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letter from the editor

Dear *CPER* Readers:

One of the great benefits of my job at *CPER* is that it acquaints me with the many different perspectives which exist side by side in the public sector labor relations community. On a daily basis, I have the chance to talk to the real, hands-on experts in the field. Your willingness to share your thoughts and opinions helps me do my job, and it certainly boosts the likelihood that what I write not only is accurate, but incorporates valuable insights into the issues you confront in your work.

In addition to my regular telephone and email contacts, I am always grateful to those of you who write main articles for *CPER*. Putting together the journal is my job, not yours, but I couldn't do it alone, without the contributions so many of you have made over the years. And, for those of you who've not yet put pen to paper, I invite you to give me a call if there's an interesting article percolating in your brain. Because outside authors always have a voice at *CPER*, I'm able to share a broad range of viewpoints with public sector practitioners.

This issue of the journal provides a great example of the valuable input we get from some of your colleagues. Greg Dannis has been a long-time contributor to these pages, and I always look forward to reading his creatively crafted perspective. Likewise, we always welcome the efforts of Dick Whitmore and his colleagues at Liebert Cassidy Whitmore. Their most recent article in this issue adds to the insightful observations of another frequent "guest author," Alan Hersh, whose article appeared in February.

In addition, we welcome new voices, like Tom Driscoll, who is making his debut in the pages of *CPER*. The views of "seasoned" practitioners are an invaluable resource that I am lucky to take advantage of.

I like to think of *CPER* readers as a community made up of a diverse group of advocates and neutrals. Your professional activities encompass varied sub-disciplines within our public sector focus. Obviously, you come to the table with different perspectives. In fulfilling my responsibilities, I am delighted to provide a forum for your many voices and opinions. I encourage you to participate.

Sincerely,

Carol Vendrillo
Editor

Teacher Credentialing, Classification, and Seniority: The Ed. Code Rules

Thomas J. Driscoll, Jr.

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The opinion of the Fifth District Court of Appeal in *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.*,¹ enforcing the Education Code's statutory scheme, is vitally significant to teachers and districts throughout California. Bakersfield City School District challenged this statutory scheme² by asserting, in essence, that since the legislature did not specify the classification of a holder of an emergency permit, pre-intern certificate, or internship credential, it was within its discretion to classify the holders of such certification documents as temporary employees. This contention is flawed.

The expansive record and numerous issues presented in the case allowed the court to comprehensively articulate and elucidate the legal principles that control teacher classification and seniority. The court's ruling relies on long-standing precedent that the classification of teachers — as permanent, probationary, temporary, or substitute — is governed by statute, not by circumstances concerning a particular teacher's credentialing.³ Similarly, the acquisition of seniority from the first date of paid service as a probationary teacher is determined by statute, not by a particular teacher's credential, whether life, clear, preliminary, internship, emergency, or waiver. The court made an equally important decision in rejecting Bakersfield City School District's laches defense, an equitable defense that is well-developed jurisprudentially, determining that a party causing the delay by misrepresenting material facts may be estopped from asserting the defense.

Overall, as this article discusses, the Fifth District made a significant contribution to the jurisprudence of teacher classification, seniority, and the equitable defense of laches. Its analyses of these issues is accurate and statutory, although tarnished by its reinstatement and damage limitation to one year.

Teacher Classification

Classification of teachers is governed by statute⁴ and is not subject to a school district's discretion.⁵ The Education Code establishes a system of teacher classification⁶ with a specific statutory scheme governing each school district's implementation of that system.⁷ Temporary classification within that scheme must be strictly construed within its legislated confines.⁸ The classification scheme is not conditioned on credentialing, which is separately governed by other sections of the Education Code.⁹

The Court of Appeal's adjudication of the issues in this case is consonant with the legislative scheme established in the Education Code and construed by the precedents of the Supreme Court, as well as those of the Courts of Appeal. Consistent with that authority,¹⁰ the Fifth District determined that school districts are required to classify teachers as temporary only as authorized by specific provisions of the Education Code.¹¹ In effect, this prevented the Bakersfield City School District from continuing its unlawful "policy" of classification based on credentialing. Said the court: "A person who has been determined to be qualified to teach is not a temporary employee simply because he or she is not yet fully accredited, but rather because he or she occupies a position the law defines as temporary"; "...classification of...certificated employees (with the single exception of district interns),¹² is not determined by what type of credential or certification they have. If a certificated employee occupies a position the Education Code defines as temporary, he or she is a temporary employee; if it is not a position that requires temporary classification (or permanent or substitute), he or she is a probationary employee. The Code grants school districts no discretion to deviate from this statutory classification scheme."

The statutory system of classification is not and never has been a function of certification; it relates only to the position to which a teacher is assigned. A teacher not already

classified as permanent or probationary — whether the holder of a life, clear, or preliminary credential, pre-intern certificate or emergency permit — who is assigned to a position the Education Code defines as temporary, is classified as temporary by law. The code expressly limits temporary classification to specific assignments.¹³

Bakersfield City School District presupposed that holders of any credential other than life, clear, or preliminary (apparently whether emergency permit, pre-intern certificate or university internship) possessed "provisional" credentials.¹⁴ No provision of the Education Code, or the sections regarding emergency permits, pre-intern certificates,

or university internships so provides. Although the First District Court of Appeal in *Summerfield v. Windsor Unified School Dist.*¹⁵ determined that teachers holding exclusively emergency permits were not entitled to receive credit toward permanent classification, neither statute nor judicial decision has so determined regarding pre-intern certificates or university internships. Moreover, the Fifth District in this case determined, as did the Fourth District in *Peoples v. San Diego School Dist.*,¹⁶ that the legislature amended the university internship provision in 1997 with the

express intention to equate the service of university interns with that of district interns, who are probationary.

Essentially, Bakersfield City School District maintained that if holders of emergency permits, pre-intern certificates, or internship credentials are at any time not able to count time toward acquisition of permanent classification, that limitation renders their classification temporary. Such analysis disregarded the specific statutory scheme of temporary classification, which is not based on certification. But more inherently, the argument lacks substance. As the opinion held, in reliance on the Fifth District's prior decision in *California Teachers Assn. v. Governing Board of the Golden Valley Unified School Dist.*,¹⁷ it would be meaningless to exclude time from counting towards acquisition of permanent status, unless credit towards acquisition of permanent classification would occur absent the limitation.

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In other words, denial of credit towards acquisition of permanent classification necessarily suggests probationary classification because the limitation is meaningless otherwise: permanent, temporary, and substitute teachers do not acquire credit toward permanent status. By legislative design, the reference to provisional credentials or time not counting towards acquisition of permanent status does not infer temporary classification but rationally implicates only probationary classification, assuming the teacher is not assigned to one of the positions specified in the Ed. Code as temporary service.

Contrary to the protestations of the district, and as the factual record before the Fifth District demonstrated, it is not possible to determine the level of teacher training, experience, or competence of a certificated employee simply on the basis of the credential under which a teacher may be serving. Teachers holding emergency permits, pre-intern certificates, or internship credentials also may hold preliminary, clear, or even life credentials, but be serving outside those credentials' authorizations.¹⁸ Or they may hold out-of-state credentials and be awaiting issuance of reciprocal California credentials or completing additional California requirements.

Teachers holding only emergency permits may have years of satisfactory employment and be within immediate receipt of a clear specialist credential,¹⁹ while those holding a preliminary credential may have taught for less than a year and be more than a year away from a clear credential. A teacher holding an emergency permit, pre-intern certificate, or intern credential may be fluent in a language other than English, a retired physicist, talented artist, or grant writer, or may possess an engaging classroom presence, while a particular clear credential holder may have no such special qualifications and may have been employed by a school district after having been non-reelected or dismissed from another district. It simply is not possible to generalize the holders of these credentials as uncredentialed or unqualified to teach, or as providing deficient service, as asserted by the district.

Teacher Seniority

In its design of the layoff system, the legislature determined that seniority would control both the order of layoff and the order of reemployment following layoff. The same basis for seniority has been in existence for 60 years: "Every probationary or permanent employee...shall be deemed to have been employed on the date upon which he first rendered paid service in a probationary position."²⁰ The provision authorizes seniority only for permanent and probationary employees, and assures precisely the same starting point for all: first date of paid service in a probationary position. The section is mandatory and may not be waived.

The legislature established a uniform statewide seniority system that gives individual school districts no discretion to establish their own system augmented by additional requirements. Nor do basic tenets of statutory construction permit the inference of additional requirements,²¹ a court need go no further than the plain language and must presume the legislature meant what it said.²² In short, a governing

board is obliged to conform the seniority system in its district to that mandated by the legislature.

Nor is seniority conditioned on whether a particular position counts toward acquisition of permanent status. The statutory language is "first date of paid service in a probationary position," not "first date of paid service in a position counting toward the acquisition of permanent status."²³ Whether a teacher serves in a probationary position for two years, three years, or ten years before being eligible for permanent status, or never attains permanent status (perhaps due to a long-standing job-share arrangement), that teacher's seniority under Sec. 44845 is still determined by the first date of paid service in a probationary position. So long as the position is probationary and the service is compensated rather than gratuitous, the teacher accrues seniority from that point forward.

Seniority is not conditioned on whether an employee holds a particular credential. The statutory language is not

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“first date of paid service in a probationary position for which the employee possesses the appropriate life, preliminary, or clear credential.” Whether the employee holds a life, clear, preliminary, internship, eminence, sojourn, pre-intern, emergency, or child development credential, seniority is determined by first date of paid service in a probationary position.²⁴ Credentialing is not a factor.

Section 44845 is simple and easy to implement. It assures that the modified last hired/first fired scheme codified by the legislature is free of subjective qualifications. Probationary employees who have served a school district the longest have seniority over probationary employees who have served the school district for less time. Permanent employees have seniority over probationary employees regardless of the length of any probationary employee’s service. The Bakersfield City School District argued, however, that the court should infer within this straightforward statutory scheme an additional credentialing factor. This attempt to modify Sec. 44845, and the provisions that rely on its application, did not win approval.

Reconfiguring a seniority system augmented by a credential requirement that is not established by the Ed. Code not only exceeds judicial authority, but raises more questions than it answers. It endangers the uniform statewide application of the scheme and makes it almost impossible to implement, as there is no other provision of the code addressing the intricacies of such an approach.²⁵

There is no legal basis for the proposition that the unambiguous statutory scheme of Sec. 44845 is inapplicable to those holding emergency permits, pre-intern certificates, or internship credentials. This was particularly true for the teachers involved in this case, most of whom were continuously employed for years and should receive credit for that seniority. As probationary employees, they retain all attributes of that classification, including seniority, unless withdrawn by statute. No provision of the Ed. Code withdraws seniority credit under any circumstances except job

termination. Even then, the code’s mandated requirement for first date of paid service in a probationary position is revived for a teacher rehired after layoff whose “original order of employment shall stand.”²⁶

The legislature specified particular limitations attendant on service under certain circumstances, and a court cannot imply additional qualifications beyond those expressed in the statute.²⁷ Nor may a court interpret the statute to conform to a presumed intention that is not expressed.²⁸

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The statutory scheme is logical. Seniority within the probationary ranks is determined by length of service in a district, length of service in a district obviously is determined by satisfactory performance, and if junior probationary employees must be retained in a layoff for specific needs authorized by law, they may be retained within certain specifications.²⁹

Alternative Credentialing

While teachers proceeding through college degrees and a fifth year to obtain a preliminary credential are praiseworthy for their efforts, so too are

those in the emergency permit, pre-intern, and internship programs, seeking credentials while they work. The legislature established these alternative credential routes because the expense of the university process impeded sufficient teachers matriculating through the state’s colleges and universities to fill California’s needs. These individuals, as the requirements of their certification attest, are not only continuing their education and certification processes, but are teaching full-time during the effort.

Working full-time and going to school is equally laudable, or at least so thought the legislature, which authored the system of which the California School Boards Association complains. If the legislature desired to restrict the benefits of probationary classification,³⁰ the legislature easily could have so mandated. Since it did not, the Fifth District accomplished neither error nor disservice to teachers in enforcing the statutory scheme.

The assertion regarding the risk of layoff to teachers with “full” credentials is exaggerated. As to those teachers whose life circumstances permitted their enjoyment of matriculation straight through school to a baccalaureate degree and a fifth year to a preliminary credential,³¹ assuming such a teacher were hired into a probationary position and not one of the positions authorized by the Ed. Code as temporary, the layoff risk is of limited duration. After only two years of that risk, the teacher becomes permanent and therefore statutorily insulated from layoff until all probationary teachers are laid off.

Their probationary counterpart, however, working under an emergency permit for four years before obtaining a preliminary credential and commencing the acquisition of time credit towards permanency, faces such risk for six years. Accordingly, teachers with “full” credentials retain a competitive advantage over those with emergency permits. As to those teachers with pre-intern certificates or internship credentials, no statute or decision specifies that these are provisional credentials, or that the teaching ability of these individuals is impaired. Of course, any district that so concludes is capable of establishing an employment pre-requisite of preliminary or clear credentials, thereby eliminating its concern.³²

Laches

Bakersfield City School District’s claim that the Fifth District erred in rejecting its laches defense disregards the uncontradicted evidence that the district caused the teachers’ “tardy” assertion of improper classification. The association’s members were teachers, not lawyers or judges, who were repeatedly admonished by administrators that their classification was mandated by law and that they risked termination if they challenged the claim. The teachers relied to their detriment on the representations of the district, not vice versa. The teachers did not specify their classifications;

the district completely controlled classification determinations. Moreover, the district’s statements to the association’s members were false, either under the Fifth District’s statutory construction or the district’s theory on appeal that their classification decisions were discretionary.

A district cannot mislead teachers to their detriment and then defend a claim that those whom it misled took too long to discern the truth; one who seeks equity must do equity.³³

Even when the classification contention was brought to its attention, the district did nothing but further its entrenched policy of misclassification, even asserting that temporary teachers could be released without board action in defiance of Sec. 44954.

The Bakersfield City School District’s reliance on *American Federation of Teachers v. Board of Education*³⁴ is misplaced because it did not involve a factual determination by the trial court that neither inexcusable delay nor prejudice had been established. *American Federation* also is distinguishable because the teacher in that case was properly classified as temporary. Given that fact and the fact that the entire situation regarding her

assignment was explained to her at the commencement of her employment, there was substantial evidence to conclude that her claim of erroneous classification was too little, too late. Here, in contrast, association members were provided with completely erroneous classifications falsely represented to be mandatory and an assertion that if challenged, termination would result.

As held by the court in *Tracy Educators Assn. v. Tracy Unified School Dist.*,³⁵ the district knew that teachers cannot waive their rights. Accordingly, it was disingenuous to suggest that the contract terms established any basis on which the district could plead either prejudice or that it was lulled into prejudicial action or inaction. Bakersfield City School District’s knowledge of the non-waivability provision estops it from relying on unlawful classifications in the contracts of employment as a basis for its laches claim. It was the district

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that caused this litigation, not any delay, misinformation, misrepresentation, or acquiescence by the association or its members.

Damage Limitation

The Fifth District's decision errs in limiting to one year reinstatement of the probationary teachers and counselors wrongfully classified as temporary. While their status as probationary excludes any right of the association's misclassified members to contest subsequent non-reelection, it does not limit the legal effect of adjudicated wrongful termination.³⁶ An employee unlawfully deprived of a position is entitled to recover accrued salary during the period performance of duties was prevented, less the amount received from private or public employment during the period of prevention of performance.³⁷

As observed by the court in *Fugit v. City of Placentia*:³⁸

There is no rational basis for differentiation between the rights of civil service and non-civil service employees or between permanent and probationary employees with respect to back pay once the determination has been made that a discharge is unlawful pursuant to the applicable law, ordinance or resolution. The discharge is thereby rendered abortive, ineffective and for all purposes unauthorized.³⁹

In such circumstances, the law requires that the wrongfully terminated employee be made whole for lost compensation, and mandate is the proper remedy to obtain such damages for the entire period performance was prevented.⁴⁰

The association's wrongfully classified members were reinstated by the trial court decision, whose reinstatement was affirmed. Those not rehired have been prevented from performing their duties for more than three-and-a-half years. Bakersfield City School District knew from the commencement of litigation in August 2003 that these

teachers and counselors sought reclassification and reinstatement. Nonetheless, the district chose to neither reinstate nor non-reelect them during the pendency of the litigation. Those employees are entitled to receive the full measure of compensation for the damage imposed on them by the district's wrongful termination, less earned compensation in mitigation.

The opinion contrary to these authorities relies on three cases: *Golden Valley*,⁴¹ *California Teachers Assn. v. Mendocino Unified School Dist.*,⁴² and *Fischer v. Los Angeles Unified School Dist.*⁴³ However, each of those cases involved a school district governing board's exercise of its non-reelection prerogative. In each case, the certificated employee had received formal written notice of non-reelection and was advised of non-reemployment beyond the current school year. It was each school board's non-reelection decision, not the employee's classification as probationary, that terminated continuing employment.

In contrast, the association's members were probationary teachers and counselors as to whom the district never exercised its right of non-reelection. These teachers and counselors were involved in a layoff, not non-reelection.⁴⁴ The association's members "release" had nothing to do with dissatisfaction with, or inadequacy of, their services, but the financial circumstances of the district utterly beyond their control.⁴⁵ These teachers and counselors were reinstated by operation of law, as Sec. 44955(c) requires any probationary teacher not noticed for layoff reemployed for the following school year. Consequently, the reinstated probationary teachers and counselors continued in employment in the following years, since reelection occurs automatically,⁴⁶ absent the notice required by Sec. 44929.21 to terminate the teachers' services as of the end of the school year.⁴⁷

The governing board's compliance with Sec. 44929.21 is mandatory.⁴⁸ For first-year probationary teachers and counselors, the notice had to have been given prior to the end of the school year, and for teachers and counselors

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completing their second consecutive probationary year counting toward acquisition of permanent status, prior to March 15. Notice of non-reelection cannot be presumed, and the district gave no such notice to these teachers. It was error for the Fifth District to overlook this aspect of Sec. 44929.21 or absolve the district of the mandatory legal obligation to actually issue the notice in order to benefit from its exercise.

It was also error for the Fifth District to exercise the district's non-reelection authority by determining that the reinstatement of the teachers and counselors, and their compensation, was limited to one year. That determination presumes non-reelection. Since non-reelection did not occur, the court could not exercise it for the district or deem it exercised. California law is clear that non-reelection authority belongs exclusively to the governing board of a school district. Section 44929.21 has consistently been so construed.⁴⁹ The California Supreme Court has so determined: "...it is clear that the intent of Section 44929.21(b) was to vest exclusive discretion in the school district to decide whether or not to re-elect probationary teachers...."⁵⁰ Non-reelection is for the district, not the Fifth District, to exercise. A court in a mandate action cannot exercise discretion vested in the inferior board or tribunal whose actions are under review.⁵¹ This aspect of the Fifth District's decision and remand order exceeds its jurisdiction and should be eliminated.

Conclusion

The opinion of the Fifth District regarding classification, seniority, and laches is entirely consonant with legal precedent. Indeed, the opinion masterfully weaves together the precedents of the California Supreme Court and the Courts of Appeal, and applies that case law to a factual situation not previously addressed in any published decision. For the first time, the court confronted a school district policy that disregarded the law of classification and seniority affecting the statutory rights of literally hundreds of teachers manifesting nearly the full breadth of credentials available in the State of California, including the varied credentialing routes established by the legislature. *

- 1 (2006) 145 Cal.App.4th 1260.
- 2 Notably, the district never seriously addressed the actual law of temporary classification set forth in Secs. 44852, 44919, 44920, 44921, and 44986, and how its theory of credential-based temporary classification was meritorious when the statutes governing temporary classification made no mention of credentials. Nor did it explain why, if its theory of credential-based classification was meritorious, the legislature would leave such an elemental ingredient of classification implied rather than expressly stated.
- 3 This includes a life credential, clear credential, preliminary credential, eminence credential, sojourn credential, internship credential, pre-intern certificate, emergency permit, or child development permit.
- 4 *Grigshy v. King* (1927) 202 Cal. 299; *Fry v. Board of Education* (1941) 17 Cal.2d 753; *Campbell v. Graham-Armstrong* (1973) 9 Cal.3d 482, 487.
- 5 *Abraham v. Sims* (1935) 2 Cal.2d 698, 709-710.
- 6 *Turner v. Board of Trustees* (1976) 16 Cal.3d 818, 822; *Taylor v. Board of Trustees* (1984) 36 Cal.3d 500, 504.
- 7 *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 917-918.
- 8 *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 826.
- 9 *Mass v. Board of Education* (1964) 61 Cal.2d 612, 618-619.
- 10 The First District Court of Appeal in *Kamin v. Governing Board* (1977) 72 Cal.App.3d 1011, 1017, and *Zalac v. Governing Board of the Ferndale Unified School Dist.* (2002) 98 Cal.App.838, 843; the Second District Court of Appeal in *Santa Barbara Federation of Teachers v. Santa Barbara High School Dist.* (1977) 76 Cal.App.3d 223, 227-228, incl. fn. 3, and *Fine v. Los Angeles Unified School Dist.* (2004) 116 Cal.App.4th 1070, 1077, fn. 7; the Third District Court of Appeal in *La Shells v. Hench* (1929) 98 Cal.App. 6, 12; the Fourth District Court of Appeal in *Haase v. San Diego Community College Dist.* (1980) 113 Cal.App.3d 913, 918, and its own decision in *California Teachers Assn. v. Governing Board of the Golden Valley Unified School Dist.* (2002) 90 Cal.App.4th 369, 383-384.
- 11 Sections 44852, 44917, 44919, 44920, 44921, and 44986. All undesignated statutory references are to the Education Code.
- 12 District interns are statutorily probationary. (Sec. 44885.5.)
- 13 Employment for less than a school year in temporary schools or classes (Sec. 44852); employment after September 1 in a position in which no other regular employee is available (Sec. 44917); employment to teach temporary classes for the first three months of a year (Sec. 44919[a]); special adult classes of four months or less (Sec. 44919[a]); schools for migratory populations of four months or less (Sec. 44919[a]); limited assignment coaching (Sec. 44919[b]), or emergencies, such as a work-stoppage, of 20 days or

less (Sec. 44919[c]); to replace a certificated employee granted leave for a semester or year, or experiencing long-term illness (Sec. 44920); the first semester when high schools expect reduced enrollment due to mid-year graduations (Sec. 44921); or filling in for a permanent teacher on disability leave (Sec. 44986). None of these sections makes the classification dependent on the credential held by the teacher, but only on the assignment in which the teacher is placed. No other provision of the Ed. Code authorizes temporary classification under any other circumstance or condition. In complementary fashion, with the singular exception of interns as probationary (Secs. 44885.5, 44466, and Stats. 1997, ch. 138, sec. 1), none of the code sections governing these credentials specify the classification of the holder of a particular credential. (Secs. 44225, 44256 through 44258.7, 44300, 44305.) Bakersfield City School District's contention that university interns were temporary disregards not only the decision of the Fourth District in *Peoples v. San Diego Unified School Dist.* (2006) 138 Cal.App.4th 463, but also the legislature's express statement of intention to classify university interns probationary like district interns in Stats. 1997, ch. 138, sec. 1. Under these circumstances, it is beyond dispute that the legislature codified express restrictions on the use of temporary classification dependent only on specific, limited assignments, without regard to the certification documents held by the teacher, and the Fifth District Court of Appeal correctly so determined.

14 The assertion that these credentials are lesser or not credentials disregards Sec. 44002 defining all such documents as credentials, thereby establishing service with these documents as positions requiring certification qualifications within the meaning of Secs. 44915 and 44929.21.

15 (2002) 95 Cal.App.4th 1026, 1030-1035. Notably, the holding simply disregarded the actual subsections referenced in the second paragraph of Sec. 44911, neither of which refer to out-of-state teachers, and lead to the anomaly of an out-of-state teacher who had not passed CBEST obtaining tenure credit (*Summerfield, supra*, 95 Cal.App.4th 1026), but a California teacher with a credential and having passed CBEST not obtaining tenure credit (*Smith v. Governing Board of Elk Grove Unified School Dist.* [2004] 120 Cal.App.4th 563).

16 *Supra*, 138 Cal.App.4th 463.

17 *Supra*, 90 Cal.App.4th 369.

18 See Secs. 44300(I) and 44307.5, 5 CCR 80023.1 through 80031.

19 Thirty-seven of the temporary teachers involved in this case had five or more continuous years of teaching with the district.

20 Sec. 44845.

21 Secs. 44845, 44848, and 44955(c) are unambiguous.

22 *Diamond Multimedia Systems, Inc. v. Superior Court*, (1999) 19 Cal.4th 1036, 1047.

23 Seniority accrues from the first date of paid service in a probationary position regardless of any action, determination, decision, or discretion of a governing board or administrator. Seniority is established and accrues whether service in the probationary position meets the requirements of Sec. 44929.21(b) or whether acquisition of permanent status is prolonged by part-time status (Secs. 44908 and 44929.21[b]), by leave of absence (Sec. 44975), by service in a categorically funded program or a regional occupational center (Secs. 44909 and 44910), by service as an intern (Secs. 44466 and 44885.5), by service under a "provisional credential" (Sec. 44911), or another reason.

24 See e.g., *San Jose Teachers Assn. v. Allen* (1983) 144 Cal.App.3d 627, 641, which concerned certificated employees transferred from the district's children's center program to the district's regular educational program: "Because probationary employees include all employees not classified as permanent or substitute (Sec. 44915), probationary service in the children's center program (under a child development permit) is to be counted in determining the employee's date of employment pursuant to Sec. 44845."

25 Do newly hired preliminary credential holders have seniority over interns completing their second year of satisfactory employment with a school district? Do newly hired clear credential holders have seniority over teachers credentialed in other states completing their first year of employment with a school district while serving on an emergency permit and gaining credit towards permanent status under the second paragraph of Sec. 44911 pending issuance of a California credential, as discussed in *Summerfield*? Do newly hired preliminary credential holders have seniority over teachers also holding preliminary credentials but serving on emergency permits or internship credentials pending issuance of a credential in another field? (See e.g., *Smith v. Governing Board of Elk Grove Unified School Dist.*, *supra*, 120 Cal.App.4th 563.) Do teachers without emergency permits but assigned by a governing board under the local assignment options of Secs. 44258, 44258.3, or 44258.7(c) or (d) accrue seniority, and, if so, are they senior to those assigned on the basis of emergency permits, pre-intern certificates, or internship credentials? These and dozens of other permutations are not addressed in the seniority system urged by Bakersfield City School District.

26 Sec. 44848.

27 *Golden Valley, supra*, 98 Cal.App.4th at p. 383.

28 *California Teachers Assn. v. Governing Board of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633; *Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365.

29 Sec. 44955(d). Indeed, upon rehire after layoff, if a less-senior probationary teacher possesses credentials for a position

that the emergency permittee, pre-intern, or intern is not certificated to provide, he or she may be passed over in favor of the junior employee. (Sec. 44957.) Even so, the district's concerns for dire consequences in reemploying the holders of emergency permits, pre-intern certificates, or internship credentials rings hollow. The district reemployed them continuously for years. Presumptively, they are competent and qualified.

30 In addition to acquisition of tenure, this includes automatic reemployment unless non-reelected (Sec. 44929.21), participation in layoff (Sec. 44955), and preferential rehire after layoff (Sec. 44957).

