that a teacher's classification must be differentiated from his or her certification, and that the district's policy of making the employee's classification dependent on his or her certification violated the Education Code. It held that the district may classify as temporary employees "only those persons who, by virtue of the position they occupy or the man-

ner of service they perform, are defined or described as temporary employees in the Education Code."

A full analysis of the court's decision by Thomas J. Driscoll, the attorney representing BETA, will appear in the next edition of *CPER*. (*Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* [12-19-06] 145 Cal.App. 4th 1260, 2006 DJDAR 16514.) \*

## Local Government

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### Exceptions to PSOPBRA's Limitations Period Scrutinized in Appellate Court Rulings

In two decisions, the First District Court of Appeal has made a careful study of the exceptions to the statute of limitations provisions of the Public Safety Officers Procedural Bill of Rights Act. In *Breslin v. City and County of San Francisco*, the court found that the disciplinary charges filed against four San Francisco police officers were untimely because the matter did not involve a multi-jurisdictional or multiple-employee investigation. In *Bettencourt v. City and County of San Francisco*, however, the court found that the charges against the officers were timely filed because the limitations period was tolled during the pendency of a civil action where the officers all were named as defendants.

In *Breslin*, the officers were involved in surveillance of an apartment in an attempt to arrest a fugitive. When the officers tried to stop the car carrying the suspect, the driver evaded them. Two officers fired shots into the car, and a bullet fired by Officer Gregory Breslin struck and killed a passenger, Shiela DeToy.

On June 10, 1998, about a month after the incident, the city's Office of Citizen Complaints received a complaint from an eyewitness and began an investigation. The San Francisco Po-

lice Department and the district attorney also conducted investigations into the matter. On May 13, 1999, Diane DeToy, mother of Shiela DeToy, filed a civil rights and wrongful death action against the city, Breslin, and several unnamed Doe defendants. That action was settled, and on December 5, 2000, it was dismissed by the court with prejudice.

The OCC submitted a final report to the police department and its chief, Fred Lau, in April 2001, but the OCC and Chief Lau held different opinions as to the officers' culpability. Finally on June 28, 2002, disciplinary charges were filed against the four officers.

The San Francisco Police Commission rejected the officers' request to dismiss the charges based on Government Code Sec. 3304(d), the statute of limitations provision of the Bill of Rights Act, which requires that all punitive actions be undertaken within one year of the public agency's discovery of the misconduct. Citing three statutory exceptions to this rule, the commission concluded that the statute was tolled during the criminal investigation under Sec. 3304(d)(1) and during the civil action filed by DeToy under Sec. 3304(d)(6). The commission also held that the statute of limitations was prop-

erly extended because the case involved a multi-jurisdictional investigation, authorized by Sec. 3304(d)(3), and multiple employees, permitted by Sec. 3304(d)(4). Efforts to dislodge the commission's rulings before the trial court proved unsuccessful, and the officers appealed.

The statute of limitations period set out in the Bill of Rights Act calls for speedy adjudication of conduct that could result in discipline, began the court, and seeks to balance the public

*PSOPBRA requires punitive actions be undertaken within one year of discovery of the misconduct.*

interest in maintaining the integrity of the police force with the individual officer's interest in receiving fair treatment. Applying Sec. 3304(d)(1), the tolling provision relevant to a criminal investigation, the court concluded that the statute was tolled from May 13, 1998, until February 11, 1999, when the district attorney conducted an investigation into the conduct of all four of the officers involved in the shooting.

The civil litigation tolling provision, Sec. 3304(d)(6), did not toll the statute with regard to the three officers

**If you're going through hell, keep going.**

*Winston Churchill*

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

(11th edition, 2004)

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not named in DeToy's civil suit, the court reasoned, because the language of the statute permits tolling "if the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant."

Relying on the unambiguous wording of the statute, the court brushed aside the officers' assertion that the civil litigation provision should not apply because the DeToy suit had no actual effect on the OCC investigation. "Our goal is to interpret the language of the statute — not to insert what has been omitted or omit what has been inserted." The only nexus that is required is that the investigation and the civil action *involve* the same underlying incident, said the court, and that requirement has been satisfied. "The statutory language does not require that the OCC investigation into that matter actually be affected by the civil action, nor does it require that the OCC be aware of the action. It merely requires that a civil action be filed involving the same underlying incident as the OCC investigation. We have no power to graft onto the language of section 3304 the additional nexus that the officers would require," announced the court.

Based on its reading of the two tolling provisions, the court calculated that the disciplinary charges against the three officers not named in the civil suit were filed almost two-and-one-half years after the statute of limitations period expired. As for Breslin, the court concluded that disciplinary charges were filed 10 months after the statutory

period expired; this prompted the court to consider the city's arguments that this period was a "reasonable extension" under Sec. 3304(d)(3) or (4).

The court determined that the tolling period could not be extended under Sec. 3304(d)(3) as a multi-jurisdictional investigation because the OCC and the police department are not separate jurisdictions. Relying on the legislative history, the court concluded that application of the multi-jurisdictional provision "turns on whether one entity had reasonable control over the investigation." Finding that the San Francisco City Charter gives the police commission management control over both the department and the OCC, the court determined that the statutory period could not be reasonably extended based on the multi-jurisdictional provision found in Sec. 3304(d)(3).

The multi-employee extension permitted by Sec. 3304(d)(4) requires some connection between the involvement of multiple employees in the investigation and the need for an extension of the limitations period, said the court. To support an extension, there must be evidence that the city was actually and actively investigating multiple employees *during the 10-month extension of the limitations period*. Evidence outside the extended period or facts unrelated to the involvement of multiple employees must be disregarded, the court emphasized.

With these constraints in mind, the court reasoned that at the time the OCC extended the statutory period, the time

for investigating the conduct of the three officers not named in the DeToy suit had expired. Therefore, Breslin was the only officer whose conduct was under investigation during the period the statute was extended and the rationale for applying the multiple employee investigation exception to the limitations period for bringing charges against him had become “illusory.”

Accordingly, the court concluded that the record did not support the findings of the trial court or the commission that the city was diligent in bringing the charges against any of the four officers within the limitations period codified in Sec. 3304(d). (*Breslin et al. v. City and County of San Francisco* [1-16-07] A111455 [1st Dist.] \_\_\_ Cal. App.4th\_\_\_, 2007 DJDAR 720).

In the second case, five San Francisco police officers were accused of mishandling an incident involving four juveniles. The OCC received a series of complaints and began an investigation. A civil suit was filed against all five officers on December 10, 2002. The OCC recommended to the department that charges should be filed with the police commission on January 8, 2003, but the officers were not served with notices of disciplinary charges until April 2003.

The commission rejected the officers’ pleas that the charges be dismissed as untimely, finding that the limitations period was tolled from December 10, 2002, the date the civil action was filed. It rejected the assertion that the tolling provision did not apply

because the civil action did not actually impede the disciplinary matter. The trial court upheld the commission’s ruling, and the officers appealed.

As in *Breslin*, the court rejected the contention that the civil tolling provision is applicable only if the civil action had an actual bearing on the OCC investigation. Finding no ambiguity in the statutory language of Sec. 3304(d)(6), the court determined that the only requirement is that the investigation and the civil action involve the same incident. “The statutory language does not require that the investigation actually be impeded by the civil action,

nor does it require that the OCC is aware of the action.”

By law, said the court, the time for the tolling of the statute began when the civil lawsuit was filed, and the one-year statute of limitations had not expired when the charges were filed in April 2003. In fact, the court noted, Bettencourt and the other four officers were not dismissed from the civil action until April 12, 2005, two years after the charges were filed against the officers. (*Bettencourt et al. v. City and County of San Francisco* [1-16-07] A112880 [1st Dist.] \_\_\_ Cal.App.4th\_\_\_, 2007 DJDAR 730.)\*

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## Public Lawyers’ Salary Survey Available

*California Lawyer* magazine recently conducted a survey of the compensation paid to lawyers employed by the 12 most populous counties in the state. According to the data, the highest starting salaries — just over \$90,000 — are paid by San Francisco to its county counsel, public defenders, and district attorneys. At the bottom of the heap is Fresno County, which pays its new lawyers approximately \$42,000.

Annual salaries of new public defenders and district attorneys in Santa Clara County are equal to those paid in San Francisco. In Contra Costa County, new lawyers in the county counsel position begin their careers earning \$76,000.

In Los Angeles County, which employs nearly 2,000 lawyers, starting pay is \$56,000. The next most-populous county, Orange, pays its starting attorneys \$62,000. On average, attorneys in San Diego and Sacramento counties earn beginning salaries of \$53,000. In Ventura County, public defenders and district attorneys start off at \$57,000; county counsel earn \$46,000 at the beginning of their career. San Bernardino pays its lawyers starting pay, on average, of \$61,000, with district attorneys earning \$64,000 compared to \$58,000 paid to county counsel.

After five years of service, attorneys in Fresno remain at the bottom of the salary spread, earning approximately

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\$52,000. Lawyers in Sacramento average \$72,000 a year after five years. Attorneys in Los Angeles, Orange, and Riverside counties earn between \$81,000 and \$84,000 after five years. Lawyers in San Francisco (\$110,000) and San Bernardino (\$113,000) fall in mid-range of these counties after five years. Topping the list is Santa Clara County, where attorneys who have five years of service earn on average nearly \$150,000 a year.

Similarly, the highest salary paid to attorneys in non-managerial positions occurs in Santa Clara County, where experienced lawyers earn, on average, \$188,000. Attorneys in the top-paid slots in San Francisco receive \$159,000, followed by lawyers in Orange and San Diego counties, who earn \$145,000 and \$142,000 a year, respectively.

The lowest paid among experienced lawyers are those in Fresno (\$93,000) and Sacramento counties (\$106,000).

Experienced lawyers in the county counsel, public defender, and district attorney assignments earn the same salaries in Fresno, Orange, Riverside, Sacramento, Fresno, San Francisco, and Ventura. The largest difference among the assignments occurs in Contra Costa County, where in the top posts, county counsel earn \$134,000 compared to district attorneys, who garner \$122,000.

While no lawyers in Los Angeles County are represented by an employee organization, all attorneys in Orange,

San Diego, Santa Clara, Sacramento, and San Francisco are represented. In Fresno, San Bernardino, and Ventura counties, public defenders and district attorneys are represented by unions, but county counsel are not. In Alameda County, county counsel and public defenders are represented, but the district attorneys are not. In Contra Costa County, only the public defenders have union representation. In Riverside County, only the district attorneys are represented.

The survey data, compiled by Donna Horowitz, a Northern-California-based freelance writer, also includes information on county lawyers' health and pension benefits. Comparisons in these categories are difficult to quantify and vary from county to county. A complete summary of the survey results appears in the January issue of *California Lawyer* and is available on line at <http://www.californialawyer magazine.com/>. \*

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## Routine Discussion With Supervisor Did Not Warrant Bill of Rights' Protections

A conversation between a police officer and her commanding officer was a routine counseling session, not an interrogation leading to punitive action, and did not trigger the procedural protections conveyed by the Public Safety Officers Procedural Bill of Rights Act, the Second District Court of Appeal ruled in *Steinert v. City of Covina*. At the time of the discussion, the sergeant had no intention of imposing any discipline on the officer and saw the exchange only as a training opportunity.

The interaction between Stephanie Steinert, a police officer for the City of Covina, and Sergeant John Curley concerned a criminal records search of an individual named Robert Tirado. In her report, Steinert designated the Tirado search "TRNG," meaning it was conducted for training

purposes. The Department of Justice and city policies preclude the use of actual criminal records for training purposes.

Rachel Leo, the support services manager at the police department, reviewed the search records and discovered that Steinert had taken a vandalism report from Wendy Roff at approximately the same time the records search was conducted. The vandalism report did not mention Tirado, but Leo discerned a possible link between him and Roff. Leo suspected that Roff had mentioned Tirado and that this had prompted Steinert to review Tirado's criminal history.

Leo gave this information to Sergeant Curley, who believed that Roff probably had mentioned Tirado's name to Steinert when she was drafting the

vandalism report but that Steinert had failed to put his name in her report. Curley believed that as long as Tirado's name had been mentioned by Roff, the criminal records search was appropriate; the only problem was that Steinert erroneously had designated the search as one initiated for training instead of a search associated with the vandalism case.

### *Steinert claimed the conversation was an interrogation.*

Curley called Steinert into his office and discussed the report. Steinert told Curley that Roff had mentioned Tirado when she was making the report and that Roff's statement caused her to access Tirado's records. Curley told Steinert that, in the future, she should make sure to include names like Tirado's in her crime reports and should use a case number, not the "TRNG" notation, when she performed record searches on individuals. During the conversation, Curley asked Steinert if she had disclosed any confidential information about Tirado to Roff, and Steinert told him she had not.

As a supervisor, Curley is required to audit two crime reports a week, and since he had already reviewed the Roff vandalism report, he decided to use it as one of the two audited reports for

that week. As part of the audit, he contacted Roff, who reported that Steinert had disclosed confidential information to her about Tirado. Based on this information, Curley launched an internal affairs investigation and Steinert was terminated.

Steinert challenged the dismissal and asked the court to suppress her statements to Curley on the ground that the conversation was an interrogation that led to punitive action and that she should have been afforded the procedural protections of the Bill of Rights Act. After the trial court rejected Steinert's claims, she appealed.

The act conveys procedural rights to police officers who are "under investigation and subjected to interrogation...that could lead to punitive action." However, the act does not apply to "any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer." Therefore, as the Court of Appeal observed, "this entire matter...hinges on the nature of the conversation between Steinert and Curley in which she lied to him about releasing Tirado's criminal history to Roff: was it an interrogation that could lead to punitive action — in which case she should have been afforded the Act's procedural protections — or was it a routine interrogation in the normal course of duty, counseling, or informal verbal admonishment, such that no violation of her rights occurred?"

Affirming the trial court's finding, the appellate court found abundant evidence to support the conclusion that Curley believed Steinert had a legitimate reason for accessing Tirado's criminal records when Roff mentioned his name in the course of the criminal investigation. Designating the search as a training exercise instead of associating it with a specific case was viewed

### *Curley viewed the conversation as an opportunity to train.*

by Curley as "a simple training issue" and not a substantial rule violation. The mislabeling was not a matter that merited a written reprimand, Curley testified, and he viewed the conversation as an opportunity to train Steinert how to appropriately access the criminal records system. The court relied on Curley's account that the purpose of the conversation with Steinert was to address a common mistake in a training or education meeting.

The court also highlighted that, at the time of the discussion, Curley was unaware of any facts that would have caused him to believe that the search itself was improper or that Steinert had disclosed confidential information to Roff. He spoke to Steinert within a few hours of learning about the matter, it was a casual conversation that took

place in Curley's office with the door open, and it lasted less than five minutes. It was Curley's subsequent discovery that Steinert had disseminated confidential information to Roff and her denial that she had done so that prompted the internal affairs investigation, the court concluded, not the mislabeling of the Tirado search.

The court distinguished these facts from those in *City of Los Angeles v. Superior Court* (1997) 57 Cal.App.4th 1506, 127 CPER 24, where, at the time of the conversation, the commanding officer knew that the officer had engaged in serious misconduct that could

their brief encounter, Curley merely instructed her to use the case report number and to mention in the police report the name of the person whose records are searched. "The evidence supports the trial court's conclusion that this was a remedial interaction," said the court, "and not the attempt to tighten the metaphorical noose around an investigated officer's neck that Steinert posits." Observing that the act was not intended to elevate any com-

munication to an "investigation," the court concluded that Steinert was not entitled to the special protections afforded by the Bill of Rights Act and that the trial court properly refused to suppress the evidence of Steinert's apparent lie to Curley. (*Steinert v. City of Covina* [10-11-06; publication ordered by Supreme Court 1-3-07] B187940 [2d Dist.] \_\_\_ Cal.App.4th \_\_\_, 2007 DJDAR 197.) \*

*The supervisor did not suspect that misconduct had occurred.*

lead to discipline but failed to inform the officer that he was under investigation. Here, said the court, at the time of the meeting, Curley had no information demonstrating that Steinert had committed a crime, had unlawfully accessed Tirado's criminal records, or had improperly shared that information with Roff. He did not suspect that such misconduct had occurred. He only believed that Steinert had misdesignated the search as a training exercise session instead of by a case number. He had no intention to punish Steinert. Rather, in

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## **Firefighter Heart Disease Presumption Supports Service-Connected Retirement**

By operation of Government Code Sec. 31720.5, a firefighter who has completed more than five years of service and develops heart disease is entitled to a presumption that the medical condition arose out of and in the course of his employment. Therefore, absent evidence presented by the agency to rebut this presumption, he is entitled to disability retirement under Sec. 31720 as a matter of law. This legal tautology formed the basis of the Court of Appeal ruling in *Pellerin v. Kern County Employees Retirement Assn.* The court overruled the retirement board's decision that purported to distinguish between the two sections regarding the burden of proof.

The case involved firefighter Richard Pellerin, who worked for the Kern County Fire Department for over 31

years. Pellerin first experienced symptoms of heart disease in 1996, but an angiogram revealed no abnormalities. However, a treadmill test administered in 2002 caused dizziness and showed abnormal results. Pellerin applied for a disability retirement and retired at the rank of captain on March 22, 2002. In October 2002, Pellerin experienced chest pains and, when tests revealed arteriosclerosis, angioplasty was performed and a stent was inserted.

In November 2003, the Kern County Employees Retirement Association board granted Pellerin a service-connected disability under Sec. 31720.5. However, based on his counsel's understanding of tax law, Pellerin requested an evidentiary hearing to review the board's decision and sought a ruling that he was entitled to a



service-connected disability under Sec. 31720.

Following an evidentiary proceeding, a hearing officer concluded that Pellerin was entitled to a service-connected disability retirement under the heart-condition presumption set forth in Sec. 31720.5. However, he found that Pellerin failed to produce evidence that his heart disease was substantially related to his work for the fire department under Sec. 31720. Although Pellerin's medical expert concluded that the heart condition was caused by his employment, the hearing officer rejected that assertion based on Pellerin's negative 1996 angiogram, the absence of history of hypertension before 2002, Pellerin's family history of heart disease, and the fact that Pellerin had gained 30 pounds and adopted an inactive lifestyle after he retired. Nonetheless, the hearing officer recommended that Pellerin be granted a service-connected disability for his heart condition based on the presumption of Sec. 31720.5, but he denied a service-connected disability under Sec. 31720.

The board adopted the hearing officer's proposed decision. Pellerin asked the superior court to reject that ruling, but it declined to do so, and he appealed.

As a member covered by the County Employees Retirement Law of 1937, Pellerin may retire for disability under Sec. 31720 if his "incapacity is a result of injury or disease arising out of and in the course of the member's employment and such employment con-

tributes substantially to such incapacity." Section 31720.5 adds that if a fireman with five years or more of service "develops heart trouble, such heart trouble so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of employment... [and] shall in no case be attributed to any disease existing prior to such development or manifestation."

### *Sec. 31720.5 shifts the burden of proof to the agency to refute it.*

As the Court of Appeal explained, Sec. 31720.5 establishes a rebuttable presumption that shifts the burden of proof to the agency to refute it. The presumption is intended not only to facilitate factfinding, said the court, but "to help that class of employees by resolving doubts in their favor and consequently to effectuate the substantive policy goal of applying pension legislation broadly." Therefore, concluded the court, when the Sec. 31720.5 presumption applies, "it means the employee does not have to prove industrial causation; instead, the agency must disprove it."

In this case, industrial causation was established because the hearing officer found that Pellerin was entitled to a service-connected disability retirement under the presumption and the

retirement board adopted that finding. The hearing officer's finding and the trial court's affirmation that there was insufficient evidence of industrial causation to support a service-connected disability under Sec. 31720 is "logically inconsistent" because the function of Sec. 31720.5 is to provide a means of establishing the causation element of Sec. 31720. Said the court:

Pellerin was entitled to take advantage of those means because he was a firefighter with five or more years of service, he had a heart condition, and the presumption of industrial causation was un rebutted. Under these circumstances, the agency *must* find industrial causation. It may not take the position that the employee must show by a preponderance of evidence that his job substantially contributed to his heart problems. Doing so improperly shifts the burden of proving industrial causation back onto the employee.

The court rejected the association's contention that, based on the language of Sec. 31720, Pellerin had to show his employment as a fire captain substantially contributed to his heart disease. That assertion reflects two misconceptions, said the court. First, it is inconsistent to say an employee is both granted (under Sec. 31720.5) and denied (under Sec. 31720) a service-connected disability retirement. The two provisions are parts of a single scheme for making a single decision, said the court: whether an employee is entitled to a service-connected disability retirement. Section 31720 sets forth the factual elements that must exist to qualify an employee

for a service-connected disability retirement. Section 31720.5 sets up an evidentiary rule — the rebuttable presumption of industrial causation applicable to certain employees with heart conditions — to be used in establishing one of those factual elements. “Where the presumption applies and is un rebutted, it is incorrect to say that the employee is still not entitled to a retirement ‘under section 31720’ even though he is entitled to one ‘under section 31720.5’ because the employee did not prove industrial causation. An employee to whom the presumption applies under section 31720.5 has established the industrial-causation element of section 31720 unless the presumption is rebutted — which was not done here.”

The court also explained that the substantial contribution language of Sec. 31720 does not add another element of causation. Reviewing the legislative history of the statute, the court said that the standards in Sec. 31720 and Sec. 31720.5 are the same. In other words, what an applicant must prove to qualify for a service-connected disability retirement under Sec. 31720 is what the Sec. 31720.5 presumption presumes. “As a matter of law,” announced the court, “an agency cannot concede that the section 31720.5 presumption applies and is un rebutted and then go on to find that industrial causation under section 31720 has not been shown.”

The court commented that Pellerin’s counsel’s belief that benefits awarded pursuant to a rebuttable presumption are taxable “may be unfounded.” However, it nonetheless directed the Kern County retirement board to set aside its finding that Pellerin’s heart disability was not shown

to be service-connected and to award him a service-connected disability retirement based on both Secs. 31720 and 31720.5. (*Pellerin v. Kern County Employees Retirement Assn.* [12-18-06] 145 Cal.App.4th 1099, 2006 DJDAR 16421.) \*

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### Challenge to Local Decert Rule Barred

The Public Employment Relations Board declined to hear a challenge to Orange County’s rule requiring a 50 percent showing of support for a decertification drive. This request was denied because SEIU Local 660 had not submitted a petition under the local rule within the six-month statute of limitations period. Absent a showing

that the union had been harmed by operation of the rule, PERB held that the unfair practice charge was untimely. The board also ruled that maintenance of the rule was not a continuing violation of the Meyers-Milias-Brown Act. See PERB log for details of *SEIU Loc. 660 v. Orange County*, PERB Dec. No. 1868-M. \*

# State Employment

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## SPB, as State Agency, Is Subject to Prohibition on Unfair Practices

The State Personnel Board is not an “employer” of employees in state bargaining units 12 and 13, but the Public Employment Relations Board has ruled that the SPB is subject to Sec. 3519 of the Dills Act. In *State of California (State Personnel Board)* PERB Dec. No. 1864-S, the board found that the SPB is subject to PERB’s jurisdiction, but that the

*IUOE negotiated a dispute resolution process for disciplinary matters.*

SPB did not interfere with employee rights under the Dills Act when it refused to accept disciplinary settlement agreements which were reached during a board of adjustment or arbitration procedure in the memorandum of understanding between the state and the International Union of Operating Engineers. A plurality of the board reasoned that the employees did not have a Dills Act right to have the SPB approve settlement agreements achieved

through the board of adjustment procedure because the Supreme Court held in 2005 that review of disciplinary matters by an entity other than the SPB is unconstitutional.

### MOU Alternative to SPB

Under the state Constitution, one of the SPB’s duties is to review disciplinary actions of state employees. The Government Code gives employees the right to challenge major disciplinary actions within 30 days of the effective date of the adverse action. If challenged, the SPB holds a hearing to determine whether it will uphold the disciplinary action. Although parties are not required to submit settlement agreements to the SPB, the Government Code provides that the SPB may approve settlement of a pending case and make the negotiated disposition final and binding and, therefore, enforceable in court.

In 1999, IUOE negotiated a dispute resolution process for disciplinary matters that allowed an employee to make an irrevocable choice whether to submit a challenge to the SPB or to waive the SPB process and use the grievance and arbitration procedure in the MOU. The contractual procedure

involved an oral presentation before a board of adjustment. If the board of adjustment decided the matter by majority vote, the decision was final and binding. If not, the union could decide whether to submit the matter to final and binding arbitration.

### SPB Rejection

Beginning in 2000, IUOE began having difficulty implementing settlement agreements in disciplinary actions because the controller’s office would not process the necessary paperwork without SPB approval. The SPB’s chief counsel had informed the controller’s office that the SPB believed the board

*SPB would not approve settlement agreements that it believed were reached during the MOU process.*

of adjustment process deprived the SPB of the opportunity to carry out its constitutional duty to review discipline, and the SPB would not approve agreements that it believed were reached during the MOU process leading to a board of adjustment hearing.

The union filed a petition for a writ of mandate in court, challenging the SPB’s actions. The chief counsel offered

to reinstate several employees whose settlements were stalled if IUOE and DPA agreed to place a moratorium on the use of the MOU's disciplinary procedures until the court ruled on the constitutional issue. IUOE rejected the proposal.

In 2001, the SPB began to insert conditions into its approval of settlement agreements that occurred during the SPB process. If the case was in fact settled through the MOU's grievance

*The agency asserted that it was not an 'employer' under Sec. 3513(j).*

and board of adjustment procedure, the SPB warned, the agency's approval of the settlement would be null and void.

In 2002, after the PERB complaint was filed, the SPB issued a precedential decision in which it rejected the settlement agreements of six employees, even though four had appealed their discipline through the SPB procedure. In the decision, the SPB explained that it had no way of knowing whether the agreements were made after being submitted to a grievance and arbitration process. It wanted to assure that the employees had had the opportunity to exercise their constitutional right to appeal discipline to the SPB. The agency required that all settlement agreements

submitted from the IUOE-represented bargaining units affirm that the disciplinary action was not challenged in an MOU process.

#### **PERB Jurisdiction Resisted**

The union filed an unfair practice charge against the SPB, and PERB issued a complaint alleging that the SPB violated the Dills Act when it refused to approve settlement agreements that resulted from a board of adjustment procedure. The SPB filed a motion to dismiss the complaint. The agency asserted that it was not a state employer or "employer" under Sec. 3513(j) of the act and that PERB lacked the jurisdiction to resolve the constitutional question which underlay the dispute. After a PERB administrative law judge agreed with the SPB and dismissed the complaint without a hearing on the motion, the union appealed the dismissal to PERB. The board remanded the matter to the ALJ for a hearing because it found the ALJ's jurisdictional ruling overly broad. It reminded the SPB that, while it could not rule on the constitutionality of SPB actions, it did have authority to harmonize provisions of the Dills Act with other laws.

During the pendency of the case, the SPB also had asked the superior court to find that the MOU's alternate dispute resolution procedure was unconstitutional. The superior court ruling in favor of the SPB was appealed to the Court of Appeal, which also held that the MOU provision was unconstitutional.

In December 2003, the ALJ issued a proposed decision. He maintained that PERB had jurisdiction over the matter. He found that the SPB had adopted a policy in its precedential decisions under which it would not approve settlement agreements in disciplinary actions that were the product of the MOU procedure solely because they derived from the negotiated agreement. This policy, decided the ALJ, interfered with the right of employees to be rep-

*The SPB's policy interfered with the right of employees to be represented by the union.*

resented by the union and the union's right to represent its employees, and also discriminated against employees and the union because of the exercise of their rights in violation of Secs. 3519(a) and (b). The SPB appealed to the board.

After the ALJ issued his decision, the California Supreme Court decided in *State Personnel Board v. Department of Personnel Administration* (2005) 37 Cal.4th 512, 176 CPER 37, that the MOU provisions violated Article VII, Sec. 3 of the Constitution, which provides that the SPB "shall...review dis-

ciplinary actions” against state civil service employees.

### **Jurisdiction Over SPB**

The board first determined that the SPB was subject to the prohibitions of Sec. 3519. The board adopted the ALJ’s reasoning that Sec. 3519 governs the conduct of the SPB even though it is not an “employer” or “State employer” under Sec. 3513(j). Section 3513(j) states that “‘State employer,’ or ‘employer,’ for purposes of bargaining or

### *Whether SPB is an ‘employer’ is irrelevant to a determination of whether it committed an unfair practice.*

meeting and conferring in good faith, means the Governor or his or her designated representatives.” Section 3519, however, makes it unlawful for the “state” to commit any of five kinds of conduct, including interfering with employees because of their exercise of Dills Act rights, the ALJ noted. The definition of “employer” in Sec. 3513 is drafted so narrowly that it would rewrite the definition and expand it beyond the legislature’s intended meaning to treat it as synonymous with the term “state” in Sec. 3519, he reasoned. Therefore, the fact that the SPB is not

an employer under Sec. 3513 is insufficient to exclude it from PERB’s jurisdiction, the ALJ concluded.

Following this reasoning, the board explained that whether SPB is an “employer” is irrelevant to a determination of whether the entity committed an unfair practice. The board held that the SPB is subject to Sec. 3519, overruling *State of California (Office of the Lieutenant Governor)* (1992) PERB Dec. No. 920-S. Although brought to its attention by dissenting Member Shek, the board ignored its prior ruling in *California State Employees Assn. (Gonzales-Coke et al.)* (2000) PERB Dec. No. 1411-S, in which it held that PERB’s own action could not be an unfair practice because the description of the purpose of the Dills Act in Sec. 3512 makes it clear that the term “state” “pertains to the state as employer.”

PERB also turned aside the SPB’s argument that it was not subject to PERB’s jurisdiction when acting in its adjudicatory capacity. Its conclusion that PERB could exercise jurisdiction over the adjudicatory actions of the SPB rested on two Supreme Court cases: *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, CPER SRS 16, and *State Personnel Board v. Fair Employment and Housing Commission* (1985) 39 Cal.3d 422, 67 CPER 20.

In fact, as dissenting Member Shek pointed out, the court in *Pacific Legal Foundation* addressed potential overlaps in jurisdiction between PERB and the SPB, not whether PERB had jurisdiction to review the SPB’s actions. And,

in *Fair Employment and Housing Commission*, the court skirted the question of whether the commission could review, in a handicap discrimination case, the SPB’s hiring criteria or its decision to uphold on appeal the California Highway Patrol’s refusal to hire several handicapped applicants for civil service jobs. Although the commission had before it a case in which the SPB was being accused of discrimination, the court discussed only the issues of overlapping jurisdiction and the potential for incon-

### *SPB’s adjudicatory authority does not insulate its actions from PERB review.*

sistent results from the SPB and the commission. It did not address whether the commission had jurisdiction to decide whether the SPB’s determination of the physical qualifications for employment and its adjudicatory decision on appeal were discriminatory.

The board concluded from the reasoning and outcome in *Pacific Legal Foundation* and *FEHC* that the SPB’s adjudicatory authority does not insulate its actions from PERB review. Because the merit principle was actually reinforced, not hindered, by PERB’s determination whether non-merit factors such as union animus have played a part in civil service

# *cper*

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

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employment, reasoned PERB, it had jurisdiction to examine the SPB's actions for the limited purpose of deciding an unfair practice dispute.

### No Interference

The board examined whether the SPB had interfered with rights granted to employees by the Dills Act. The board framed the issue as whether the act provides a right to submit settle-

*The board rejected the notion that 'unconstitutional activity constitutes a claimed right under the Dills Act.'*

ment agreements obtained during the board of adjustment process to the SPB. By contrast, Chairperson Duncan asserted in his dissent, the ALJ viewed the issue as whether the SPB improperly determined it would not review settlement agreements reached during the contractual board of adjustment procedure.

Relying on *State Personnel Board v. Department of Personnel Administration*, the board concluded that no entity other than the SPB can review discipline of a civil service employee, even if the matter is subsequently submitted to the

SPB. In *SPB v. DPA*, the court found unconstitutional legislatively approved MOUs that allowed employees to obtain review of discipline through arbitration rather than the SPB process. In that case, the court also was faced with, but did not approve, another unit's MOU provisions that required submission of an arbitrator's decision to SPB for approval. Noting that IUOE's submission of settlement agreements for review was similar to the review provisions found unconstitutional in *SPB v. DPA*, the board rejected the notion that the "unconstitutional activity, submitting BOA 'settlement agreements' for review by the SPB, constitutes a claimed right under the Dills Act." The union's complaint was therefore dismissed.

Member Shek wrote a lengthy opinion explaining her view that the SPB is not subject to Sec. 3519 of the act because it was performing in its constitutional quasi-adjudicatory capacity and not as an employer for purposes of the Dills Act. She also asserted that the SPB's adjudicatory authority

insulates it from PERB's jurisdiction because its proceedings fall outside the realm of negotiation or administration of collective bargaining agreements. As she noted, there is no breach of the duty of fair representation if a union refuses to represent an employee before the SPB. She found the *Pacific Legal Foundation* and *FEHC* cases inapplicable.

Chairperson Duncan emphasized in his dissent that the sole reason the SPB refused to process the settlement agreements was because of the MOU provisions. The ALJ found that the SPB never before had questioned how settlement agreements were reached. The chair explained that he would have adopted the ALJ's findings that the SPB interfered with employee rights and that he joined the plurality position on PERB's jurisdiction over the SPB. (*International Union of Operating Engineers v. State of California [State Personnel Board]* [11-14-06] PERB Dec. No. 1864-S, by Member Neuwald, with Member McKeag; Member Shek concurring and Chairperson Duncan dissenting.) \*

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## Receiver Points to SPB as Obstacle in Prison Reform

The State Personnel Board is not moving fast enough for the receiver appointed by Federal District Court Judge Thelton Henderson to oversee the state prison health care program. In September, Receiver Robert Sillen asked the board to waive a drug-testing require-

ment for licensed vocational nurses, but he still had not received an answer by the end of the year. And he is miffed that the board reinstated a medical technical assistant after he issued instructions that no MTAs should be returned to that position, since he plans to re-

**Make everything as simple as possible, but not simpler.**

*Albert Einstein*

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place employees in the MTA classification with licensed vocational nurses by June 1, 2007. The receiver is threatening to ask for sanctions against the board and is planning to transfer review of clinicians from board administrative law judges to other clinicians. The SPB claims he has some of his facts wrong.

#### **Testing Requirement ‘Unwarranted’**

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 Henderson determined that little progress had been made and decided to appoint a receiver to reform the correctional system’s medical program for inmates after he found that an average of one preventable death was occurring in the prison system each week.

One of the receiver’s plans for fundamental change within the inmate health care system is to move to a “nurse-driven” system from one he says focused on staffing the health care program with physicians and medical technical assistants. MTAs are licensed vocational nurses who are used for inmate supervision and custody, and are represented by the California Correctional Peace Officers Association. Sillen claims that MTAs are not used in any other prison system in the United States, and that their dual capacity com-

plicates lines of authority and creates “unnecessary tension among nursing clinicians” in the prisons. Also, they are expensive. In his third bimonthly report, filed in December, he indicated he would eliminate the use of MTAs in the correctional system and allow the employees to transfer to either licensed vocational nurse, registered nurse, or correctional officer positions, a change that would result in \$39 million in compensation savings in the first year of implementation.

### *Sillen requested that the SPB waive the drug-testing requirement for LVNs.*

Last summer, Sillen discovered that the SPB was requiring applicants for LVN positions to pass a drug test prior to employment. He requested that the SPB waive the drug-testing requirement for the California Department of Corrections and Rehabilitation. According to the board’s chief legal counsel, Elise Rose, the receiver has never elaborated why he wanted the testing requirement waived. Nevertheless, SPB staff explained in a letter that the waiver would be granted, subject to ratification by the board. Rose told *CPER* that a final decision had not been made by mid-January, but board minutes show the board initially denied the waiver in



October and, in December, placed on hold an amended staff resolution to grant the waiver. The board was scheduled to meet with the receiver in late January, after *CPER* went to press.