31 Secs. 44852, 44817, 44919, 44920, 44921, or 44986.

32 Which of course begs the question. Those with alternative credentials are employed because the number in possession of those credentials is insufficient. However employed in positions requiring certification qualifications, those with alternative credentials are entitled to all statutory classification and seniority benefits imposed by law.

33 *Bell v. Walsh* (1857) 7 Cal. 84; *DeGarmo v. Goldman* (1942) 19 Cal.2d 755, 764-765 (unconscientious conduct repels relief).

34 (1977) 77 Cal.App.3d 100.

35 (2002) 96 Cal.App.4th 530, 539.

36 *Fugit v. City of Placentia* (1977) 70 Cal.App.3d 868, 876.

37 *Fugit, supra*; *Stockton v. Department of Employment* (1944) 25 Cal.2d 264, 273; and *Wiles v. State Personnel Board* (1942) 19 Cal.2d 344.

38 *Fugit, supra*, 70 Cal.App.3d 868.

39 *Ibid.*

40 Civil Code Sec. 3300; *Fugit, supra*, 70 Cal.App.3d 868.

41 *Supra*, 98 Cal.App.4th 369.

42 (2001) 92 Cal.App.4th 522.

43 (1999) 70 Cal.App.4th 87.

44 In other words, but for the layoff, their employment would have continued uninterrupted, as the district governing board released only three teachers (none of whom is involved in this litigation) pursuant to Sec. 44954.

45 *Gassman v. Governing Board of Rincon Valley Union School Dist.* (1976) 18 Cal.3d 137.

46 *Owens v. Board of Education of City of Santa Cruz* (1924) 68 Cal.App. 403, 405-406; *Abraham, supra*, 2 Cal.2d at p. 711; *Horner v. Board of Trustees of Excelsior Union High School Dist.* (1964) 61 Cal.2d 79, 87.

47 *Fischer, supra*, 70 Cal.App.4th at p. 94 ("as long as the district gives notice....," quoting *Board of Education v. Round Valley Teachers Assn.* [1996] 13 Cal.4th 269, 279.) It is undisputed that all wrongfully classified temporary teachers were given temporary release notices pursuant to Sec. 44954 by the district administration. As probationary teachers, a release notice under Sec. 44954 was inapplicable and ineffectual as a notice of non-reelection under Sec. 44929.21. (*Cf. Kavanaugh, supra*, 29 Cal.4th at pp. 914-916, 926.)

48 *Fischer, supra*, 70 Cal.App.4th at p. 93 ("The statute...requires notice of non-reelection"); *Kavanaugh, supra*, 29 Cal.4th at p. 917 (non-reelection requires "timely notice").

49 *McFarland Unified School Dist. v. Public Employees Relations Board* (1991) 228 Cal.App.3d 166, 169; *Bellflower Educators Assn. v. Bellflower Unified School Dist.* (1991) 228 Cal.App.3d 805, 811.

50 *Round Valley, supra*, 13 Cal.4th at p. 287. See also *Kavanaugh*. Having classified Kavanaugh as a temporary teacher, the district gave her a temporary teacher release in April. This court determined, however, that since Kavanaugh was actually a first-year probationary teacher pursuant to Sec. 44916, who the district had not timely notified of non-reelection, she was automatically reemployed. (*Id.*, 29 Cal.4th at pp.914-916, 926.) This court did not limit her reinstatement to one year, which, as in the instant case, had long expired before final judgment.

51 *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495.

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Employee Religious Rights and Sexual Harassment: Competing Policies

Richard Whitmore

Employers in both the public and private sector are facing an increasing number of complaints from employees alleging that they are victims of religious discrimination in the workplace. Indeed, since 2000, there has been a 30 percent increase in the number of complaints of religious discrimination and harassment filed with the Equal Employment Opportunity Commission.

In addition to an increase in number, there appears to be a gradual but noticeable change in the type of religious complaint being filed. In prior years, the majority of such complaints came from individuals who felt that their employers were infringing on their personal religious rights. These employees typically sought to have their employers accommodate their individual religious beliefs. Those claims seemed to be largely personal, limited to one employee's concerns about how he or she was being impacted in the workplace.

More recently, religious discrimination claims appear to be less personal and focused on an employee's right to impact others in the workplace. Indeed, two recent Ninth Circuit cases have involved employees who assert the religious right to criticize and/or preach to coworkers who are homosexual. When disciplined for violating the employer's policy against harassment, these employees have asserted the defense of protected religious activity.

They contend that imposing discipline for violating anti-harassment policies constitutes discrimination based on their religious beliefs. Courts are being asked to resolve the conflict between a public policy that allows employees to be free from workplace harassment based on sexual orientation and a policy that prohibits religious discrimination in the workplace.

Many of the early cases dealing with claims of religious discrimination in employment asserted a failure to accommodate personal religious beliefs. These often involved an employee's request that he or she not be scheduled to work on

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days designated as holidays by a particular religion. Typical of this type of claim was the lawsuit filed by an Orthodox Jew who challenged the scheduling of an entry-level civil service examination on a Saturday, a holy day in his religion. The Circuit Court found that the employer's "rigid policy" regarding the exam schedule constituted a refusal to afford reasonable accommodation to the employee's religious practices.¹

Employees also filed lawsuits asserting that work schedules interfered with their personal religious rights. For example in *EEOC v. Ithaca Industries*,² an employee who had been told when hired that Sunday work would be voluntary was later ordered to work on a Sunday, contrary to his religious tenets. He was fired for refusing to obey the employer's order and filed suit alleging that the employer failed to make a reasonable effort to accommodate his religious beliefs. His suit was dismissed by the District Court, which concluded that he had been too absolute in his refusal to work on Sundays. The Seventh Circuit reversed the dismissal, allowing the employee to proceed to trial to show that the employer did not make a sufficient effort to accommodate his personal religious practices.

Another typical individual claim of religious discrimination prior to 2000 was the allegation that an employer failed to accommodate an employee's personal appearance motivated by religious belief. For example, in *EEOC v. United Parcel Service*,³ a truck driver asserted his right to wear a beard in accordance with his Islamic religious beliefs, contrary to the company's no-beard policy. He was allowed to pursue his claim that the company had failed to accommodate his personal religious practice.

At the same time that these plaintiffs were achieving some success in their claims for personal religious accommodation, there was an increase in the number of claims by employees asserting a right to advocate their religious beliefs in the workplace. While the earlier religious

accommodation cases were relatively benign in their overall impact on the workplace, these "proselytizing" cases demonstrated an assertiveness that posed a substantial impact on their coworkers. These employees — who claimed they were victims of religious discrimination because their employer denied them the right to "preach" religion to coworkers — met with far less success than employees who sought accommodation.

For example, in a case brought in 1995, an employee claimed she had a right to wear a button at work with a graphic color photograph of a 20-week-old fetus to demonstrate her religious opposition to abortion. Some of her coworkers complained because of religious reasons; others objected for personal reasons, like infertility, miscarriage, or the death of a premature child. The employee was fired for refusing to remove or cover the button while at work. But the Eighth Circuit Court of Appeals upheld the firing and denied her claim that she was a victim of religious discrimination.⁴

In *Chalmers v. Tulon*,⁵ the employee claimed to be a victim of religious discrimination when her employer fired her for sending personal religious letters to her boss and to a coworker. The letters cited Biblical passages and warned that the recipients should "invite God into your heart" before "it is too late." The letters had substantial personal and emotional impacts on the recipients. The Fourth Circuit Court affirmed the summary dismissal of the employee's religious discrimination action.

In *Venters v. City of Delphi*,⁶ the police chief spoke to a dispatcher about her salvation, quoted from the Bible, and told her that a heart attack suffered by a city council member was a sign of God's displeasure. Finally, he told her that she could not continue working for the chief if she followed "Satan's way." When she was fired, she sued the city, and the Seventh Circuit allowed her to pursue her case against the chief and the city because the chief had "used his office to impose his religious views."

*Many early cases
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In the religious accommodation cases, the conduct of the plaintiffs tended to have little impact on other employees in the workplace. Those plaintiffs were asserting their religious rights as against their employer, and they frequently prevailed.

In contrast, the behavior of the plaintiffs in “proselytizing cases” had a substantial impact on other employees. Those plaintiffs seemed to create a conflict between their religious rights and the religious rights of their coworkers, and they frequently did not prevail.

Two recent cases demonstrate an even more dramatic conflict between employees asserting their religious rights and their coworkers in the workplace. The plaintiffs in these cases asserted a religious right to confront fellow employees who were homosexuals. This contention creates a conflict between competing policies — one that protects homosexual employees from harassment in the workplace and another that safeguards an employee’s right to practice his or her religion.

In *Peterson v. Hewlett-Packard*,⁷ Richard Peterson, a devout Christian, reacted in response to diversity posters at work that acknowledged homosexual employees. He posted Biblical passages at his workstation. The passages included references to homosexuality as an “abomination” and warned that homosexuals “shall surely be put to death.” When his supervisors removed the passages, he posted them again. When told that the passages were “hurtful” to gay and lesbian employees, he responded that he intended them to be hurtful. When he refused an order to remove the passages, he was fired. He sued, contending that his dismissal was religious discrimination, that the company was failing to accommodate his religious beliefs, and that the discipline was retaliation against him for practicing his religion.

The Ninth Circuit Court of Appeals resolved the conflict between religious discrimination and anti-harassment policies by dismissing Peterson’s claims and upholding the

rights of employees to be protected against sexual-orientation harassment. Mirroring some of the earlier proselytizing cases, the court said the plaintiff had no right to impose his religious beliefs on others.

In *Bodett v. CoxCom*,⁸ Evelyn Bodett, an evangelical Christian and supervisor at the company, repeatedly advised an openly gay female employee whom she supervised that the employee should not date another woman, that “God’s design” was for heterosexual relationships, and that

homosexuality was a sin. When the company learned of this conduct, it informed Bodett that her behavior was in violation of the company’s anti-harassment policy. She responded that “sometimes there is a higher calling than a company policy.” When she was fired, Bodett sued, but her lawsuit was dismissed by the District Court.

The Ninth Circuit Court of Appeals upheld Bodett’s dismissal, finding that she had violated the company’s anti-harassment policy and that this was a legitimate business reason for the company’s action. As in *Hewlett-Packard*, the Ninth Circuit reasoned that religious rights do not permit an employee to harass a gay coworker.

Both *Hewlett-Packard* and *Bodett* involved dismissal of an employee for violation of an express employment policy against harassment. Whether the outcome in those cases would have been the same absent such a policy appears to be answered in the affirmative by the observation of the court in *Hewlett-Packard* that the company’s “efforts to eradicate discrimination against homosexuals in the workplace were entirely consistent with the goals and objectives of our civil rights statutes....”⁹

Although the holdings in *Hewlett-Packard* and *Cox* offer clear and unequivocal guidance, pending legislation could alter the judicial analysis in future cases where claims of religious discrimination face off against assertions of harassment based on sexual orientation.

In contrast, the behavior of the plaintiffs in ‘proselytizing cases’ had a substantial impact on other employees.

The Workplace Religious Freedom Act of 2003 (S.B. 893) represents congressional interest in addressing issues of religion in the workplace. Introduced by Senator Rick Santorum in 2003, the bill would restrict employers from limiting an employee's right to "participate in a religious observance or practice" at work. The language in this bill might have given Peterson and Bodett support for their claims to preach to coworkers about their belief that homosexuality is a sin. However, since this bill has never emerged from the Senate committee and passage by Congress does not appear likely, speculation regarding its impact may be simply an academic exercise. Thus, absent a change in the statutory law, the federal courts appear inclined to uphold an employer's disciplinary actions against employees who violate anti-harassment policies, even if those employees act pursuant to their own religious beliefs. *

- 1 *Minkus v. Metropolitan Sanitary Dist. of Chicago* (7th Cir. 1979) 600 F.2d 80.
- 2 (4th Cir. 1988) 849 F.2d 116.
- 3 (7th Cir. 1996) 94 F.3d 314.
- 4 *Wilson v. U.S. West Communications* (8th Cir. 1996) 58 F.3d 1337.
- 5 (4th Cir. 1996) 101 F.3d 1012.
- 6 (7th Cir. 1997) 123 F.3d 956.
- 7 (9th Cir. 2004) 358 F.3d 599.
- 8 (9th Cir. 2004) 366 F.3d 736.
- 9 *Hewlett-Packard, supra*, 58 F.3d 599, citing *Rene v. MGM Grand Hotel* (9th Cir. 2002) 305 F.3d 1061 (en banc) (Title VII forbids same-sex harassment).

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The Evolution of a Negotiator

Gregory J. Dannis

I have been blessed to be able to lead a wonderfully turbulent and chaotic professional life. I get to visit a different school district almost everyday. This experience has taught me that each district is a different country, with unique traditions, protocols, cultures, and taboos. And each bargaining table is a distinct subculture within each district, with its own set of rules and traditions. It is constantly exciting, sometimes frustrating, and often infuriating. But it is always, always challenging.

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I also have found, however, that this life as a troubadour negotiator can be as consuming as it is stimulating. Beneath every proposal, offer, dispute, or disagreement lie the most basic human emotions: dignity, self esteem, self-control, security, and stability. This transforms what might otherwise be objective discourses over workplace issues into subjective and emotional exchanges over matters of survival, such as whether one can provide health care for one's self and one's family. These conversations — these negotiations — day after day can be psychologically, intellectually, and even physically draining, leaving little energy to devote to other aspects of life.

In other words, the intensity of negotiating every day often leaves little time for contemplation about what you have done. This past year, however, two events caused me to take a deep, reflective breath.

First, my father died suddenly and unexpectedly. My father was a teacher by profession and by nature. Following his retirement after about 35 years, he continued to substitute teach almost to the end of his life. He was a quiet man who listened much more than he talked, and had a great sense of humor. His passing caused me for the first time to confront the fact of my own mortality.

Second, in October, I turned 52, and November marked my 26th year of working for the law firm that now bears my name. I had an arithmetic epiphany —

I have spent half of my entire life working for the firm! Half of my life has been negotiating in the public schools.

These events evoked a single question in my mind: How does one evolve into a negotiator? I have concluded that the evolution of a negotiator bears a striking resemblance to the stages of development in the journey from birth to adulthood.

Birth and Infancy

At birth and during infancy, we are pure, innocent, and untarnished. We are entirely dependent on others for our sustenance and well-being because they are older, wiser (we assume), and ambulatory. We look at these adults — these ultimate mentors — with complete trust and faith that they will do nothing less than is absolutely right and true.

We hear everyone around us speaking what appears to be a language, but it is unintelligible to us — it sounds like just so much noise, even though they all seem very intent on trying to explain something. At first, this new world is such a shock that we just watch. The comedienne Gracie Allen described it perfectly when she said, “When I was born, I was so surprised I didn’t talk for a year and a half.”

Eventually, we start to speak our own language with equal lack of success at communicating. At times, we get so frustrated at not being understood that we want to burst out screaming, and sometimes we actually do. Ultimately, we understand that we can do only one thing — be ourselves — because there is nothing and no one else we are equipped to be.

These attributes of birth and infancy describe well the life of the novice negotiator. When I sat at my first negotiations table in 1980, I had never even seen a negotiations session, yet I was the spokesperson for the district. Several things became clear to me immediately.

First, I knew nothing other than what I had heard or read about negotiations, so, drawing on my fine command of the English language, I said nothing. Instead, I was

determined to listen as much as possible. A different language was being spoken and I did not have time to take a class to learn it. I was obviously an “NLL” attorney — a Negotiations Language Learner. Yet, with my agile mind and extensive legal education, I was able to quickly deduce that “scope” was not a mouthwash, “COLA” was not a soft drink, and “EERA” was neither misspelled, nor did it refer to a period of time.

Thus, I learned my first great lesson of negotiations: Always listen more than you talk. As one philosopher stated, “To listen closely and reply well is the highest perfection we

are able to attain in the art of conversation.” To my inexperienced ears, that is exactly what negotiations appeared to be — a conversation about how people were to do their jobs. And so, out of necessity and practicality, I listened much and talked little, mindful of Calvin Coolidge’s advice that “No man ever listened himself out of a job.”

Second, I realized I needed to be confident enough to admit freely and openly to both sides of the table all that I did not know, and to ask all participants to teach me and help me understand. This was not a calculated strategy, but I see now that unwittingly, I had played straight to the hearts of teachers on both sides of the table by asking them to mentor me.

The third thing I discovered was that I could not play a role or fake a personality at the table. I was ill-equipped to do so, for I had no role model or idea of how a negotiator should act. So, with no other options, I defaulted to being just myself. This, it turns out, is another key development in the birth and infancy of a public school negotiator. The negotiations process is about discussing the needs of adults in the context of a system dedicated to serving children. Thus, on all levels, the process is about people serving people, and one must be a real person at the bargaining table, rather than a manufactured stereotype of what a lawyer or a negotiator should be. Even novice negotiators can detect insincerity, and the non-negotiators — the teachers and classified employees — can smell it instantly.

*‘No man ever
listened himself
out of a job.’*

— Calvin Coolidge

Childhood

Aristotle once said, “Young people are in a condition like permanent intoxication, because youth is sweet and they are growing.” Indeed, youth would be an ideal state if only it came a little bit later in life!

The negotiator in the childhood stage believes his or her world is the most fascinating place in the universe. There is the lively banter of the table; the challenge of weaving language into a cohesive fabric that pulls together so many thoughts, goals, and demands; and the ultimate joy of signing an agreement, often when many think no agreement is possible.

As we all know, however, childhood marks the beginning of adult-like aspects of personality, both good and bad. The child experiences feelings of competitiveness and begins to argue to prove a growing intelligence (and sometimes just for the sake of argument). In youth, we fear failure and rejection and their dampening effect on our natural enthusiasm.

As a young negotiator, I learned that there is a unique definition of winning and losing in bargaining. Some negotiators demonstrate that, while you can only be young once, you can always be immature. These individuals seem to define victory as “beating the other side” and see the process more as a forum for argument than reasoned debate. These individuals invariably demonstrate that it is not necessary to understand things in order to argue about them.

The growing negotiator, however, knows that the only true “victory” is in reaching agreement — an agreement that all participants can support. He or she knows that negotiations are not a war in which a winning side claims all spoils, and a loser is vanquished. For, unlike a war, the parties must live to work together tomorrow, next month, and for years to come.

In order to achieve these victories, the child negotiator must display the following knowledge and abilities.

Use soft words and hard arguments. As the saying goes, be soft on the people and hard on the issues. I have never understood the thinking of negotiators who try to anger the other side when their purpose, their role, is to try to persuade the other side to accept a new idea. Once you anger someone, their mind closes to new possibilities and instead focuses on defense and perhaps retribution. We are supposed to be engaged in a process to expand each other’s vision of the possible, yet “an eye for an eye” mentality only results in making the whole world blind.

Use the full scope of your growing intellect. The test of a first-rate intellect is the ability to hold two opposing ideas in the mind at the same time and still retain the ability to function. A good negotiator must have three brains — one for intelligence and rational thought, one for subjectivity, creativity and emotion, and a third one that recognizes at all times which kind of conversation is occurring at the table. Because of the life-affecting subject matters that arise at the table, the conversation can switch back and forth between the emotional and the rational at a moment’s notice. The negotiator’s third brain must recognize immediately when the pendulum shifts, and guide

the discussion accordingly.

Do not be afraid of failure. In fact, think hard and long about what failure really means in the bargaining context. I do not know the key to success, but the key to failure, especially in negotiations, is trying to please everybody. Act as if it were impossible to fail, but know that you will not always please every member of the school board, or the superintendent, or the administration, or even your own bargaining team. However, if you get an agreement that preserves good relations and protects your core values, ask yourself if you have really failed. Teachers will remain in the classroom teaching and children will continue learning. Even if there are those who assert you have failed, as Sir Winston Churchill said, “Success is the ability to go from one failure to the other with no loss of enthusiasm.” Do not lose your enthusiasm if you know you have done your job as a negotiator.

*‘Success is the
ability to go from
one failure to
another with no
loss of enthusiasm.’*

— Winston Churchill

Adolescence

Like many of you, I would prefer to skip the teen years because they are too painful to recall. But I will persevere nonetheless because they happened.

I have two teenage daughters, so I have some credibility here. At one point, I was compelled by circumstance to read a book about the makeup of teenagers, and one premise stuck with me. This author asserted that teenagers' brains are not fully developed in one particular regard: They have not yet attained the mental capacity to foresee or even think about the consequences of their words or their actions. When they say or do what we see as "outrageous" things, and we as adults react with anger, disappointment, or disapproval, they are shocked, sullen, and even combative.

The teenager is coping with a new sensation of aggressiveness and is struggling with how to manifest the growing power of his or her self in a quest for respect. The teen is forever questioning authority and displays a split personality by either talking too much or brooding in silence. The teen is also learning the joy of creativity, beginning to trust her instincts, and refining a sense of humor, which is sometimes gentle and sometimes mean.

Our adolescent negotiator portrays many of these same attributes. With a few contracts under her belt, she begins to act a little over-confident or even cocky. Other people seem to think and move too slowly for her, so she becomes impatient, even a little intolerant. And maybe, just maybe, our teenager stops listening as much as she used to.

These are perilous times for the teen and the teen negotiator. For our adolescent is at a crossroads — she can choose to harness and understand the maelstrom of emotions exploding within and use them to grow well into adulthood, or she can let them run wild with unforeseeable results. There are many lessons to be learned in adolescence that will help develop our negotiator.

Questioning is good. Albert Einstein said: "The important thing is not to stop questioning. Curiosity has its own reason for existing. One cannot help be in awe when he contemplates the mysteries of eternity, life, of the marvelous structure of reality. It is enough if one tries merely to comprehend a little of this mystery every day. Never lose a holy curiosity."

The field in which we toil — public education — demands that we maintain a "holy curiosity" because every faction, every authority, and every constituent group claims at some point, on some subject, that they and only they have "the answer" and "the truth." In bargaining, the best advice simply may be to look at all the sentences and statements that seem true and question them, not with challenge or aggressiveness, but with a manifest desire to learn what has been written or said. A good negotiator realizes it is better to know some of the questions than to think you know all of the answers.

Do not be afraid to question authority. This is especially true

concerning the authority that employs you. You are no longer wholly dependent on the all-knowing parent. You have some knowledge now — probably less than you think, but knowledge nonetheless. Think of it this way — our parents were not perfect and they did not always make the best decisions. Part of your role as a negotiator is to challenge assumptions constructively and respectfully in the decisionmaking process.

Do not be afraid to be silent. Abraham Lincoln once said, "Better to remain silent and be thought a fool than to speak out and remove all doubt." The best negotiators know when to speak and when to let silence speak volumes. I cannot learn when I am talking, but I do when I am listening. But for goodness sake, know when to talk. In the words of Martin Luther King, Jr., "Our lives begin to end the day we become silent about things that matter."

*'The important
thing is not to stop
questioning. Curiosity
has its own reason
for existing.'*

— Albert Einstein

Trust your instincts, your creativity, and your ideas.

Creativity comes from trust. Trust your instincts. Truly successful decisionmaking relies on a balance between deliberate thinking and instinctive thinking, so use all three of your active brains! Negotiators are paid for their ideas. As one superintendent told me, “We pay you to bring an added value to our district; if you don’t, we are wasting our money.” That added value is your creativity and your ideas. Parents often do not approve when their teens push the boundaries, but that is part of the negotiator’s job.

Revel in your sense of humor. I tell my bargaining teams that if we cannot have fun in negotiations, no matter how intense they are, then something is very wrong. In the worst of times, I console them by saying, “Don’t worry — we’ve got them right where they want us!” At this point in your career, you should be starting to think about yourself as a leader and showing some leadership qualities. Well, a sense of humor is part of the art of leadership, of getting along with people, of getting things done. Over the years, I can think of a few examples:

- After a bargaining session that lasted deep into the wee hours, the district negotiations team showed up the next morning in pajamas.
- During tense discussions over the cost of prescription drugs, just to see if anyone was paying attention, I made a written proposal that all emergency drugs could be obtained only by mail order.
- Again to test if the other team was awake, I proposed in the middle of a long document the elimination of Labor Day as a paid holiday.
- Although it was unintentional, after a long discussion of retiree benefits and GASB 45, our written proposal demanded that the union acknowledge the district’s serious “unfounded liability.”

I have found that most if not all union teams will reciprocate with humor once you demonstrate your comfort

with it. For example, many years ago, after a long day of tense bargaining, at about 10 o’clock at night, the superintendent directed me to go back into the negotiations room, pound the table, and yell at the teachers that there was no more money, and that if they couldn’t accept this, we would go to impasse. I informed the superintendent that this was not my style of negotiating. She responded, “I am the client, you are my attorney. Do it!”

I retreated to a corner of the caucus room to find my motivation for the scene in which I was about to act. Once prepared, I went back to the bargaining table and, feeling like a fool, did exactly what the superintendent had directed. The teacher team, with whom I had bargained for many years, had no reaction other than to say, “We will caucus now.”

After about 30 minutes, they called us back. At this point I should mention that the Olympics were underway. The teacher spokesperson said, “We have two responses to your proposal. First, as to substance...” and they all held up scorecards that said 0 and 1 or 2 at the most. “Second,” the spokesperson said, “as to style...” and they all held up scorecards with perfect 10s!

Obviously, they knew I had been acting. Their comfort with expressing a sense of humor in this tense situation, however, defused what could have been an escalation of our dispute and, instead, we reached a settlement the next morning — in regular clothes, not pajamas. Thus, humor can be like a rubber sword — it allows you to make a point without drawing blood.

Adulthood

Finally! Informed by vast experience and guided by extensive knowledge, our negotiator is at the top of the bargaining mountain surveying his labor relations kingdom. This is when it all comes together for our negotiator, as he travels from table to table, clutching victory from the jaws of certain defeat, forging agreements none thought possible, and waging peace when all thought war would surely erupt.

*‘Our lives begin to
end the day we
become silent about
things that matter.’*

— *Martin Luther King, Jr.*

Is this an accurate portrayal? Absolutely not.

Adulthood for many brings more doubt, with the realization of how much you still do not know. The adult realizes that he is no longer young enough to know everything. Having passed through the previous stages of growth, we begin to appreciate the inevitability of change and our struggle to cope with it. Instead of being in a constant hurry, we begin to learn the value of patience. It is ironic that the years teach us patience — that the shorter our time, the greater our capacity for waiting.

More than anything else, the growing adult begins to distill past experiences and reconcile conflicting thoughts, in an attempt to bring them into some sense of order, some structure, even a philosophy. In this manner, the adult seeks wisdom.

The adult negotiator experiences many of these feelings. After all the proposals and offers and brainstorming and conflicts and contracts, he realizes that he cannot possibly know it all, nor has he seen it all. This is true for two reasons.

First, thanks to our state legislature, we can rest assured that there will always be something new down the road regarding public education. So long as those in authority persist in the view that public education is broken, there will be never-ending efforts to fix it. Perhaps someday, reality will overcome perception and our lawmakers will accept the fact that the vast majority of citizens support our public schools.

Second, and more significantly, the negotiations process will always be unpredictable because it is inhabited by an ever changing cast of characters — people with diverse personalities, backgrounds, prejudices, hopes, and fears. Even if the issues seem to be the same year after year — salaries, benefits, work hours, etc. — the discussions, the dynamics, and the outcomes will be different every year because the people on the teams will change, even if they are the same individuals.