Sillen believes that the drug-testing requirement was improperly adopted. State regulations do not allow applicant drug testing unless the board has approved the requirement after an agency has shown evidence in a public

*Rose disputes the claim that the testing requirement was improperly adopted.*

hearing of several criteria, including evidence that the employees would work in a sensitive position with such independence that supervisors or others would not discover a mistake caused by inattentiveness, diminished coordination, or other compromised abilities. Sillen charges that no public hearing was conducted on the propriety of drug testing for LVNs in the prisons, and that their work does not warrant the requirement.

Rose disputes the claim that the testing requirement was improperly adopted. The LVN-safety classification was established in 2000, and, at the request of the Department of Mental Health and the Department of Developmental Services, a drug-testing re-

quirement for the class was approved after a public hearing in August 2000, Rose told *CPER*. Rachel Kagan, the receiver's spokesperson, contends that that public hearing does not suffice because the LVN class used in prison medical care is a new classification with a different hiring authority. There were no LVNs in the prison medical system previously, she says, and their work in the prison medical system does not warrant drug testing.

In his report, the receiver listed numerous medical positions that do not have a testing requirement, ranging from physicians, surgeons, and nurse practitioners to registered nurses, pharmacists, and pharmacy technicians. However, registered nurses and supervising registered nurses with a safety designation must pass a drug test prior to employment. Rose told *CPER* that drug testing was approved for the nurse practitioner-safety classification, but was erroneously omitted from the class description. As for the other positions that do not require applicant drug-testing, Rose believes that testing might be advisable in some sensitive positions, but the corrections department has not requested it.

Rose objected to the receiver's characterization of the board as an obstacle. Last July, board staff promptly eliminated an impediment to hiring LVNs in the prisons, she claims. Previously, LVN-safety employees were approved for hire by DMH and DDS, but could be employed by the CDCR only after obtaining the consent of DMH or

DDS. Board staff removed the consent requirement.

**Attack on SPB Decision**

More egregious than the drug-testing dispute is the receiver's attack on the SPB for its decision regarding an MTA who had been fired for misconduct and dishonesty relating to providing medication to an inmate, says Rose. Last June, the SPB overturned the dismissal and reinstated the MTA, subject to a six-month suspension. The receiver objected to the reinstatement, both because of the planned elimination of MTAs from the prisons and because the MTA was reinstated to patient care.

The board's role is to determine if cause for termination was proven, and if not, to return the employee to employment. In this case, the employee claimed a doctor authorized her actions, and the department did not call the doctor to rebut her testimony, Rose says. If the employee's position no longer exists, the CDCR has the responsibility to figure out how to return the employee to work, asserts Rose. The appropriate way to challenge an SPB decision, by writ to the superior court, was not used, she points out. She was astonished that the receiver attempted to change the final decision of the board.

In a November 7, 2006, letter to SPB Executive Officer Floyd Shimomura, the receiver's chief of staff, John Hagar, castigated the board for "another inexcusable example of the Board's downplaying serious, deliber-

ate clinical misconduct and dishonesty," which he asserted would place patients at risk of serious future harm by returning to patient care an employee that the board itself characterized as "clueless." He accused the administrative law judge who heard the case of stating falsely that the MTA had a discipline-free record, and charged that she had been involved in another case in which a patient died. Hagar requested that the board omit that part of its decision that reinstated her to an MTA position or that it find other state employment for her. If not, the letter warned, the employee "will be instructed to cease providing patient care and to report to an alternative work assignment" at the SPB headquarters.

*Hagar requested that the board omit that part of its decision that reinstated an MTA.*

Kagan told *CPER* that the receiver will not accept the employee for work in patient care in the prisons, although she could work in another job in the corrections department. As a result, CDCR assigned the employee to the mailroom, but her attorney is insisting she be reinstated as an MTA.

### **Plans to Change SPB Review**

In the November 7 letter, Hagar foreshadowed plans to change the disciplinary review process for medical employees charged with malpractice. The class descriptions for the positions would be modified to add that employees maintain "full staff privileges" as a condition of continued employment.

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### **CAPT's Pay Raise Prediction Borne Out**

When Federal District Court Judge Thelton Henderson granted the prison health care receiver's motion to raise salaries of medical personnel in the California Department of Corrections and Rehabilitation last fall, the California Association of Psychiatric Technicians hinted it had received assurances that pay hikes also would be forthcoming for mental health workers in the department. (See story at *CPER* No. 181, pp. 49-52.) In mid-December, the prediction became a reality. Federal District Court Judge Lawrence Karlton approved raises that Special Master J. Michael Keating Jr. had proposed with the cooperation of the Department of Personnel Administration.

### ***Coleman v. Schwarzenegger***

In 1995, Karlton found that prison officials were deliberately indifferent to the needs of mentally ill prisoners, and he ruled the state prison system's treatment of mentally ill inmates was un-

constitutional. The mental health care system was found deficient in a number of areas, one of which was staffing. As a result, the court appointed a special master to oversee compliance with

Charges that affect staff privileges would be heard during a due process review which would involve other clinicians evaluating the employee's conduct, "rather than administrative law judges who have no medical training, no prison experience, and no knowledge of the subject's clinical history." \*

*Vacancy rates among psychiatrists have been climbing since early 2005.*

the order to implement a minimally adequate mental health system in the prisons. The *Coleman* lawsuit is separate from the *Plata v. Schwarzenegger* case (see pp. 55-58 of this issue of *CPER*), which concerns the prison medical system.

In the past, Judge Karlton has implemented compensation increases to combat high vacancies in specific

classifications or locations. In 2000, psychiatrists received a \$20,000 increase. Differential pay has been ordered in 2005 for all clinicians in the Corcoran facility, for example.

In his 16th report to the court, delivered in December, the special master reiterated that vacancy rates among psychiatrists have been climbing since early 2005. In addition, newly allocated positions in mental health classifications have made it difficult for the state

*Rather than objecting  
or waiting for a court  
order, the state  
proposed a plan.*

to recruit and retain sufficient numbers of employees in order to avoid reliance on contracts with outside practitioners. Low pay has been blamed for the staff shortages. DPA's own survey in 1995 found that the maximum pay for staff psychiatrists in Sacramento, the Los Angeles Area, and the Bay Area was 57 percent less than peers in the market. Psychologists' pay was 33 percent behind the market, and recreational therapists were suffering from a 22 percent pay lag.

In November, the special master informed the state that it would be asking the court to order the state to propose a plan to address undercompensation of its mental health employees. Rather than

objecting or waiting for a court order, the state proposed a plan for inclusion with the special master's report. As the special master wrote, "Perhaps the defendants' experience in *Plata* with the mechanics of salary enhancements persuaded them of the utility, even the necessity, of a proactive approach to the issue." (See story on raises for prison medical personnel in *CPER* No. 181, pp. 49-52.)

**Salaries Hiked**

Effective January 1, salaries were raised substantially for nearly 20 classifications. The new salary ranges roll into base pay most of the recruitment and retention differentials that have been awarded in the past. This move will raise retirement benefits of the employees, as retirement formulas use base pay without differentials.

The maximum salary for a chief psychiatrist jumped from \$160,000 to \$298,000 a year. The maximum annual salary for a clinical psychologist rose from \$73,000 to over \$100,000. Starting pay for a psychiatric technician has been boosted from \$40,000 to \$55,000 annually. A senior psychiatric technician can earn a salary as high as \$68,500.

As in the *Plata* case, the state warned that it would be unable to move quickly to implement the proposed raises because of state law requirements. Therefore, the judge approved the special master's recommendation to waive state laws that required like salaries for comparable duties and collective bargaining for represented employ-

ees. It also waived the restriction that limited compensation to amounts which were payable from existing appropriations.

CAPT applauded the court for taking a step that it believes will increase mental health staffing in the department. Now it is calling on the Department of Mental Health and the Department of Developmental Services to implement similar pay raises. The effort could be successful. Last year, after the *Plata* court implemented recruitment and retention differentials, the Department of Mental Health was forced to raise nurse salaries to match CDCR rates when its nurses began to transfer to correctional facilities in search of higher pay. \*

## Higher Education

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### CFA Sues to End Executive Transition Perk

The Board of Trustees of the California State University voted in November to amend a controversial policy that gave departing executive employees a year of paid leave whether or not they became employed elsewhere or continued to serve the university. Despite the amendment, the California Faculty Association filed suit, claiming the transition payments are illegal. The lawsuit asks for recoupment of amounts already paid to, or on behalf of, former executives as well as an injunction to prohibit the practice.

#### Only Future Execs Affected

Chancellors, presidents, and vice chancellors appointed on or after November 1992, became eligible for a year of paid leave after their CSU employment ends. Pay during the transition year was midway between the executive's salary and the maximum salary for a 12-month full professor. For example, former executive officer and chief academic officer David Spence received \$173,952 while the maximum salary for a professor in 2005 was \$112,000. He received the pay despite having secured new employment in another state that paid him \$225,000 annually.

After this executive perquisite was publicized in a special report by the *San Francisco Chronicle* last summer, CFA seized on the issue. Mired in stalled contract talks over salaries and workload, the union started a campaign to "stop the ripoffs." The union contrasted the generous executive benefit with CSU's offer to the faculty union. The university is proposing general salary increases of less than 15 percent over the next four years, after faculty received only 7.5 percent in across-the-board raises in the last five years. Reports that the university had spent about \$4 million on transition pay and special assignments for former executives also incensed students, since student fees have risen 76 percent in the last four years.

Individual trustees wrote opinion letters and editorials in various newspapers, explaining that a competitive executive package is necessary to attract and retain top-quality executives to the university. The chair of the board, Roberta Achtenberg, cited a 40 percent salary lag between executives of 20 comparable universities and those at CSU. She claimed that nearly 40 percent of the comparators offered tenure and paid leave to departing presidents and chancellors. CFA claims, however,

that no public university offers a benefit without some continued service to the university.

In response to pressure from employees, students, and the media, the board of trustees decided to revise, but not abolish, the policy. Effective November 15, 2006, newly hired executives are eligible for a transitional program only if the executive has served in a CSU executive position for five years, is in good standing when the transition program begins, has identified a CSU

*Spence received transition pay despite having secured new employment.*

position to occupy after the transitional program, and does not accept outside employment. The new policy includes no minimum or maximum transition period and no compensation guidelines. It provides that the chancellor or the board will negotiate the duration of the program, "specific duties and assigned locations, compensation and support." If the parties are unable to reach agreement, says the new resolution, there is no right to a transition program and no right to appeal to the board to obtain a transitional benefit.

The university did not extend the new restrictions to 22 current executives. Achtenberg issued a statement

that explained the prior policy was part of the employment agreements of current high-level employees and could not be changed retroactively.

### **'Gift' or 'Double-Dipping'**

CFA responded swiftly. The union's court papers claim that the transition pay is either a gift of public funds or a publicly funded retirement system. Either way, asserts the union, the compensation is illegal. Article 16, Sec. 6,

*CFA contends that the executives receive credit for the same service in two systems.*

of the state Constitution prohibits any gift of public funds. In order to avoid violation of this restriction, benefits received after an employee has left public employment have been treated as deferred compensation — earned while working, but paid afterward. Accordingly, CSU contends that the transitional benefit is not a gift because it is part of the compensation package the board approves at the time of hire for the services of the executive employee.

If the paid leave is deferred compensation, argues CFA, then it constitutes a public retirement system. Government Code Sec. 20303(a) excludes from membership in the California

Public Employees Retirement System persons who receive credit for their service in another publicly funded retirement system. CFA contends that the executives essentially receive credit for the same service in two systems — CalPERS and the executive transition program. CSU flatly denies that executives are accruing benefits simultaneously from two agencies, says university spokesperson Clara Potes-Fellow.

While the law does make an exception for some deferred compensation plans, the only plans that comply are those which set aside the employee's own wages, CFA's attorney Glenn Rothner told *CPER*. CSU's transition perk does not involve deferring executives' wages, he pointed out.

### **Executive Raise During Factfinding**

As *CPER* went to press, the board of trustees increased 27 executives' salaries by 4 percent effective July 1, 2006. The Committee on University and Faculty Personnel noted in its rationale that a consultant study indicates CSU presidents' salaries lag those of their peers at comparator institutions by 42 percent. While 4 percent is not sufficient to close the gap, the recommendation asserts that the percentage is "consistent with the offer to the CSU faculty."

Bargaining between CFA and the university is at impasse, and the parties entered factfinding last month. The university's offer prior to mediation was a 4 percent raise for 2006-07, but only

a 3 percent increase was certain. The last 1 percent was contingent on receiving more money for salaries than the compact between the governor and the university calls for. As CFA feared, the governor's budget did not include the 1 percent augmentation.

The governor's budget underscores the difficulty the university has had paying competitive salaries. CSU's board resolved last year to bring all employees' salaries to market rates in

*CSU presidents' salaries lag those of their peers at comparator institutions by 42 percent.*

five years. But despite a 3.5 percent increase for 2005-06, the average professor salary at CSU is now 18 percent lower than the average salary in comparator institutions, a step backward from the 12 percent lag that existed two years ago. The university has closed some of the executive pay gap, however. After an average 14 percent raise in September 2005, the pay lag for executives shrank to 42 percent from 49 percent two years ago. \*

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

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

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## U.C.'s Health Care Workers Struggle to Have a Say in Pension Bargaining

California health care professionals represented by the University Professional and Technical Employees, CWA Local 9119, are a lonely group of employees trying to gain raises while fighting off university attempts to charge more for their benefits. Several bargaining units have formed a coalition to negotiate U.C.'s plan to restart employee pension contributions. (See *CPER* No. 181, pp. 42-44.) But the university will not agree to let the health care unit join the coalition negotiations and is demanding a waiver of the unit's right to bargain separately for benefits. U.C. and its employees are wrestling with a widening pay lag and a simultaneous need to divert more employee pay into pensions and health benefits.

### Pension Holdup

Bargaining between U.C. and the health care professional unit began last April. In August, as the parties began to discuss compensation, the university proposed restarting employee contributions to the University of California Retirement System. Neither U.C. nor its employees has made any contributions to UCRS since 1990, when the system was overfunded by 40 percent. Since then, the 2 percent employee contribution has been placed into a defined contribution plan. Now, however, the surplus is dwindling and is expected to

disappear by 2010 without new funding. The university administration and the academic senate agree that participation should begin before the retirement system becomes less than 100 percent funded to avoid a sharp spike in the amount of necessary contributions.

*All unit employees would contribute an additional 1 percent of pay beginning July 1, 2008.*

The university initially proposed to use the 2 percent of the employee's salary that currently goes to a defined contribution plan as the employee contribution to the pension plan beginning July 1, 2007. For those paid over \$94,000 annually, the highest salary subject to Social Security taxes, U.C. suggested an employee contribution of 4 percent of the amount over \$94,000. All unit employees would contribute an additional 1 percent of pay beginning July 1, 2008.

In October, UPTE requested that it join the coalition bargaining on pension contributions. The university re-

fused. Instead, U.C. offered a five-year compensation package along with a demand that UPTE's health care unit cease negotiations on pension contributions and agree to go along with whatever the UPTE-represented researcher and technical worker units settle on in the coalition negotiations. U.C. reasoned that removing pension bargaining from the health care professionals' negotiations would enable the parties to settle the contract. The university suggested UPTE also leave a provision in the contract that waives bargaining over health benefits as long as all other staff employees in the same facility have the same benefits and contribution schedules.

### Pay vs. Benefits

UPTE lashed out at the university for holding the unit's wage increases hostage over U.C.'s demand for a waiver of the right to negotiate employee contributions. According to UPTE's executive director, Dominic Chan, the parties had reached agreement on more than 90 percent of the contract and had nearly agreed on salaries. If the union waived pension bargaining rights and settled the contract, health care workers would lose not only a voice in the pension negotiations, but also the right to strike in support of the units that are engaged in coalition bargaining.

U.C.'s pay severely lags the market for some health care professionals. UPTE claims that starting pharmacist pay at Kaiser in San Diego is 80 percent higher than that of a beginning

U.C. San Diego pharmacist, and U.C. clinical laboratory scientists make 40 percent less than their counterparts. Pay for psychologists and child development associates at UCLA lags the market by 30 percent. Social worker pay at U.C. San Francisco is 13 percent below market, and physician assistant salaries are 25 percent below market rates.

*Unions have named U.C.'s retirement contribution proposal 'payouts for pensions.'*

University unions have named U.C.'s retirement contribution proposal "payouts for pensions." In September 2005, a university consultant reported to the U.C. Board of Regents that university salaries, excluding the national laboratories and medical centers, were an average of 15 percent below market rates, but that compensation was competitive if employees' benefits were included. However, the regents' Committee on Finance warned that health care cost increases and the likely resumption of pension contributions would reduce the value of the benefits. As a result, the regents resolved to bring U.C. salaries up to market rates over a 10-year period.

The reduction in value of the benefits has begun, but the market lag in

salaries has yet to be addressed for many employees. This January, employee contributions for medical benefits rose over 70 percent for some employees in health maintenance organizations while U.C.'s costs increased about 8 percent. Despite a state funding increase of 4 percent for 2006-07 salaries and benefits, many non-represented academic employees received only a 2 percent cost-of-living increase, the remainder being reserved for merit raises that employees are not eligible to receive annually. Non-represented staff received a 3.5 percent "merit pool" and some equity increases for below-market salaries. Union-represented staff received increases of 3 to 5 percent.

**Faculty Alarmed**

Faculty received only a 2 percent cost-of-living adjustment for 2006-07, despite the fact that associate professor pay lagged the market by 14 percent in 2005-06 and full professor pay was 12 percent below market. As the regents planned the university's budget request for 2007-08, the governing body of the academic senate weighed in. Concerned by reports that the regents were requesting only a 3 percent COLA plus 2 percent funding for merit increases, the academic council sent U.C. President Dynes its analysis of the pay increases that would be necessary to maintain the same standing relative to faculty of comparator institutions.

The council pointed out that redirecting employee contributions to the pension system rather than to their de-

finer contribution accounts decreases compensation because the contributions will no longer generate retirement income that is in addition to their pensions. The consultant study valued the defined contribution plan as roughly equivalent to 3 percent of pay up to the Social Security wage base and 6 per-

*The governor's budget did not include the \$60 million for employer pension contributions.*

cent of pay above the wage base of \$94,200. In addition, contended the council, pay at comparator institutions is likely to rise 4 percent in 2007-08.

The faculty pointed out that merit increases do not help maintain the relative standing of faculty salaries with their peers because senior faculty with high salaries retire and are replaced by lesser-paid professors. The council explained, "[A] large part of the merit money is, in fact, used to retain faculty who have received outside offers that vastly exceed the UC scale... We need to adjust the *scale* to compensate for the increase in competitors' salaries and for the restart of UCRP contributions. A COLA is the only way to increase the scale."



U.C.'s 2006-07 budget request included a 5 percent increase in funding for all aspects of compensation except employer pension contributions. The university asked for an additional \$60 million for the first year of pension payments. The governor's budget fulfilled the 5 percent increase for compensation but did not include the \$60 mil-

lion for employer pension contributions. According to U.C. spokesperson Nicole Savickas, the university will continue to work to secure extra funding for the pension contributions and still aims to reinstate both employer and employee contributions "as early as July 1, 2007." \*

The labor programs began 60 years ago when former U.C. President Clark Kerr founded and became the first director of the IIR at Berkeley. A similar institute was created at UCLA the same year. The labor centers were established 20 years later, one at each institute, to provide service and outreach activities with union and community partners. In 2000, new state budget appropriations of \$6 million led to an expansion of existing programs, establishment of a statewide faculty research fund, and financing for labor studies on all U.C. campuses.

In recent years, labor research has focused on employment trends, union density, health care policy, and job quality in immigrant and African American communities. Education programs have focused on leadership development for union leaders, and for women and people of color.

Republican lawmakers consistently have opposed funding the programs, arguing that tax dollars should not pay for centers that help labor unions. In response, proponents point out that state funds often are allocated to support university schools of business. \*

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## U.C. Labor Studies' Funding Up in the Air Again

Governor Schwarzenegger's proposed state budget for fiscal year 2007-08, issued on January 10, again fails to include funding for the University of California's Institutes of Industrial Relations and their Centers for Labor Research and Education, located at the Berkeley and Los Angeles campuses. The omission also impacts additional systemwide labor programs administered by U.C.'s Office of the President.

The governor has eliminated state funding for these programs several times before. In 2004, he removed funding for the last six months of the fiscal year. Then, the money was not included in the 2005 fiscal year budget and was covered by other U.C. money. For fiscal year 2006-07, the governor left the funding out of his proposed budget, but the legislature later added it back in. U.C. officials had hoped the governor would continue to include the \$6 million in funding in this year's proposed budget.

At a meeting of the U.C. Board of Regents' Subcommittee on Educational Policy held January 17, Assembly Speaker Fabian Nunez, who is also a U.C. regent, assured university officials that the funding would be in the budget and would be made permanent. He said the governor told him that state budget officials had "inadvertently" left out the funding for the centers in the proposed budget. Nunez said the governor promised that the funding would be added to the final budget. "We were told the labor centers would be permanent from last year's budget on," Nunez said. "Obviously the budget we send to the governor comes from the legislature, so I'm not concerned."

Nunez made his comments after the regents voted to affiliate IIR and the Center with the Miguel Contreras Labor Program. Contreras was the former head of the Los Angeles County Federation of Labor and one of the most influential Latino leaders in Los Angeles.

# Discrimination

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## No Individual or State Liability for ADA Violations

The Ninth Circuit Court of Appeals has determined that state and individual defendants are immune from liability for money damages for claims of employment discrimination under the Americans with Disabilities Act. The court also held that the plaintiff in *Walsh v. Nevada Department of Human Resources* did not have standing to request injunctive relief because she had left her employment and did not plan to return to the job.

### Factual Background

Nancy Walsh, an employee of the Nevada Department of Human Resources, had been diagnosed with obsessive compulsive disorder prior to being hired. She did not request any accommodation for the first two years of her employment. After her reassignment to a new supervisor, Jeri Bennett, in March 2003, Walsh began to experience increased anxiety and depression, and a return to ritualistic behaviors. Walsh and Bennett had an altercation on April 16, 2003. On April 21, Walsh wrote a memo to Bennett's supervisor, Tina GerberWinn, informing her of her OCD and requesting that she be assigned to a different supervisor and placed in a quiet work environment. On

April 24, 2003, GerberWinn issued Walsh a written reprimand for her conduct during the April 16 altercation.

On July 15, 2003, Walsh's supervisors placed cubicle walls around her workspace, but they did not provide Walsh with a quiet work environment. Bennett refused Walsh's numerous requests for a meeting to discuss her disability.

On December 13, 2003, Walsh filed a complaint with the Nevada Equal Rights Commission and the Equal Employment Opportunity Commission, alleging that the department had violated the ADA.

On June 24, 2004, Walsh's doctor ordered her not to return to work, and her employment ended July 1, 2004.

Walsh filed a lawsuit on August 25, 2004, naming the State of Nevada and the department as defendants, and alleging that her supervisors had discriminated against her because of her disability in violation of the ADA. In addition to money damages, Walsh requested injunctive relief, i.e., that the court force the defendants "to adopt and enforce lawful policies regarding discrimination based on disability." Walsh later sought to add Bennett and GerberWinn as individual defendants.

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

*Gloria Steinem*

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## Pocket Guide to Workplace Rights of Public Employees

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The trial court dismissed Walsh's case, finding that the state and the supervisors were immune from liability under the ADA. The trial court also concluded that Walsh did not have standing to ask for injunctive relief because she was no longer employed by the department. Walsh appealed.

### Court of Appeals Decision

The Ninth Circuit affirmed the trial court's rulings. Regarding the department's claim of immunity, the Court of Appeals pointed to the Supreme Court's decision in *Board of*

The appellate court agreed with Walsh's legal argument but concluded that Walsh did not have standing to bring a claim for the type of injunctive relief she requested. Under *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.* (9th Cir. 2004) 368 F.3d 1053, "to have standing to bring a claim for relief, a plaintiff must show that she has (1) suffered an injury that (2) was caused by the defendant and (3) is likely to be redressed by the relief she seeks," said the court. Although Walsh's complaint satisfied the first two prongs, it did not satisfy the third, according to the court:

Walsh is no longer an employee of the Department. She admits that her employment ended in 2004. There is no indication in the complaint that Walsh has any interest in returning to work for the State or the Department. Therefore, she would not stand to benefit from an injunction requiring the anti-discriminatory policies she requests at her former place of work.

The court distinguished cases indicating that a non-employee may have standing to sue for injunctive relief on the grounds that the plaintiffs in those cases were in the process of seeking reinstatement or other work from the employer.

In addition, said the court, Walsh failed to raise the issue of injunctive relief before the trial court and so is barred from raising it for the first time on appeal.

Turning to the liability of individual defendants under the ADA, the court recognized this as an issue of first impression for the Ninth Circuit. It noted, however, that the circuit has determined that individuals are immune from liability under Title VII in *Miller v. Maxwell's International, Inc.* (9th Cir. 1993) 991 F.2d 583. In that case, the court reasoned that Congress could not have intended for individual employees to be sued under Title VII because it limited liability to employers with 15 or more employees so as not "to burden small entities with the costs associ-

*Walsh was no longer  
an employee of the  
department.*

*Trustees of the University of Alabama v. Garrett* (2001) 531 U.S. 356, 147 CPER 50, holding that state governments can invoke the Eleventh Amendment's guarantee of sovereign immunity against ADA suits seeking money damages for employment discrimination.

Conceding this point, Walsh however claimed that the trial court should not have dismissed her case because she was asking for injunctive relief in addition to money damages and that *Garrett* held that sovereign immunity does not bar employment discrimination suits under the ADA against state officials for injunctive and declaratory relief.

*Walsh did not stand  
to benefit from  
an injunction.*

ated with litigating discrimination claims." *Miller's* bar on suits against individual defendants should also apply to the ADA "because Title I of the ADA adopts a definition of 'employer' and a remedial scheme that is identical to Title VII," concluded the court. (*Walsh v. Nevada Dept. of Human Resources* [9th Cir. 12-18-06] 471 F.3d 1033, 2006 DJDAR 16345.) \*

## Court Finds Insufficient Evidence to Support Finding of Harassment

In *Roby v. McKesson*, the Third District Court of Appeal overruled a jury's finding of hostile work environment and harassment under the Fair Employment and Housing Act. The court concluded that there was insufficient evidence to support the verdict on the harassment cause of action and the award of \$1.1 million in non-economic damages, and millions more in punitive damages. The court upheld the jury's verdict for the plaintiff on other causes of action but modified the damages award on those causes of action as well.

### Factual Background

Charlene Roby had been employed by McKesson for 25 years at the time she developed a panic disorder that caused her to miss many days of work. Two years later, Roby was terminated from her customer service position for absenteeism under the employer's new attendance policy even though many of her absences were attributable to her psychiatric disability.

Roby's supervisor for the last two years of her employment was Karen Schoener. Schoener disliked Roby and made no attempt to hide it. She did not return Roby's greetings. She gave presents to all of her subordinates, except Roby. She made Roby document all her phone calls and answer the phones during the office Christmas party. She referred to Roby's job as a "no-brainer."

She reprimanded Roby loudly in front of her coworkers. Schoener complained about Roby's body odor even though she knew it was caused by medication Roby was taking for her disability. She told Roby that she should bathe and shower more frequently. Roby once came to work and found soap, shampoo, and deodorant on her desk. Schoener called Roby's heavy sweating and scratching of her arms, both symptoms of her condition, "disgusting."

After she was fired, Roby filed a lawsuit alleging, in part, hostile work environment and harassment under the FEHA. The jury found both McKesson and Schoener liable for harassment, and awarded Roby \$600,000 against McKesson and \$500,000 against Schoener, and punitive damages in the amount of \$3,000 and \$15 million respectively. Both defendants appealed, arguing, in part, that there was insufficient evidence to support the harassment verdict.

### Court of Appeal Decision

The appellate court first determined that the applicable standard of review in this situation is that of substantial evidence, or, "whether there is any substantial evidence contradicted or uncontradicted that will support the finding of fact."

The court set out the standard that a plaintiff must meet to prove harass-

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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## Pocket Guide to the Family and Medical Leave Acts

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ment based on a hostile work environment under the FEHA: The employee “must demonstrate that the conduct complained of was severe enough *or* sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their [mental disability].” It clarified that all the circumstances must be con-

*All the circumstances must be considered in determining a hostile working environment.*

sidered in determining whether a working environment is hostile or abusive. This may include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”

The court instructed that “in determining what constitutes ‘sufficiently pervasive’ harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature.” And, “the harassment must satisfy an objective and subjective standard,”

meaning that it must be shown that the defendants’ conduct “would have interfered with a reasonable employee’s work performance and would have seriously affected the psychological well-being of a reasonable employee and that she was actually offended.”

While the court recognized that an employer is vicariously liable for harassment perpetrated by a supervisor, it determined that Schoener’s actions could not be deemed harassment within the meaning of the FEHA because they fell within the scope of her business and management duties. In support of its position, the court borrowed from the California Supreme Court’s decision in *Reno v. Baird* (1998) 18 Cal.4th 640, 131 CPER 62:

Harassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct *outside the scope of necessary job performance*, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer’s business or performance of the supervisory employee’s job. We conclude, therefore, that the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, *do not come within the meaning of*

*harassment*. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions *outside the scope of job duties which are not of a type necessary to business and personnel management*.

*Most of the alleged harassment fell within the scope of business and management duties.*

Applying the *Reno* principles to the facts before it, the appellate court determined that most of the alleged harassment here was conduct that fell within the scope of Schoener’s business and management duties. Specifically, the court found that “acts such as selecting Roby’s job assignments, ignoring her at staff meetings, portraying her job responsibilities in a negative light, or reprimanding her in connection with her performance, cannot be used to support a claim of hostile work environment.” Therefore, the court reasoned, “while these acts might, if motivated by bias, be the basis for a finding of employer *discrimination*, they cannot be determined to be ‘harassment’ within the meaning of the FEHA.”

Nor did Schoener's conduct outside the scope of activities protected by *Reno* rise to the level of harassment based on hostile work environment, said the court. "No matter how unpleasantly Schoener may have behaved toward Roby, her conduct cannot be deemed harassment unless it was based on and directed toward Roby's mental disability." The court found no evidence that it was, with the exception of Schoener's comments about Roby's sweating and body odor. But even those could be shown to have "a reasonable relationship to [Schoener's] management duties and cannot be classified as harassment" because "the record showed that Roby's unpleasant body odor disturbed her fellow employees and therefore affected the work environment."

The court clarified the distinction between discrimination and harassment, stating:

While the evidence showed that Schoener obviously disliked Roby, shunned her, and showed no compassion for her condition, neither cold indifference nor lack of sensitivity toward a disabled employee can be alchemized into a claim of hostile work environment. If such were the case, virtually every case of disability discrimination could be parlayed into a supplementary damage claim for harassment.

The court was not sympathetic to Roby's argument that the evidence showed that Schoener's behavior aggravated her symptoms and "left her emotionally ravaged." It found that Roby,

"already emotionally frail from the severe effects of her psychological disorder, was highly susceptible to even the slightest display of antipathy." While it was true that Roby subjectively perceived the workplace as hostile, the court concluded that a reasonable person in her same position, considering all the circumstances, would not share the same perception. "The reasonable person test is necessary to protect employers against claims that are frivolous or brought by hypersensitive employees," it said.

The court struck the harassment verdict against both McKesson and Schoener, and vacated the compensatory damage awards. It also vacated the punitive damage award against Schoener and reduced the \$15 million punitive damage award against McKesson to \$2 million. (*Roby v. McKesson HBOC* [12-26-06] Nos. C047617, C048799 [3d Dist.] \_\_\_ Cal.App.4th \_\_\_, 2006 DJDAR 16848.) \*

## General

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### Contract Violation Regarding Permissive Subject of Bargaining Not Unfair Practice

The Public Employment Relations Board has ruled in *El Centro Elementary Teachers Assn. v. El Centro Elementary School Dist.* that it is not an unfair practice for an employer to execute a unilateral change in a contract where the issue involves a permissive subject of bargaining.

The association filed an unfair practice charge claiming the district violated the Educational Employment Relations Act when it unilaterally altered terms regarding health benefits for both current employees and retirees in the parties' collective bargaining agreement. The association claimed that the district unilaterally imposed salary deductions from bargaining unit members and demanded payments from the retirees for health benefits when the agreement did not authorize such payments and deductions. Regional Attorney Tammy Samsel deferred the allegation regarding the deduction of monies from current employees' checks to arbitration. But she dismissed the allegation regarding payments from retirees, finding that PERB is precluded from enforcing the parties' agreement on that issue because it is based on conduct that does not also constitute an unfair practice under EERA Sec. 3541(b). The association

appealed the dismissed allegations regarding the retirees.

The board adopted the R.A.'s decision, with some additional clarification. It noted that EERA Sec. 3541(a) provides for the filing of an unfair practice charge by "any employee, employee organization or employer..." Retirees are not protected by EERA because they

*Retirees are not  
protected by EERA  
because they no longer  
are 'employees.'*

no longer are "employees," said the board, citing *County of San Joaquin* (2003) No. 1570-M, 164 CPER 169. "Consequently," it reasoned, "medical benefits for these individuals are permissive subjects of bargaining."

The association argued that once the issue of health benefits for retirees was incorporated into the CBA, the parties were bound to bargain in good faith and to refrain from executing unilateral changes regarding those benefits during the life of the contract. It pointed to language in two PERB cases in sup-

port of its position. In *Eureka City School Dist.* (1992) No. 995, 98 CPER 56, the board stated:

Matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring. Although employers retain the right to meet and consult with employee organizations on any subject outside the scope of representation, the parties are not required to bargain over a permissive subject. However, once agreement is reached concerning a permissive subject and it is embodied in the parties' CBA, the parties are bound by the terms of the agreement until its expiration or unless modified by the parties.

The employer retains its management prerogative over subjects outside the scope of representation. Further, by once bargaining and agreeing on a permissive subject, the parties do not make the subject a mandatory topic for future bargaining.

In *City & County of San Francisco* (2004) No. 1608-M, 166 CPER 78, the board said:

Thus, *Eureka* recognizes that there is no obligation on either party to negotiate over permissive subjects of bargaining. However, once an agreement is reached regarding a permissive subject and it is embodied in the parties' CBA, the parties are bound to that agreement for its duration. Once the agreement has expired there is no obligation to adhere to the agreement or bargain over a new one.

The board in this case found the foregoing language to be ambiguous. "Although both the *Eureka* case and the

*San Francisco* case indicate the parties are 'bound' by a permissive subject when incorporated into a CBA, neither decision defined the term 'bound,'" said the board. "As a result, it is unclear, based on these cases, whether the repudiation of a term in a collective bargaining agreement regarding a matter not within the scope constitutes an unfair labor practice."

### *The association is free to file an action for breach of contract.*

The association took the position that "bound" refers to both contract and PERB law and, therefore, once the retirees' benefits were incorporated into the contract, the parties must bargain any changes to such benefits. "In essence," said the board, "the Association argued that a permissive subject of bargaining (i.e., health benefits for retirees) was transmuted to a mandatory subject when it was incorporated into the parties' CBA."

The board found the association's interpretation "overbroad." It pointed to EERA Sec. 3541.5(b), which states, "The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter." It concluded that this lan-

guage makes it clear that the legislature "envisioned a distinction between straight contract violations and contract violations that also constitute unfair practices." "In so doing," said the board, "the Legislature imposed a significant limitation on PERB's jurisdiction." The association's interpretation "renders this limitation moot."

The U.S. Supreme Court came to the same conclusion in *Chemical Workers v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157, a case decided under the National Labor Relations Act, said the board. In that case, the court stated:

By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining. When a proposed modification [to a CBA] is to a permissive term, therefore, the purpose of facilitating accord on the proposal is not at all in point, since the parties are not required under the statute to bargain with respect to it....The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract,...not in an unfair-labor-practice proceeding.

The board agreed with the reasoning of the Supreme Court and ruled that "it is not an unfair practice for an employer to repudiate a contractual provision containing a permissive subject of bargaining because the employer does not have a duty under EERA to negotiate that term." In dismissing the charge, the board noted that the association was not left without a remedy. "It is free to file an action for breach of contract," it said.