When the negotiator internalizes this simple yet crucial fact, he truly has reached adulthood, for he will realize the following:

The bargaining process is mostly about change — seeking it, reacting to it, or resisting it. Labor seeks to improve the conditions in which people work and to create an environment in which the work is rewarded, financially, emotionally, and spiritually. Management seeks to retain a semblance of control over a system that often seems uncontrollable.

The point, however, is that all change is threatening, and people can tolerate only a certain pace of change. That pace is slower or faster depending on the subject at hand and how deeply it affects us as human beings. For example, one might be able to negotiate new leave-of-absence language in relatively short order. But it is likely to take years if one seeks a major overhaul in health benefits for current or retired employees. The former does not concern me much, but the latter threatens my well-being now and in the future.

The adult negotiator knows it is folly to try to ignore the forces of change; instead he embraces it. As one commentator noted, “Change has a considerable psychological impact on the human mind. To the fearful, it is threatening because it means things may get worse. To the hopeful, it is encouraging because things may get better. To the confident, it is inspiring because the challenge exists to make things better.”

The adult negotiator is hopeful and confident that he or she can make things better. And yet, he knows that in order to accomplish this, he must exercise discretion. He must realize that when it is not necessary to make a decision, it is necessary not to make a decision.

In the face of constant emergencies, our negotiator recognizes that patience always will achieve more than force. Isaac Newton once said, “If I have ever made any valuable discoveries, it has been owing more to patient attention than to any other talent.” Even if the school board or

*‘It is the province of
knowledge to speak
and it is the privilege
of wisdom to listen.’*

— Oliver Wendell Holmes

superintendent or bargaining team never says it directly, they all are counting heavily on the negotiator to maintain focus, patience, and calm in the eye of the bargaining storm. Part of that focus is always keeping in sight what might be, rather than what is merely possible. If we limit our choices only to what seems possible or reasonable, we disconnect ourselves from what we truly want, and all that is left is a compromise. The adult negotiator knows that, strange as it may seem, the goal of negotiations is to reach solutions rather than compromises.

More than anything else, the adult negotiator seeks to infuse his practice with wisdom. In order to do this, he seems to have fewer and fewer personal viewpoints about the matters on the table, and instead scrutinizes, analyzes, and attempts to craft solutions from the input of others. He suspects that

wisdom is what is left after we have run out of personal opinions.

He realizes that the problem is never how to get new, innovative thoughts into your mind, but how to get old ones out.

Ironically, the adult negotiator, with all his experience, begins to speak less than she used to. Oliver Wendell Holmes said, "It is the province of knowledge to speak and it is the privilege of wisdom to listen." Our negotiator has acquired great knowledge through study; but to acquire wisdom, she knows she must observe.

Thus has the evolution of a negotiator come full circle, for the most important skill he possesses is the one he first learned in infancy — to listen more and talk less. For only by listening can the adult negotiator learn, create, and lead. And only by realizing that the evolution of a negotiator is ongoing can the adult negotiator continue to grow. *



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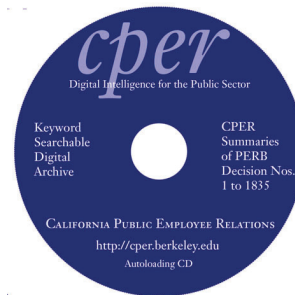
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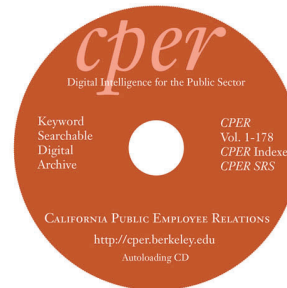
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Recent Developments

Local Government

Decision to Hire Annuitants as Police Officers Is Policy Decision Outside Bargaining Duty

The proposal of the City of Sacramento Police Department to hire retirees as temporary, non-career employees to remedy a short-term staffing shortage was a fundamental managerial policy decision designed to maintain the existing level of public safety

Retirees would not be used to circumvent the civil service system.

in the community, said the Third District Court of Appeal in a long-awaited ruling. As such, it was not subject to the city's duty to meet and confer with the Sacramento Police Officers Association, the court announced, even if the proposal represented a change in the status quo to terms and conditions of employment. The appellate court also reasoned that because implementation of the plan was not intended to affect employment terms, details of the plan were not subject to the duty to meet and confer imposed by the Meyers-Milias-Brown Act.

The dispute can be traced back to an interest arbitration award that sig-

nificantly enhanced retirement benefits effective July 2002. This resulted in a spike in retirements. By September 2002, there was a shortage of nearly 16 percent, or 92 positions, in the authorized staff of rank and file positions.

The city found it difficult to find recruits within Sacramento's tight labor market for law enforcement officers. These efforts were exacerbated by the fact that there is a lag time between identifying the need for additional personnel and the availability of new hires. A successful applicant must attend a 23-week training academy. Based on the schedule of these training opportunities, the city anticipated that its staffing level would exceed 100 percent by December 2003.

To address this problem, the city discussed with the SPOA the possibility of using retirees as part-time, non-career, limited-term employees to fill vacancies until the police department could replenish its ranks with new recruits. In a memo to department management, the city stated that use of retirees would not be used to circumvent the civil service system or labor agreements.

The SPOA demanded that the issue be submitted to binding arbitration. However, the city personnel director sought and received authority

from the city council to appoint retirees to the police force until completion of the scheduled academies in 18 months. At the director's request, the council adopted a resolution announcing that the use of retirees was not to save money, block promotional opportunities, or eliminate acting assignments. The city pledged its commitment to insure that the hiring of retirees would not create adverse impacts on career employees, but would allow the city to maintain its level of public safety service.

The city pledged the hiring of retirees would not create adverse impacts on career employees.

The association filed suit, requesting that the city and police department meet and confer over implementation of the policy. The trial court sided with SPOA and ruled that the city had a duty to meet and confer with the association before initiating the retiree measure because it represented a change in the status quo since the city had never before used retirees to fill vacancies in sworn bargaining unit positions. The trial court found the policy affected the working conditions of unit members because it limited overtime and promotional opportunities. And, the court

rejected the city's claim that it needed to respond to staffing shortages because of exigent circumstances.

The Court of Appeal first brushed aside the parties' differences of opinion as to whether any members of the bargaining unit in fact had experienced any detrimental impacts from the retiree program or whether the appointment of retirees to bargaining unit positions was a departure from or inconsistent with past practice. Rather than decide these factual disputes on the anecdotal evidence in the record, the Court of Appeal addressed the scope of representation issue with the assumption that the retiree proposal did represent a change in the status quo.

Noting that Government Code Sec. 3504 requires bargaining over all matters relating to wages, hours, and other terms and conditions of employment, the court focused on the import of language that excludes from scope "the consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Relying on *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 180 CPER 21, and *Building Material & Construction Teamsters Union v. Farrell* (1986) 41 Cal.3d 651, the court observed that while there may be a duty to bargain about the "details of implementing a fundamental managerial decision," the decision itself is not subject to the bargaining process unless the benefit of improved labor relations flowing from the bargaining process outweighs the need for unfet-

tered management decisionmaking and the transactional cost of bargaining."

In forging this balance, the Court of Appeal concluded that the trial court "had intruded into one of the most fundamental management prerogatives in the public sector — the manner of responding expeditiously to a labor market shortage in a department affecting the public safety."

In support of this conclusion, the court examined several prior decisions where other courts have attempted to determine whether changes in the sta-

The trial court 'had intruded into one of the most fundamental management prerogatives in the public sector.'

tus quo represent fundamental managerial policy decisions. While the court commented that those opinions do not articulate the specific criteria guiding their conclusions and instead represent "axiomatic declarations," it nonetheless reviewed the digest of authority hoping to "extract what principles we can."

Citing *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, the court found that the selection of a standard for fire prevention in a community, in-

cluding the number of fire stations or amount of equipment, involves a fundamental management policy decision, unless staffing is decreased to such an extent that it threatens safety or increases workload. Also examined by the court was *State Association of Real Property Agents v. State Personnel Board* (1978) 83 Cal.App.3d 206, which found that the decision to reduce a workforce in the face of budget restrictions implicated fundamental management policy.

On the other hand, the court reviewed *Dublin Professional Fire Fighters, Loc. 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, holding that the assignment of overtime to temporary personnel outside the bargaining unit was not a fundamental management policy decision and was subject to bargaining. And, in *Farrell*, where the public agency made the decision to transfer work to personnel outside the bargaining unit, the court held that the choice was not a fundamental management policy decision because it did not relate to the level of service provided to the public but merely reallocated the work to staff at an existing level of service. The court found these cases instructive "primarily to the extent they define a context that is opposite to the present: *removing* work from a bargaining unit with available personnel."

The court also analyzed other cases where certain non-economic changes were found to be fundamental managerial policy decisions. It cited *Claremont*, where the parties agreed

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there was no duty to bargain over the decision to collect data on racial profiling in traffic stops; *San Jose Peace Officers Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, which found no duty to bargain over a policy prescribing the police use of firearms; and *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, where the court found no duty to bargain over the decision to improve community relations by allowing members of citizen and police inquiry boards to attend each other's meetings.

The decision did not involve reallocation of work from unit members.

"Although the parties bat these cases back and forth," said the Court of Appeal, there is little guidance that we can derive from them...because they resolve the abstract MMBA principles in a context other than unit workload." "At the risk of being an additional example of 'ruling from the gut' in this area of jurisprudence," admitted the court, "it is readily apparent to us that the trial court...both overstepped its bounds in its disregard of the findings of the local legislative body, and mechanically applied the concept of subcontracting unit work without considering the nuances of the specific factual situation."

First, said the Court of Appeal, "it ill-behoved the trial court to reject the City's claim that urgency underlay its plan to make use of retirees." The court pointed to the surge in retirements. That increase could not have been anticipated a year in advance, said the court, and the city responded as expeditiously as it could. The court also emphasized that the retiree plan was prompted by the city's determination regarding the level of staffing necessary to provide the proper level of protection to the residents.

Unlike the facts in *Farrell or Dublin Fire Fighters*, the court explained, the decision did not involve reallocation of work from unit members to other personnel outside the unit. Rather, said the court, there was a shortage that could not be filled with unit members. The Court of Appeal criticized the trial court for trying to bring the case within "*Farrell's* pigeonhole" and overlooking the express administrative principles included in the personnel director's memo to the council. "Nothing about the decision to appoint retirees or its *planned consequences* resulted in the reallocation of work opportunities away from unit members."

Finally, the court added, if execution of the policy in fact resulted in detriment to individual unit members, the proper procedure would have been for SPOA to file grievances under the existing MOU, not to compel bargaining over effects that were contrary to the city's stated policy.

The court concluded:

The City's decision to use retirees to respond to a short-term staffing shortage in a work force concerned with public protection involves a question of fundamental managerial policy that neither SPOA nor the trial court were entitled to second-guess. As in *Claremont Police Officers*, this speculative assertion of possible impacts from the implementation of this managerial policy is insufficient to trigger a duty to bargain with SPOA over its enactment. Moreover, even if SPOA had marshalled evidence of a significant impact on working conditions, this shortage was beyond the power of SPOA to remedy (other than through overtime to the limits of human endurance, a remedy itself fraught with danger to public safety). As a result, there is no benefit in subjecting the decision to the bargaining process that outweighs the City's interest in unfettered decisionmaking or the transactional cost of the bargaining process.

While the specific dispute presented may have become moot, the court denied the union's petition, citing the possibility that a future shortage of police officers or other personnel who protect the public safety may arise due to unforeseen circumstances and present too brief a duration to allow for effective review. (*Sacramento Police Officers Assn. v. City of Sacramento* [1-31-07] 147 Cal.App.4th 311.) *

Legislation Introduced to Address PERB Jurisdiction in Strike Cases

On February 21, legislation was introduced by Assembly Member Ed Hernandez (D-West Covina) that would address growing confusion as to the scope of PERB's jurisdiction in cases involving work stoppages by public employees, particularly in local government jurisdictions.

Almost 30 years ago, the California Supreme Court decided in *San Diego Teachers Assn. v. San Diego Superior Court* (1979) 24 Cal.3d 1, 41 CPER 2, that the Public Employment Relations Board has exclusive initial jurisdiction in cases where an employer seeks to enjoin a strike or other job action in the public schools. In *San Diego*, the court announced that PERB has exclusive jurisdiction over activity that arguably is an unfair practice under the Educational Employment Relations Act. As a result of that important decision, employers seeking to enjoin work stoppages have come to PERB and asked the board to seek injunctive relief on their behalf.

Recently, however, in a number of instances around the state, employers in cities and counties have gone to the local superior court in search of injunctive relief and have bypassed PERB altogether.

During the recent strike in Sacramento County, for example, the county counsel convinced a superior court judge to issue a temporary restraining

order prohibiting a limited number of county employees from participating in the planned job action. The court's temporary restraining order targeted employees who were deemed essential to safeguard the public health and safety.

This link to the public health and safety is derived from language in *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, 65 CPER 2. In that case, which arose under the Meyers-Milias-Brown Act, the Supreme

In a number of instances, employers in cities and counties have bypassed PERB altogether.

Court held for the first time that strikes by public employees were not illegal unless prohibited by statute. And since the MMBA did not address strikes, the Supreme Court held that employees covered by that statute — cities, counties, and special districts — were not prohibited from striking. The court tempered its ruling by adding that public sector strikes could be enjoined if they threatened the public health or safety.

If you're going through hell, keep going.

Winston Churchill

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The *County Sanitation* case was decided after *San Diego*, at a time when the local sanitation district was not under the jurisdiction of PERB and the parties in that jurisdiction only had the superior court to turn to.

The jurisdictional dispute that has emerged in the local government arena springs from the fact that when the Supreme Court recognized PERB's exclusive jurisdiction in *San Diego*, the board had no jurisdictional authority to hear or decide unfair practice charges lev-

The superior court judges feel that they have a responsibility to protect the health and safety of the public.

ied by local governments or the unions operating under that act. Therefore, the logical underpinning of *San Diego* had no direct bearing on MMBA jurisdiction. That remained the case when the Supreme Court decided *County Sanitation*. PERB still had no jurisdiction in the local government arena and no argument could be made that PERB had exclusive jurisdiction to hear injunctive relief requests by virtue of its authority over unfair practices.

However, with PERB's recent acquisition of jurisdiction over local gov-

ernment entities, the question that has emerged is whether, in line with *San Diego*, PERB's new authority to resolve unfair practice charges under the MMBA gives it the exclusive initial jurisdiction to act in strike cases where the conduct arguably is an unfair practice. This reasoning would extend the rationale of *San Diego* to situations involving local government jurisdictions and would support the conclusion that the parties must ask PERB to seek injunctive relief on their behalf in strike situations in cities, counties, and special districts.

Beyond the Sacramento County situation, challenges to PERB's jurisdiction have arisen in strikes in Contra Costa and Santa Clara counties and in the City of San Jose. In these cases, the focus of the requests for injunctive relief also has been on curtailing essential employees from participating in the job actions. Superior court judges have been sympathetic to arguments from employers that they are not seeking a blanket curtailment on the right to strike, but are seeking injunctive relief only against essential employees. In most cases, the superior court judges are fully aware of PERB and its jurisdiction over unfair practices, but feel that they have a responsibility under *County Sanitation* to protect the health and safety of the public by prohibiting essential employees from participating in the strike.

As the issue awaits decision in a number of appellate courts, Assembly Member Hernandez has offered a quick

solution to the problem. A.B. 553 would add to the powers and duties of the board as currently delineated in the MMBA. By amendment to Government Code Sec. 3509, the board would acquire exclusive jurisdiction to determine "whether to seek from a court of competent jurisdiction injunctive relief involving or growing out of relations between an employee organization and a public agency."

On its face, this statutory fix would seem to provide clear direction to the superior courts and the parties. How-

A.B. 553 offers a quick solution to the problem.

ever, some observers suggest that the legislation does not address underlying concerns voiced by practitioners opposed to ceding injunctive relief jurisdiction to the board. In situations where threats to the public health and safety are imminent, they argue, it is too time consuming to insist that the parties funnel their injunctive relief requests through the administrative body. Where time is of the essence, the argument goes, the superior court should be permitted to act against strikes that pose serious risks to the public. *

No Due Process Violation Where ‘Skelly’ Officer Investigated Employee Misconduct

Due process principles do not prohibit the manager who initiated disciplinary action against an employee from presiding over that employee’s *Skelly* hearing, ruled the Second District Court of Appeal, especially when the employee is afforded a full evidentiary hearing before a neutral hearing examiner appointed by the civil service commission. And, the court held, where the weight of the evidence supported the charges levied against the employee, the trial court erred when it rejected the penalty of discharge that had been ordered by the commission.

Factual Summary

While working as a truck driver for the Los Angeles Department of Water and Power, Kenneth Flippin was observed by a customer to be sleeping in a hammock beneath a DWP truck on a public street during work hours. The citizen called DWP. Dispatcher Gary King and Flippin’s supervisor, Steven Thompson, drove to the location and found Flippin reclining on the hammock with his eyes closed, snoring. They took photographs, and when Flippin awoke to King’s yells, he gestured at the two men by raising his middle finger. King told Flippin that his behavior was unacceptable and to remove the hammock. Later, when King encountered Flippin at the DWP yard, he discovered that Flippin had not

removed the hammock and again instructed him to do so. Flippin replied, “You should rattle,” by which he meant that King was “a snake.”

A DWP manager, John Sharp, investigated the incident. As part of his investigation, he reviewed Flippin’s personnel records and discovered that Flippin had been disciplined twice for leaving an assigned work location with-

Discharge is within the range of penalties for sleeping on the job.

out proper approval, requiring excess supervision. Flippin also had received three letters of commendation for courteous and exemplary performance during his 16-year career with the department.

Sharp also reviewed the department’s administrative manual, which contains guidelines for employee discipline, and learned that discharge is within the range of suggested penalties for the first offense of sleeping on the job.

Sharp recommended that Flippin be terminated, and DWP assistant general manager Thomas Hokinson approved his recommendation.

Sharp then sent Flippin written notice of his proposed dismissal based

on charges of insubordination, requiring excessive supervision, sleeping on the job, and misconduct adversely reflecting on city employees. Sharp informed Flippin that he could respond to the proposed discipline by presenting any facts he wished Sharp to consider.

Sharp met with Flippin’s union representative to discuss the proposed discipline. Flippin did not participate in this meeting. His union representative offered no mitigating information but asked that Flippin be permitted to retire rather than be terminated. Sharp agreed to this proposal, but Flippin later rescinded his offer to retire, asserting that it had been based on erroneous information provided by his union representative that he risked losing his retirement benefits if his challenge to the discharge proved unsuccessful.

Administrative Review

Following his termination, an administrative hearing was conducted by a hearing examiner appointed by the Los Angeles Board of Civil Service Commissioners. Initially, Flippin’s counsel stipulated that DWP had complied with the requirements of *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. But a few months later, Flippin’s counsel claimed that DWP had violated the due process requirements by allowing Sharp to act as the *Skelly* hearing officer when he also had investigated the alleged misconduct and had recommended termination.

The hearing officer heard testimony about the customer’s complaint and ob-

servations, about King and Thompson's visit to the job site, and about Sharp's investigation and his role as the *Skelly* officer. Flippin denied that he had been sleeping on the job and claimed that he simply had been resting. He also testified that he had used the hammock on this truck for years and never was told it was impermissible.

Flippin waived his right to a Skelly hearing.

The hearing examiner concluded that DWP had satisfied the requirements of *Skelly* and that the department had met its burden of establishing that Flippin was sleeping while on duty in public view, that his misconduct reflected poorly on the city, and that he was insubordinate when he pointed his middle finger at his superiors and called King a snake. However, the hearing examiner found insufficient evidence in support of the allegations that Flippin was insubordinate by failing to remove the hammock from his truck or that he needed excessive supervision. Viewing the letters of commendation in mitigation, the hearing examiner concluded that the penalty of discharge was excessive.

On exceptions from both parties, the board sustained the hearing examiner's factual findings and the con-

clusion that the *Skelly* requirements had been met, but it sustained the discharge.

Court Review

Flippin then filed a petition in superior court to compel his reinstatement. After a hearing, the trial court concluded that the weight of the evidence supported the findings that no *Skelly* violation had occurred and that Flippin had waived his right to a *Skelly* hearing. The court also concluded that the weight of the evidence supported the charges that Flippin had been sleeping on the job, was insubordinate, and had engaged in misconduct that reflected poorly on the city and its employees. The trial court nevertheless found that the penalty imposed by the board was excessive and directed the board to "reconsider its determination of discipline in a measure less than discharge."

On appeal, the court found that Flippin waived his right to a *Skelly* hearing. He chose not to participate in the meeting with Sharp, and neither he nor his union representative presented any mitigating information in response to the charges that were the basis for the proposed dismissal. The court concluded that Flippin "was accorded his due process right to confront the charges against him and to present mitigating information in his favor at a *Skelly* hearing. He chose not to exercise that right."

Despite that conclusion, the court held that, even absent any forfeiture, no due process violation occurred. The court found no authority that precludes

or categorically disqualifies any official initiating disciplinary action against an employee from presiding over that employee's *Skelly* hearing.

In reaching this conclusion, the Court of Appeal dismissed Flippin's reliance on *Civil Service Assn. v. Redevelopment Agency* (1985) 166 Cal.App.3d 1222, where the court condemned the

Sharp's dual role was no violation of due process rights.

practice of allowing the same person who originally imposed the discipline to review that decision *in an administrative appeal*. Underscoring the difference between an administrative appeal and a *Skelly* hearing, the court found that the *Civil Service* case "affirms the apparently common practice of having the same official who initiates an employee disciplinary proceeding also conduct the *Skelly* hearing."

The court concluded that Flippin failed to establish that Sharp's dual role as *Skelly* hearing officer and as the person who initially recommended his discharge was a violation of his due process rights. The court noted that Sharp's involvement consisted of investigating the charges of misconduct, recommending Flippin's discharge, and conducting the *Skelly* hearing at which time Flippin had the opportunity to respond to the charges and recommendation.

But, said the court, the penalty of discharge was then “imposed” by a different DWP manager, who approved Sharp’s recommendation. And, the court emphasized, “two more stages of review followed: a full evidentiary hearing before a neutral hearing examiner appointed by the Board, and a review of the hearing examiner’s decision by the Board itself.” The only sense in which an “involved” person reviewed his own prior determination, said the court, was that Sharp made the initial recommendation that Flippin be dismissed and then served as the *Skelly* hearing officer. There is no authority that prohibits such dual function, said the court.

Finally, the Court of Appeal chastised the trial court for substituting its discretion for that of the board concerning the appropriate penalty. Having found evidentiary support for the findings of insubordination, sleeping on the job, and misconduct reflecting poorly on the city, the trial court was required to uphold the punishment if there was any reasonable basis for doing so. The penalty imposed by an administrative agency will not be disturbed “absent a manifest abuse of discretion,” admonished the Court of Appeal. “It is only in the exceptional case, when it is shown that reasonable minds cannot differ on the propriety of the penalty, that an abuse of discretion is shown,” said the court, and that was not shown here. (*Flippin v. Los Angeles City Board of Civil Service Commissioners; Los Angeles City Department of Water and Power, RPI* [3-1-07] B187388 [2d Dist.] ___ Cal.App. 4th ___, 2007 DJDAR 2939.) *

Bill to Open Police Officer Disciplinary Hearings Introduced

In August, the California Supreme Court announced in *Copley*, that records related to a police officer’s disciplinary appeal are not subject to disclosure under the California Public Records Act. The court’s decision resolved a conflict concerning the reach of Penal Code Sec. 832.7(a), which provides that peace officer records “are confidential and shall not be disclosed in any criminal or civil proceedings....”

Rejecting the view expressed by the Court of Appeal in *Bradshaw v. City of Los Angeles* (1990) 221 Cal.App.3d 980, 86 CPER 12, that the Penal Code provision only prohibits disclosure in criminal and civil proceedings, the high court read “confidential” as establishing a general condition of confidentiality applicable to *all* disciplinary records maintained by *any* employing agency. In the *Copley* case, *The Copley Press, Inc v. Superior Court* (2006) 39 Cal.4th 1272, 180 CPER 42, the court ruled that the records held by the San Diego Civil Service Commission were not subject to disclosure in the course of an officer’s appeal of disciplinary action.

The Supreme Court found it would be unreasonable to assume that the legislature intended to put strict limits on the discovery of police personnel records in the context of civil or criminal discovery, and then to permit the public to obtain them through the

Public Records Act. (See *CPER* No. 180, pp. 42-47, for a complete summary of the court’s analysis.)

As a result of the *Copley* opinion, the standard operating procedure in several law enforcement jurisdictions in California has changed. For example, in Los Angeles, the disciplinary hearings that historically had been open to

Copley changed standard operating procedure in several law enforcement jurisdictions.

the press are now closed. And recently, an Alameda County superior court judge ruled that meetings of the City of Berkeley’s Police Review Commission had to be closed in light of the *Copley* decision.

These reactions to the court’s ruling have brought the issue to the attention of the legislature in Sacramento. On February 23, Assembly Member Mark Leno (D-San Francisco) introduced A.B. 1648, which would declare the lawmakers’ intent to “abrogate the *Copley* decision” and would make specified information in certain disciplinary records available to the public.

The bill proposes an amendment to Penal Code Sec. 832.7, adding that, notwithstanding the confidentiality language of Sec. 832.7(a), "with respect to each complaint, charge, disciplinary matter, or internal investigation that results in either discipline, a sustained complaint or charge, or a finding that an officer's conduct was out of policy, a department or agency that employs peace officers or custodial officers shall release: (1) the name and badge number of the subject officer; (2) the name and current address of the complain-

*Reactions to the ruling
have brought the
issue to the attention
of the legislature.*

ant, unless the complaint requests that they be kept confidential; (3) a summary of the factual allegations contained in the complaint or other charging document; (4) the charges brought against the officer; (5) the factual findings with respect to the conduct at issue; and (6) the discipline imposed or corrective action taken."

The bill also would allow the discretionary release of information in cases where a civilian review board or other governmental body outside the department or agency recommends discipline or makes a finding that the officer's conduct was out of policy, or

that a complaint was well-founded and that finding is overturned or the recommendation is not followed.

Senator Gloria Romero (D-Los Angeles) also has proposed the *Copley*

decision be addressed by legislation that would reopen some disciplinary meetings and records to public scrutiny. *

Interest Arbitration Law Still Unconstitutional, Superior Court Judge Rules

Sacramento County and the Sacramento County Probation Association have reached a tentative agreement to succeed their prior contract that expired on June 30, 2006. But, along the way, the parties heard from a superior court judge on the legality of S.B. 440, the legislation that amended the binding interest arbitration law to permit invalidation of the panel's award by a unanimous vote of the governing body.

This fall, bargaining between the county and the probation officers' exclusive representative proved unsuccessful, and mediation also proved ineffective at forging an accord. As a result, in October, the association declared impasse and requested that the dispute be submitted to impasse under the Code of Civil Procedure Sec. 1299.7, the statutory provision authorizing the use of binding interest arbitration as a means of resolving bargaining impasses for firefighters and law enforcement personnel in the state.