Member Shek submitted a concurring opinion disputing the majority's purported discovery of an "ambiguity" in *Eureka* and *San Francisco* regarding interpretation of the term "bound." Shek found the term self-explanatory "when read within the proper context." She reasoned that both cases "held that the parties are bound by the terms of the agreement for its duration, until its

### *The legislature imposed a significant limitaton on PERB's jurisdiction.*

expiration, or unless modified by the parties," and that "there is no basis for the Association's contention that the parties are bound to negotiate over permissive subjects of bargaining."

Shek also expressed concerned that the majority, by its language, may have created the misconception that PERB condones the repudiation of contractual provisions containing a permissive subject of bargaining. She also worried about the majority's assertion that Sec. 3541.5(b) imposes a "significant limitation" on PERB's jurisdiction. "Granted PERB lacks jurisdiction under Section 3541.5(b) to enforce parties' settlement agreements, and to issue a complaint on any charge based on alleged violation of any agreement that would not



also constitute an unfair practice,” she said. “However, I find no authority to support the majority’s qualification that the Legislature imposed a ‘significant’ limitation on PERB’s jurisdiction in this regard.” (*El Centro Elementary*

*Teachers Assn. v. El Centro Elementary School Dist.* [11-13-06] PERB Dec. No. 1863; 9 pp. + 10 pp. regional attorney dec. By Member McKeag, with Member Neuwald; Member Shek concurring.)\*

decision, policy or practice that the physician reasonably believes impairs his or her ability to provide medically appropriate health care.” The Court of Appeal was not impressed with Sarka’s argument. It found that both the IPR and the trial court considered the statute and properly applied it to the facts presented. The record contained substantial evidence to support both decisions, said the court:

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## No Retaliation Where Doctor Discharged for Insubordination

A doctor employed at the University of California at Los Angeles student health center was discharged for insubordination, and not because he was advocating for medically appropriate health care for his patients, concluded the Second District Court of Appeal. The court found the university did not violate Business and Professions Code Sec. 2056, and upheld the termination.

Dr. George Sarka was employed as a primary care physician at the student health center for 14 years. In August 2002, the university informed Sarka that he was being dismissed from his position for refusing to modify his approach to student care.

The university maintained that Sarka repeatedly ordered many more tests for his patients than did the other primary care physicians at the center and that he saw his patients an average of two visits per student, while other physicians averaged 1.3 visits. He also ordered many more x-rays than did the other doctors. During the 15 months prior to his dismissal, his supervisors warned Sarka about his overuse of re-

sources and requested he modify his management and care-delivery patterns. He did not do so.

Sarka filed a grievance claiming that he was using his best clinical judgment and that he was discharged in retaliation for advocating for his patients. Sarka’s grievance went to an administrative factfinding hearing before a hearing officer, called an independent party reviewer. The IPR upheld the termination, and Sarka filed a petition for writ of administrative mandate seeking to overturn the IPR’s decision, alleging abuse of discretion and insufficient evidence to support the IPR’s finding that he was not discharged principally in retaliation for patient care advocacy. The trial court denied the petition, and Sarka appealed.

Sarka’s sole argument on appeal was that the university violated Business and Professions Code Sec. 2056, and that the IPR and trial court failed to consider or apply the section properly. The statute declares, in part, that it is the policy of the State of California to encourage physicians to protest “a

Specifically, the University submitted evidence supporting the testing and follow-up practices by which it expected Dr. Sarka to abide. Yet, Dr. Sarka did not comply with the University’s repeated requests, over 15 months, to utilize resources more judiciously by relying more on his own clinical judgment. Rather, he resisted those requests. The University’s witnesses testified about the deleterious effect on other physicians and staff at SHS and on patients because Dr. Sarka wasted resources, squandered students’ time, and caused them needless concern about their health. The final notice of dismissal stated unequivocally that Dr. Sarka was discharged because he “continued to be unwilling to accept my directions to you, and that you see no reason and have no intention of modifying your practice as I have repeatedly requested of you.” Therefore, the evidence supports the trial court’s conclusion Dr. Sarka was *discharged for insubordination*.

The court rejected Sarka’s argument that the trial court’s statement that it had neither the expertise nor the duty to decide which physician (Sarka or his supervisor) was right, proved that it had refused to apply Sec. 2056. The Court

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of Appeal reasoned that the trial court's comment referred only to the fact that the application of the statute required expert testimony about whether a physician's advocacy was "medically appropriate." The university presented expert testimony that its policies were medically appropriate for student health care at large university campuses. Sarka, on the other hand, presented expert testimony that his performance did not fall below the standard of care. "But," said the court, "*this case is not about negligence or malpractice.*" Rather, to show that he was protected by Sec. 2056, "Dr. Sarka was obligated to demonstrate that his advocacy was 'medically appropriate' for primary care physicians in a large university's student health service," said the court. "This he did not do." Because Sarka failed to introduce expert evidence that it could weigh against that presented by the university, "the evidence supports the trial court's conclusion that Dr. Sarka was not discharged principally for advocating medically appropriate health care," reasoned the appellate court. "Therefore, neither the IPR nor the trial court abused its discretion or committed error," it concluded. (*Sarka v. Regents of the University of California* [12-28-06] B181753 [2d Dist.] \_\_\_ Cal.App.4th \_\_\_, 2007 DJDAR 9.) \*

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## Changing of the Guard at PERB

As of January 1, Bernie McMonigle is the new chief administrative law judge at the Public Employment Relations Board. McMonigle was selected by the board to fill the position left vacant by the retirement of long-time PERB ALJ Fred D'Orazio.

McMonigle has been a member of the PERB staff since 1988. During his tenure at the board, he served as an attorney in the Office of the General Counsel and took on temporary ALJ assignments beginning in 1995. He was appointed to a permanent ALJ slot in 2004.

Prior to his service at the board, McMonigle worked as a labor relations neutral for many years. In 1977, he was appointed a commissioner of the Federal Mediation and Conciliation Service. He also was a board counsel for the California Agricultural Labor Relations Board, and an arbitrator and ad hoc hearing officer for the Sacramento County Civil Service Commission.

Retiring ALJ D'Orazio began his career at PERB in 1978. He served as chief ALJ on two occasions. D'Orazio conducted numerous evidentiary hearings and authored hundreds of decisions. Before joining PERB, he served as the assistant general counsel for the National Treasury Employees Union. Although he has retired from PERB, D'Orazio will continue to be involved in labor relations as an arbitrator.

Another new face at PERB is Tami Bogert-Yuill, who is the new general counsel as of February 5. Bogert-Yuill has served as a deputy legal affairs secretary to Governor Schwarzenegger since 2003. Prior to that, she was an attorney at the California District Attorneys Association. \*

## Public Sector Arbitration

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### Allegations of Attempted Poisoning Unfounded, Skelly Violations Abound

Putting a toxic substance into a coworker's drink clearly is an action worthy of discipline. Hearing officer Christopher Burdick has made clear, however, that such an alleged action does not lessen an employer's burden to prove just cause for discipline, nor does it negate an employee's right to procedural due process.

The appellant, an equipment services worker for the Stockton Unified School District, was accused of, and dismissed for, pouring a toxic cleaning chemical, Odor-End Emergency Clean-Up, into his coworker's drink. The charge arose when a mechanic for the district claimed he observed a reflection in the glass insert of an office door and saw the appellant pour a then-unknown substance into a cup. Despite the mechanic's belief that the liquid was toxic, he waited 10 to 15 minutes before examining the possibly poisonous substance, which he later claimed had smelled "rasty." After he examined its contents, the mechanic took the cup to his supervisor.

At this point, the recitation of facts becomes cloudy. The mechanic claimed he poured the liquid from the cup *prior* to telling his supervisor what he saw and smelled. But the supervisor

maintained that it was he, and not the mechanic, who disposed of the suspect liquid and subsequently washed the cup. Despite this ambiguity, the district's police department opened a criminal investigation into the matter.

In true CSI fashion, the department sent the cup in question to a crime lab for analysis. The lab found no foreign substance in the cup and issued a report to this effect. An expert from the crime lab also testified that when he, in the course of the investigation, added Odor-End to liquid, it became a gel and did not issue a "rasty" odor, but instead smelled "flowery." Ultimately the criminal case was dismissed.

Adding yet another piece to the ever-mounting pile of contradictory evidence, the appellant claimed, and later proved, that the mechanic could not have seen a reflection in the glass door. That particular glass pane had been obscured by a calendar from 2002. The mechanic subsequently rescinded his testimony and admitted that he had not actually seen the appellant pour anything into the cup.

Given these conflicts in the evidence, Burdick concluded that the district failed to meet its burden of proving the allegations by a preponderance

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of evidence and, therefore, just cause for termination did not exist. Based on this failure of proof, Burdick ordered the appellant reinstated with full backpay, benefits, and seniority, retroactive to the date of his termination.

This might have been the end of the matter, but realizing that possible due process violations may have occurred, Burdick undertook an examination of the district's procedural actions and omissions.

According to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 175, 27 CPER 37, the appellant was entitled to pre-termination procedural due process. *Skelly* provides that prior to disciplining an employee for cause, that employee is entitled to a brief statement of the facts on which the charges are based, copies of all the documents and materials on which the proposed discipline is based, and the opportunity to respond to the proposal. The district did issue the appellant three *Skelly* notices (two of which were issued prior to interviewing the appellant), each informing him that he would be terminated. What the district did not do, however, is provide the appellant with required and relevant documentation, namely the materials relied on by the district in making its recommendation to terminate. This omission was repeated with each *Skelly* notice, depriving the appellant of the opportunity to present a response to the proposed termination.

Because the district did not meet the requirements set forth in *Skelly*, Burdick found that the district violated the appellant's due process rights. Failure to comply with the pre-termination notice requirements of *Skelly* does not alter the underlying discipline, but it entitles an employee to backpay for the period of wronged discipline. As explained by the California Supreme Court in *Barber v. State Personnel Board* (1976) 18 Cal.3d 395, 32 CPER 76, the appropriate remedy under these circumstances is backpay from the date the discipline was imposed until the time the discipline is validated by a hearing preceded by the proper notice and opportunity to respond.

Thus, Burdick instructed, the appellant is entitled to backpay under *Barber*; regardless of the eventual outcome on the merits. (*CSEA and Stockton USD* [6-00-06] 31 pp. *Representatives*: Dan Morris, for the appellant; David W. Tyra, Esq. [Kronick, Moskovitz, Tiedmann & Girard], for the district. *Arbitrator*: Christopher D. Burdick, CSMCS Case No. ARB-04-2954.) \*

# Arbitration Log

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- Pay and Benefits
- Leave Accrual

**City of Folsom Fire Dept. and Moreno** (3-1-06; 11 pp.). *Representatives*: John P. Chiolero, for the grievant; Jack W. Hughes, Esq. (Liebert Cassidy Whitmore), for the city. *Arbitrator*: Katherine J. Thomson.

*Issue*: Should the grievant have accrued paid leave time at the rate of a 56-hour-shift employee or at the rate of a 40-hour non-shift employee when he worked a 40-hour-a-week assignment?

*Grievant's position*: (1) The grievant is a suppression battalion chief who has worked for the city for 20 years.

(2) When on regular assignment, the grievant works two 24-hour shifts followed by four 24-hour shifts off, and is known as a 56-hour-shift employee.

(3) A 56-hour employee accrues 48 hours a month of annual leave allowance. A 40-hour employee accrues 24 hours a month.

(4) As a result of an injury, the grievant was taken off work in 2004, and subsequently released for modified duty with no restriction on work hours. In 2005, the grievant was involuntarily assigned to a part-time schedule.

(5) During this time, the grievant was paid his full salary, but his leave accruals were reduced to that of a 40-hour non-shift employee.

(6) The city violated the personnel rules by diminishing the grievant's leave

benefits when he was assigned to modified duty.

(7) Because the MOU is silent on the question of compensation for modified-duty assignments, the personnel rules control. The rules provide that if an employee is assigned modified duty, the employee shall be compensated for hours worked at the regular rate of base salary and benefits regardless of whether or not the employee performs work within the regular classified position.

(8) There was a negative impact on the grievant when he was credited annual leave at the 40-hour rate instead of the 56-hour rate. The grievant did not volunteer or ask for the reduced assignment and is therefore entitled to his regular rate of base salary and benefits pursuant to the personnel rules.

*City's position*: (1) The personnel rules were not crafted with the 56-hour-shift firefighter in mind.

(2) The MOU states that when policies conflict with the MOU, the MOU shall prevail.

(3) The MOU states that a 56-hour employee assigned to a temporary 40-hour work schedule shall receive a 10 percent salary differential in base pay for the duration of the assignment, in part, to compensate for the reduction in annual leave accrual.

(4) Past practice establishes that employees on temporary 40-hour-a-week schedules accrue leave as 40-hour employees, not 56-hour employees.

(5) 56-hour-shift employees are not granted paid holidays. This is why, in part, 56-hour employees receive greater annual leave than 40-hour employees. While on reduced assignment, the grievant was granted paid holidays.

*Arbitrator's holding*: The grievance was denied.

*Arbitrator's reasoning*: (1) The personnel rules do not provide that a modified-duty employee must be paid his full salary and benefits, only that he must be paid at the regular rate of pay and benefits for the hours worked.

(2) Because the personnel rules do not specify the rate of compensation for an employee on modified duty, the MOU must provide this information.

(3) The MOU does not state whether the accrual rate changes if an employee is temporarily reassigned to

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a different schedule, but the bargaining history of the 10 percent pay differential indicates that the city and union intended employees on temporary 40-hour-a-week assignments accrue leave at the 40-hour-a-week rate rather than the 56-hour rate. The grievant was granted this differential.

(4) Testimony indicates that an employee's accrual rate changes with a shift in schedule, even if temporary. This means that if scheduled to work 40 hours a week, an employee accrues leave at the rate of a 40-hour employee.

(5) The city and the union have thought carefully about how to equalize the paid time off between employees on differing schedules. To allow an employee to accrue at a higher rate while working fewer hours would be unfair to other employees.

(6) The parties bargained for a 10 percent differential to be provided to rank and file firefighters as well as battalion chiefs to make up for the lesser leave accrual rate if assigned to a reduced schedule. There is no evidence that the city and the union intended to exclude 40-hour-a-week modified-duty assignments from the application of differential pay.

(7) The grievant was compensated at the regular rate of leave accrual for the hours he worked. He was not entitled to accrue paid-leave time at the rate of a 56-hour employee when he worked 40 hours; therefore, the grievance is denied.

*(Binding Grievance Arbitration)*

• **Contract Interpretation — Salary Differential**

• **Bargaining History**

**International Assn. of Fire Fighters, Loc. 1165, and Santa Clara County Fire Protection Dist.** (5-25-06; 8 pp.). *Representatives:* Christopher E. Platten, Esq. (Wylie, McBride, Jesinger, Platten & Renner), for the union; Katie Zoglin, Esq., for the county. *Arbitrator:* Alan R. Rothstein (CSMCS Case No. ARB-05-1165).

*Issue:* What is the appropriate pay scale for the fire mechanic position?

*Union's position:* (1) At the time the county created three new fire mechanic positions, the parties agreed to set the wage rates for the new positions by using the older classifications as a benchmark.

(2) The position of senior fire mechanic previously was classified as master fire mechanic. The master fire mechanic was paid a 19 percent wage differential over the wage of the fire mechanic.

(3) During negotiations, the parties agreed to a 7 percent differential.

(4) The 7 percent is a minimum differential; thus, if the fire mechanic's wage increases, so would the wage paid to the senior fire mechanic in order to maintain the 7 percent differential.

(5) The county failed to pay the 7 percent wage differential.

*County's position:* (1) The parties never agreed to a wage spread for the new fire mechanic classifications. Nor did the county agree to tie the new wage rates to existing pay rates. Instead, the parties agreed to a new position with a stated salary.

(2) A wage survey demonstrated that the new fire mechanic classifications were paid approximately 40 percent more than comparable positions at other fire departments in the county.

(3) The county did not lower the wages of existing fire mechanics, but determined that lower wage rates would apply to the new fire mechanic classifications.

(4) There was no plan to change the senior mechanic wage rate in the first year of the contract because the position was vacant, and the county did not agree to maintain an ongoing 7 percent differential between that position and that of the fire mechanic.

(5) The senior mechanic position was filled after an across-the-board pay increase. Because the parties agreed only to a starting salary and not a 7 percent spread, this pay increase did not apply to the senior mechanic's position.

*Arbitrator's decision:* The grievance was denied.

*Arbitrator's reasoning:* (1) The parties' misunderstanding regarding the new wage rates focuses on whether they agreed to a percentage differential between the incumbents of one classification and the incumbents of an adjoining classification.

(2) This misunderstanding was exacerbated by the fact that the parties' agreement conveyed to existing employees a general across-the-board pay increase, and the fact that the senior mechanic classification was vacant at the time of the general pay raise and in the first year of the new agreement.

(3) The parties agreed that the top step of the senior fire mechanic position would be 7 percent above the then-existing top step of the fire mechanic. But there was no discussion about maintaining the differential after an across-the-board wage increase.

(4) The senior fire mechanic position was filled after the general pay raise, and as such, did not receive the increase.

(5) In order to prevail, the union must demonstrate that it told the county during the bargaining session that its proposal was for a permanent differential between the two classifications.

(6) The evidence offered demonstrates that the senior mechanic wage rate was set at a top step that was 7 percent above a specific figure. There was no language by either party that evidenced the position's top step would remain 7 percent above the fire mechanic position.

*(Binding Grievance Arbitration)*

- **Contract Interpretation**
- **Seniority**
- **Resassignments**

**Oakland and SEIU, Loc. 790** (6-15-06; 12 pp.). *Representatives*: Vincent Harrington, Esq. (Weinberg, Roger &

Rosenfeld), for the union; Tracy Chriss, for the city. *Arbitrator*: Bonnie Bogue (CSMCS Case No. ARB-96806).

*Issue*: Did the city misinterpret or misapply MOU provisions when handling the grievant's transfer request?

*Union's position*: (1) The grievant was employed as a librarian I in a full-time permanent position.

(2) The grievant became aware of a vacancy for another librarian I position and submitted a reassignment request for that vacancy. Nothing came of this request.