As originally drafted, the law gave the three-person arbitration panel the authority to select the last, best offer submitted by the party that most nearly

complied with the factors enumerated in the law. Those factors include the interest and welfare of the public, the financial condition of the employer, and comparisons with other fire or law enforcement employers.

*The county refused to
submit the bargaining
stalemate to binding
arbitration under the
amended law.*

The statutory scheme was struck down by the California Supreme Court in *County of Riverside v. Superior Court of Riverside County, Riverside Sheriff's Assn., RPI* (2003) 30 Cal.4th 278, 160 CPER 19. The court in *Riverside* found that the statute impermissibly interfered with the county's constitutional authority to set employee compensation and control county finances.

Following that decision, the legislature enacted S.B. 440, which amended

Sec. 1299.7 of the law to provide that the arbitration panel's decision could be rejected by a unanimous vote of the members of the governing body.

In Sacramento, after the association declared impasse, the county refused to submit the bargaining stalemate to binding arbitration under the

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requirement upsets
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governing body.*

amended law. Based on the advice of county counsel, a lawsuit was filed seeking declaratory relief as to the constitutionality of S.B. 440.

The court heard oral arguments from the parties, and Superior Court Judge Shelleyanne Chang issued her decision in January. Judge Chang found that the amended version of the statute still did not pass constitutional muster. The court ruled that the arbi-

tration mechanism for resolving the bargaining impasse usurps the function of the legislative body. And, the unanimous vote requirement makes it difficult — if not impossible — for the county board of supervisors or the city council to adopt compensation levels. The court also noted that the unanimity requirement upsets the balance of power within the governing body. Since unanimity is required to reject the arbitration panel's award, the court reasoned, the statute gives one official the ability to stymie the process rather than giving the governing body the ability to adopt the compensation level through the normal process of give and take, compromise, and a majority decision.

While the court's ruling blocked use of the statutory arbitration process as a means of resolving the bargaining impasse, talks continued and, as *CPER* went to press, the parties had reached a tentative agreement on a new five-year accord. Employees will be supplied with a mail ballot to ratify the contract, and then, if ratified, it will go to the board of supervisors where, as the county governing body, it will give its approval to the contract terms. *

Public Schools

Year-Long Study Finds California Schools Have Big Problems

The findings of a major study commissioned over a year ago by Governor Arnold Schwarzenegger and a bipartisan group of state lawmakers and educators recently saw the light of day. Its conclusion: the California public school system is “deeply flawed” and requires both a massive infusion of money and “systemic and fundamental reform.”

“Getting Down to Facts” is actually a collection of 22 studies conducted by the Institute for Research on Education Policy and Practice at Stanford University. The research was led by Stanford education professor Susanna Loeb at a cost of \$3 million, which was paid for by four private foundations: the Bill and Melinda Gates Foundation, the William and Flora Hewitt Foundation, the James Irvine Foundation, and the Stuart Foundation.

The project addressed three broad questions:

- (1) What do California school finance and governance systems look like today?
- (2) How can the state use the resources that it has more effectively to improve student outcomes?
- (3) To what extent are additional resources needed so that California's

students can meet the performance goals that have been set for them?

The report was presented in two parts. The first focuses on the problems, and the second on broad recommendations. The project was not designed to recommend specific policies but rather to provide common ground for understanding the current state of school finance and governance, and for a serious and substantive conversation about necessary reforms.

The conceptual background for the project was developed by Robert Reich, who served as Secretary of Labor under President Clinton. It represents an attempt to synthesize what the experts know as a basis for convening the necessary public conversations about what should be done. Several of the studies addressed topics such as an overview and the evolution of the system of financing K-12 education, the incentives that drive California's finance system, and an analysis of the revenues and expenditures in the school districts. Other studies focused on governing and structural issues, including the autonomy of, and resources allocated to, charter schools; personnel policies and practices of the schools; and collective bargaining and teacher assignment.

Teacher Policies Study

One study in the report involved an in-depth review of state teacher policies, their effects on learning and teacher performance, and the implications for school finance. Conducted by Professor Loeb and Luke C. Miller, a doctoral candidate in the economics of education at Stanford and a research assistant at IREPP, the authors examined eight broad policy areas related to the teaching profession: teacher preparation or pre-service; licensing and cer-

California offers teachers tenure earlier than most other states.

tification; tenure; professional development, including performance evaluation; incentives for recruitment, retention, and assignment; salary structure; teacher associations; and teacher retirement.

Preparation and licensing. Loeb and Miller concluded that there is little research to judge how state policies that impose preparation and licensing requirements affect the ability to teach. They did find strong evidence that pre-service requirements affect the pool of potential teachers; routes to teaching that have less pre-service course work tend to attract a larger pool of candidates.

Tenure. The study found that California offers teachers tenure earlier

than most other states. It is one of ten states that award tenure after only two years; all other states require a longer period of service, ranging from three years (32 states) to five years (two states). Two provide no state guidance. The authors could find no published research on the effects of teacher tenure policies on recruitment, retention, teacher quality, or student achievement. They did find, however, that there are strongly held opinions on these mat-

Principals cite tenure laws as one of the greatest barriers they face.

ters in California. They noted that opponents of increased probationary time argue that it would make recruiting quality teachers more difficult, but they found no evidence to support these claims. There is also no available evidence to judge whether the increased costs of evaluating probationary teachers for a longer probationary period (and then having to recruit and hire new ones) would be worth the benefits to students in removing more teachers.

Those promoting tenure reform, they said, argue that proposals designed to strengthen administrators' ability to dismiss low-quality teachers would improve teacher quality. The researchers appear to agree, pointing to find-

ings that there is no evidence that preparation and licensing are good predictors of effectiveness in the classroom. "Because of this," they wrote, "it is important to be able to assess teachers once they are teaching and to have the flexibility to dismiss ineffective teachers." They found evidence that principals can identify poor teachers and note that principals cite tenure laws as one of the greatest barriers they face in improving teaching. Interestingly, the researchers discovered that 50 percent of the principals say they would dismiss one or no teachers, while 25 percent would dismiss only two. The researchers stated:

To the extent that a teacher's quality can not be fully assessed within the first two years, too many low quality teachers may receive tenure and due process rights. Once tenured, the costs associated with the legal process of dismissing a teacher serve to siphon money from other instructional programs and can prove prohibitive for many districts. By strengthening the ability of administrators to release low quality teachers, opponents of tenure assert that the overall quality of the teacher labor force would increase and, along with it, student achievement.

The authors recommend a "loosening of state laws through extending tenure or redefining valid reasons for dismissing teachers." They also suggest that there is some flexibility within the current system "for districts to develop evaluation processes that would aid schools and districts in identifying their

least effective teachers and dismissing them." But, they cautioned, "this within-district process requires a type of collaboration between bargaining units which has been scarce to date."

Professional development and teacher evaluation. The state's investment in professional development for beginning teachers appears to help keep them in the profession, concluded Loeb and Miller. However, there is no evidence that the state requirement that

Principals in California find it more difficult to dismiss teachers.

all teachers complete a minimum of 150 hours of "professional growth activities" every five years improves teacher effectiveness: "There is substantial evidence that while some professional development and more formal education can improve teacher effectiveness, the acquisition of generic credits as specified in California does not." "For example, teachers with master's degrees are, on average, no more effective than those without," they noted. "However, teachers who participate in some sustained professional development closely linked to the work they do in their classrooms do, on average, become more effective."

While California has state guidelines for teacher evaluation, it leaves the

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design and implementation of the evaluation systems up to the districts, found the researchers. For example, while the state requires that teacher evaluations consider measures of student performance, it gives no guidance as to who should conduct the evaluations. And, while, “in theory,” tenured teachers with poor evaluations can be dismissed, “little is known about teacher evaluation procedures, the evaluation clauses in teacher contracts, or how these affect teacher assessment and career trajectories,” they said. They also found that principals in California find it more difficult to dismiss teachers than do principals in other states.

Incentives. The authors found that, overall, teachers respond to incentives such as those that encouraged postponing retirement, mentoring interns in low-performing schools, remaining to teach in high-priority schools, and obtaining credentials in critical subject areas, such as math and science. “However,” they said, “the research on the effectiveness of specific programs is sparse and the findings are mixed.” The authors note that there are no incentives based on teacher performance, but the research is not clear as to whether this would be beneficial. They suggest that the state undertake additional research, “including cost-benefit analyses on the full array of incentives.”

Salary structure. California, like many other states, has a minimum salary level for all teachers but it is not binding on most districts. Teacher sala-

ries are decided by district, and unions help define the compensation package. The salary schedule is based on years of experience and education. The researchers found that this salary structure presents several problems. Because it treats all schools within a district the same, teachers choose a site assignment based solely on working conditions. And because, generally, teachers prefer teaching higher-scoring students, schools with the lowest performers end

Teachers unions in California are particularly powerful.

up with the least-experienced teachers. In addition, because all specializations are treated equally in terms of salary, it is difficult to attract teachers in fields such as math and science that have good alternative occupational fields. This is especially true for schools with difficult working conditions.

The researchers note that “the question of a state-level salary schedule is sometimes raised in California,” but that they know of “no studies assessing the impact of this salary approach on student achievement.”

Teacher associations. The authors recognize that “the teachers’ unions in California are particularly powerful, bargaining not only for salaries, benefits, and working conditions, but also

lobbying for bills and influencing the election of school boards.” The researchers discuss a number of studies focused on the impact of the unions’ efforts. While it is clear that teachers unions increase worker pay and benefits, “the evidence on the effects of unions and union strength on student outcomes is much less clear.” Some studies show that unions help to increase student achievement, while others suggest that the increase in salaries forces a trade-off with other resources, resulting in decreasing achievement and increasing drop-out rates.

Teacher retirement. The authors undertook an extensive review of retirement plans in California and other states, finding that there is a widely held belief that retirement plans influence recruitment and retirement decisions of teachers. However, Loeb and Miller found only one research study on the subject. “If a State wants to encourage long-serving teachers to retire, an increase in retirement benefits will increase retirement rates among the target population,” they surmised.

In general, concluded the authors, California needs to systematically evaluate its teacher policies. “If the State is going to continue to intervene as heavily in the teacher labor market, it is worth assessing the effects of these interventions to a much greater extent than is currently the case,” they said. Otherwise, “we will be in no better position to learn from experience in the future than we are today.”

Other Findings

Additional findings emerged from some of the other studies included in "Getting Down to Facts." One conclusion is that the state has far too many categorical programs that tie up educational funding provided to the schools; the state's imposition of too many one-size-fits-all rules require administrators to spend inordinate amounts of time filling out paperwork rather than concentrating on student learning. And, the state's data systems

*The full report is
available at
www.irrep.net.*

are so bad that it is impossible for schools to share information about what is working and what is not.

Overall, California does not spend enough money on education, found the researchers. This is especially true in terms of schools with high-needs students, or those who are poor, speak little English, or need special education. The state spends approximately \$10,600 per student, which is about 30 percent less per pupil than most other states and 75 percent less than New York.

Four studies focus on how much more money is needed to help every school reach a score of 800 on California's Academic Performance Index. Interestingly, the reports reached vastly different conclusions, ranging

from several billion dollars to \$1.5 trillion annually. But all of the researchers agreed that more money alone will not fix the problems — massive reforms are needed too.

The report concludes that at least two reforms are essential. Schools with populations of high-needs students require a lot more money. And, local education officials, not the state, need to decide how that money is spent.

Reaction to the report has been varied. Governor Schwarzenegger highlighted the recommendations for change rather than those for increased funding. "We need to focus on critical school reform before any discussion about more resources," he said. State schools superintendent Jack O'Connell reacted by stating that "reform and revenue" should occur at the same time. Democratic Assembly Speaker Fabian Nunez agreed. "These reforms need to come with resources. You can't do one without the other," he said.

California Teachers Association President Barbara Kerr criticized the

report's focus on ineffective teachers. "Frankly, firing one or two teachers isn't what this is about," she said. "It's about big picture reform." Reacting to the proposal that school districts should be given more money for higher-needs students, and the power to spend it as they see fit, Mary Bergan, president of the California Federation of Teachers said, "We won't disagree with that, but we want teachers to have the main voice over how the money is spent."

However, it is the Governor's Committee on Education Excellence, a bipartisan group, that is expected to study the report and make legislative recommendations for consideration in the fall. Chairman Ted Mitchell said he does not want the committee to be pressured in its work and hopes that it can take the time to develop a "creative but honest solution" to the problems set out in the report.

The full report is available at the IREPP website, www.irepp.net. *

LAUSD and UTLA Agree on Contract

On the eve of a strike authorization vote, the Los Angeles Unified School District and United Teachers of Los Angeles reached a tentative agreement. The settlement came on February 13, 2007, after months of contentious negotiations. (For a more detailed discus-

sion of the negotiations, see *CPER*No. 182, pp 38-39.)

According to the union, the district upped its raise offer from 4.5 percent to 6 percent just days before the strike authorization vote. "The District knew that voting had begun on strike autho-

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By Dale Brodsky

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rization,” said the union on its website. “Chapter chairs were already predicting 90 percent-plus support for strike authorization at their schools,” it continued. “LAUSD fear of the vote created the ‘settlement moment’ that led to the breakthroughs on salary, class size, and other issues that enabled us to come to a tentative agreement,” it concluded.

The contract also provides for a process aimed at reducing class size.

The new contract was ratified overwhelmingly on March 15, with more than 24,000 teachers voting, representing approximately one-half of the union membership. Of those, nine in ten voted to accept the contract.

The three-year agreement gives teachers a 6 percent salary increase for the current year, retroactive to July 1, 2006. Salary negotiations for the next two years are expected to begin soon. Health benefits will continue to be funded at the current level. The contract also provides for a process aimed at reducing class size. The agreement, which UTLA claims is the “first-ever contract agreement to reduce class size,” calls for a phased-in reduction by two students in grades 4 through 12 in all schools, and for flexible class-size caps.

Both sides anticipate more decreases in the future.

The union said that it sacrificed money that could have raised the salary offer to win smaller classes. “Class-size reduction is the biggest piece in school reform,” said A.J. Duffy, president of UTLA, at a press conference announcing the agreement. “It is also very, very expensive,” he added.

The district estimates that the total package increases district salary costs by \$240 million a year and that maintaining current health benefits will cost an additional \$60 million. The class-size reduction program, when fully implemented, will cost approximately \$135 million annually. It is anticipated that most of the funding will come from

an increase in the money the state pays school districts per student.

Recently hired LAUSD Superintendent David L. Brewer III expressed pleasure at the results of the ratification vote. “I am glad LAUSD was able to offer our valuable teachers the negotiated 6 percent salary increase on top of a 1.5 percent increase in health benefits,” he was quoted as saying on the district’s website. “It keeps our teachers right in line with the raises their colleagues in other school districts received this year while providing one of the best health benefits package in the nation,” he noted. “By keeping pay increases commensurate with other school districts, LAUSD can continue to aggressively seek out the best and the brightest in education.” *

Calculation of Full-Time Assignment Dependent on District Practice

A terminated community college instructor was denied reinstatement because he failed to prove that his status had changed from temporary to permanent during the course of his employment. The First District Court of Appeal found that the employee did not meet the requirements of Education Code Sec. 87482.5 because he did not work at least 60 percent of the hours per week based on what the district considered to be a full-time assignment. In reaching this conclusion, the court rejected the argument that a full-time

assignment is defined by law, not by a district’s local practice.

Christopher Womack was hired by the San Francisco Community College District as a temporary English as a Second Language instructor in 1987. By 1993, his workload had increased to a total of nine hours of class time, or 10.5 units. He was terminated in 2001 after a series of poor performance reviews.

Womack filed a grievance challenging the decision, but it was denied by the district. He then filed a petition

for writ of mandate alleging that he had obtained probationary status during the 1995-96 academic year because he worked more than 60 percent of a full-time work assignment for two consecutive semesters. He also alleged that, because he continued working at the same level for several additional academic years, he had become a tenured professor by operation of law at the start of the 1998-99 academic year. Because a tenured professor cannot be terminated in the manner or time frame in which he was, he demanded reinstatement with backpay, costs, and attorneys' fees.

The trial court denied the petition, in part, because it found that Womack did not show that he had worked in excess of 60 percent of a full-time instructor's work hours. Womack appealed.

Court of Appeal Decision

The court identified the principal statute controlling Womack's status at the time of his termination as Sec. 87482.5. It states in relevant part:

(a) Notwithstanding any other provision of law, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee, and shall not become a contract employee under Section 87604.

Womack argued that a full-time assignment was 15 hours per week and

that his nine hours or 10.5 units equaled or exceeded 60 percent of that time. The district argued that a full-time instructor was required to work 18 hours or units per week, made up of 15 classroom hours and three mandatory office hours, and that Womack's nine hours/10.5 units constituted at most 58.33 percent of a full-time load. Womack, on appeal, abandoned his trial argument that his own office hours should be considered in the computation.

The court noted that "where the parties clearly differ now is on the question of how a 'full-time' assignment is defined." Womack argued that the definition is a matter of law whereas the district maintained that evidence of its own interpretation of a full-time assignment was admissible and determinative. The Court of Appeal agreed with the district:

First of all, we find nothing in the language of section 87482.5 which requires, or for that matter even suggests, that there is a mandatory, statewide definition of what constitutes a full-time teaching assignment in a community college. The critical term in that section is "60 percent of the hours per week *considered* a full-time assignment for regular employees having comparable duties." Nothing in that language suggests there is a strict legal rule as to who does the "considering" required to define a "full-time assignment."

The court referred to a companion statute, Sec. 87883(b), which permits a community college district to provide compensation for office hours

held by part-time faculty and provides: "The compensation paid to part-time faculty under this article shall equal at least one paid office hour for every two classes or more taught each week for 40 percent of a full-time load *as defined by the community college district.*" It found that this language "suggests rather strongly" that the "consideration" referred to in Sec. 87482.5 is that of the relevant district. Following the rule of

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assignment is defined.*

statutory construction "that statutes relating to the same subject matter must be read together and reconciled whenever possible," the court had "no difficulty in concluding that section 87883(b) confirms [the district's] argument that a community college district may decide what constitutes a full-time assignment for purposes of applying the 60 percent rule of section 87482.5."

The court rejected Womack's argument that three other Court of Appeal cases decided under Sec. 87482, the predecessor statute to Sec. 87482.5, mandated that only actual teaching hours by full-time instructors may be used in the computation of the 60 percent rule. While it was true that the

Fourth District Court of Appeal in *Rooney v. San Diego Community College Dist.* (1982) 129 Cal.App. 3d 1977, 54 CPER 74, used only the classroom teaching portion of the full-time teaching assignment in its 60 percent computation, “it nowhere held that such was statutorily required,” concluded the court. Regarding *Kalina v. San Mateo Community College Dist.* (1982) 132 Cal.App. 3d 48, 54 CPER 46, another First District decision, the court said, “although we used the phrase ‘60 percent or less of full-time assignments’ in our opinion, we did not purport to hold, or even hint for that matter, how such an assignment should be defined.”

The court had a more difficult time distinguishing *McGuire v. Governing Board* (1984) 161 Cal.App.3d 871, 64 CPER 38. In that case the Fourth District reversed the lower court’s holding that the tutoring work of a temporary employee could be used in the 60 percent calculation, stating, “we conclude the statute [Sec. 87482] means what it says and the proper measure in determining whether the 60 percent limit is exceeded is the number of hours the person seeking tenure spends teaching classes compared to the number of hours per week a regular fully assigned employee spends on comparable duties.” The court reasoned that, because *McGuire* was decided before the enactment of Sec. 87883(b), which “makes clear the substantial discretion of the relevant district to define what is meant by a ‘full-time load,’” it could not be read as meaning that as a matter of law

only teaching hours should be considered. And, “even if we disregard the language of section 87883(b), we do not interpret *McGuire* as denying the power and right of a district to exercise its discretion pursuant to the critical ‘considered’ terminology used in section 87482.5, subdivision (a), terminology quoted in all three of the decisions.”

The court agreed with the district that language in the case of *Steinberg v. Los Angeles City Unified School Dist.* (1979) 95 Cal.App.3d 473, interpreting a 60 percent rule statute applicable to elementary school teachers, was persuasive in this case. The *Steinberg* court, referring to the phrase “considered a full-time assignment” contained in that statute said, “It follows that what is con-

sidered a full-time assignment is left to the determination of the Board, within its reasonably exercised discretion.” The Court of Appeal concluded, “We agree with this interpretation: indeed, what else could the Legislature have meant, either regarding elementary or community college teachers, by the careful term “*considered* a full-time assignment?”

The court found the district had presented sufficient evidence to show that it specifically defined a full-time load for ESL instructors as 18 hours, including the three mandatory office hours. (*Womack v. San Francisco Community College Dist.* [2007] 147 Cal.App.4th 854.) *

School District May Not Deduct Existing Employee’s Salary From Absent Employee’s Pay

Education Code Sec. 45196 provides that a school district may deduct the salary of a temporarily disabled classified employee and use it to pay the substitute employee hired to fill the position. However, the district may not deduct the salary if the substitute is a currently employed, classified employee assigned the absent employee’s hours or tasks, ruled the Fourth District Court of Appeal in *CSEA v. Tustin Unified School Dist.*

While Joan Featherstone, a classified employee, was on temporary disability leave from her job as a nutrition

services assistant, the district assigned some of her work hours to other classified employees and deducted their pay from her salary. Featherstone is a member of the bargaining unit represented by the California School Employees Association. CSEA filed a petition for writ of mandate on her behalf. The association claimed that Sec. 45196 did not permit the deductions for wages paid to classified employees. The superior court concluded otherwise, and CSEA appealed.

The association’s view won support from the Court of Appeal.

Section 45196 provides, in part:

When a person employed in the classified service is absent from his duties on account of illness or accident for a period of five months or less, whether or not the absence arises out of or in the course of employment of the employee, the amount deducted from the salary due him for any month in which the absence occurs shall not exceed the sum which is actually paid a substitute employee employed to fill his position during his absence.

Section 45103 defines “substitute employee” as “any person employed to replace any classified employee who is temporarily absent from duty.”

The word ‘employ’ is synonymous with ‘hire.’

The court concluded that the word “employ” as used in Secs. 45196 and 45103 is synonymous with “hire” because the Education Code uses the word “employ” where it means “hire.” It pointed to Sec. 45103(a) as an example: “The governing board of any school district shall employ persons for positions not requiring certification qualifications....The employees and positions shall be known as the classified service.” “Employ” does not mean “to use” or “to assign” because “the Education Code uses the word ‘assign’

specifically to refer to the situation where an existing employee is given a particular task,” the court instructed. It cited as an example Sec. 45102(b), which states: “[I]f, during a school year, it is necessary to assign a regular classified employee to perform an assignment..., a school district shall pay the classified employee on a pro rata basis for the additional assignment or service.”

Section 45196 also provides that a district may, as an alternative, adopt and maintain a rule requiring the school district to credit a regular classified employee with at least 100 working days per year of sick leave, compensated at not less than 50 percent of the employee’s regular pay.

The court held as follows:

Accordingly, under section 45196, a school district may deduct from the absent employee’s pay only the amounts paid to a substitute employee *hired to fill the absent employee’s position*, unless the district adopts and maintains a policy crediting regular classified employees with not less than 100 days per year of paid sick leave. An existing classified employee who is *assigned* the absent employee’s hours or tasks is not a substitute employee. If the school district assigns the absent employee’s tasks to an employee who was hired for a purpose other than to fill the absent employee’s position, then section 45196 does not permit the district to deduct that employee’s pay from the absent employee’s salary.

The court found that the legislative history was in accord with its interpretation. It pointed to A.B. 258, which amended Sec. 45103 to define “substitute employee” as meaning any person “employed to replace a classi-

‘Employ’ does not mean ‘to use’ or ‘to assign.’

fied employee who is *temporarily* absent from duty.” The staff analysis of the bill stated, “proponents argue that the bill would correct an abuse in the classified service whereby a number of school and community college districts hire substitute employees to fill vacant, permanent positions on a long-term basis,” and that “substitute or short-term employees are not part of the classified service.”

The court rejected the district’s argument that when a current employee volunteers to perform the tasks of a classified employee on a temporary leave of absence, the district “rehires” the current employee to perform additional tasks. “There is no evidence in the record of the School District preparing the paperwork and undertaking the administrative tasks (including job postings) required to hire an employee, just to assign additional tasks to an existing employee,” noted the court. “Further, under the statutes, the amount of a

temporarily disabled employee's salary should not depend on whether another employee voluntarily or involuntarily

*The ruling applies to
all unit members.*

agreed to perform the absent employee's tasks."

The district's argument that any classified employee may be a substitute met a similar fate. "The fact a substitute employee may be a classified employee does not mean that all classified employees are or can be substitute employees," said the court. "Whether an employee is a substitute employee depends on the purpose for which a school district hires the employee."

The court also concluded that CSEA had standing to seek prospective relief on behalf of bargaining unit members other than Featherstone. Accordingly, its ruling applies to all unit members in addition to Featherstone. (*CSEA v. Tustin Unified School Dist.* [3-12-07] G037118 [4th Dist.] ___ Cal. App.4th___, 2007 DJDAR 3378.) *

Higher Education

U.C. and UPTE-CWA HX Reach Tentative Agreement

The University Professional and Technical Employees and University of California bargaining teams reached a tentative agreement for a new five-year contract on February 15, 2007, after 11 months of bargaining. If ratified, the contract covering health care professionals would run until June 30, 2011. It would give the union the right to reopen the agreement and bargain again in 2009 over wages, health care benefits, and pensions for 2010 and 2011.

The union would have the right to strike over pensions.

The tentative agreement would allow health care professionals to bargain pension issues together with other UPTE units, an issue that was bitterly fought over the last few months. (For a full discussion, see *CPER* No. 182, pp. 63-65.) The union would have the right to strike over pensions. The union credited the actions of its members for this concession by the university. On January 11, 2007, while the bargaining

teams met at UCLA, thousands of workers demonstrated outside to object to U.C.'s refusal to allow HX, as the health care professional unit is called, to join the pension bargaining process. HX workers at UCSC, UCSF, UCSD, UCB, and UC-Davis also staged protests on that day.

Under the agreement, a step system of pay would be instituted starting July 1, 2007, with step increases to take place annually on July 1. Each step is a 2 percent salary increase and, with some exceptions, there would be a total of 15 steps for each job title. Zone salary structure would be maintained for the first year of the contract, but pay increases would not be retroactive to July 1, 2006. They would be implemented within 120 days of the date of ratification but would date back only to the effective date of the agreement. Wages have not been determined for years four and five of the contract, and would be the subject of bargaining in the spring of 2009. U.C. can hold up step increases if there is no agreement on pension contributions by July 1, 2008.

U.C. and UPTE will have annual "market equity discussions" at each campus to begin later this year.

Other provisions include a \$1,000

lump sum "signing bonus" for every HX employee upon ratification; new language regarding fair and respectful treatment, reasonable accommodation, and professional development; expansion of coverage for family care and medical leave; and language providing that dependent sick leave and bereavement leave will include domestic partners. Health care costs will remain the same for 2006 and until the contract is ratified. For years 2007, 2008, and 2009, health care costs will remain the same as for other U.C. employees. Health care costs for 2010 and 2011 will be bargained in 2009.

With the union ratification vote pending, the UPTE-CWA systemwide executive board recommended a "no" vote on the contract based on the lack

The UPTE-CWA systemwide executive board recommend a 'no' vote.

of pay retroactivity and the inability to bargain health care benefits with other UPTE units or other unions at a time of major change. Also influencing the "no" vote recommendation is the fact that some titles at certain campuses would not make any progress toward market rates. These union leaders are also displeased that the proposed step

pay plan does not incorporate experience at or outside U.C., that the university can unilaterally allocate equity increases to whomever it wants, and that U.C. can hold up step increases if agreement on pension contributions is not reached.

The bargaining team recommended a “yes” vote. “While we did not win everything we wanted, the bargaining team feels this contract is a vast improvement over our previous contract,” it explained in the contract ratification vote notification sent to HX members. *

gram, the grievance procedure, lecture reappointment rights, and disciplinary challenges.

As summer approached, pay for teaching during the summer sessions became a front-burner issue. CFA had won an arbitration that prohibited the university from paying professors who taught state-funded summer classes at the low rate paid to extension class teachers. The award also required CSU to provide certain benefits, such as sick leave. But many details remained to be worked out before the award could be implemented fully. In mid-April the parties announced an agreement that applied only to summer classes in 2006, and bargaining continued. (See story in *CPER* 178, pp. 53-54.)

CSU Faculty Strike Looms as Factfinding Concludes

Tensions ran high in mid-March as members of the California Faculty Association voted to strike and a report from a three-member factfinding panel was released to the parties. In a fierce public relations battle, the union and California State University each asserted its opponent was spreading misinformation. As *CPER* went to press, the parties were attempting to break the bargaining impasse, using the results of the factfinding report, which by law could not be released to the public until March 25.

Interim Agreements Reached

Bargaining for a new contract began nearly two years ago, only two months before the collective bargaining agreement was set to expire. At that point, the faculty had not received a general salary increase for two years. When the 2005-06 state budget was enacted, there finally was money for raises, but the parties were arguing over the structure of pay plans, in particular the university's insistence that part of

the money it was willing to pay be diverted into a highly discretionary merit pay plan. Nearly three months later, at the urging of the academic senate, the university agreed to provide a 3.5 percent salary increase with no strings attached. (See story in *CPER* No. 175, pp. 41-42.)

As bargaining continued into the spring, CFA began to hold rallies to draw attention to the slow progress over seemingly intractable issues. CFA still objected to CSU's proposal to give provosts funding for “merit increases” that were not tied to any criteria and that could be challenged only in an appeal to the campus president. The union also was not happy that the university wanted to pay smaller general salary increases if the union insisted on annual step increases in pay. CFA argued that step increases cost the university nothing over time because higher-paid faculty retire and are replaced by lower-paid professors. The parties were far apart on issues of workload, the university's desire to end an early-retirement pro-

CFA argued that step increases cost the university nothing over time because higher-paid faculty retire.

These interim successes did not create the momentum the parties had hoped would produce a final agreement. By October, when the parties declared an impasse, most of the same issues remained on the table.

Impasse Declared

In September, CSU announced that it had offered the faculty a 24.87 percent salary increase over four years, without any changes to health and welfare benefits. Rather than proclaim its delight, CFA claimed the offer really amounted to less than a 15 percent increase from 2006-07 through 2009-10. CFA spokesperson Alice Sunshine told *CPER* that the union does not think that most professors' salaries would rise any faster than inflation if it accepted the university's proposal.

CSU's proposal was dependent on a 1 percent augmentation of compact funding in future years.

For 2006-07, CSU offered a 4 percent general salary increase. The university proposed 5.53, 5.84, and 6.5, percent general raises in 2007-08, 2008-09 and 2009-10, but the offer for 2007-08 through 2009-10 contained contingencies. Not only was the proposal for future years conditioned on receiving the funding Governor Schwarzenegger had planned to provide under the May 2004 higher education compact with CSU, it was dependent on a 1 percent augmentation of that funding in future years. So far,

pointed out CFA, the governor's budget for 2007-08 does not contain the augmented funding that CSU requested. Subtract 3 percent off the top of the alleged 24.87 percent increase, CFA advised faculty.

Subtract another 4 percent if faculty want step increases, CFA contended. The university was willing to agree to provide step increases for recognition of each additional year of service, but would offer only a 3 percent general raise if CFA wanted a 2.65 percent step increase in 2006-07, a 4.53 general increase with step increases in 2007-08, and a similar 1 percent "deduction" from the proposed raise each of the last two years. CFA protested that the university was requiring faculty to "buy" their own step increases, even though, the union contended, step increases do not cost anything.

CSU countered that its proposed general salary increases under the step increase option were still as high or higher than the 3 percent increase in funding the university received under the compact for 2006-07, and the 4 percent increase expected under the compact for 2007-08. But CFA President John Travis told *CPER* that CSU has created an artificial link between compact funding increases and salary increases. While the compact may speak of providing increases in base funding "for basic budget needs including salary increases, health benefits, maintenance, inflation and other cost increases," nothing restricts the university from paying more than a 3 percent

raise for 2006-07. "It's a political decision," says Travis.

Subtract another 3 percent for CSU's merit pay plan, CFA argued. Most faculty would not receive this discretionary pay, the union contended. CSU Assistant Vice Chancellor Sam Strafaci told *CPER* he is "befuddled" by CFA's stance. He thought the parties had reached agreement on a plan to pay equity and incentive increases in the last three years of the contract. Funding equivalent to a .5 percent salary increase would be used to raise salaries of pro-

Some probationary professors are being paid lower than more-newly hired faculty.

bationary professors who are being paid lower than more-newly hired faculty. The equity increases would take effect in the third and sixth year of probation if the professor's performance is satisfactory. To address the problem of full professors who are at the top of the salary scale, another .5 percent would be paid to full professors whose performances were judged satisfactory in their reviews every three years. "This was based on CFA's proposal," a bewildered Strafaci told *CPER*.

Travis acknowledged that the parties had discussed such a program for

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

Pocket Guide to the Higher Education Employer-Employee Relations Act

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

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

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probationary faculty, and for full professors and lecturers at the top of the salary scale, but it was never an official CSU offer. The components of the program never were finalized, he said, because impasse was declared.

Apparently the details of the proposal were not hashed out in mediation, as the parties announced that neither side had changed positions on key issues during five days of meetings with a state-appointed mediator at the end of last year. The parties entered factfinding in January.

Proposals Debated

In February, CFA began a series of meetings with its members to explain the outstanding bargaining issues and obtain strike commitment cards. The union also began informational picketing and rallies on each of the 23 campuses statewide. Faculty were particularly incensed that CSU's board of trustees had decided in January to increase executive salaries 4 percent retroactive to July 1, 2006, after granting up to 20 percent increases in executive compensation in fall 2005, when the faculty received a 3.5 percent increase. A public relations battle began. Professors and trustees wrote letters to the editors of major California newspapers, each side trying to persuade the public to see the university's salary offer through its own lens.

While CSU insisted its proposal to faculty amounted to a 27 percent increase over four years, once the annual increases were compounded, CFA

countered with its own demand of a 25.25 percent raise over the same period. CFA demanded 4 percent, 4.25 percent, 4.5 percent, and 5.25 percent raises from 2006-07 through the last year of the contract. In addition, the union was insisting on step increases each year for eligible faculty, which would cost the equivalent of a 3.75 percent raise, and two programs that would address current salary inversion and compression problems. Probationary

Average salaries of CSU professors were 14.4 percent behind the pay in comparable institutions in 2005-06.

faculty who are paid less than more newly hired faculty would be in line for a pot of money equal to a 2 percent increase over the four years. In the last three years of the contract, full professors and lecturers at the top of the salary scale would receive raises that would cost the university an amount equal to another 1.5 percent salary increase.

CFA insists its proposed raises are necessary to retain and attract faculty. The California Postsecondary Education Commission calculated in March

2006 that average salaries of CSU professors were 14.4 percent behind the pay of faculty in 20 comparable institutions in 2005-06, and projected that the lag would increase to 18 percent this year without a raise. The \$86,056 average salary of CSU full professors fell from 15th rank to 20th rank in 2006; the average associate professor salary fell to 15th rank out of 21 institutions; and the average CSU assistant professor salary dropped from 10th to 17th rank.

Strafaci told *CPER* that the university believes that its offer would close the CPEC salary gap to 3 percent at the end of the fourth year. That estimate is based on an assumption that the average increase in professors' salaries nationwide would amount to 3 percent each year. The College and University Professional Association for Human Resources announced in mid-March, however, that the average salary increase nationwide in 2006-07 is 3.8 percent.

Other outstanding contract issues included the length of time a senior faculty member could participate in the Faculty Early Retirement Program, which allows faculty to retire and continue to teach part-time. The union contends that FERP saves the university money while retaining the services of experienced faculty because the university no longer makes contributions to the State Teachers Retirement System for the retired professors and pays lower salaries to new faculty who replace them. CSU began bargaining by proposing elimination of FERP, but at

the time of impasse, was proposing to reduce the program from five years to four “to more accurately reflect utilization of this benefit.”

The parties also had not agreed on procedures for challenging discipline. A new law requires that faculty committees hear faculty discipline cases, whereas now a professor challenges discipline through a grievance and arbitration process. In addition, the parties were wrangling over CFA's propos-

and the university expressed its commitment to finding a resolution before a strike occurred. The results were announced after the parties had received the factfinding report, but during the 10-day period the report was still confidential under the Higher Education Employer-Employee Relations Act. An overwhelm-

ing majority, 94 percent of those voting, supported a strike.

If CFA holds a strike, it will be the first for the 22,500 faculty members. At rallies and in the media, the message from professors in favor of the job action has been, “I don't want to strike, but I will.” *

The parties were wrangling over CFA's proposals to eliminate arbitration backlogs of up to three years.

als to change the grievance and arbitration procedure to eliminate arbitration backlogs of up to three years.

Workload is also a sore point for faculty. Class sizes have increased over the last several years and the university is expecting professors to engage in more research, but CFA contends there has been no offer to compensate the faculty for the increased load.

Strike Vote Held

In March, CFA held a strike vote among its 10,100 members. CSU contended the vote was premature since the parties were still engaged in factfinding,

Lawmakers in Sacramento have taken note of the compensation recently paid to top administrators in the California State University system and have proposed a legislative fix. On February 23, Assembly Members Anthony Portantino (D-La Canada Flintridge) and Julia Brownley (D-Woodland Hills) introduced A.B. 1413 which would attempt to exert legislative influence over CSU's board of trustees and limit the amount of “transition pay” that recently has been doled out to former university administrators.

Last year, the university drew criticism from the press and the California Faculty Association for payments made to top administrators who left their posts at CSU for positions outside of the system. Under CSU policy, chancellors, presidents, and vice chancellors appointed on or after November 1992, are eligible for one year of paid leave after their CSU employment ends. Compensation during the transition year is set at the mid-point between the

executive's salary and the maximum salary for a 12-month full professor. The transition pay has been awarded to top officials who have secured new employment elsewhere.

Pressure from employees, students, and the media prompted the board of trustees to revise the policy. Newly hired CSU executives now become eligible for a transitional program only after five years of service. And, the executive must identify a CSU position to occupy after the transitional period ends and must agree to accept no outside employment during that period. The board did not apply the new restrictions to executives covered by the former policy. (See *CPER* No. 176, pp. 55-57, and No. 182, pp. 60-61, for a complete summary.)

Scrutiny of CSU's executive transition pay policy began when the trustees announced that the university would pay former Chancellor Barry Munitz \$163,000 to teach one English class at CSU's Los Angeles campus and engage

Legislators Take Aim at CSU's Executive Pay Practices

in fund-raising activities. Mindful that the top salary earned by a full CSU professor is \$122,548, CFA called for the board to retract the offer and rescind the policy under which the university authorized the deal. Union leaders charged that the decision to give Munitz the job as “trustee professor” was made in violation of the Bagley-Keene Open Meeting Act, but in Janu-

*The law allows
personnel issues to be
addressed in private.*

ary, Superior Court Judge Dzintra Janavs rejected that assertion, finding that the law allows personnel issues to be addressed in private.

Munitz was a CSU chancellor from 1991 until 1998, when he left the university to serve as president of the J. Paul Getty Trust. He resigned from that position in February 2006, amid allegations of lavish spending. The CSU policy permits former chancellors, vice chancellors, and campus presidents appointed prior to 1992 to return to CSU with duties assigned by the chancellor and the campus president where the returning administrator will work.

Union officials asked for an investigation by the attorney general, and in February, state legislators called for a comprehensive audit of CSU’s compensation and hiring practices.

A.B. 1413 is designed to reform the current system by changing the configuration of the board of trustees. Currently, the board is composed of 25 members: 16 appointed by the governor for eight-year terms, two CSU students and two CSU faculty members appointed by the governor for two-year terms, and five “ex officio” members. This bill would authorize any ex officio trustee, such as the governor, to designate a person to attend a board meeting in his or her absence and to act on his or her behalf at that meeting. The bill also would increase the total membership of the board to 27, by adding an appointee of the Speaker of the Assembly and of the Senate Committee on Rules; both of these members would serve two-year terms.

The legislation would prohibit the board of trustees from approving a contract to hire an executive officer unless that contract is adopted in a noticed meeting of the board. As far as executive compensation, A.B. 1413 would mandate that transition pay not exceed the compensation received by that individual in the last year of his or her regular duties, and it would be paid only for actual duties performed. The bill also would provide that no compensation could be paid to a trustee professor unless it is paid in consideration for actual teaching and does not exceed the amount paid to a full CSU professor with a similar teaching assignment.

The proposed statutory language would require that the California

Postsecondary Education Commission annually submit a report to the governor regarding specified expenditures related to instruction, student services, and administration within the two higher education systems and the community college system. The reporting requirement is proposed “to achieve transparency and accountability in the compensation process.” *

State Employment

Lying by State Employees in an Investigation Is a Separate Act With Its Own Deadline for Discipline

Lying during a state workplace investigation has its own risks now that the Court of Appeal has held in *California Department of Corrections v. State Personnel Board* that a state employer may serve notice of an adverse action within three years of the dishonest statements even if the statute of limitations prevents action on the misconduct that led to the investigation. The court's holding is at odds with *Alameida v. State Personnel Board* (2004) 120 Cal.App.4th 46, 167 CPER 61, which involved the same question under the Public Safety Officers Procedural Bill of Rights Act and held that lying about alleged misconduct during an investigation "merged" with the underlying misconduct. State employees may be disciplined for dishonest denials of misconduct even after the state is barred from disciplining them for the conduct it was investigating.

Pyramid Scheme Denied

In December 1999, four employees of the Department of Corrections, including two correctional officers, were served with notices of suspension for participation in a pyramid scheme from June through September 1996. Government Code Sec. 19635 bars ad-

verse actions based on conduct that is more than three years old, except for instances of fraud, embezzlement, and falsification when the employer has three years from the discovery of the misconduct to serve a notice of adverse action. In addition to charges of incompatible activities, inexcusable neglect of duties, and other failure of good behavior, the notices charged the employees with dishonesty for lying during the investigation of the pyramid scheme in 1997 and 1998.

One correctional officer denied any participation in, or firsthand knowledge of, the scheme. The second denied that he recruited, handled money, or hosted meetings or parties for the scheme. He continued to deny he was involved in any way, even after he was told that witnesses had testified that they had been to recruiting parties at his home and that he was actively involved with the scheme. The two non-officer employees also made extensive denials of recruiting, handling money, hosting parties, or involvement of any kind.

After appeals to the State Personnel Board, an administrative law judge found cause for discipline. The ALJ specifically found that the denials of

involvement were not credible in light of the testimony of numerous witnesses, and that two employees were dishonest when they denied any knowledge of, or participation in, the scheme. The SPB adopted the ALJ's proposed decisions but later granted the employees' petitions for rehearing.

Charges Dismissed

After rehearing, the SPB dismissed all the charges against the employees, including the dishonesty charges, because the notices were not served within three years of the misconduct and the facts did not support a finding of fraud

The SPB acknowledged the charges were serious but found them untimely.

that would have triggered the discovery exception to Sec. 19635. Although the SPB acknowledged that the dishonesty charges were serious and separate from the underlying misconduct, it found them untimely. The board reasoned that allowing the dishonesty charges to survive the dismissal of the untimely charges on the underlying conduct would force the employees to litigate the time-barred charges to rebut their employer's contentions that they participated in the pyramid scheme. The result would be to "eviscerate one of the

primary purposes of a statute of limitations — to prevent the hardship and injustice of having to defend against stale claims after memories have faded or evidence has been lost.”

There was no claim in this case that memories were clouded or evidence lost.

The Department of Corrections went to court to set aside the SPB’s decision. The trial court held that the board had erred when it dismissed the dishonesty charges as untimely, and it reinstated those charges against the employees. The employees appealed.

Alameida Distinguished

The Court of Appeal was faced with the *Alameida* holding that interpreted Government Code Sec. 3304(d), the one-year statute of limitations of the Public Safety Officers Procedural Bill of Rights Act. In that case, another appellate court had decided that dishonesty charges based on lying during an investigation merged with, and were derivative of, the misconduct being investigated and were, therefore, also untimely. Section 3304(d) did not apply to the present case because the peace officers’ interviews occurred in December 1997, before the one-year statute of limitations became effective.

In addition to the reasoning advanced by the SPB in this case, the *Alameida* court emphasized that under *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 67X CPER 1, public employees can be subject to discipline for insubordination for refusing to answer investigation questions as long as there is an agreement not to use their answers against them in a criminal proceeding. The *Alameida* court found it “unseemly” to force an employee to answer questions and then punish him for denying the alleged misconduct.

Despite the similarity of the issue, the Court of Appeal declined to follow the reasoning in *Alameida*. Under the plain language of Sec. 19635, the employees could be disciplined for dishonesty that occurred within three years of the notice of adverse action, said the court, because dishonesty is a statutory cause for discipline of state civil service employees.

The court pointed out that the SPB itself had found in a 1992 precedential decision that lying during an investigation is a separate and serious charge. (See *Timothy Welch*, SPB Dec. No. 92-03). And the United States Supreme Court held in 1998 that federal agencies may discipline employees for lying during investigations of misconduct. (See *LaChance v. Erickson* (1998) 522 U.S. 262.)

To differentiate the *Alameida* case, the court portrayed the dishonesty in *Alameida* as “mere denials of underlying charges” in contrast to the extensive and repeated denials of the factual

allegations relating to the underlying charges present in this case. And, reasoned the court, the employees in this case were served with notices only a few months after the statute of limitations ran on the underlying misconduct. In *Alameida*, on the other hand, the notice was served two years after the underlying misconduct. While the *Alameida* court was concerned with faded memories, there was no claim in this case that memories were clouded or evidence was lost, the court observed.

Public policy considerations held the most weight for the court.

The court rejected the employees’ contention that allowing the dishonesty charges to proceed would effectively extend the three-year statute of limitations into a six-year statute of limitations for dishonesty charges. The employees overstated their case, the court chided. Here, the employees would have to defend charges that were made an entire year before the statute of limitations expired.

Public Policy Cited

It was public policy considerations, though, that held the most weight for the court. “Appellants are public employees to whom we entrust the care and rehabilitation of criminals. Moreover, two of the appellants are peace officers

who are held to a higher standard of conduct than other public employees,” emphasized the court. Public employees owe a special duty of integrity, the court observed, citing *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 69X CPER 1. And by listing dishonesty as a statutory ground for discipline, the legislature has expressed a public policy against employing dishonest individuals.

Lastly, the court reasoned that a contrary holding would encourage lying during investigations due to a lack of consequences for lying.

[A] finding that the lies merge with the underlying offense would encourage a rational person to lie where the investigatory interview into misconduct occurred towards the end of the limitations period, as it would be unlikely for the investigator to discover that the denials were lies within the limitations period.

Therefore, the court concluded, Sec. 19635 did not bar the dishonesty charges against the employees in this case. (*California Department of Corrections v. California State Personnel Board* [2007] 147 Cal.App.4th 797.) *

income taxes, unlike service retirement benefits.

In September, Helmick himself applied for a disability pension. He had filed several workers’ compensation cases in the three years prior to his retirement.

Within days, the *Bee* ran a series of articles about a phenomenon that lower-ranked CHP officers had termed “Chief’s Disease.” One article related the story of Deputy Commissioner Ed Gomez, who filed a workers’ compensation claim for stress and physical ailments in February 2000, was awarded \$39,000 and lifetime medical care for his injuries, and then retired with a \$106,000 annual disability pension in July 2000. Two years later, after the September 11, 2001, terrorist attacks, Gomez took a stressful job as security director at the San Francisco Interna-

No CHP Chiefs Prosecuted for Workers’ Comp or Disability Retirement Fraud

Back in September 2004, as momentum was building for pension reform, the *Sacramento Bee* published a series of articles exploring “Chief’s Disease,” the propensity for California Highway Patrol chiefs near retirement to make workers’ compensation claims that would pave the way for a disability pension. The CHP began an internal investigation, and the California Public Employees Retirement System proposed statutory changes that would enable better fraud detection. (See box on p. 62.) The legislation inexplicably was shelved. And now, after one successful prosecution of a rank-and-file officer for workers’ compensation fraud, the CHP has announced there will be no charges filed against any chiefs. The

Sacramento District Attorney’s Office, which investigated several CHP chiefs, repeatedly noted in its report that witnesses were “unable or unwilling to recall” specific conversations that would have identified who approved questionable claims.

‘Chief’s Disease’

In April 2004, former CHP Commissioner Dwight O. “Spike” Helmick complained to the *Sacramento Bee* about officers who continued working until they had accrued the maximum retirement benefit and then suddenly filed claims for workers’ compensation just before retiring. The injury claims often led to retirement disability benefits, only half of which are subject to

Lower-ranked CHP officers termed the workers’ comp claims ‘Chief’s Disease.’

tional Airport. Gomez’ story was not unusual, the *Bee* articles revealed. Of 65 chiefs who retired since 2000, 55 had filed workers’ compensation claims within two years before retiring.

As the Legislative Analyst’s Office later reported, CHP workers’ compensation costs had increased 89 percent,

from \$36 million in 1995-96 to \$68 million in 2003-04. As a percentage of payroll, workers' compensation costs had risen from 7.7 to nearly 10 percent. Nearly two-thirds of CHP retirees took disability retirement. Among retiring chiefs, the percentage was 80 percent. The CHP workers' compensation and disability retirement rates were higher than other public safety groups, including local law enforcement and other state peace officers and firefighters.

Helmick withdrew his application for disability retirement after the Bee printed its articles.

Fraud Investigation

The new CHP commissioner, Michael Brown, reestablished a workers' compensation fraud investigation unit that had been eliminated in the late 1990s. The fraud unit reviewed every disability retirement awarded between January 2000 and June 2004. Of 982 officer retirements, the CHP unit found that 60 percent of rank-and-file officers received disability retirement benefits, a lower rate than chiefs.

The department blamed the higher disability retirement rate of chiefs — 80 percent — on their generally higher

age and years of service at retirement. But the Legislative Analyst's Office disputed this explanation. It found that only 56 percent of lieutenants received disability retirements. CHP data shows that lieutenants' average age at retirement, 55.68, was essentially the same as the chiefs' average retirement age, 56.52, although the average retiring chief had four more years of service.

The CHP unit also reviewed disability retirements for signs of fraud. It found about 20 cases that required further investigation, only 15 of which it believed might merit criminal charges. In December 2005, a 10-year veteran officer was convicted of workers' compensation fraud. As part of his sentence, he was required to pay restitution of \$79,146 to the CHP. Other cases referred for prosecution eventually were dropped.

Investigation of the Chiefs

Because of the very high rank of several chiefs who had made suspicious claims, the CHP decided to turn over investigation of 16 cases to the Sacramento County District Attorney's Office. Former Commissioner Helmick's case was not involved, since he withdrew his application for disability retirement after the *Bee* printed its articles.

The Sacramento County District Attorney's Office utilized a grand jury to compel witness testimony and production of documents. Early this year, it released its report explaining why it would not be prosecuting any CHP

chiefs despite finding abuses of the workers' compensation system.

The investigation revealed that one deputy commissioner, who claimed stress-related injuries after his relationship with Helmick became strained, was carried on paid leave for over four years until he reached age 50. If he had left the CHP earlier, he would not have been eligible for a full service retirement or an enhanced disability retirement benefit. The workers' compensation salary benefits, together with personal and vacation leave, were not sufficient to extend to his 50th birthday.

No crime of insurance fraud could be proven beyond a reasonable doubt.

Nevertheless, the D.A. noted, witnesses reported that "there was direction from 'the Commissioner's Office,' through the chain of command, to find a way to get him to age 50 without loss of salary." During the investigation, "no one could identify a specific person in the Commissioner's Office who was the source of the direction," although there was some evidence that it was not Commissioner Helmick, the D.A. explained.

As his one year of paid workers' compensation leave was about to ex-

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.

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

Pocket Guide to the Ralph C. Dills Act

By Fred D’Orazio, Kristin Rosi and Howard Schwartz
(2nd edition, 2006) \$12

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pire, the deputy commissioner claimed back pain relating to a 1987 injury and received additional paid workers' compensation leave. At one point, he worked for about three-and-a-half months before he was again taken off work on a claim of "cumulative trauma," received an additional year of paid workers' compensation leave, and then took accumulated sick leave until his 50th birthday, when he retired.

The problem, said the D.A., is that no crime of insurance fraud could be proven beyond a reasonable doubt. Witnesses in the chain of command above CHP's Disability and Retirement Section "were either unable or unwilling" to verify who had given the order

to find a way to avoid the deputy's loss of salary until he turned 50 years old. Further, because there are legal presumptions in the Labor Code that certain health conditions of a peace officer, such as hypertension, are work-related, and the medical reports supported the deputy commissioner's claims, it would be difficult to prove that the order affected the determination whether the deputy commissioner was entitled to workers' compensation leave.

Similar problems prevented prosecution of an assistant chief who left on sick leave while being investigated for two allegations of misconduct, reported the D.A. The assistant chief soon filed a workers' compensation claim for cu-

mulative trauma to his back and other body parts due to his lengthy CHP employment. After an initial State Compensation Insurance Fund doctor's determination that the back pain was not work-related, the assistant chief began to run out of sick leave. The D.A. reported, "Witnesses in Disability and Retirement Section state that the direction they received through the chain of command...was that [he] be paid workers' compensation salary benefits ...despite the determination by the SCIF doctor." No one informed SCIF that the assistant chief was under investigation for misconduct when he filed his claim. The doctor later changed his position based on a Labor Code presumption that

cal pers again sponsoring anti-fraud legislation

In 2004, before the *Bee* first reported on "Chief's Disease" and the high rate of disability retirements from the CHP, the California Performance Review recommended legislation that would define a crime of disability retirement fraud and assist CalPERS fraud investigations. In early 2005, CalPERS sponsored several bills to enable it to ferret out disability retirement fraud. One, A.B. 456 (Torricono, D-Fremont), passed both houses of the legislature but was suddenly made inactive by its author before the Assembly could vote to concur in Senate amendments. (See story in *CPER* No. 174, pp. 49-50.)