(3) The grievant later became aware of several other vacant librarian I positions and again filed a reassignment request. These positions were filled by applicants from a civil service list.

(4) Section 14.8.1 of the parties' contract permits unit members to move laterally within their classification before the city fills a vacant position. This provision gives employees priority over non-employees and the right to be transferred to a vacancy before it is filled by an applicant from the civil service list.

(5) In his interview for the positions, the grievant asked how his current employment status and seniority would effect the selection process. He

was told he would be scored on the same criterion as other candidates.

(6) Two current employees who were qualified candidates for the nine entry-level generalist positions were denied jobs. Instead, all nine positions were filled by outside applicants.

(7) The city's contention that the contract merely requires it to consider unit members, but does not require it to transfer an employee, does violence to the concept embodied in the contract.

(8) The language requiring the city to take seniority into account has application only between contesting internal transfer applicants since people not yet hired have no seniority.

(9) The management right's clause does not grant the city authority to hire from outside the current workforce without first complying with Sec. 14.8.1. The city agreed to modify its rights when it included that section in the contract.

(10) The union does not contest the city's authority to hire, only its right to ignore unit members' transfer and seniority rights under the contract.

(11) The statement of the employee relations representative that the grievant's chances for the positions were negatively affected by his grievance is clear evidence of a retaliatory motive for denying his transfer request. No testimony was offered to refute this contention.

(12) The city should consider transfer requests first and independently of new hires, prior to making any decision to fill vacant positions.

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*City's position:* (1) Because the grievant has been promoted to librarian II and no longer has any interest in working as a librarian I, this grievance is moot and should be dismissed.

(2) The plain meaning of the word "consider" in Sec. 14.8.1 merely requires the city to "think about" internal candidates and their seniority before placing them in a vacant position. The grievant's seniority was taken into consideration by the interview panel before the vacancies were filled by hiring from the civil service list.

(3) No language in the MOU requires that employees be given priority based on seniority. Seniority is to be taken into account, along with other factors, but the contract does not make it the determining or even a primary factor.

(4) Nothing in the job vacancy provision requires the city to give preference or greater weight to seniority than the other factors that are taken into account.

(5) The city acted in accordance with the plain language of Sec. 14.8.1, and took into consideration the grievant's 33 months of seniority along with his personal interests in the vacant position.

*Arbitrator's holding:* The grievance was sustained.

*Arbitrator's reasoning:* (1) The grievance is not moot. The city's actions that precipitated the grievance have not been rescinded, and the contract language has not been eliminated or changed. Therefore, how the city

handles transfer requests remains a live dispute between the city and the union. The grievant's status merely affects the nature of the appropriate remedy.

(2) The union's position is that the language of Sec. 14.8.1 compels the city to consider current employees' transfer requests before exercising its managerial right to interview and hire new employees. The city maintains that this language merely requires it to consider current employees, but does not compel it to grant transfers before filling vacancies from the civil service list.

(3) The language of this section creates an ambiguity as to what rights and duties it confers. A principle of contract interpretation is that an interpretation which renders a provision meaningless should be avoided.

(4) The requirement that the city "shall consider" employees on the transfer list "prior to filling a vacant position" becomes illusory if read to mean that the city merely has to give that consideration before it makes the final hiring decision, but not before it has interviewed and considered outside candidates.

(5) By considering the grievant at the same time that it was considering outside applicants, and by requiring him to undergo the same interview process along with outside applicants without regard to his status as a unit employee, the city rendered this mandatory contract requirement meaningless.

(6) The vacancy clause identifies seniority as merely one of the factors

the city has to consider; it does not cite seniority as the deciding factor. But the issue in dispute is not how much weight seniority should be given, but rather the effect the reference to seniority has on interpretation of this language. The reference to seniority would have no meaning if internal applicants were considered on the same basis and in the same selection process as outside applicants who have no seniority.

(7) The reference to seniority only can mean that the parties intended to create a separate procedure for filling vacancies from the transfer list, and this requires the city to consider seniority among other factors. This procedure must occur prior to interviewing applicants from the civil service list.

(8) The very existence of the transfer clause demonstrates the parties' intent to guarantee first consideration to employees who request transfers, prior to turning to outside applicants.

(9) Section 14.8.1 places limits on the city's managerial discretion by requiring it to give current employees certain transfer opportunities before it exercises the reserved right to fill job vacancies.

(10) The city misinterpreted and misapplied Sec. 14.8.1 of the MOU. It is directed to cease and desist from the improper practice of filling vacancies, and is further directed to handle unit members' request for transfers in accordance with this determination.

*(Binding Grievance Arbitration)*

• **Contract Interpretation —  
Lesson Plans**

**Berkeley Unified School Dist. and Berkeley Federation of Teachers, CFT, AFT, Loc. 1078** (6-28-06; 11 pp.). *Representatives:* Stewart Weinberg, Esq. (Weinberg, Roger & Rosenfeld), for the union; Terry Filliman, Esq. (Atkinson, Andelson, Loya, Ruud & Romo), for the district. *Arbitrator:* Paul D. Staudohar (CSMCS Case No. ARB-05-0377).

*Issue:* Did the district violate the parties' agreement by requiring teachers to submit lesson plans?

*Union's position:* (1) The parties' agreement states that lesson plans shall be the creation and property of the teacher. Teachers shall not be required to submit lesson plans on a routine basis, but only during an evaluation process or when a teacher has received a less-than-proficient rating.

(2) A principal in the district requested that teachers routinely write their daily agenda and objectives on the classroom board, as well as provide him with a curriculum map of what they would teach during the school year.

(3) After the union asked the principal to rescind his request, he issued a memo instructing teachers to disregard his earlier directive. However, he also instructed teachers to submit and discuss lesson plans, and to bring their curriculum maps and sample lessons to staff meetings.

(4) These actions violate the parties' bargaining agreement. The agreement states that teachers shall not be

required to submit lesson plans on a routine basis, subject to two exceptions, neither of which is present here.

(5) The district's argument that the principal's requests are not "routine" must fail. "Routine" refers to a regular or commonplace act, such as that requested by the district.

(6) The district's argument that curriculum maps are not lesson plans within the meaning of the parties' agreement also is unpersuasive because the district previously characterized such maps as "lesson plans."

(7) The district should clarify that a lesson plan is any curriculum planning document, and all requests for such documents should be rescinded. No further requests should be made unless in accordance with the terms of the agreement.

*District's position:* (1) A lesson plan and a curriculum map are substantially different documents.

(2) Testimony demonstrates that a curriculum map is a long-term planning tool distinguishable from a lesson plan, which is a short-term planning tool. Testimony also demonstrates that a posted daily agenda is not the same as a lesson plan. This testimony is consistent with that of school districts across the country.

(3) The principal's request that teachers write their daily agenda on the board was made for the benefit of the students. The principal did not require teachers to submit this agenda to him.

(4) Teachers who did not comply with the district's requests were not dis-

ciplined, and the district did not request that lessons plans be submitted on a routine basis.

*Arbitrator's holding:* The grievance is sustained.

*Arbitrator's reasoning:* (1) Because there is no teacher evaluation under consideration and no less-than-proficient teacher's fate at stake, the two contractual exceptions for routine submission of lesson plans are not present.

(2) The key issues to be determined are the definitions of "lesson plan" and "routine."

(3) The district required teachers to submit curriculum maps, which provide long-term guidelines for the development of lesson plans. Based on nationwide practice, they are not considered lesson plans.

(4) However, the principal also instructed teachers to post a daily agenda and stated that this material would be included in their evaluations.

(5) A lesson plan is a condition precedent to providing a daily agenda for the students. The daily agenda does not cease to be a lesson plan because it is written on the board.

(6) If the daily agenda is expected of teachers and constitutes part of the framework for evaluations, it is required of teachers and therefore "routine" within the meaning of the parties' agreement.

(7) The district is in violation of the parties' agreement and must cease and desist from requiring teachers to routinely submit lesson plans.

*(Binding Grievance Arbitration)*

• **Contract Interpretation —  
Vacant Position**  
• **Seniority**

**Southern Kern Unified School Dist. and Rosamond Teachers Assn., CTA/NEA (7-11-06; 17 pp.).**  
*Representatives:* Dr. David A. Aponik, for the union; Dwaine L. Chambers, Esq., for the district. *Arbitrator:* Joseph F. Gentile.

*Issue:* Did the district violate the parties' agreement when it denied the grievant a teaching position and selected a teacher with less seniority?

*Union's position:* (1) The parties' agreement mandates that when substantially equal applicants apply for a vacant position, the most-senior employee shall be offered the position. The agreement also provides that a list of requirements be posted and an established time line followed for the application process.

(2) These provisions apply to the position in question.

(3) The grievant, who has worked for the district since 1998, applied for the vacant position of elementary program coordinator. The job posting stated a \$5,000 salary for the position. No requirements were listed.

(4) The grievant was denied the position. It was given instead to a teacher who began working for the district in 2004.

(5) The grievant was told that the successful applicant was selected because she was more experienced than the grievant; however, the job posting did not indicate that prior experience was a requirement.

(6) Further, the district selected the successful applicant prior to the closing date for the application process.

(7) The superintendent demonstrated bad faith by suggesting the grievant "reconsider the situation" when he denied her level-three grievance.

*District's position:* (1) The parties' agreement is not applicable here because the elementary program coordinator is a stipend position. The agreement applies only to "vacancies," and stipend positions do not qualify as such.

(2) The contract states that the most-senior applicant will be provided the position only when the candidates have "substantially equal" qualifications.

(3) The less-senior applicant had prior experience as an elementary program coordinator, and the grievant did not. Thus, the applicants were not "substantially equal."

(4) The successful applicant was chosen on August 25 or 26. The closing date for applications was August 19.

(5) The superintendent did not act in bad faith.

*Arbitrator's decision:* The grievance was denied.

*Arbitrator's reasoning:* (1) The threshold issue is whether the parties' agreement applies to stipend positions. This determination requires defining the word "vacancy" as it is used in the parties' contract.

(2) The contract does not define the word "vacancy"; thus, the definition must be determined by considering other provisions of the agreement. The agreement expressly exempts from the

word "vacancies" long-term substitute positions, but makes no mention of stipend positions.

(3) Accordingly, it is clear that the position of elementary program coordinator is not exempted from the definition of "vacancies."

(4) The parties' contract states that, when choosing an applicant, individual requirements necessary to ensure the best-possible learning conditions for students will be considered.

(5) The grievant is more senior, but the successful applicant had prior experience as an elementary program coordinator and was therefore more qualified. As such, the grievant and the successful applicant were not "substantially equal."

(6) The principal's testimony that he did not pre-select for the position is believable. No finding of bad faith can be made based on the evidence.

*(Binding Grievance Arbitration)*

# Resources

## Answers About Unions

In response to a request by union leaders to educate its members and the general public about the value of unions, the U.C. Berkeley Labor Center at the Institute of Industrial Relations has published this informative and inexpensive booklet. It provides a starting point in answering basic questions about the labor movement, and can be used in membership trainings, community relations meetings, or in any situation where questions about unions and the labor movement arise.

The booklet was written by Fred Glass of the California Federation of Teachers, and produced by the Labor Center in consultation with the California Speaker's Commission on Labor Education. It can be ordered online at the Labor Center's website.

**Work, Money and Power: Unions in the 21st Century**, by Fred Glass (2006) 24 pp. U.C. Berkeley Labor Center, <http://laborcenter.berkeley.edu/>. Booklet, \$1.25.

## The Lowdown on Layoffs

*The Disposable American* is an account of layoffs in the U.S. — their questionable necessity, their overuse, and their devastating impact on individuals at all income levels. Despite all this, warns the author, the incidence of layoffs is accelerating. Award-winning *New York Times* economics writer Louis Uchitelle traces the rise of job security in the United States to its heyday in the 1950s and 1960s, and then the panicky U-turn. He describes the unraveling of job stability through the experiences of both executives and workers.

Uchitelle argues against the ongoing public policy of subsidizing retraining for jobs that, in fact, do not exist. He documents the failure of these policies and describes the significant psychological damage that the trauma of a layoff invariably inflicts, even on those soon reemployed. While recognizing that in today's global economy some layoffs must occur, the author argues that government policies should encourage restriction of layoffs and generation of jobs to supplement the present shortfall.

**The Disposable American: Layoffs and Their Consequences**, by Louis Uchitelle (2006) 304 pp. Random House, <http://www.randomhouse.com/>. Hardcover, \$25.95.

## Race and Employee Turnover

In a recent study on employee turnover, Professors David Levine and Jonathan Leonard found interesting and provocative links between employee turnover and workplace diversity. The U.C. Berkeley Haas School of Business professors studied over 70,000 "front line" employees in more than 800 workplaces. Contrary to popular thinking among some diversity consultants, employing workers of many different races has little effect on average turnover in a retail workplace, although employees do quit more often if fewer colleagues are the same race. Their findings appear in an article titled "The Effect of Diversity on Turnover: A Large Case Study," in the journal *Industrial and Labor Relations Review*. A synopsis of their study can be found at: [http://www.berkeley.edu/news/berkeleyan/2006/11/29\\_diversity.shtml/](http://www.berkeley.edu/news/berkeleyan/2006/11/29_diversity.shtml/).

## Move on for Motherhood

Joan Blades, cofounder of MoveOn.org and Berkeley Systems, and Kristin Rowe-Finkbeiner, a consultant and researcher in the field of environmental policy and political strategy, have written a book that calls for a transformation in the American attitude towards working mothers. In *The Motherhood Manifesto*, they argue that across public and private sectors, radical change is needed to make parenting and the workplace compatible. The *Manifesto* not only identifies the obstacles facing working mothers today, it proposes concrete solutions for demolishing them.

Blades, Finkbeiner, and others also have founded MomsRising. The organization's goal in championing core motherhood and family issues in political, social, and economic spheres is twofold. First, it seeks to build a massive grassroots online resource to move motherhood and family issues to the forefront of the country's awareness, and second, it aims to provide grassroots support for leaders, as well as organizations, addressing key motherhood issues. Based on

the MoveOn.org organizing model, MomsRising.org offers an easy entry to motherhood-focused activism and education.

**The Motherhood Manifesto: What America's Moms Want — And What to Do About It**, by Joan Blades and Kristin Rowe-Finkbeiner (2006) pp. Nation Books, <http://www.nationbooks.org/index.mhtml/>. Softcover, \$14.95.

**MomsRising**, <http://www.momsrising.org/>.

### Challenges for the Community College System

California's community college system is the largest postsecondary education system in the country — with more than 2.5 million mostly part-time students enrolled in more than 100 campuses. In its in-depth look, the reporting series *California Counts* finds an extremely diverse student body in terms of race/ethnicity, age, education level, and academic goals; however, few students accomplish their goals, such as transferring to a four-year institution or earning an associate's degree. This is a major challenge for the system and the state because community colleges enroll over 70 percent of all public higher education students in California.

**"California's Community College Students,"** Ria Sengupta and Christopher Jepsen (November 2006) 24 pp. *California Counts: Population Trends and Profiles*, Vol. 8, No. 2, Public Policy Institute of California, <http://www.ppic.org/>. No charge; a free download of the report is available online.

### It's Who You Know....

The Bureau of National Affairs continues to publish its comprehensive and up-to-date directory of unions and related labor organizations in the U.S., the only complete directory of private- and public-sector unions and union leaders, the *Directory of U.S. Labor Organizations*.

This new edition includes an overview of Change to Win, a newly formed labor federation made up of former AFL-CIO unions, including the names of top officials and contact information; a detailed listing of top officials of the AFL-CIO at the headquarters, state, and local level; vital data on every national and international union in the U.S. (with proper names, addresses, telephone, fax, websites, email

addresses, publications, officers, and membership figures); local labor organizations by city and state; union membership and earnings data compiled by the U.S. Bureau of Labor Statistics; and National Labor Relations Board data on union representation elections in 2005. The directory also explains federal reporting requirements for unions and summarizes the rights of union members guaranteed by law.

**Directory of U.S. Labor Organizations, 2006 Edition** (2006) 260 pp. BNA Books, <http://www.bnabooks.com/>. Softcover, \$130.

### Nursing as Serious Business

In a series of essays, *The Complexities of Care* rejects the assumption that nursing work is primarily emotional and relational. The contributors all argue that the "caring" discourse in nursing is a dangerous oversimplification that has created many dilemmas within the profession and in the health care system. "Nursing, everyone believes, is the caring profession," write the editors. "Yet, in spite of what seems to be an endless outpouring of public support, in almost every country in the world nursing is under threat, in the practice setting and in the academic sector. Indeed, its standing as a regulated profession is constantly challenged."

The editors opine that "this paradox is neither accidental nor natural but, in great part, the logical consequence of the fact that nurses and their organizations place such a heavy emphasis on nursing's and nurses' virtues rather than on their knowledge and concrete contributions." The ideas presented here can foster a critical debate that will assist nurses to better understand the nature and meaning of the nurse-patient relationship, confront challenges to their work and their profession, and deliver the services patients need now and into the future.

**The Complexities of Care: Nursing Reconsidered**, edited by Sioban Nelson and Suzanne Gordon (2006) 224 pp. Cornell University Press, <http://www.cornellpress.cornell.edu/>. Hardcover, \$49.95; softcover, \$18.95.

### **The Basics for University Presidents**

Management concepts and practices applicable specifically to universities are covered in this addition to the *ACE/Praeger Series on Higher Education*. The book offers potential presidents and management teams answers to questions they ought to be asking themselves once appointed: How are 21st-century state universities perceived? How would I fit into a specific university and its leadership position? What should I expect in the selection process? What should I be sure to know — about the university's programs, key people, money, priorities?

Among the topics covered are critical first steps, and when, where, and how to take them; steps the appointing authority or one's predecessor can take that will help ease the transition; and other issues that will be faced. Equally important, the book explains where state university money comes from, and in what proportions, as well as ways to manage those sources to get needed funds. Finally, it suggests ways to handle a demanding management job and still enjoy good family relationships and good health.

**Can State Universities Be Managed? A Primer for Presidents and Management Teams**, by Duane Acker (2006) 236 pp. Greenwood Publishing Group, <http://www.greenwood.com/>. Hardcover, \$39.95.