Recently, however, CalPERS decided to try again. Assembly Member Roger Niello (R-Fair Oaks) has introduced A.B. 36, which is nearly identical to the anti-fraud bill that passed the Senate in August 2005. The bill would establish a crime of retirement benefit fraud similar to the crime of workers' compensation insurance fraud that has existed since

1992. It would be unlawful to provide false information with the intent that it be used to obtain or otherwise affect retirement benefit decisions by CalPERS or the State Teachers Retirement System. It also would be a crime to accept or obtain a benefit knowing that the recipient is not entitled to the payments. Conviction of fraud could be punished by up to a year in county jail and a fine, in addition to any order to make restitution of the illegally obtained benefit.

CalPERS says the bill is necessary because there are no provisions that define fraud connected with applications for retirement benefits or that establish penalties for fraudulent applications. The agency asserts it has had difficulty convincing some prosecutors to follow through with cases of fraud because the general crimes of making false claims, grand theft, or perjury do not fit the true nature of retirement fraud.

lower-back pain of a peace officer is work-related. The assistant chief initially filed for a disability retirement but withdrew the application in early 2005.

The D.A. asserted it could not prove that SCIF would have found the assistant chief's cumulative trauma in-

*The D.A.'s office
criticized the CHP
for ignoring its
own policies.*

juries unrelated to his work if they had known of the investigations, particularly in light of the Labor Code presumptions. The D.A.'s office also complained it could not identify the specific source of the direction to pay the assistant chief workers' compensation salary benefits even when the doctor denied the claim was work-related. Three employees, reported the D.A., "either denied passing the direction along, or were unable or unwilling to recall conversations."

The D.A. also looked into the claims of Edward Gomez, the division chief whose actions were reported in the *Bee*. The investigation revealed that Gomez filed his "cumulative trauma" workers' compensation claims, including stress claims, while being investigated for inappropriate comments in

the workplace. No one disclosed the investigation, which could have been a flag that the workers' compensation claims were non-compensable because they were due to a good faith personnel action. Even when the SCIF claims manager asked about rumors of an investigation, the CHP chain of command directed that the Disability and Retirement section tell SCIF that the commissioners were not pursuing the issues surrounding Gomez' departure from the CHP. This was in violation of department policies that internal affairs investigations be reported to SCIF when the target of the investigation makes a workers' compensation claim.

Again, the D.A.'s office attributed its decision not to prosecute on the inability to identify the source of the suspect directions. Documents made generic references to the "chain of command," and no individual could confirm who made the decision not to respond to the SCIF's inquiry about the rumored investigation. Again, in Gomez' case, the Labor Code presumptions were blamed for an inability to prove that the medical determinations would have been different if the doctors had known about the internal affairs investigation.

The D.A.'s office criticized the CHP for ignoring its own policies and using the workers' compensation system "as a tool to deal with problematic employees." Although the evidence showed "significant institutional failings," the report concluded, it did not support the prosecution of any employee.

Make everything as simple as possible, but not simpler.

Albert Einstein

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

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

Pocket Guide to the Fair Labor Standards Act

See back cover for price and order information

CHP Reforms

After the D.A.'s report, CHP Commissioner Brown said he found "disturbing" the references to failures to adhere to departmental policies. He pledged to "formulate a strategy to ensure strong oversight of costs and prevention of abuse and fraud." The CHP already had implemented 16 measures

to curb costs and abuse, he said. Data from the end of 2006 indicate that workers' compensation costs are down 7.2 percent and that new claims have been reduced by about 24 percent since 2004, he asserted. In a report in mid-2006, the CHP reported that six chiefs had retired since January 2005, and none had received a disability retirement. *

2002, lawmakers put some teeth into the statutory provision. The law now requires the state to pay average compensation levels, as determined by the Department of Personnel Administration's survey of the five urban police departments, whether or not it has reached agreement with CAHP.

No other unit of state employees has such a statutory formula. But at the end of 2001, when the California Correctional Peace Officers Association discovered the CAHP deal, it successfully demanded a similar formula in its MOU. The 2001-06 agreement called for salary increases using the "law enforcement methodology" that gradually raised correctional officers' monthly salaries to a point only \$666

LAO's Compensation Recommendations Include Limiting Arbitrator Remedies and Ending Formulas

Uncertainty of state employee compensation makes the Legislative Analyst's Office uncomfortable, and it recommended legislative fixes in its annual publication, *Analysis of the 2007-08 Budget Bill: Perspectives and Issues*. In response to an arbitrator's recent award that will cost the state \$440 million, the LAO suggested that the legislature amend the Dills Act or state arbitration law to limit arbitrators' remedies under future collective bargaining agreements. It also recommended short-term agreements and the elimination of pay formulas that tie state employees' salaries to those of similar employees who work for other public employers. Implementation of these suggestions, presented in "Legislative Oversight of State Employee Compensation," would give the legislature greater control over the state budget.

Unpredictable MOU Costs

Out of a total budget of \$131 billion, state civil service employees' salary figures are anticipated to reach about \$14.4 billion in 2007-08. Benefits for state employees probably will boost that amount at least another \$4 billion. The legislature, said the LAO, needs to enhance its leadership role to control such a significant part of the budget.

Several memoranda of understanding with state employee organizations have placed salary increase decisions almost completely out of the legislature's control for several years at a time. These MOUs grew out of a 1974 statute that expressed the legislature's intent to pay California Highway Patrol officers salaries comparable to peace officers in five local jurisdictions, including the City of Los Angeles. In 2001, the California Association of Highway Patrolmen achieved an agreement to bring lagging salaries up to par over four years. In

Several MOUs have placed salary decisions almost completely out of the legislature's control for several years.

below that of CHP officers by July 2006. In 2003, the Professional Engineers in California Government gained an agreement that will bring state engineers' and architects' salaries into parity with employees at other public entities by July 2008.

The LAO recommended that the legislature refuse to approve automatic pay raise formulas in future MOUs and repeal the statutory formula for CHP officers when the current CAHP MOU expires. The LAO emphasized that formula-driven pay increases are hard to predict. DPA's surveys usually are not completed until May, making it difficult for the legislature to establish priorities and balance the budget without knowing what raise 36,000 officers will receive.

The LAO recommended that the legislature refuse to approve automatic pay raise formulas.

In addition, the LAO recommended that the legislature not approve agreements with terms longer than two years. Long-term agreements pose a challenge to budgeting when revenues drop or other expenses increase faster than expected. Since each of the pay parity MOUs had a five-year term, it was hard to forecast salary increases of other government employees at the time the MOUs were approved by the legislature. For example, correctional officers' salaries were predicted to increase 20 to 30 percent when the MOU

was hammered out in 2001, but pay actually has increased 34 percent over the past four years. Although the legislature threatened to refuse to appropriate funds for CCPOA's promised increase in 2004, it has never withheld the funding. The only relief the state has seen has been the union's agreement to delay scheduled increases in exchange for other valuable benefits that have long-term costs, observed the LAO.

Arbitrators' 'Enormous Power'

The LAO expressed particular discomfort with arbitration decisions that force the state to pay out compensation which the legislature did not foresee when an MOU bill was passed. Its concern was triggered by a recent arbitration between CCPOA and the state over the proper implementation of the salary increase methodology that resulted in a 3.125 percent raise and attendant pension benefit costs.

The CCPOA MOU required pay raises that would be based on a "law enforcement comparative methodology" which was contained in a sideletter agreement. The sideletter expressed the parties' intent to preserve the relationship between the compensation of CHP and correctional officers that existed on June 30, 2001. It attached "sample" illustrations listing items of compensation such as physical fitness pay and educational pay that were described as "items within [the] package." Specifically, the parties agreed that the "total compensation package" for the correc-

tional officers would be \$666 less than the total compensation package for CHP officers.

The LAO was alarmed by arbitrator Alexander "Buddy" Cohn's reliance on negotiating history, which the legislature had never seen, to interpret the agreement that the legislators approved. The arbitrator turned to negotiating history when he found "at the very least latent ambiguity — if not actual ambiguity" — in the methodology agreement.

The LAO was alarmed by the arbitrator's reliance on negotiating history, which the legislature had never seen.

Part of the dispute was determining which items of patrol officers' compensation comprised "total compensation." Due to budget troubles, the Schwarzenegger administration had renegotiated compensation with CAHP in 2004 and 2005, trading smaller salary increases for additional paid leave and increased employer contributions to health benefits. When DPA calculated the total compensation of patrol officers, it failed to include the value of the increased health care contributions

and paid leave, resulting in a lower calculation of total compensation, and therefore, a smaller correctional officer salary increase.

The arbitrator decided, based on discussions between the parties at the bargaining table, that removal of items of compensation from the calculation of patrol officers' total compensation, without recognizing the exchange for

To prevent future fiscal surprises, the LAO suggested that the legislature change the law.

other items of value such as leave, violated the parties' agreement. He also found employer health benefit contributions were an item of total compensation that should have been considered in the calculations in 2005, even though they were not listed in the attachments to the sideletter. In large part, Cohn relied on the acknowledgement by the state's negotiator that items of total compensation could come on and go off the list in accordance with future bargaining. In fact, the attachments to the sideletter listed different items of compensation.

The legislature, complained the legislative analyst, "could not possibly have known about the extensive set of

oral understandings between the administration and the officers' union when it approved the 2001 MOU, the 2004 renegotiated MOU, or the 2006-07 budget." The LAO acknowledged that the large monetary remedy in the Cohn arbitration award was unusual, but still expressed its view that "arbitrators should not have the authority to approve the expenditure of funds to implement a provision of an MOU." To prevent future fiscal surprises, the LAO suggested that the legislature change the law that would apply to future MOUs. The law might prohibit awards that would cost over \$10 million annually. Alternatively, the legislature could require that large awards be approved before they are finalized, or that an award would become final only if the legislature failed to enact a bill overturning the award within six months. The LAO concluded, "These [legislative] measures would ensure that the Legislature's interpretation of the expenditures it approved for MOUs takes precedence over those of an arbitrator."

Inadequate Legislative Process

The rest of the legislative analyst's suggestions were aimed at increasing the legislature's focus on MOUs. The collective bargaining agreements are long, complex documents that drive a significant amount of the state's operating costs and affect how departments carry out their responsibilities, observed the LAO. The office asserted it sometimes has difficulty analyzing MOUs within the 10 days that the law

currently allows the LAO to provide an analysis to the legislature. The legislature should give itself another three weeks to review the proposed MOUs before it votes whether to approve them, the LAO suggested. In some units that have large fiscal and policy implications, the legislature should hold joint hearings to study those issues, the LAO advised.

The legislature should require the administration to submit proposed management salary increases by May.

The report also chastised DPA for failing to inform the legislature of its proposals for compensation of supervisors and managers in a timely way. DPA has reasoned that it needs to know what rank-and-file raises will be before it determines management salary increases. But the legislative analyst pointed out that DPA's treatment of management compensation as an afterthought has led to compaction of the salary scale, where supervisors are paid little more than those they supervise and sometimes less, where lower-level employees receive overtime or pay differentials. Also, the LAO emphasized,

the late information makes it difficult for the legislature to consider budgetary ramifications of management pay raises. By the May revision, when the governor presents a revised budget to the legislature, DPA should know generally what it is offering other employee units and what raises some already have accepted. The legislature should enact provisions that require the administration to submit proposed management salary increases by the May revision, the LAO suggested.

Whether the suggestions will lead to any changes is unknown. At press time, no legislators yet had introduced bills to implement any of the LAO's advice. "Our recommendations often have a long shelf life," says Jason Dickerson, the public employment and retirement legislative analyst. "Sometimes they are never adopted, and sometimes they are revisited many years into the future." *

disclosures and the adverse actions. The officer found that her employer would have taken the actions regardless of whistleblowing.

The SPB regulations in 2002 stated, "If the Notice of Findings concludes no retaliation occurred, the complainant may file a Petition for

The court expressed doubt in the validity of new SPB regulations.

Quasi-Judicial SPB Whistleblower Findings Must Be Challenged by Writ of Administrative Mandate Before Suit

A whistleblower who sued in court after receiving adverse findings from the executive officer of the State Personnel Board did not exhaust administrative remedies as required by the former SPB regulations, the Court of Appeal has decided. When she received an adverse notice of findings, she should have requested an SPB hearing and, if unsuccessful, filed a writ of administrative mandate to overturn the SPB's decision. Filing a tort claim was irrelevant to whether she exhausted administrative remedies. The court expressed doubt in the validity of new SPB regulations that allow a claimant to go to court after receiving adverse findings without requesting an SPB hearing or using administrative mandate to overturn the findings.

Notice of Adverse Findings

Carole Arbuckle, an employee of the State Board of Chiropractic Examiners, claimed that her employer retaliated against her for reporting that one of the board members remained in his post after his chiropractic license expired. She filed a complaint with the State Personnel Board in 2002. The SPB executive officer reviewed 500 pages of documents submitted by her and by her employer, and issued a notice of findings consisting of a 16-page legal analysis rejecting her claim. While finding that Arbuckle had made "protected disclosures" under the California Whistleblower's Protection Act and had suffered adverse actions, the executive officer saw no connection between the

Rehearing before the [SPB]." Arbuckle's notice stated, "If no party files a petition for hearing within 30 days following service of this Notice of Findings, this recommendation shall become the final decision of the [SPB]." The notice also provided that, even if a party's request for a hearing was denied, the notice of findings would become the final decision of the SPB.

Arbuckle did not petition for a hearing. She conceded that the adverse notice of findings was a final decision of the SPB. She also did not seek to overturn the decision by filing a petition for writ of administrative mandate in court.

Instead, within 30 days of receiving the notice, she filed a lawsuit alleging violations of the California Whistleblower Protection Act and Labor Code Sec. 1102.5. Her employer, the board, lost both its motion to dismiss the lawsuit and its motion for sum-

mary judgment in the trial court. It then petitioned the Court of Appeal for a writ of mandate to overturn the trial court's ruling.

Incomplete Administrative Challenge

The Court of Appeal first reviewed the legal doctrines of exhaustion of administrative remedies and exhaustion of judicial remedies. In *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465, the court explained, the Supreme Court held that a doctor was required to challenge the hospital board's quasi-judicial decision to revoke his staff privileges by filing administrative mandate proceedings rather than by filing tort claims in court. If the quasi-judicial action is not overturned in a mandate proceeding, case law provides that the propriety of the action is established and the issues may not be relitigated, the court instructed.

Cases also have held that employees must exhaust appropriate internal remedies. In *Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 171 CPER 57, the Supreme Court held that a whistleblower had to file a complaint using the university's special whistleblower complaint process, not its general complaint procedure, before filing suit under Labor Code Sec. 1102.5.

The California Whistleblower Protection Act provides that any person or entity that retaliates against a whistleblower is liable for damages in

addition to other "penalties provided by law." A whistleblower also may recover punitive damages and attorneys' fees. However, Sec. 8547.8(c) of the act bars an employee from seeking damages in court until the employee has filed a complaint with the SPB and the executive officer has "issued, or failed to issue, findings pursuant to Section 19683."

The court saw three possible outcomes from a whistleblower complaint filed with the SPB.

Arbuckle argued that this language allowed her to go to court after receiving findings, even if the executive officer rejected her claim. The Court of Appeal disagreed, holding that the SPB administrator's findings, even though never reviewed by the full board, amounted to a quasi-judicial decision that had to be challenged by administrative mandate proceedings before Arbuckle could seek damages in court.

The court first looked at the act together with Sec. 19683. Section 19683(a) provides that the executive officer "shall complete findings" on a complaint within 60 working days. Subdivision (c) authorizes the SPB to award reinstatement, backpay, compen-

satory, and other relief to the whistleblower if the SPB finds after a hearing that a violation of the act occurred. The SPB also may award relief if the executive officer finds a violation of the act and there is no request for a hearing by the offending manager or agency. The remaining three subdivisions describe the rights and adverse action procedures relating to the person or entity that is found to have retaliated against a whistleblower.

The court concluded that the "findings" to which Sec. 8547.8(c) of the act refers are only those that are favorable to the employee because the only subdivision of Sec. 19683 that referred to the retaliation victim was the subdivision that authorized relief if a violation of the act was found.

The court construed Sec. 8547.8(c) as a provision that authorizes penalties that the whistleblower can obtain "beyond" the relief awarded by the SPB. Skimming over the phrase that made the manager liable "in an action for damages," the court viewed that section as providing extra penalties to the claimant who was successful before the SPB.

Based on this construction, the court saw three possible outcomes from a whistleblower complaint filed with SPB. SPB findings favorable to the complainant would result in an SPB order of "restorative" relief, such as reinstatement and backpay, and allow the complainant to go to court to get further remedies such as punitive damages and attorneys' fees. The SPB's failure to issue findings also would allow the com-

plainant to file an action for damages in court. But findings adverse to the complainant, said the court, would preclude a civil lawsuit unless the complainant succeeds in overturning the SPB findings by a writ of administrative mandate because the SPB was given quasi-judicial powers by the state Constitution. "Any other conclusion would mean the administrative proceeding was a waste of time," the court pointed out.

The court rejected Arbuckle's argument that the "findings" required by Sec. 8547.8(c) were merely investiga-

The documentary review was sufficient to constitute a 'hearing.'

tive findings that did not warrant treatment as a quasi-judicial decision. The executive officer conducted a "'documentary' hearing" based on opposing evidentiary submissions, the court said. Under the former regulations, the executive officer could assign the case to an evidentiary hearing before an ALJ if fact questions remained after the documentary review. Those regulations offered an unsuccessful complainant a chance to request a hearing. If no hearing was requested, the regulations provided that the executive officer's findings became the final decision of the SPB.

Applicability of Mandate Proceedings

Arbuckle argued that the SPB whistleblower procedure was not subject to administrative mandate proceedings because the writ of administrative mandate is available only where a "final administrative order or decision [is] made as the result of a proceeding in which by law a hearing is required to be given...." Although the SPB could have denied Arbuckle's request for a hearing, the documentary review was sufficient to constitute a "hearing" under administrative mandate case law because the officer was required to accept and consider evidence from interested parties, the court observed, citing *Friends of the Old Trees v. Dept. of Forestry and Fire Protection* (1997) 52 Cal.App.4th 1383.

In addition, the SPB's decision to grant a hearing was guided by regulations that required denial of a hearing unless the executive officer's findings were not supported by substantial evidence or were procedurally defective. This procedure required the SPB to review the findings, the court pointed out.

Even if the documentary hearing was not sufficient to make administrative mandate proceedings applicable, Arbuckle still would have been required to overturn the decision by ordinary mandate proceedings, the court observed, citing *Bunnett v. Regents of the University of California* (1995) 35 Cal.App.4th 843, 113 CPER 72. Therefore, Arbuckle still would not have been excused from requesting a

hearing before the board and filing for mandate proceedings if the hearing was denied.

Tort Claim Irrelevant

Arbuckle contended that she had exhausted administrative remedies applicable to her Labor Code claim when she filed a tort claim with the state. While the court did not determine whether she should have filed her claim with the labor commissioner, as some courts have held, it decided her Labor Code complaint was barred by the doc-

The Labor Code complaint was barred by the doctrine requiring exhaustion of judicial remedies.

trine requiring exhaustion of judicial remedies. The tort claim requirement is for the benefit of the state and is not a substitute for an available administrative remedy, the court held.

The court rejected Arbuckle's analogy to cases arising under the Fair Employment and Housing Act. A public employee who sues under FEHA need not exhaust internal remedies because they would be duplicative of FEHA's own administrative procedures and would frustrate the legislature's intent to expand an employee's access to

another forum for discrimination claims. Cases involving exhaustion of internal remedies for FEHA claims were not persuasive for a non-FEHA claim, particularly a whistleblower claim.

New Regulations Questioned

Arbuckle argued that the correct interpretation of the interplay between the SPB remedies and a civil suit is apparent from new SPB regulations. The 2006 regulations provide that a complainant has exhausted administrative remedies and may file suit under the whistleblower act after receiving an adverse notice of findings from the executive officer. Under the current regulations, Arbuckle's suit would have been allowed to proceed.

The court not only rejected the argument, but criticized the SPB at length for regulating matters beyond its expertise and powers as an administrative agency. The doctrine of exhaustion of administrative remedies cannot be

altered by the SPB, the court scoffed, and the regulation appeared to be an effort to lighten the workload of the SPB "in defiance of the relevant statutes." The court essentially proclaimed the new regulation invalid.

*The court criticized
the SPB for
regulating matters
beyond its expertise.*

The court concluded that Arbuckle's civil suit was precluded because it was based on the same facts as her SPB suit. It directed the trial court to enter an order granting the employer's motion for summary judgment. (*State Board of Chiropractic Examiners v. Superior Court [Arbuckle]*[2007] 148 Cal.App.4th 142. *

Discrimination

Hearing-Impaired Security Officer Not Disabled Under Rehabilitation Act

The Ninth Circuit Court of Appeals has determined that a court security officer who was terminated because of a “significant” hearing impairment was not disabled within the meaning of the Rehabilitation Act of 1973.

The employee, Naomi Walton, worked for Akal Security in the United States District Court for the Northern District of California. Akal was under contract with the U. S. Marshals Service to provide CSOs at federal courthouses within the Ninth Circuit. During an annual physical exam, the examining doctor, Dr. Chelton, found that Walton had a “significant hearing impairment” in that she had “only one functioning ear.”

He determined she was “unable to localize the direction of sound, an essential job function.” He concluded that her inability to detect where sound is coming from posed a significant risk to her health and safety, and to that of other law enforcement officers and the public.

Based on these findings, the USMS determined that Walton did not meet its audiological standards. It medically disqualified her from the CSO position, and Akal terminated her. Walton filed a lawsuit alleging that the USMS terminated her employment in viola-

tion of the Rehabilitation Act. The district court dismissed her case, finding that Walton had failed to make a prima facie showing that she was disabled within the meaning of the act.

Court of Appeals Decision

Walton did not allege that she was actually disabled but rather that she was “regarded as” disabled. The court recognized that the Rehabilitation Act covers an individual who is regarded by her employer as disabled, citing *Sutton v. United Airlines, Inc.* (1999) 527 U.S. 471, 137 CPER 21. *Sutton* held that an employee may be “regarded as” disabled if:

- (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or
- (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities.

“In both cases, it is necessary that a covered entity entertain misperceptions about the individual — it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impair-

ment is not so limiting,” explained the court in *Sutton*.

The Ninth Circuit requires that a plaintiff alleging a “regarded as” claim provide evidence of the employer’s subjective belief that the plaintiff is substantially impaired, instructed the court, citing *EEOC v. United Parcel Service, Inc.* (9th Cir. 2002) 527 U.S. 516, and *Murphy v. United Parcel Service, Inc.* (1999) 527 U.S. 516, 137 CPER 21. The plaintiff must show that her employer regards her as substantially limited in a major life activity, “not just unable to meet a particular job performance standard.”

The doctor did not express an opinion on whether the USMS regarded her impairment as substantially limiting.

The court held that “in order to state a ‘regarded as’ claim a plaintiff must establish that the employer believes that the plaintiff has some impairment, and provide evidence that the employer subjectively believes that the plaintiff is substantially limited in a major life activity.” This can be proved through direct evidence or, absent direct evidence, the plaintiff must show that the impairment imputed to her is,

objectively, a substantially limiting impairment.

Walton alleged that she was regarded as substantially limited in the major life activities of hearing, working, and localizing sound. The appellate court found that she failed to meet her burden of proof as to any of those activities.

While hearing is a major life activity, according to the regulations of the Equal Employment Opportunity Commission, the court found Walton failed to show that the USMS subjectively believed her hearing to be substantially limited, or that the inability

Dr. Sweetow's report did not state a factual basis for his opinion.

to localize sound is an objectively substantial limitation on hearing. "A substantial limitation on the major life activity of hearing is a severe restriction on the use of an individual's hearing compared to how unimpaired individuals normally use their hearing in daily life," explained the court.

Walton's argument that her disqualification for failure to meet the USMS' hearing standards constituted direct evidence that it regarded her as disabled in a major life activity fails, said the court, relying on *EEOC v. United Parcel*. In that case, the Ninth

Circuit found the fact that an employer requires its employees to meet certain vision standards does not prove that the employer regards those who do not meet the standards as being substantially limited in the major life activities of seeing or working.

The court also rejected Walton's argument that the statements in Dr. Chelton's report constituted direct evidence of the USMS' subjective belief that Walton was substantially limited in hearing, because Dr. Chelton did not express an opinion on whether the USMS regarded her hearing impairment as substantially limiting in a major life activity.

Because she could not show by direct evidence that USMS regarded her as disabled, "Walton must show that the inability to localize sound is an impairment that substantially limits the major life activity of hearing," said the court. Walton argued that she made the requisite showing, pointing to comments in a report by her expert, Dr. Robert Sweetow, stating that Walton was "unable to localize the direction of sound" and the opinion that the ability to localize sound is essential to the condition or manner under which an individual can use the sense of hearing. Dr. Sweetow also said that being able to localize sound severely or significantly restricts one's hearing as compared to how unimpaired people normally hear in everyday life. The court was not persuaded Dr. Sweetow's opinions supplied a sufficient basis to conclude that Walton's impairment substantially lim-

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ited the major life activity of hearing because his report did not state a factual basis for his opinion.

Walton's only other proof on this issue was a draft report prepared by Dr. Lynn Cook for the United States Naturalization and Immigration Service indicating that "a complete inability to localize sound may severely impact how hearing is used in daily life by precluding activities such as locating other people, pinpointing the direction of a sound of interest, and identifying if footsteps are retreating or approaching." This evidence was insufficient, determined the court, because Dr. Cook also opined that visual localization mitigates the effects of the inability to localize sound. "Walton relies solely on Dr. Cook's report, and presents no contrary evidence in the record that auditory localization, as mitigated by visual localization, is an objectively severe restriction on the use of an individual's hearing compared to how unimpaired individuals use their hearing in daily life," the court said.

Walton also did not raise sufficient evidence to support her argument that the USMS regarded her as substantially limited in the major life activity of working, determined the court, because she failed to "present specific evidence about relevant labor markets" and "identify what requirements posed by the class of jobs were problematic in light of the limitations imposed on her," as required by EEOC regulations and *Thorton v. McClatchy Newspapers, Inc.* (9th Cir. 2001) 261 F.3d 789.

The Court of Appeals declined to consider whether localizing sound could be a major life activity because Walton did not raise this issue before the district court.

Walton also maintained that she was covered by the Rehabilitation Act because she has a record of a substantially limiting impairment, i.e., Dr.

Chelton's reports constitute a medical record of having only one functioning ear and being unable to localize sound. However, said the court, she failed to show that this is a substantially limiting impairment meeting the requirements of the act. (*Walton v. U.S. Marshals Service* [9th Cir. 2-12-07] 476 F.3d 723. *

Class-of-One Equal Protection Claim Inapplicable to Public Employer

Disagreeing with every other circuit, a panel of the Ninth Circuit Court of Appeals in *Engquist v. Oregon Department of Agriculture* has determined by a split decision that the class-of-one theory of equal protection is inapplicable to workplace decisions made by public employers. In so holding, the Ninth Circuit now stands in direct opposition to the First, Third, Fifth, Sixth, Seventh, and Tenth Districts, assuring a future Supreme Court ruling on the question.

Factual Background

Anup Engquist was hired in 1992 as an international food standards specialist working for the Export Services Center, a laboratory in the Oregon Department of Agriculture. Norma Corristan was director of the ODA's Laboratory Services Division. John Szezepanski assumed oversight of the lab in 2001. Shortly thereafter,

Szezepanski told a client that he could not control Engquist, and that Engquist and Corristan "would be gotten rid of." In the fall of 2001, Szezepanski selected Joseph Hyatt, a systems analyst at the LSD with whom Engquist had repeated difficulties, for the ESC manager posi-

The Ninth Circuit stands in direct opposition to every other circuit.

tion. Szezepanski passed over Engquist even though she had a more extensive educational background and more customer service experience. Then, Szezepanski eliminated Corristan's position, allegedly because of the state budget crisis. Hyatt told a client that Corristan and Engquist had run the

ESC “into the ground,” they were on their way out, and he would take over and put it all back together. Engquist’s position was eliminated in January 2002, allegedly due to the reorganization caused by the budget. Engquist was not able to find another job in her field.

Engquist filed a lawsuit claiming violations of Title VII of the Civil Rights Act, equal protection, and procedural and substantive due process, and intentional interference with the contract. The trial court dismissed some claims but allowed others to go to trial. A jury found the defendants liable for violations of equal protection, substantive due process, and contract interference.

The case presented several issues of first impression in the Ninth Circuit. One was whether the class-of-one theory of equal protection is applicable to employment decisions. A second issue concerned the requisite showing in a substantive due process claim based on the right to pursue a particular profession.

Ninth Circuit on Equal Protection

The Equal Protection Clause ensures that “all persons similarly situated should be treated alike.” The Supreme Court first recognized class-of-one equal protection actions in *Village of Willowbrook v. Olech* (2000) 528 U.S. 562.” In *Olech*, the court found grounds for an equal protection violation where a municipality conditioned water service for a property on the grant of a 33-foot easement from a single property

owner, even though it required only a 15-foot easement from all other property owners. The Court of Appeals summarized the *Olech* decision as follows:

The Court allowed the plaintiff to proceed on the class-of-one theory, recognizing claims where a plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. The Court stated that allegations of irrational and wholly arbitrary treatment, even without the allegations of improper subjective motive, were sufficient to state a claim for relief under equal protection analysis.

Based on *Olech*, the court acknowledged that it “has applied the class-of-one theory in the land-use context to forbid governmental actions that are arbitrary, irrational, or malicious,” citing *Squaw Valley Dev. Co. v. Goldberg* (9th Cir. 2004) 375 F.3d. 936, and *Valley Outdoor, Inc.* (9th Cir. 2006) 446 F.3d 948. But the court had never decided whether the class-of-one theory should be extended to public employment decisions.

Many other Courts of Appeals have chosen to apply the class-of-one theory to public employment decisions, recognized the court, citing cases from the First, Second, Third, Fifth, Sixth, Seventh, and Tenth Circuits. However, these courts have struggled to define the contours of class-of-one cases because, unless constrained, “the class-of-one theory of equal protection claim could provide a federal cause of action for review of almost every executive or

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administrative government decision.” “Thus,” the Ninth Circuit said, “although courts have recognized class-of-one employment claims, they have almost always ultimately concluded that the particular claim before them was insufficient.” For this reason, the court remarked, Engquist’s thus far successful claim on this theory “presents a unique case.”

But Engquist’s success was short-lived. The court concluded that the class-of-one theory should not be applied to public employment claims for several reasons.

When a public employee is involved, the need for federal judicial review under equal protection is especially thin.’

First, “there is a distinction between the government acting as a proprietor that was managing its own internal affairs rather than a lawmaker that was attempting to regulate or license,” said the court, and “the Supreme Court has always assumed that the government as employer indeed has far broader powers than does the government as sovereign.” The court referred to other areas of constitutional law where the Supreme Court has lim-

ited the rights of public employees, such as in the First Amendment context where “courts review restrictions on employees’ speech with greater deference in order to balance the government employer’s legitimate interests in its mission,” citing *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951, 179 CPER 21. In the context of the Fourth Amendment, the Supreme Court has determined that a government employer does not need to obtain a warrant to search an employee’s property, noted the court.

The court concluded that “the class-of-one theory of equal protection is another constitutional area where the rights of public employees should not be as expansive as the rights of ordinary citizens.” It reasoned that “the paradigmatic class-of-one case should be one in which a public official, for some improper motive, comes down hard on a hapless private citizen.” However, when a public employee is involved, “the need for federal judicial review under equal protection is especially thin given the number of other legal protections that public employees enjoy.”

Second, “applying equal protection to forbid arbitrary or malicious firings of public employees would completely invalidate the practice of public at-will employment,” reasoned the court, because, under common law, employers may discharge employees for arbitrary reasons unless constrained by contract or statute. “We decline to effect such a significant change in em-

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ployment law under the general provisions of the Fourteenth Amendment," it announced.

Third, "applying the class-of-one theory to public employment would also generate a flood of new cases," warned the court, "requiring the federal courts to decide whether any public employee was fired for an arbitrary reason or a rational one."

And, finally, the court argued that the Supreme Court could not have intended such a "dramatic" transformation of public employment law by its opinion in *Olech*.

Ninth Circuit on Substantive Due Process

The second issue of first impression addressed by the court concerned the showing required in a substantive due process claim based on the right to pursue a particular profession. The jury found that the defendants "subjected [Engquist] to arbitrary and unreasonable government actions causing [her] to be unable to pursue her profession." The defendants argued that they could not be held liable on this claim as a matter of law or, in the alternative, that Engquist did not present sufficient evidence that their actions deprived her of the right to pursue her profession.

The court held that Engquist *did* state a valid claim on substantive due process grounds, but agreed with the defendants that the evidence was insufficient.

"We have recognized the liberty interest in pursuing an occupation of

one's choice," said the court, citing *Ditman v. California* (9th Cir. 1999) 191 F.3d 1020. The Ninth Circuit has also held that "a plaintiff can make out a substantive due process claim if she is unable to pursue an occupation and this inability is caused by government actions that were arbitrary and lacking a rational basis," the court said, citing *Ditman, Sagana v. Tenorio* (9th Cir. 2004) 384 F.3d 731, and *Wedges/Ledges of California, Inc. v. City of Phoenix* (9th Cir. 1994) 24 F.2d 56.

However, all of these cases dealt with government legislation or regulation, and not with the government as an employer. Because constitutional review of government employment decisions is more constrained than the review of legislative or regulatory ones, the defendants argued, there should be no substantive due process review of employment decisions. The court was not persuaded:

We decline to hold that there is no substantive due process claim for a public employer's violations of occupational liberty. Rather, we limit the claim to extreme cases, such as a government blacklist, which when circulated or otherwise publicized to prospective employers effectively excludes the blacklisted individual from his occupation, much as if the government had yanked the license of an individual in an occupation that requires licensure. Such a governmental act would threaten the same right as a legislative action that effectively banned a person from a profession, and thus calls for the same level of constitutional protection. The concerns about federal courts reviewing

every public employee discharge are not implicated because such a claim is colorable only in extreme cases. Nor does such a standard, unlike the class-of-one theory, affect the vast majority of public employer decisions.

Not before having addressed the question of the standard of proof required to sustain a substantive due process claim, the court adopted the standard set out by the Seventh Circuit in *Bordelon v. Chicago School Reform Board*

Engquist's problem finding a job stemmed from the fact that there were not many jobs in her highly specialized field.

of Trustees (7th Cir. 2000) 233 F.3d 524: "It is not enough that the employer's stigmatizing conduct has some adverse effect on the employee's job prospects; instead, the employee must show that the stigmatizing actions make it virtually impossible for the employee to find new employment in his chosen field."

In this case, Engquist's evidence of defamatory statements made to two or three other people in the industry was not sufficient to meet the standard, determined the court. It concluded that Engquist's problem finding a job

“The right to procedural due process is one of the most significant constitutional guarantees provided to citizens in general and public employees in particular.”

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stemmed from the fact that there were not many jobs in her highly specialized field available in Oregon. “Because Defendants did not cause this situation, their specific actions have not made it virtually impossible for Engquist to find new employment,” it reasoned.

The Dissent

Judge Stephen Reinhardt disagreed with the majority regarding the class-of-one equal protection claim. “The majority’s holding relating to the class-of-one theory of equal protection creates inter-circuit conflict, is at odds with the precedent of the Supreme Court and of this circuit, and is not justified by the policy concerns raised by the majority,” he wrote.

Reinhardt noted that no circuits were drowning in a flood of litigation.

Reinhardt found the majority’s approach contrary to that taken not only by all the other circuits but by the Ninth Circuit as well. “Until now, we have recognized that a class-of-one equal protection claim is no different from any other equal protection claim that does not involve a protected class,” he said, citing *Squaw Valley* and other cases. “Indeed the majority does not

identify a single case in our equal protection jurisprudence or that of any other circuit that limits equal protection rights in the context of public employment.”

The majority’s attempt to distinguish *Olech* on the grounds that the case before it involved an employment decision rather than a regulatory decision is not persuasive, concluded Reinhardt. “The majority is correct that there are differences between the state’s powers in the two realms,” he said. “However, unlike in the First and Fourth Amendment contexts, upon which the majority relies, the Court has not limited the Fourteenth Amendment’s scope as applied to public employment.” And, “even in the First and Fourth Amendment contexts, in which courts have concluded that some limitations on individual rights are necessary to facilitate government employment, federal employees do not give up their right to be free from hostile, arbitrary, and malicious treatment by the government.”

Reinhardt also dismissed the majority’s concern that the class-of-one rule would eliminate at-will employment. “[The majority] apparently believes that arbitrary treatment of public employees is a necessary and accept-

able part of public employment,” he wrote. “I disagree.” He pointed out that at-will employment continues to exist in the circuits that have applied the class-of-one theory to public employment. Nor are those circuits drowning in a flood of litigation. “Rather, as the majority notes, those circuits have set standards for assessing class-of-one employment disputes such that petitioners win only in extreme cases.”

Reinhardt voiced support for the approach set out in *Squaw Valley* for assessing these cases. Under this standard, “a plaintiff must show both that he was treated differently than others and that there was no rational basis for this treatment.” This can be done by comparing her treatment to that of someone in her situation or by showing that the government’s treatment was motivated by undeserved malice. Because Engquist presented her case on a theory that Szezepanski and Hyatt were acting out of malice, and the jury agreed, Reinhardt would affirm the district court’s determination that her equal protection rights were violated. (*Engquist v. Oregon Department of Agriculture* [9th Cir. 2-8-07] 05-35170, ___ F.3d. ___, 207 DJDAR 1836.) *

Court Rejects Wage Discrimination Claim by Female Attorneys

The Second District Court of Appeal found no discrimination in *Hall v. County of Los Angeles*, a class action case

in which female attorneys hired by the county to represent juveniles claimed that they were being paid less than male

attorneys doing the same work. The class, consisting of 200 female attorneys, alleged violations of the state and federal Equal Pay Acts and the California Fair Employment and Housing Act.

Factual Background

In response to a caseload crisis in 1984, the Los Angeles Board of Supervisors authorized “as-needed” contracts with lawyers for the juvenile courts to cover cases that could not be handled by the Los Angeles county counsel staff. In 1989, the county counsel asked the board to establish a single employer-provider to manage the contract attorneys. The board agreed and

Lawyers were described as ‘employees solely of ALS.’

established Auxiliary Legal Services, Inc., which entered into a contract with the county to provide lawyers to work under the control of the county counsel. Under the terms of the contract, ALS was deemed an independent contractor, and the lawyers provided by ALS were described as “employees solely of ALS and not of the County for any purpose.”

The class action lawsuit was filed in 1999 against ALS, the county counsel, and the county, alleging that the three defendants were, in reality, a single enterprise. Danna Hall, repre-

senting the class, alleged that ALS was just a “payrolling scheme” that helped the county counsel maintain a two-tier attorney workforce, with the predominantly female ALS unit receiving substantially less pay and benefits than the predominantly male county counsel unit — notwithstanding that all lawyers in both units did the same work under the same working conditions.

The defendants’ motion for summary judgment was granted, and Hall appealed.

Court of Appeal’s Equal Pay Act Claim

The defendants argued that although there were more female employees at ALS than at county counsel, both groups were gender-integrated. During the relevant time period, the evidence showed that the highest differential between female and male lawyers at ALS was 71 percent female and 29 percent male; the lowest differential among county counsel was 22 percent female and 78 percent male. The record also demonstrated that males and females at ALS doing the same work received the same pay and benefits, and that males and females among the county counsel staff doing the same work received the same pay and benefits. While it was true that employees at the county counsel were paid more and received more benefits than ALS employees, defendants argued that this was “due to cost-savings” and not gender. The defendants pointed to documents indicating that the board of supervisors was motivated to enter into

the contract with ALS because it was “an economical and cost effective way to provide supplemental legal services.”

Hall argued that because of the county counsel’s “pervasive control” of ALS, the ALS lawyers were, in reality, county counsel’s common law employees entitled to be paid “in accordance with civil service compensation rules.” Therefore, the pay and benefits received by the female lawyers at ALS should be compared to those received by the male lawyers in the county counsel staff to determine defendants’ liability.

The Court of Appeal was not persuaded by Hall’s reasoning. It rejected her argument that the appropriate

The suit alleged ALS, the county counsel, and the county, were a single enterprise.

“comparator” is male county counsel employees for purposes of determining liability under the Equal Pay Act. “We agree with the County that, even assuming Hall is viewed as an employee of County Counsel, she is using the wrong comparator and that the appropriate comparator is male ALS lawyers,” said the court. “A plaintiff cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and fe-

males,” the court instructed, quoting from *Arthur v. College of St. Benedict* (D.Minn. 2001) 174 F.Supp.2d 968. Further, noted the court, as stated in *Hofmister v. Mississippi State Dept. of Health* (S.D.Miss.1999) 53 F.Supp.2d 884, the “legislative history of the EPA shows that differences in pay between groups or categories of employees that contain both men and women within each group or category are not covered by the EPA.”

Within ALS, women were paid the same as men.

The court pointed to *Schulte v. State of New York* (EDNY 1981) 533 F.Supp.31, in support of its position. In that case, female psychiatric social workers, constituting 70 percent of all psychiatric social workers, sued the state claiming that they performed substantially the same work for less pay than psychologists, who were 67 percent male. The state responded by showing that, although the social workers were paid less and received fewer benefits than the psychologists, male and female social workers received the same pay and benefits, and male and female psychologists received the same pay and benefits. In that case, the court held that because there was “such a substantial representation of the ‘minority sex’ within each classification, the fact that

they were paid different salaries did not establish sex discrimination because the EPA was not intended to address the situation where an employer pays different wages to two different job classifications, each of which include both men and women.”

The Court of Appeal applied the *Schulte* court’s reasoning to this case. “Because undisputed evidence establishes that, at any given time, ALS and County Counsel both employed a substantial number of women and that, within ALS, women were paid the same as men, there is no basis for Hall’s use of a male County Counsel lawyer as a comparator,” it held. “For this reason alone, Hall’s claims fail as a matter of law.”

The court also found that, even assuming Hall properly could compare ALS female lawyers to county counsel male lawyers, dismissal of her case was warranted because “undisputed evidence establishes that the wage disparity between ALS and County Counsel was based on an acceptable business reason, which is a recognized factor ‘other than sex.’” The evidence showed that the use of independent contractors was authorized by the county as “a gender-neutral cost-saving measure” and the contract with ALS was entered into to develop a cost-effective way to provide supplemental legal services, said the court. Because there was a legitimate and non-discriminatory cost-savings purpose for ALS’ existence, the two-tier wage and benefits system is not discriminatory, it held, citing *Prieto v.*

City of Miami Beach (S.D.Fla. 2002) 190 F.Supp.2d 1340, *Arthur v. College of St. Benedict*, and *Aldrich v. Randolph Cent. School Dist.* (2d Cir. 1992) 963 F.2d 520.

FEHA Claims

Hall alleged that evidence introduced in support of her FEHA claims for sex-based wage discrimination established both disparate treatment and disparate impact discrimination. The court disagreed.

The use of independent contractors was ‘a gender-neutral cost-saving measure.’

In order to meet her burden of proof for disparate treatment, said the court, “Hall was required to show membership in a protected class, qualification for the position at issue, adverse employment action, and at least an inference of intentional discrimination from facts showing that the County chose the particular policy because of its effect on members of a protected class, not just that the County was aware that a given policy would lead to adverse consequences for a given group.” Regarding disparate impact discrimination, “Hall was required to show that, regardless of the County’s motive, a facially neutral practice or policy bear-

ing no relationship to job requirements had a disproportionate adverse effect on members of the protected class,” instructed the court.

Hall did not meet her burden under either theory, the court concluded, “because she did not present any evidence to show that the County created ALS because of its effect on female lawyers (or even that the County was aware that the use of independent contractors would lead to adverse consequences for female lawyers), or any evidence to show that the creation of ALS had a disproportionate adverse effect on women.”

Even if Hall had met her burden, the defendants’ evidence of the cost-savings motivation for its actions would have prevailed. The court found no support for Hall’s claim of pretext because there was no evidence that ALS’ lawyers (male or female) were precluded from applying for jobs with the county counsel or that the ALS’ contract or compensation decisions were the result of gender bias.

Therefore, the court affirmed the trial court’s grant of summary judgment dismissing the case. (*Hall v. County of Los Angeles* [2-22-07] B186224 [2d Dist.] ___Cal.App.4th___, 2007 DJDAR 3062.) *

General

Overall Union Membership Declines — Again

Overall union membership in the United States continued its steady decline in 2006, according to data released by the Department of Labor's Bureau of Labor Statistics. Last year, 12 percent of workers were union members, down from 12.5 percent a year earlier. In terms of numbers, this is a decline of 326,000 workers, to 15.4 million in 2006.

These composite figures represent a union membership rate of just 7.4 percent for employees in private industry. This is in sharp contrast to the union membership of 36.2 percent for all public sector workers — federal, state, and local government employees. Within the public sector, local government workers had the highest union membership rate, at 41.9 percent; this group showed no change from the 2005 mark. According to Labor Department data, union membership in the public sector is nearly five times that of private sector employees.

The data also reveal that union membership among men was higher, at 13 percent, than for women, at 10.9 percent. The gap between these rates has narrowed in the last 20 years; however, the BLS reports that this narrowing occurred because the union mem-

bership rate for men declined more rapidly than the rate for women during this period.

In terms of race, black workers were more likely to be union members (14.5 percent) than were white workers (11.7), Asians (10.4 percent), or Hispanics (9.8 percent). By age groups,

Union membership in the public sector is nearly five times that of the private sector.

union membership was the highest among workers 45 to 64 years old (16 percent) and was lowest among those ages 16 to 24 (4.4 percent). Full-time workers were more than twice as likely as part-time workers to be union members, 13.1 and 6.3 percent, respectively.

Unions in 29 states and the District of Columbia had membership rates below the national average; 20 states had higher rates, and 1 had the same rate. In terms of changes in union membership since 2005, rates were down in 30

states and the District of Columbia, up in 17 states, and unchanged in 3. Four states had union membership rates over 20 percent in 2006 — Hawaii (24.7 percent), New York (24.4 percent), Alaska (22.2 percent), and New Jersey (20.1 percent). Hawaii and New York have led the pack among all states for 10 of the past 11 years.

In California, with wage and salaried workers tabulated to be about 14.5 million in 2006, 15.7 percent are union members, or 2,273,000 workers. This is a decrease from 2005, when 16.5 percent were union members, or 2,424,000 workers. This represents a decline of 151,000 union members in California.

In 2006, the largest numbers of union members lived in California (2.3 million) and New York (2 million). Just under half of the 15.4 million union members in the United States lived in six states: California (2.3 million), New York (2 million), Illinois (.9 million), Michigan (.8 million), New Jersey (.8 million), and Pennsylvania (.7 million). *

News From PERB

Reappointment, New Appointment, and New Hire Add to Experience of Board

Sally McKeag of Sacramento was reappointed to the Public Employment Relations Board by Governor Arnold Schwarzenegger on February 23, 2007. She has served in this capacity since 2005. McKeag previously was chief deputy director for the Employment Development Department from 2004 to 2005 and served as deputy staff director for the Office of Governor Schwarzenegger from 2003 to 2004. Prior to that, she was a special assistant in the office of the assistant secretary for the U.S. Department of Labor. McKeag's experience also includes service as deputy director of regulatory operations for the Department of Consumer Affairs, acting deputy director of the Department of Fish and Game, and director of constituent affairs for the Office of Governor Wilson. This PERB position requires Senate confirmation.

Yaron Partovi joined the PERB, General Counsel's Office as a regional attorney, effective December 18, 2006. Yaron graduated from law school in May 2005 and passed the State Bar in June 2006. Yaron worked at Renne, Sloan, Holtzman & Sakai and at the California Correctional Peace Officers Association, and was an intern for the State Department of Personnel Administration.

Robin Wesley has been appointed an administrative law judge at PERB. She joined PERB more than 16 years ago and has served as board counsel, regional attorney, hearing officer, and most recently as acting general counsel. Wesley previously served as the deputy director for Local Government Affairs in the Governor's Office of Planning and Research and as the district administrative assistant to a member of the legislature. She is a graduate of Westmont College and McGeorge School of Law, and is a member of the Labor and Employment Law Section of the State Bar. ❁

Public Sector Arbitration

Federal Laws Preempt Parties' Agreement When Special Education Student Is Involved

Federal law makes clear that students with disabilities have the right to participate in the educational process free from unlawful harassment. So when a teacher was accused of verbally denigrating and physically punishing a student diagnosed with attention deficit hyperactivity disorder, arbitrator Alonzo M. Fields found that federal law, not the parties' agreement, controlled.

The appellant, a long-time teacher for the San Leandro School District, was accused of directing words such as "dumb," "stupid," and "idiot," towards a special education student in her classroom. She was also accused of forcing him to kneel for extended periods of time. Evidence in support of allegations was contradictory. The teacher claimed she used the demeaning words only for role play, in which she described inappropriate behaviors and words that students should not use. She did not deny having the student kneel, but said it was for only a short time.

The allegations surfaced when the student was suspended for an unrelated disciplinary infraction. When his mother met with the principal, she informed him of the supposed harassment. The principal suggested the mother meet with the teacher, but the

parent declined to do so, claiming both that she was intimidated by the teacher and that she could not afford to take off from work. The principal arranged to meet with the teacher and put in writing the details of his conversation with the aggrieved mother. The letter contained directives for the teacher to follow which, in the association's view, suggested that the incidents had occurred.

The parties' contract provides that complaints concerning school personnel are to be made directly by the complainant to the person against whom the complaint is lodged. Here, the mother went directly to the principal, bypassing the student's teacher. The agreement also provides that the complaint must be in writing; if it is not, the district must cease to pursue the claim and remove any evidence of it from the employee's file. Here, because the mother did not provide a written statement of her complaint, the association demanded that all evidence of disciplinary actions be destroyed. The complaint reached arbitrator Fields when the district refused to comply with this request.

Before discussing the merits of the association's claim, Fields first had to

determine whether the matter was arbitrable. The district argued it was not, asserting federal preemption.

In support of this position, the district pointed to Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act; both address the rights of disabled students. The district claimed that the acts applied because the allegations against the teacher were sufficient to establish that the comments were made based on the student's disability.

The Ed. Code states no school employee may engage in corporal punishment.

The district also referenced an Education Code provision that states no school employee may engage in corporal punishment. Because the teacher allegedly forced the student to kneel for extended periods of time, corporal punishment was involved and, as such, the district was not obligated to follow the procedural rules set forth in the parties' agreement, the district argued. It reasoned that, under the Educational Employment Relations Act, provisions of a collective bargaining agreement are preempted if they conflict with rights established by the Education Code.

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

Molly Ivins

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Alternatively, the district claimed that if the complaint were arbitrable, it was without merit because the teacher had not been adversely affected. The principal's letter was not disciplinary in nature, merely informative. Nor could the letter adversely affect the teacher's employment because it was not placed in her file. All the district did, it claimed, was investigate, an action legally mandated when an allegation of abuse is involved.

The association did not contest the district's right to investigate the allegations, but asserted that the district had no right to issue a letter of reprimand without a written complaint from the parent. The failure to do so rendered the entire complaint void, according to the terms of the parties' contract. The association referenced prior cases in which administrative directives were issued but later rescinded because required procedures were not followed. Fields, however, felt the current claim was not comparable to those instances.

Here, the district asserted that federal laws were compromised, a fact for the arbitrator to determine. Fields found dispositive that the student received special education services and was qualified as disabled under the Americans with Disabilities Act. The type of comments alleged, such as calling a student "stupid" and "idiot," might have a greater impact on a student who receives special services because of learning difficulties. As Fields wrote, "these comments are demean-

ing, particularly to a student in a special education program."

Because of the student's special education status, and because of the circumstances involved, Fields agreed that the complaint was not arbitrable. He wrote, "the words [the teacher] used in role play turned out, because of [the

An investigation is legally mandated when an allegation of abuse is involved.

student's] status, to be inappropriate. Given his status as a special ed student, [the principal] by necessity was forced to intervene." (*San Leandro Unified School Dist. and California Teachers Assn.* [2-15-07] 28 pp. *Representatives:* Allison C. Neufeld and Michelle Baker [Ruiz & Spelow, LLP], for the district; Lorraine Lerner and Ballinger G. Kemp, for the association. *Arbitrator:* Alonzo M. Fields, Jr., CSMCS Case No. ARB-05-0619.) *

Arbitration Log

• **Out-of-Class Pay**

Service Employees International Union, Loc. 1000, and Dept. of Corrections and Rehabilitation (3-17-06; 19 pp.). *Representatives:* Lois Kugelmass, Sr., for the union; Edmund “Deak” Brehl, Esq., for the department. *Arbitrator:* John F. Wormuth.

Issue: Did the grievants work out of class as certified nursing assistants?

Union’s position: (1) On a routine and daily basis, the grievants, who are classified as hospital aides, perform the more complex duties of certified nursing assistants as defined in the class specifications.

(2) The grievants routinely perform duties that require them to use and be familiar with nursing skills exceeding the class specification of hospital aide.

(3) The grievants maintain certification as nursing assistants and have provided evidence of this certification to the department.

(4) The classification of hospital aide does not require certification, yet the department displays the grievants’ certifications when it is inspected by the Department of Health Services. This provides a benefit to the department.

Department’s position: (1) The duties performed by the grievants are within and covered by their class specification.

(2) There are discernable and identifiable differences between the duties of hospital aides and those of certified nursing assistants, including the type of patients to whom care is given.

(3) Nursing assistants require certification while hospital aides do not.

(4) There is overlap of routine duties between both classes, but they are performed at substantially different levels of care with completely different outcomes.

(5) The union has not met its burden of demonstrating an out-of-class claim.

Arbitrator’s holding: The grievance was sustained.

Arbitrator’s reasoning: (1) The duties described by the grievants reflect the higher-skilled tasks assigned to a certified nursing assistant.

(2) Testimony supports the conclusion that hospital aides perform the higher-level duties of certified nursing assistants, such as providing recognition of clinical symptoms. This exceeds their class specification.

(3) These duties require training achieved by attending and completing formal course instruction, as is indicated by the nursing assistant certification held by all hospital aides.

(4) Despite the department’s assertion that there is a distinct difference between the types of patients cared for by hospital aides and certified nursing assistants, it has not shown a compelling nexus between the prognosis of a patient and the level of skill needed to provide effective care. The ability to comprehend and interpret clinical symptoms in both settings demands the same degree of acuity and skill.