### **Workplace Violence on the Rise**

The statistics are alarming. Homicide is the most frequent manner in which female employees are fatally injured at work; it is the number two cause for men. According to a recent study cited by the Society for Human Resource Management, incidents of workplace violence have increased steadily over the past 16 years; 58 percent of participating companies reported that disgruntled employees have threatened senior managers in the past year, 17 percent said employees had intentionally and maliciously downloaded computer viruses, and 10 percent said they were victims of product tampering. Meanwhile, the costs linked to workplace violence have been estimated at over \$120 billion. Experts agree that risk factors for workplace violence include

psychological, behavioral, and situational stressors — and today's volatile work environment increases their intensity.

Experts in the fields of management and social psychology identify the sources of workplace violence and offer practical strategies for preventing it, protecting oneself and one's employees from it, and reacting swiftly and effectively when it happens. Featuring case examples, interviews, practical recommendations, and resources for additional information, the authors debunk common myths and misconceptions about workplace violence, its perpetrators, and its victims, and consider the link between domestic and workplace violence — in particular, its implications for women and minorities. The guide is for anyone seeking solutions to the impact of workplace violence: managers and employees, human resource professionals and counselors, psychologists and other advocates.

**Understanding Workplace Violence: A Guide for Managers and Employees**, by Michele A. Paludi, Rudy V. Nydegger, Carmen A. Paludi (2006) 144 pp. Greenwood Publishing Group, <http://www.greenwood.com/>. Hardcover, \$39.95.

### **Turning 60**

At its 60th Anniversary Celebration, the California Legislature awarded U.C. Berkeley's Institute of Industrial Relations a certificate of appreciation for 60 years of contributions. The day-long event included four panel discussions — the state of the labor movement, public policy to improve California's labor markets, immigration, and globalization. The lunchtime address was by Art Pulaski, Executive Secretary-Treasurer of the California Labor Federation, AFL-CIO. A webcast of the discussions is available at the IIR website, <http://www.iir.berkeley.edu/>.

# 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.

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### Dills Act Cases

#### Unfair Practice Rulings

##### No interference found when act does not provide claimed right: California State Personnel Board.

(*International Union of Operating Engineers v. State Personnel Board*, No. 1864-S, 11-14-06; 39 pp. dec. By Member Neuwald, with Member Shek concurring and Chairperson Duncan dissenting.)

**Holding:** SPB is subject to Dills Act Sec. 3519 and cannot interfere with an employee's exercise of rights under the act. SPB's adjudicatory authority does not insulate it from PERB review for the limited purpose of deciding an unfair practice dispute. However, because the Dills Act does not provide the right to submit settlement agreements to SPB through an unconstitutional MOU procedure, IUOE failed to establish a prima facie case of interference. See State Employment section for discussion.

### EERA Cases

#### Unfair Practice Rulings

##### Settlement reached and appeal withdrawn: Victor Valley CCD.

(*Victor Valley College Faculty Assn., CTA/NEA v. Victor Valley Community College Dist.*, No. Ad-357, 11-8-06; 2 pp.

dec. By Member Neuwald, with Chairperson Duncan and Member Shek.)

**Holding:** Because the parties mutually reached a settlement, the board granted the association's request to withdraw its unfair practice charge and to vacate the decision issued by the ALJ.

**Case summary:** The unfair practice charge alleged that the district violated EERA Sec. 3543.5 by unilaterally increasing required summer session contact hours and summer session individual course meetings for teachers. The parties settled their dispute, and requested that the ALJ's decision be vacated and that the unfair practice charge and complaint be withdrawn. The board found it appropriate to grant the withdrawal and to vacate the decision issued by the ALJ.

##### Parameters of permissive bargaining addressed by board: El Centro ESD.

(*El Centro Elem. Teachers Assn. v. El Centro Elem. School Dist.*, No. 1863, 11-13-06; 9 pp. dec. + 10 pp. R.A. dec. By Member McKeag, with Member Neuwald; Member Shek concurring.)

**Holding:** The board lacks jurisdiction to issue an unfair practice complaint challenging a unilateral mid-term modification of a contract provision that is a permissive subject of bargaining. See General Section for discussion.

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



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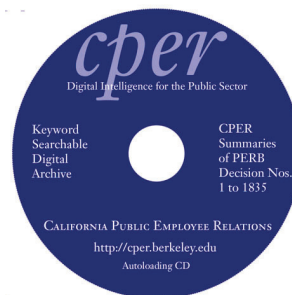
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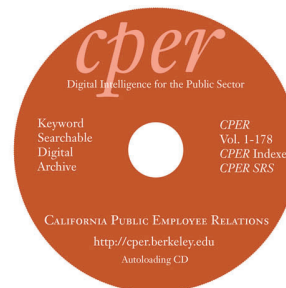
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**Board exercises discretion to grant withdrawal of exceptions: Hesperia USD.**

*(Hesperia Education Assn., CTA/NEA v. Hesperia Unified School Dist., No. 1875, 12-29-06; 3 pp. dec. By Member Neuwald, with Chairperson Duncan and Member McKeag.)*

**Holding:** The request to withdraw exceptions to the ALJ's proposed decision was granted.

**Case summary:** The district filed an exception to an ALJ's proposed decision. The underlying charge alleged that the district violated EERA Sec. 3543.5(a) and (b) by retaliating against certified teachers for their protected activities. The district withdrew its exception to the proposed decision and requested that PERB consider the case closed.

In cases where exceptions have been filed, the board has discretion to grant or deny the request and to allow the withdrawal of a charge and complaint, as well as to vacate a proposed decision. In this case, the board found the request in the best interest of the parties, and that such action would effectuate the purpose of EERA. Therefore, the board granted the district's request to withdraw its exceptions to the ALJ's proposed decision.

**Ignorance of the law no excuse for late filing: Modesto City School Dist.**

*(Estacio v. Modesto City School Dist., No. 1873, 12-29-06; 2 pp. + 8 pp. G.C. dec. By Member Shek, with Members McKeag and Neuwald.)*

**Holding:** Because it was untimely filed and did not state a prima facie case, the charge was dismissed.

**Case summary:** The charging party was terminated from her employment as a bus driver for the district on April 6, 2004. Prior to her termination, the charging party had been reprimanded on several occasions and had been assigned a less-desirable bus route. After being assigned the new route, the charging party filed a grievance against her supervisor alleging unfair treatment and a violation of a provision of the agreement regarding the assignment of routes, an action the employee asserted was vindictive. This grievance was denied, and CSEA requested it be advanced to arbitration.

Following these events, the charging party reported false overtime and was late on her routes. She then was placed on administrative leave. The district instructed the employee to remain at home during work hours while on leave. On one occasion, the charging party informed the district she had to leave her home to visit her sister in the hospital; the district requested proof of this necessity. CSEA asked the district to explain this action, but did not receive a response. The district subsequently terminated the employee from her position, a decision that was sustained at a hearing before an ALJ. All witnesses who testified on behalf of the district at this hearing received special treatment of monetary compensation.

On June 24, 2004, CSEA filed an unfair practice charge alleging unlawful termination. This charge was dismissed, and CSEA did not appeal the dismissal. The current charge was filed on February 9, 2005.

EERA Sec. 3541.5(a)(1) prohibits the board from issuing a complaint with respect to any charge based on an alleged unfair practice occurring more than six months prior to the filing of the charge. The limitations period begins to run once the charging party knows or should know of the conduct underlying the charge. This charge was filed more than 10 months following the date of termination. The employee argued that she could not timely file her complaint because she misunderstood PERB procedures, but PERB's general counsel noted that the board has long held that lack of knowledge of the law does not toll the statute of limitations period. Because there was no evidence that the limitations period should be tolled, the charge was dismissed as untimely.

Further, even if the charge had been timely filed, the general counsel found that it did not state a prima facie case of discrimination. To demonstrate a violation of Sec. 3543.5(a), the charging party must show that she exercised rights under EERA, that the employer knew of this action, and that the employer interfered with the employee because of the action. Here, although the charging party engaged in protected activity known to the district and the district im-

posed an adverse action, there was no evidence that the termination was caused by the employee's protected conduct.

The board upheld the decision of the general counsel as the decision of the board itself and dismissed the charge.

### ***Duty of Fair Representation Rulings***

#### **Charge dismissed for failure to state 'who, when, or where': Public Employees Union, Loc. 1.**

(*Pina v. Public Employees Union, Loc. 1*, No. 1872, 12-29-06; 3 pp. + 6 pp. R.A. dec. By Member Shek, with Chairperson Duncan and Member McKeag.)

**Holding:** Because the charging party failed to provide sufficient factual detail to state a prima facie case, the charge was dismissed.

**Case summary:** The charging party alleged that the union violated EERA by breaching its duty of fair representation regarding her employment with Mr. Diablo USD. The charge stated in its entirety that the union "failed to fairly represent me in dealings with the Mt. Diablo Unified School District." The R.A. found this allegation failed to establish a prima facie case.

PERB requires that an unfair practice charge include a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. To demonstrate a breach of the duty of fair representation, the charging party must show that the alleged action was arbitrary, discriminatory, or in bad faith. This must include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. Because such facts were not asserted here, the charging party failed to state a prima facie case, and the R.A. dismissed the charge accordingly.

The board upheld the R.A.'s decision, subject to further discussion. The charging party filed an untimely amendment to her appeal, for which good cause did not exist. Further, even if the charge had been timely filed, sufficient facts were not shown to establish a prima facie case. The charging party alleged that the union disclosed communications to

her supervisor, did not return phone calls, and promised to see her but never did. The amendment further maintained that an attorney would not take the case because the union failed to do so. However, because the letter did not state the relevant facts of "who, when, or where," the charging party failed to establish a prima facie case.

#### **Charge dismissed for late filing, failure to state a prima facie case: CSEA.**

(*Estacio et al. v. California School Employees Assn., Chap. 007*, No. 1874, 12-29-07; 2 pp. + 13 pp. G.C. dec. By Member Shek, with Members McKeag and Neuwald.)

**Holding:** Because it was untimely filed and did not state a prima facie case, the charge was dismissed.

**Case summary:** The charging parties alleged that CSEA violated its duty of fair representation regarding their employment with the district. This duty was allegedly breached in conjunction with the employees' actions against the district, including a grievance, a termination hearing, a complaint for unfair treatment, and allegations of forced resignation.

The grievance and termination hearing arose when one charging party, a bus driver for the district, was reprimanded for various actions and assigned a bus route with fewer hours than those assigned to less-senior drivers, allegedly because the charging party previously had questioned such assignments. The grievance maintained that this conduct was unfair harassment, and a violation of the collective bargaining agreement regarding the assignment of bus routes.

When the employee spoke with CSEA about her grievance, the union informed her that her claim did not have merit because she had been offered another route by the district and rejected the assignment. It was for this reason that the grievance was denied. CSEA requested the grievance advance to arbitration, but indicated that it would not represent the charging party. The employee appealed CSEA's decision, but her appeal was denied.

Subsequent to these actions, the charging party was involved in several incidents for which she was reprimanded and eventually placed on administrative leave. The district

then terminated the employee from her position, a decision that was sustained at a hearing before an ALJ.

The charging party requested that CSEA represent her at the ALJ hearing, but her request was denied since such cases are normally presented by labor relations representatives.

After the ALJ upheld the dismissal, CSEA filed an unfair practice charge alleging unlawful termination. This charge was dismissed, and CSEA did not appeal.

The charging party then applied for unemployment benefits but was denied. She appealed this decision, and a CSEA representative accompanied her at the unemployment insurance hearing but did not represent her. This was because the charging party had elected to represent herself.

In his decision to dismiss, PERB's general counsel referenced EERA Sec. 3541.5(a)(1), which prohibits the board from issuing a complaint with respect to any charge based on an alleged unfair practice occurring more than six months prior to the filing of the charge. The limitation period begins to run once the charging party knows or should know of the conduct underlying the charge. This charge was filed more than six months following the date of termination. Because there was no evidence that the limitations period should have been tolled, the charge was dismissed as untimely.

Further, even if the charge had been timely filed, the allegation that CSEA breached its duty of fair representation failed to state a prima facie case. The duty of fair representation does not apply to non-contractual administrative forums such as PERB.

Similarly, the charge did not demonstrate a violation of Sec. 3544.9. Under this section, the charging party must show that the union's conduct was arbitrary, discriminatory, or in bad faith, none of which was evidenced here. CSEA represented the party at her termination hearing and filed an unfair practice charge before PERB on her behalf. It also informed the employee her grievance did not have merit, attempted to resolve the grievance, and preserved her right to proceed to arbitration, even though it would not represent her there.

The charge against CSEA regarding administrative leave arose when the second charging party filed a complaint against the district, alleging unfair treatment. He did not discuss the alleged unfair treatment with his supervisor prior to filing the claim, nor did he file his complaint with the union. The district thus declared the claim invalid and threatened the employee with a slander lawsuit. The employee met with CSEA regarding the claim but provided no support for his allegations, and the charge was ultimately dismissed.

Following this grievance, the charging party failed to follow proper district procedure for using sick leave, and was placed on administrative leave for this action. The union did not challenge this decision. The employee did not return to work following his leave, and the district announced its intent to terminate him for abandoning his job. CSEA and the employee met with the district regarding this decision. While at this meeting, the charging party signed a document of resignation including a waiver and release of all claims against the district, as well as provisions that required the district to remove prior disciplinary actions from his personnel file and pay him an amount equal to four weeks of summer service.

The general counsel found this charge was untimely filed. The events underlying the claim occurred more than six months prior to the filing of this charge. Further, even if the charge had been timely filed, the employee failed to state a prima facie case. CSEA represented the grievant in meetings regarding his complaint of unfair treatment. It was the charging party's refusal to supply information, not the union's actions, that led to dismissal of the charge. The union additionally represented the charging party regarding the administrative leave and resignation, and there is nothing in the charge that demonstrates that the union's conduct was arbitrary, discriminatory, or in bad faith.

The board upheld the general counsel's decision as the decision of the board itself and dismissed the charge.

## HEERA Cases

### *Unfair Practice Rulings*

Individual unit member lacks standing to bring claim: CSU.

(*Chemello v. California State University [Humboldt]*, No. 1866-H, 12-14-06; 2 pp. + 13 pp. B.A. dec. By Chairperson Duncan, with Members McKeag and Neuwald.)

**Holding:** The charge was dismissed because the employee untimely filed the unfair practice charge, lacked standing to file the charge, and failed to provide sufficient evidence to support a prima facie case.

**Case summary:** This unfair practice charge came before the board on appeal of a board agent's dismissal. The charge alleged that the university violated HEERA by misclassifying the charging party's position, threatening the charging party, improperly terminating him, refusing to meet and confer after the dismissal, and violating the collective bargaining agreement.

Prior to a layoff of CSU employees, the charging party was employed by the university as a facilities worker II and was represented by the State Employees Trades Council United. While still employed in this position, the charging party's supervisor stated in relation to his participation in a reorganization process that "when you bring up the problem, you are the problem and layoffs are looming." Shortly thereafter, CSU issued notices that all but two employees were to be laid off.

In accordance with a settlement agreement arising from the layoff, the charging party was granted a right of first refusal for general maintenance work and was placed on a rehire list for five years. Subsequently, the charging party applied for several positions, none of which was within the bargaining unit or at the class level included in the right of first refusal agreement, and each time he was not selected for the job. A less-senior applicant was selected, however, for a carpenter position, a job for which the charging party applied. CSU claimed that although the successful applicant was less senior, he had a more relevant skill set for the position than did the charging party.

The charging party believed CSU would not rehire him because of a letter he wrote critical of the university and published in CSU's newsletter. This, he asserted, was discriminatory action. The charging party further alleged that CSU violated the bargaining agreement by refusing to rehire him and failing to meet and confer with him in regard to the layoff. The charging party claimed this action amounted to a unilateral change in the collective bargaining agreement.

Although the charging party demonstrated that CSU's decision to hire the other employee did occur in close temporal proximity to the publication of his critical letter, the B.A. nonetheless found that the charging party failed to demonstrate a nexus between the adverse action and the protected conduct, a necessary element in proving discrimination.

Additionally, because the charging party did not file his claim until six years after the layoff, his charge was not timely filed. Even if the charges were timely filed, the B.A. concluded that because the charging party brought the unilateral change violation as an individual, he did not have standing to assert violations of HEERA that protect collective bargaining rights of employee organizations. The B.A. also determined that the charging party did not demonstrate that CSU was not permitted to hire another employee for the carpenter position. Nor did he provide evidence showing how the university deviated from the provisions of the bargaining agreement. Consequently, the charging party did not establish a prima facie case, and the B.A. dismissed the charge.

The board agreed with the B.A.'s finding, adding only that even if the allegation proved that CSU violated the collective bargaining agreement, PERB still did not have jurisdiction to hear the case. HEERA Sec. 3563.2(b) states that the board lacks authority to enforce agreements between parties on any charge alleging violation of that agreement unless the violation would also constitute an unfair practice under HEERA. The charging party failed to present facts establishing such an action occurred.

Accordingly, the board adopted the B.A.'s decision as the decision of the board itself and dismissed the charge.

**Settlement reached and appeal withdrawn: U.C.**

(*AFSCME, Loc. 3299 v. University of California*, No. 1869-4, 12-15-06; 2 pp. dec. By Member McKeag, with Chairperson Duncan and Member Shek.)

**Holding:** Because the parties settled their dispute, the board granted the parties' request for a withdrawal.

**Case summary:** The university appealed the ALJ's decision that the university violated HEERA when it unilaterally implemented a 5 percent salary increase for certain employees represented by AFSCME, Loc. 3299. The ALJ further found that the university violated HEERA when it directly announced to these employees the implementation of the salary increase and took sole credit.

The parties reached a settlement and requested withdrawal of the unfair practice charge. The board requested that the parties provide a copy of the signed settlement agreement or that the university confirm the settlement. The board received no response to its request. Relying on *ABC Unified School Dist.* (1991) PERB Dec. No. 831(b), 86X CPER 13, the board exercised its discretion to permit withdrawal of the charge.

**Board dismisses claim for failure to state a prima facie case, late filing: U.C.**

(*Coalition of University Employees, Loc. 6 v. University of California*, No. 1870-H, 12-28-06; 3 pp. + 5 pp. R.A. dec. By Member Shek, with Chairperson Duncan and Member Neuwald.)

**Holding:** Because the union requested information pertaining to employees outside of its bargaining unit, the university did not violate HEERA when it refused to provide the requested information.

**Case summary:** During negotiations for a successor agreement, the union requested the university to provide it with a copy of work rules for all departments in the medical center. The university refused to supply the information, and CUE filed an unfair practice charge alleging the university's action was a violation of HEERA.

The R.A. dismissed the charge for failure to state a prima facie case. She explained that while an exclusive representative is entitled to all information necessary and relevant to its representation duties, the information requested did not pertain to CUE's bargaining unit. Therefore, the requested information was not relevant and the university's failure to provide the information did not constitute an unfair practice.

On appeal, the board adopted the R.A.'s decision as the decision of the board itself, subject to further discussion. The board also reviewed the union's assertion that it had filed its appeal of the dismissal five days after the stated deadline because the union representative was on vacation, and that an inexperienced staff member did not realize he had to arrange an extension. This, the board held, did not demonstrate good cause to excuse the late filing, and it declined to consider any additional allegations or amendments presented on appeal.

**Allegations of conditional bargaining and campaign to disparage union dismissed: CSU.**

(*Statewide University Police Assn. v. California State University*, No. 1871-H, 12-28-06; 2 pp. + 9 pp. B.A. dec. By Member Shek, with Chairperson Duncan and Member Neuwald.)

**Holding:** Because the condition placed on bargaining was within the parties' control, and because the university's communication with employees did not evidence a campaign to disparage the union, the case was dismissed.

**Case summary:** Statewide University Police Association filed this charge against CSU, alleging that it violated HEERA by dealing directly with employees regarding the status of ongoing negotiations and by engaging in conditional bargaining.

SUPA is the exclusive representative of a unit of law enforcement personnel at CSU. After the parties' MOU expired, they entered into negotiations for a new agreement. SUPA contended that while negotiations were ongoing, the university issued an email regarding these negotiations, and this memo was shared with employees in violation of HEERA.

The association maintained that the email contained numerous errors in a deliberate attempt by the university to undermine the union and to “sway” employee views while retaining an inflexible stance at the bargaining table. These misstatements purportedly created the impression that SUPA was not proactively engaged in negotiations and had caused a delay in the negotiation process.

SUPA further alleged that CSU engaged in conditional bargaining by stating it would provide its proposed wage increase only if SUPA accepted it by a predetermined date. SUPA contacted the university one day after the stated deadline had passed, and the university rescinded its offer.

Referencing HEERA Sec. 3571.3, the B.A. dismissed the association’s charge of direct dealing. Relying on the NLRB’s interpretation of a National Labor Relations Act provision identical in substance to Sec. 3571.3, PERB has consistently held that employers may communicate with employees about labor relations so long as the communication does not contain a threat of reprisal or promise of benefit, and so long as the communication is not an attempt to sway the views of employees while the employer maintains an inflexible position at the negotiating table. Nor may the employer engage in a campaign to disparage the exclusive representative’s negotiators so as to drive a wedge between union representation and bargaining unit employees.

The B.A. found that the alleged misrepresentations in the email did not rise to the level of a campaign to disparage SUPA. While the university’s communication may have been an attempt to explain the status of negotiations from its perspective, it did not attempt to confuse employees or disparage SUPA’s proposals. In addition, the email was sent to campus administrators, not unit employees, with an acknowledgement that it may be shared with unit members. That campus administrators may have chosen to act on this acknowledgement does not evidence a campaign to undermine SUPA or its bargaining positions.

Similarly, SUPA did not provide evidence that the university engaged in conditional bargaining. In regard to this allegation, CSU’s reliance on previous PERB decisions, including *Modesto City Schools* (1983) No. 1249-S, 45 CPER 5,

and *Muroc USD* (1978) No. 80, 40 CPER 65, was misplaced. In those cases, the conditions placed on the bargaining process — a no-strike clause and the use of a tape recorder during negotiations, respectively — were different from those at issue here. The B.A. instead relied on *Fremont USD* (1980) No. 136, 46 CPER 38, in which the board found that conditional bargaining does not exist if a party conditions a proposal on something within the control of the negotiators. Here, time limits placed on the proposal were within the control of the parties and did not indicate bad faith.

Accordingly, the board upheld the B.A.’s decision as the decision of the board itself and dismissed the charge.

#### **Parking fees, not structures, within the scope of bargaining: CSU.**

(*California State Employees Assn., CSU Div., and California Faculty Assn. v. California State University*, No. 1876-H, 12-29-06; 25 pp. dec. By Member McKeag, with Members Shek and Neuwald.)

**Holding:** The university violated HEERA when it consulted an outside task force regarding matters within the scope of bargaining and when it failed to provide the union with requested information pertaining to a mandatory subject of bargaining. However, CSU had no obligation to bargain over the location of a parking structure.

**Case summary:** This charge came before the board following a lengthy procedural process, during which the substantially similar allegations of CSEA and CFA were consolidated. Both CSEA and CFA’s bargaining agreements with the university state that employees wishing to park at any CSU facility shall pay a parking fee in accordance with campus policy, and that there would be no parking fee increases for the 2002-03 fiscal year. Parking locations were not bargained.

Due to increased student enrollment, CSU built new parking facilities on campus. CSU did not allow union-represented faculty or staff to park in the new structures, an act the unions alleged constituted a unilateral change in violation of HEERA Sec. 3571(c). The unions also alleged the university violated HEERA by consulting with an outside

advisory group regarding parking fees for the new structures and by refusing to comply with a request for parking information. The ALJ found CSU in violation of HEERA on all charges. The board agreed that the university violated HEERA when it refused to provide CFA with relevant and necessary information, as well as when it consulted an outside task force. But the board dismissed the allegation of unilateral change.

CSU's decision to build new parking structures resulted in increased student and faculty parking fees. The university did not raise the parking fees for CFA- or CSEA-represented employees. In fact, unit members were not allowed to park in the new structures.

CSU's president was concerned that only students and a limited number of faculty were charged higher parking fees. University faculty suggested adopting a funding mechanism whereby represented faculty and staff could choose to pay the increased fee for the benefit of parking in the garage, and the president created a task group to make recommendations on the issue.

Following the above actions, CFA requested the university provide it with information regarding on-campus parking. CSU declined to supply the information, stating that since it did not plan to increase unit members' parking fees, there was no basis for an information request. CFA repeated its demand, explaining that it was considering reopening the bargaining agreement to discuss parking fees and needed the requested information to make a final determination. CSU again declined to produce the documents.

To establish a violation of HEERA Sec. 3571(c) regarding unilateral change, the board must find that the employer implemented a change in policy concerning a matter within the scope of representation. In *Anaheim Union High School Dist.* (1981) Dec. No. 177, 52 CPER 64, PERB determined that a matter is within the scope of bargaining if it is related to hours, wages, or terms of employment; if conflict is likely to occur and collective bargaining is the appropriate means of resolving the conflict; and if the obligation to negotiate would not abridge the employer's freedom to exercise managerial prerogatives.

Applying this test, the board found that parking locations are not within the scope of bargaining. Faculty parking fees did not change when the new structures became available; therefore, the decision to restrict represented faculty from parking at these locations had no impact on employee wages. Further, the unions' argument that hours were increased because employees had to spend time looking for parking spaces was unfounded. Employees do not begin work when they park their cars but when they commence duties. Accordingly, location of parking is not related to hours of employment. The board additionally held that parking is not a condition of employment because employees are not required to drive to work and are not limited to on-campus parking.

The board therefore dismissed the charge of unilateral change.

CSU maintained that CFA's charge regarding its information request should be deferred to arbitration. The board found otherwise, reasoning that the matter had been fully litigated, and that arbitration would result in duplicative proceedings and needless delay. Therefore, the union's request did not fall within the parameters of the objectives set forth in *State of California (Dept. of Corrections)* (1995) PERB Dec. No. 1100-S, 112 CPER 81, which ensure that only one neutral administrative forum will be responsible for resolution of any specific dispute, so that duplicative proceedings will be avoided and disputes resolved more quickly.

The board did agree, however, with CFA's assertion that CSU violated HEERA Sec. 3571(b) when it failed to produce requested documents. Because the requested information was necessary for the union to evaluate its decision to reopen negotiations on the issue of parking fees, it pertained to a mandatory subject of bargaining and should have been produced.

The board also found that CSU violated HEERA Sec. 3571(f) when it created and consulted with a group of outside representatives on a matter within the scope of bargaining. The board noted that Sec. 3571(f) never has been interpreted by PERB, but because CSU did not file exceptions to

the claim, the board affirmed the ALJ's conclusion that consulting the task force was a violation of the act.

### ***Representation Rulings***

#### **Appeal withdrawal granted: CSU.**

(*California State University v. California State University Employees Union and State Employees Trades Council-United*, No. Ad-358-H, 12-15-06; 2 pp. dec. By Member McKeag, with Chairperson Duncan and Member Neuwald.)

**Holding:** Because the union withdrew its appeal, the board granted the withdrawal.

**Case summary:** The union sought the transfer of positions held by six employees in the Unit 6 facilities series to the Unit 5 grounds series, alleging that the positions had evolved from skilled trades to ground works and were no longer appropriate for the facilities series unit. The union requested to withdraw its appeal. Finding this to be in the best interest of the parties and the board granted the withdrawal.

### ***Duty of Fair Representation Rulings***

#### **Dismissed employee is not entitled to union representation: SETC-U.**

(*Chemello v. State Employees Trades Council United*, No. 1867-H, 12-14-06; 2 pp. + 7 pp. R.D. dec. By Chairperson Duncan, with Members McKeag and Neuwald.)

**Holding:** Because the charge was not timely filed, and because the charging party was not entitled to union representation, the charge was dismissed.

**Case summary:** This charge arose following a layoff at California State University, Humboldt. The charging party was employed as a facilities worker II and was represented by the State Employees Trades Council United. In early 2004, CSU notified several SETC-U members of future planned layoffs. CSU did not meet with the union prior to proceeding with the proposed layoffs. SETC-U filed grievances on behalf of several affected employees, and was successful in reaching settlement agreements. All but two layoffs were averted, one of which was the charging party's. Although he

was laid off, the charging party was granted a right of first refusal for general maintenance positions and was placed on a five-year rehire list.

Following his layoff, the charging party applied for several positions at CSU but was never hired. The jobs for which he applied were either outside the bargaining unit or of a higher classification than those encompassed by the right of first refusal agreement. One such position was that of carpenter I. The charging party applied for a carpenter position but was not hired. Instead, CSU rehired an employee junior to the charging party, claiming that he had the required skill set for the job and that the charging party did not.

In response, the charging party filed a level-three grievance but was told that because he was not employed by the university, he lacked standing. The charging party subsequently filed a grievance against SETC-U, alleging that it failed to enforce its agreement with CSU, including failure to challenge CSU's use of students to perform bargaining unit work and CSU's practice of allowing positions to remain unfilled. He also claimed SETC-U allowed employees represented by the California State Employees Association to perform SETC-U bargaining unit work.

The R.D. found the alleged facts failed to state a prima facie case. HEERA requires that an unfair practice charge be filed within six months from the time the party knows or should have known of the conduct underlying the charge. This charge was filed more than six months after the charging party had such knowledge. In addition, SETC-U's obligation to represent the charging party terminated with his layoff in 2004. The allegations against SETC-U occurred after termination of the charging party's employment and therefore SETC-U did not owe him a duty of fair representation. Accordingly, the charge was dismissed.

In a third amended charge, the charging party alleged that SETC-U was defrauding Humboldt State University and the California State Employees Association by collecting dues from employees and representing employees who should be included in the unit represented by CSEA. He further alleged that SETC-U defrauded him by collecting his dues even though it had no duty of representation, and



that SETC-U committed perjury in its statements responding to his charge.

Because individual employees lack standing to challenge unit configuration, this charge was also dismissed.

The board adopted this decision as the decision of the board itself and dismissed the charge.

## MMBA Cases

### *Unfair Practice Rulings*

#### **PERB lacks jurisdiction to hear claim of transportation employee: City of Santa Clarita.**

(*Keymolent v. City of Santa Clarita*, No. 1865-M, 12-7-06; 2 pp. + 5 pp. R.A. dec. By Chairperson Duncan, with Members Shek and Neuwald.)

**Holding:** Because PERB lacks jurisdiction over private employees, the charge was dismissed.

**Case summary:** This unfair practice charge alleged that the city violated the MMBA by retaliating against the charging party and denying him union representation.

The charging party was employed by Veolia/Connex/ATC, a private provider of transportation services under contracts with the city. The charging party alleged he was terminated from his employment because he filed an unfair practice charge, that his employer disciplined him and treated him inhumanely because he sent a letter to the county supervisor, and because his employer suspended him without providing union representation.

Although ATC is a private entity, the charging party argued that it contracted and shared resources with the city and therefore qualified as a public entity. Because ATC had a contract with Teamsters Loc. 986, the R.A. contacted the union representative and was informed that a hearing was scheduled regarding the charging party's dismissal, and that the charging party was not a state or public employee.

PERB only has jurisdiction over public employees. It does not have authority over collective bargaining laws covering employees of private companies. Such authority rests

with the National Labor Relations Board, which is the appropriate venue for the charging party's complaint.

In *Fresno USD* (1979) PERB Dec. No. 82, 41 CPER 45, PERB decided that employees of a private company who contracted to provide transportation services to the Fresno Unified School District were not public employees because dismissal of the employees was carried out by supervisory personnel at the private company and school district personnel were not involved in the dismissals. Similarly, the charging party was dismissed by his supervisor, an employee of ATC.

Therefore, PERB lacked jurisdiction over the matter and the R.A. appropriately dismissed the charge. The board adopted the R.A.'s decision as the decision of the board itself.

#### **The existence of unreasonable local rules does not constitute an ongoing violation absent harm suffered: Orange County.**

(*SEIU, Loc. 660 v. Orange County*, No. 1868-M, 12-15-06; 32 pp. + 11 pp. ALJ dec. By Member McKeag, with Member Neuwald; Member Shek dissenting.)

**Holding:** Because the existence of an unreasonable local rule does not establish a continuing violation, and because the charging party's harm occurred outside the statutory period for an unfair practice charge, the claim was dismissed as untimely.

**Case summary:** SEIU, Loc. 660, brought an unfair practice charge against Orange County alleging that the county's local rules contained an unreasonable signature requirement for decertification petitions. The ALJ held SEIU's charge was not timely filed, and dismissed the complaint and underlying charge. The board adopted the ALJ's decision, subject to further discussion and dissent by Member Shek.

MMBA Sec. 3507 allows a public agency to adopt reasonable rules and regulations for the administration of employer-employee relationships. Pursuant to this section, the county adopted local rules in regard to the decertification process. The rule at issue stated that requests for decertification must be accompanied by a petition signed by at least 50 percent of the regular and probationary employees with the bargaining unit, within a 30-day period. Previously, the

county's local rules required the signatures of only 30 percent of unit employees.

In 1997, subsequent to implementation of the increased signature requirement, SEIU filed a petition to decertify a bargaining unit but was not successful. It has not filed a petition since. The current charge was filed in 2002, five years after SEIU's petition for decertification was denied. The ALJ deemed the charge untimely filed.

Relying on *Long Beach USD* (1987) PERB Dec. No. 608, 72 CPER 73, SEIU argued the charge was not untimely filed because the unreasonable signature requirement constituted a continuing violation. In *Long Beach*, the board held that an employer's regulation limiting a union's right of access to employees was a continuing violation and that the date on which the regulation was adopted or revised was immaterial. The ALJ found *Long Beach* distinguishable from the present case because a union's access to employees has a day-to-day effect on representation rights while petitioning for the decertification of an incumbent union is a rare occurrence. The ALJ also noted that a challenge to unreasonable access rules risks disciplinary consequences while a challenge to the decertification rule requires only the filing of a petition.

SEIU additionally argued that MMBA Sec. 3507(d) specifically authorizes employee organizations to challenge local rules at any time. The ALJ disagreed. In his view, such an interpretation is inconsistent with the legislature's cautious approach to expanding PERB's jurisdiction or authority. Because SEIU could not establish a continuing violation, the charge was dismissed as untimely filed.

On appeal, the board rejected SEIU's argument that the harm at issue arose not from the filing of a petition but rather from the existence of the local rule. The board found this argument inconsistent with PERB's long-standing case law establishing that the existence of an unreasonable rule does not automatically trigger the continuing violation doctrine. Nor can a continuing violation be found where the employer's conduct during the limitations period constituted an unfair practice only in relation to the original offense. If SEIU's argument were adopted, it would eviscerate the stat-

ute of limitations for local rule challenges and local rules would be subjected to perpetual vulnerability. The board thereby affirmed that the continuing violation doctrine requires there to be a new wrongful act within the statutory period.

The board also held that because SEIU had not been harmed by the signature requirement, there was no case or controversy before the board and any decision rendered would be advisory, overturning PERB precedent barring the issuance of such decisions.

SEIU asserted that the holding in *SEIU v. Superior Court* (2001) 89 Cal.App.4th 1390, 149 CPER 34, requires the board to invalidate the signature requirement regardless of whether SEIU suffered harm within the statutory period. In that case, the Court of Appeal addressed a rule established by the Superior Court of Orange County which required that 50 percent of employees sign a decertification petition. The court held that such a rule was unreasonable. PERB declined to follow that precedent, again asserting the lack of harm suffered, stating that "to rule otherwise would disregard years of PERB precedent and potentially open the floodgates to a myriad of local rule challenges."

Accordingly, the board adopted the ALJ's decision as the decision of the board itself and dismissed the case.

In dissent, Member Shek argued that the majority opinion misinterpreted and misapplied the doctrine of continuing violation set forth in *San Dieguito Union High School Dist.* (1982) PERB Dec. No. 194, 53 CPER 42, and *Long Beach*, as well as other PERB decisions. Those cases, Shek contended, establish that a new wrongful act is not required for a continuing violation where the charging party alleges that a rule or regulation is invalid on its face. Further, the 50 percent requirement has a chilling effect on the exercise of employees' right to join and participate in the activities of the labor organization of their choice and is therefore in violation of the MMBA. Shek also would have held the decertification rule invalid in accordance with *SEIU v. Superior Court*.