(5) The overlapping duties that the department claims bar an out-of-classification claim does not occur within the nursing care function, but in the function of transporting patients and equipment.

(6) To bar an out-of-class claim, the overlapping responsibilities would have to constitute 20 percent of hospital aides’ duties. That is not the case. The overlap between classes is insignificant and prevalent only in the most ordinary and routine functions.

(7) The union has met its burden of demonstrating that hospital aides are performing the duties of certified nurs-

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ing assistants at least 50 percent of the time and over at least two consecutive workweeks, and are entitled to out-of-class pay.

(Binding Grievance Arbitration)

- **Incompatible Duties**

- **Past Practice**

Department of Food and Agriculture and California Union of Safety Employees (4-17-06; 19 pp.). *Representatives:* Andrea Perez, for the union; Kenneth Hulse, for the department. *Arbitrator:* Bonnie G. Bogue.

Issue: Did the department violate the agreement by determining that the grievants' jobs with outside entities are in violation of the incompatible activity policy?

Union's position: (1) The parties' agreement prohibits a state employee from engaging in any employment, activity, or enterprise that is clearly inconsistent, incompatible, in conflict with, or inimical to state employment. The branch chief is also authorized to decide, on a case-by-case basis, whether a particular outside employment or activity is permissible.

(2) This policy is overbroad and unduly restrictive as applied to the grievants, who inspect cattle brands for the department and also perform work for private employees.

(3) Management permitted the grievants to hold both jobs, and the department supervisors were aware of the dual employment arrangement.

(4) Permission to perform the outside work was revoked after 22 years for one grievant and after 17 years for

the other. Both grievants need the compensation from their outside jobs.

(5) The nature of the cattle industry and the specialized work and hours of inspectors preclude normal application of the incompatibility policy to the grievants.

(6) Although the department maintains that an inspector may perform unpaid work for the same rancher whose cattle are inspected by the employees, the language of the policy precludes unpaid activity as well as outside employment.

(7) The grievants' activities are not incompatible because the special duties of brand inspectors require that they work in the cattle industry.

(8) Because the policy requires a case-by-case determination of what is incompatible, the department must consider the grievants' performance history to determine whether an outside activity adversely affects the department. Aside from speculation, there is no evidence that the department has been adversely effected by the grievants' employment.

Department's position: (1) The department has properly and fairly implemented the incompatibility policy.

(2) The policy clearly prohibits employees from taking anything of value from someone who the employees' regulate, which is the case here. As brand inspectors for the department, the grievants regulate and inspect livestock of their private employers.

(3) The fact that the grievants previously have held outside employment does not mean such activity should exist in the future.

(4) One grievant inspects brands for the department at the same time he unloads cattle for his private employer. This is outside employment subject to review because he inspects cows at the same private facility where he is employed.

(5) The other grievant accepts payment from an entity she is regulating. This creates a clear conflict.

Arbitrator's holding: The grievance is denied.

Arbitrator's reasoning: (1) The policy specifically prohibits outside employment related to duties as a state employee.

(2) Although the concurrent employment duties are not similar, there is no question that the grievants' outside employment is related to their departmental duties.

(3) The union has not demonstrated there are other brand inspectors similarly engaged in outside employment that relates directly to their duties who have not been required to give up the outside employment.

(4) The department's determination that the grievants' outside employment is incompatible with their duties is not overbroad or unreasonable, but rather is consistent with similar rules governing conflicts of interest.

(5) Determination of compatibility is made annually, and the fact that the grievants have held their outside jobs openly and with permission for many years does not preclude the department from revising its prospective enforcement of the policy.

(Binding Grievance Arbitration)

• **Call-Back Pay**

American Federation of State, County and Municipal Employees, Loc. 2229, and ABC Unified School Dist. (5-26-06; 13 pp.). *Representatives:* Pete Schnauffer, for the union; Sharon J. Ormond, Esq. (Atkinson, Andelson, Loya, Ruud & Romo), for the district. *Arbitrator:* Water N. Kaufman.

Issue: Did the district violate the parties' agreement when it did not grant the grievant call-back pay?

Union's position: (1) The parties' agreement allows any employee called back after normal working hours to receive not less than three hours of overtime pay. The agreement also provides that employees on standby for alarm calls will receive a stipend of \$675 for each week of this duty. These provisions are not mutually exclusive.

(2) While on alarm-call standby, the grievant was called to open the district office for the sheriff's department following a shooting. The grievant was called out a second time to secure the building.

(3) The grievant submitted two requests for call-back pay to be granted in addition to the weekly alarm-call stipend.

(4) The grievant received both the stipend and call-back pay for the first call, but received only the alarm-call stipend for the second.

(5) The second call would not have occurred but for the first. Therefore, if the first call warranted call-back pay, then so does the second.

District's position: (1) The first call was required of the grievant and covered by the weekly stipend.

(2) The grievant was given both call-back pay and the stipend for that call only because he had to expend extra effort to unlock the building.

(3) The second call was required and within the normal scope of alarm-call duties. Extra effort was not required; therefore, the second call does not require call-back pay.

Arbitrator's holding: The grievance is denied.

Arbitrator's reasoning: (1) The first call was within the grievant's normal scope of duties.

(2) He received call-back pay only because of the extra effort required in assisting the sheriff's department.

(3) The second call required nothing more than performing the standard alarm-call duty of securing a site. As

such, only the alarm-call stipend is warranted, and the grievance is denied.

(Binding Grievance Arbitration)

• **Past Practice**

Ventura County Community College Dist. and Federation of College Teachers, AFT Loc. 1828. (1-11-07; 7 pp.). *Representatives:* Lawrence Rosenzweig, Esq., for the union; Howard A. Friedman, Esq. (Fagen, Friedman & Fulfroost), for the district. *Arbitrator:* Philip Tamoush, CSMCS Case No. ARB-06-0133.

Issue: Did the district violate the agreement by failing to assign the grievant summer counseling hours?

Union's position: (1) The district has an established past practice of assigning summer hours to counselors who volunteer for such assignments. The assignments are made on an equal basis rather than by selecting certain counselors and not others.

(2) The district does not dispute this practice exists; it arose pursuant to an agreement between the counselors, and the agreement was accepted by the administration.

(3) In contravention of this practice, the district assigned only some counselors to summer sessions, allocating up to 160 hours. The grievants were not assigned any hours.

(4) According to past practice, the district should have assigned the grievants and all other volunteering counselors 96 hours of summer counseling each.

(5) The district's interim dean acted arbitrarily when he assigned counselors

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based on subjective evaluation rather than in accordance with past practice.

District's position: (1) The interim dean who made the assignments was told that he had the authority and discretion to assign summer counselors.

(2) The only limitation on assignments is that contract faculty be given priority over non-contract and other faculty.

(3) There is no formula involved in making counselor assignments, and no violation of the agreement occurred.

Arbitrator's holding: The grievance is sustained.

Arbitrator's reasoning: (1) The district has a responsibility to follow consistent past practice, which can be as binding on the parties as contract language and can amend an existing contract.

(2) The evidence demonstrates that the district had an obligation to negotiate any changes in past practice.

(3) The district did not provide an effective defense. It acted arbitrarily, capriciously, and discriminatorily, and is ordered to pay each grievant not less than 96 hours of summertime compensation, and to follow the practice of assigning hours equally in the future.

(Binding Grievance Arbitration)

- **Family and Medical Leave Act**
- **Pay and Benefits**

Amalgamated Transit Union, Loc. 256, and Sacramento Regional Transit (2-14-07; 15 pp.). *Representatives:* William J. Flynn, Esq. (Neyhart, Anderson, Flynn & Grosbol), for the union; Larry M. Kazanjian, Esq. (Palmer, Kazanjian, Wohl & Perkins),

for the district. *Arbitrator:* Matthew Goldberg, CSMCS Case No. ARB-05-0678.

Issue: Should the district count actual time worked or compensable hours to calculate hours of service eligibility for the Family and Medical Leave Act/California Family Rights Act?

Union's position: (1) The parties' contract states that an employee whose total shift consists of less than eight hours of actual work is paid an eight-hour minimum.

(2) Under the Family and Medical Leave Act eligibility requirements, an employee must have been employed at least 1,250 hours during the prior 12 months.

(3) The time that makes up the eight-hour guarantee, regardless of whether work is actually performed during that time, should be counted towards the 1,250 because it is compensable time under the terms of the parties' contract.

(4) The FMLA's general rule that non-work time, such as lunch breaks or sick leave, is excluded from the regular rate is not absolute. The parties may modify the rule by agreement.

(5) The parties reached an agreement that any work beyond the regular shift is paid as overtime. Because the hours are counted in calculating overtime, they are hours that should be counted towards the FMLA 1,250-hour requirement.

(6) The district's argument that the FMLA counts only "actual hours worked" must fail. The regulation calls for an accurate accounting of actual

hours worked under Fair Labor Standards Act principles. But, FLSA principles establish that the hours counted under the FLSA may be augmented by the parties' agreement.

(7) It is not reasonable to argue that the same hour credited towards FLSA overtime should not be credited as an FMLA hour. The district cannot substitute its own definition of hours for that provided by statute.

District's position: (1) The parties' agreement does not provide that paid time off shall be considered actual hours worked.

(2) The Code of Federal Regulations defines what are considered actual hours worked. Under the CFR, the key factor is whether work is being performed. In this case, no work is performed.

(3) Hours of service under the FMLA must be calculated using the same principles that are used in the FLSA, which states that an employee only gets credit towards the FMLA for hours actually worked.

(4) Case law supports the contention that non-working hours are not counted toward FMLA hours.

(5) In *Mion v. Aftermarket Tool* (1997) 9909 F.Supp. 535, the court interpreted federal regulations to define "hours worked" as time when the employee must be on duty or on the work premises primarily for the employer's benefit.

(6) Under the plain meaning of the statute, applicable regulations, and case law, whether the employer considers non-work hours for pay and overtime

purposes does not convert the time to “actual hours worked” for purposes of determining FMLA eligibility.

Arbitrator’s holding: The grievance is sustained.

Arbitrator’s reasoning: (1) The FLSA includes in its definition of regular rate all remuneration for employment; thus, the statute adopts an expansive, not a restrictive, view of what constitutes hours of service.

(2) The district’s argument that non-work hours cannot be included in the calculation is unpersuasive because the regular rate determination is not limited to periods during which the employee performs physical or other labor.

(3) The exclusion of hours under the statute pertains only to infrequent or sporadic absences, not to regular absences such as lunch periods or regularly scheduled days of rest. Therefore, when time off is not occasional but is an ongoing and regular part of what employees are compensated for, wages paid for that time are included in the regular rate under the FLSA and in determining FMLA eligibility.

(4) According to *Ricco v. Potter* (2004) 377 F.3d 599, if hours are used to determine computation of overtime, they must also be included as credit towards hours of service under the FMLA.

(5) The parties’ agreement provides compensation for hours spent in certain activities that would not be regarded as working time under the act if no compensation were provided. Such an agreement may or may not convert them into hours worked. This deter-

mination must take the parties’ agreement into consideration.

(6) The parties have agreed to augment compensation to provide a minimum of eight hours’ wages. The parties also have agreed that the eight hours will count toward FLSA overtime, and therefore have converted the compensation into payment for “hours worked.”

(7) Federal regulations support the interpretation that the district’s agreement to consider such hours in its overtime calculations leads to the conclusion that it agreed to count such hours as “hours of service.”

(8) The minimum hours-of-service requirement is construed in a manner consistent with the legal principles established for determining hours of work for payment of overtime compensation. Accordingly, hours of service are measured in the same way as the method used to establish hours of work for purposes of calculating overtime.

(9) Under the regulations, the parties’ agreement will be respected if reasonable. Although the time between shifts is not spent performing operator duties, the district imposes certain restrictions on the employees during that time. Because of these limits, the agreement of the parties to consider such time as compensable or within the regular rate is reasonable.

(10) The district should count all compensable hours pursuant to the eight-hour guarantee provided for in the parties’ agreement when determining hours-of-service eligibility for FMLA leave.

(Appeal Procedure)

Public Employment Relations Board

Orders & Decisions

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

Dills Act Cases

Administrative Appeals Rulings

Request to disqualify ALJ denied: DPA.

(*AFSCME Loc. 2620 v. Department of Personnel Administration*, No. Ad-359-S, 2-22-07; 2 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: The request to disqualify an ALJ from presiding over an administrative hearing was denied because it would not effectuate the purpose of the Dills Act.

Case summary: The department requested special permission to appeal the refusal of an administrative law judge to disqualify himself from presiding over an administrative hearing. The request was made pursuant to PERB Reg. 32155(d), which permits the board to grant immediate relief through an interlocutory appeal of a board agent's refusal to disqualify himself whenever the board determines that permitting such an immediate appeal would effectuate the purposes of the Dills Act.

The board found that disqualification of the ALJ would not effectuate the act, and denied the request. The board noted that the department is free to reassert its arguments concerning the ALJ's disqualification should it file exceptions to the ALJ's proposed decision.

EERA Cases

Unfair Practice Rulings

Agreement reached, exceptions and charge withdrawn: Riverdale JUSD.

(*Riverdale Teachers Assn., CTA/NEA v. Riverdale Joint Unified School Dist.*, No. 1878, 1-10-07; 2 pp. dec. By Member Shek, with Chairperson Duncan and Member McKeag.)

Holding: The board granted the district's request to withdraw its exceptions and the association's request to withdraw its unfair practice charge with prejudice.

Case summary: The district filed an exception to an ALJ's proposed decision. The underlying charge alleged the district violated EERA when it unilaterally implemented a policy regarding extra-duty coaching assignments that required high school physical education teachers to coach two sports.

The parties reached an agreement on the matter and asked to withdraw the charge. The board found it appropriate to do so, and therefore granted the withdrawal of the district's exceptions and the association's unfair practice charge with prejudice.

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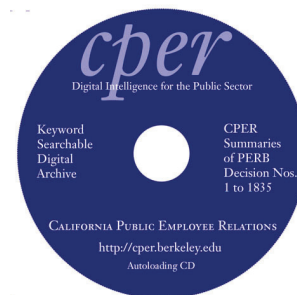
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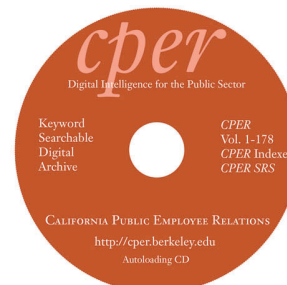
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Failure to reelect teacher but not placement on administrative leave was unlawful retaliation: Oakland USD.

(*Oakland Education Assn. v. Oakland Unified School Dist.*, No. 1880, 1-11-07; 48 pp. + 77 pp. dec. By Chairperson Duncan, with Member McKeag; Member Shek concurring in part and dissenting in part.)

Holding: The district's decision not to reelect a teacher was motivated by his protected activities; the district would not have made that choice but for his protected conduct. However, the district placed the teacher on administrative leave based on reasonable concerns about school safety.

Case summary: Ronald Robinson, a teacher at McClymonds High School in Oakland, was issued a notice of non-reelection for the 2002-03 school year and placed on paid administrative leave in May 2002 for the remainder of the term. The association alleged that these decisions were made because of Robinson's protected activities in violation of EERA Sec. 3543.5(a).

An administrative law judge concluded that the district discriminated against the teacher when it decided not to reelect him and by placing him on administrative leave. On appeal, the board reviewed the ALJ's proposed decision and drew contrary conclusions. Applying the three-part *Novato* test, the board first reviewed the record for evidence that Robinson had engaged in protected activities. The board found that Robinson's attendance at a community meeting on education convened by Oakland Mayor Jerry Brown focused on student violence and discipline policies at McClymonds, and thus was protected activity. The ALJ properly considered Robinson's involvement in this meeting as "background information" relevant to the "pattern of antagonism" that developed between Robinson and the principal at McClymonds.

Following the community meeting, Robinson sent a memorandum to the principal, complaining about the administration's inadequate discipline policies. Robinson sent a copy of the memo to the association's executive director. While the board cautioned that, without more, copying a union representative on correspondence is not protected conduct, in this case, where the memo directly

addressed safety and violence issues, the memo was protected under EERA.

The board also reviewed a number of instances where Robinson requested union representation. Under *NLRB v. Weingarten* (1975) 420 U.S. 251, an employee is entitled to union representation where there is a reasonable belief that disciplinary action will result. Because Robinson was required to meet with administrators prior to the determination regarding his reelection, and because Robinson reasonably believed that his employment status would be decided at that meeting, his rights were violated when the district denied representation.

Similarly, Robinson was asked to attend a meeting regarding a classroom assignment that the district saw as inappropriate. Because the meeting concerned the district's disapproval of Robinson's teaching methods, he believed it could result in discipline. He requested union representation, and although this request was granted, the principal became angry that Robinson would not meet with her immediately.

The union alleged the district also retaliated against Robinson for his participation on a teacher-based committee that addressed issues such as safety, school violence, and student discipline. The board concluded that Robinson's activity concerning safety conditions of employment was a protected act.

To determine whether the district retaliated against Robinson based on his protected conduct, the board next considered the justifications for the adverse action — the non-reelection decision.

The board inferred an unlawful motive from the record as a whole. It looked at the close temporal proximity between Robinson's protected activity and the principal's non-reelection recommendation, the district's disparate treatment of Robinson in contrast to other classroom teachers, the inconsistent justifications proffered by the administration for its adverse action, and evidence of anti-union animus. Like the ALJ, the board found that the association established a prima facie case of retaliation, demonstrating the specific nexus to show an unlawful motive attributable to the district when it issued the notice of non-reelection.

The burden then shifted to the district to show that Robinson would have been terminated absent the protected activities. While Robinson's teaching methods had been criticized, the district acknowledged that he received adequate evaluations that consistently improved. Citing "glaring inconsistencies" underlying the district's decision to non-re-elect Robinson, the board concluded that the district failed to carry its burden that it would have chosen not to rehire Robinson regardless of his engagement in protected activity. By this conduct, the board concluded that the district violated EERA Secs. 3543.5(a) and (b).

Separate from the termination, the board considered the district's decision to place Robinson on paid administrative leave prior to the end of the school term. Supporting this decision, the district claimed that Robinson had become prone to violent outbursts and that other teachers had expressed their fear of him.

The ALJ found the decision to place Robinson on paid administrative leave was an immediate and direct response to his criticism of the administration's failure to implement the teachers' recommendations on school discipline, a protected activity. However, the board disagreed and found sufficient evidence to demonstrate that Robinson was a safety risk.

Prior to being placed on leave, Robinson authored a memo in which he waged personal attacks against the school principal. While it is true that an employee's criticism of his or her employer is protected when its purpose is to advance working conditions, the memo did not advance legitimate employee interests but rather Robinson's own personal agenda. The memo substantially disrupted and materially interfered with school activities to such an extent that its issuance could no longer be considered a protected activity.

Robinson attempted to convince other school employees to support his criticisms of the administration. Those solicited described Robinson's demeanor as unstable and threatening, causing three faculty members to report safety concerns to the principal. The board disagreed with the ALJ's finding that the principal requested the letters and unilaterally implemented Robinson's administrative leave. In addition,

given the concerns taken to the principal, it was reasonable for the district to conclude Robinson was a threat to himself and others. Because of these concerns, Robinson would have been placed on leave irrespective of protected activities.

The board ordered the district to rescind Robinson's termination and reinstate him with backpay and lost benefits, plus interest.

Member Shek concurred with the majority decision on the issue of involuntary leave, and dissented on the issue of non-reelection. She maintained that the district would have neither reelected the teacher nor rescinded the termination due to Robinson's poor classroom instruction. Shek also concluded that the memo critical of the principal, as well as other activities undertaken by Robinson, were not protected because the teacher took these actions without union assistance. Shek interpreted this as self-representation, which is not protected by EERA.

No rescission of contract where mistake resulted from lack of diligence: SDUSD.

(*California School Employees Assn., Chaps. 759, 724, and 788 v. San Diego Unified School Dist.*, No. 1883, 1-25-07; 9 pp. + 23 pp. ALJ dec. By Member McKeag, with Chairperson Duncan and Member Neuwald.)

Holding: The district acted unlawfully when it failed to implement a two-tier leave accrual system without providing the union notice or an opportunity to negotiate.

Case summary: CSEA represents classified employees in three bargaining units: the operations-support services unit, the paraeducators unit, and the office-technical and business services unit.

The bargaining agreements between the district and these three units provided that part-time employees would accrue sick leave and vacation benefits on a pro-rata basis, or based on hours worked. In November 2002, the district purchased a computer software program to manage human resources functions, including accrual of sick leave and vacation benefits. The software was designed to accommodate a two-tier schedule allowing part-time employees to accrue

benefits based on whether they worked more or less than four hours a day. The district hired a computer consulting firm to modify the software to comply with the current pro-rata accrual system, but was advised that it would be more economical to use the software's original two-tier system.

In a letter to CSEA, the district explained that the new software could be modified to comply with the district's current method of sick- and vacation-leave accrual, but that such a modification was cost prohibitive. Instead, the district wished to modify its current accrual system rather than the software. This change, the district maintained, would benefit employees because their accrual rates would be rounded up.

In May 2003, the district presented the association with MOUs providing for a two-tier accrual schedule, and urged that the agreements be signed by June 1 so they could be presented to the school board at its July meeting. Although the parties signed the MOUs in May, the district did not take them to the board in July as planned.

In these MOUs, the parties acknowledged that use of the new computer software would require modifications to the current MOUs and that the modifications would be effective when the new software was fully operational. The MOUs contained a clause providing that until the new software was "fully operational," the existing contract language would remain in effect.

After the May MOUs were signed, and while the parties were in negotiations for a successor agreement, the district reached a tentative agreement with CSEA covering the office-technical and business services unit. That agreement provided that any unit member whose FTE was greater than .5 would accrue eight hours of leave a month, and those with an FTE of less than .5 would accrue four hours of leave a month. This agreement was taken to, and approved by, the board in June 2003.

Before the May MOUs were presented to the board for approval, but after the OTBS agreement had been approved, the district's budget supervisor determined that the decision to convert to a two-tier system would have a "huge impact" on the district's labor costs, estimated as an additional \$1.2

million in vacation benefits and \$800,000 in sick leave. The district therefore opted to modify the software program to comply with the existing pro-rata schedule. CSEA was not included in any discussion or given notice concerning the decision.

The May MOUs were presented to the school board in November and were approved. The OTBS contract was approved in June.

The software, modified for accrual on a pro-rata basis, became fully operational in 2004. When it was implemented, CSEA filed an unfair practice charge. The OSS unit and the district entered into successor negotiations after CSEA filed its charge, and the district proposed that no language could be agreed to, nor a decision made, regarding sick leave and vacation benefit accrual until PERB reached a decision on the unfair practice charge. The school board approved this agreement.

Subsequent to this action, the district's labor representative took to the board the original OSS and PARA MOUs, despite the fact that the presentation was undertaken 16 months after the MOUs had been signed. The board rejected both MOUs, and the district notified CSEA that it would return to the bargaining table to further discuss the issue. In the interim, the district continued to provide sick leave and vacation benefits on a pro-rata basis.

In its arguments before the ALJ, the district alleged that it had no obligation to provide a two-tier accrual system because the MOU with OTBS contained the default language, and the OSS and PARA agreements provided for a pro-rata basis. Because the school board rejected all three MOUs, the district argued that the pro-rata system was still in effect for each unit. CSEA maintained that the units were entitled to a two-tier system and that the district's refusal to provide such a system was an unlawful unilateral change in policy.

In determining whether a party has made a unilateral change, PERB considers whether the employer implemented a policy change concerning a matter within the scope of representation, whether the change was implemented before the employer notified the union or allowed it to request ne-

gotiations, and whether the change had a generalized application and continued effect.

Sick leave and vacation benefits are within the scope of representation, and there was no dispute that the district implemented the change without giving CSEA notice or an opportunity to bargain. The district defended its actions by claiming it could not take unilateral action on MOUs not approved by the board and that there was no change in policy since the software was not fully implemented. The district further claimed that a two-tier system could not be implemented because the MOUs were not “sunshined,” and because the district mistakenly believed creating a two-tier system would cost less than modifying the software, thus rendering enforcement of a two-tier system unconscionable.

The ALJ found the district did not unlawfully refuse to implement the OSS or PARA units’ MOUs because the board had not approved them for implementation. Even if the district were obligated to honor the MOUs, the ALJ reasoned that implementation of the two-tier system was not required because the MOUs did not specifically refer to such a system. The PARA contract provided for a pro-rata system and the OSS contract reserved its accrual language pending PERB’s decision. Therefore, the ALJ concluded that the two-tier system was not developed and did not become fully operational; instead, a pro-rata system was implemented and in operation. Accordingly, even if the MOU were honored, the default language would be in effect, allowing the district to use its pro-rata system of accrual.

The ALJ reached a different conclusion regarding the district’s agreement with OTBS. Although OTBS signed the original MOU in May 2003, it reached an agreement that had terms contradictory to those in the May MOU. The subsequently reached agreement provided for a two-tier accrual system and made no reference to the May MOU.

The ALJ relied on *Morgan Hill USD* (1999) No. 1362, 140 CPER 58, which implies that a final collective bargaining agreement takes precedence over prior tentative agreements. Therefore, she concluded the agreement reached in June 2003 superseded the May MOU and that the district’s continued accrual on a pro-rata basis unilaterally changed

its terms. Further, the policy change was of a generalized application and continued effect because it affected all part-time unit employees. Consequently, the ALJ found that the district was in violation of EERA Secs. 3543.5(a), (b), and (c).

Addressing the district’s argument that the accrual provisions could not be implemented because they were not subject to public disclosure, the ALJ instructed that when the actual cost of a proposal is not known in advance, cost analysis is not necessary and compliance with sunshine laws is satisfied by notifying the public that the issue is to be negotiated. Therefore, this factor did not bar implementation of the two-tier system.

The ALJ also rejected the district’s argument that the contract language was unconscionable and void because the district was mistaken in its assumption of labor costs.

On appeal, the board upheld the ALJ’s decision but further discussed unilateral mistake of fact.

In this case, the district was unaware of the cost of a two-tier system and made a mistake of fact when it assumed the costs would be negligible. In *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, the California Supreme Court determined that rescission based on unilateral mistake of fact may be appropriate where the defendant made a material mistake regarding a basic assumption upon which the defendant made the contract, the mistake was not caused by the defendant’s neglect of a legal duty, and the effect of the mistake was such that enforcement of the contract would be unconscionable.

Guided by analysis of the National Labor Relations Board, PERB held that technical rules of contract law do not apply to collective bargaining. Under the traditional rules, a mistake does not include the failure to exercise ordinary diligence. However, in the instance of collective bargaining, such diligence is a significant factor in engaging in productive and meaningful negotiations. The board wrote, “If we permitted rescission based on alleged lack of preparation, we would both open the door to contract challenges based on careless bargaining and undermine the need for adequate preparation.” Accordingly, the board concluded that rescission is appropriate only if the party seeking rescission did not neglect a legal duty or otherwise fail to exercise ordinary

diligence. Because the district's mistake was the product of its own negligence and lack of preparations for negotiations, it failed to exercise ordinary diligence and the contract could not be rescinded on these grounds.

The board ordered the district to implement the two-tier accrual system provided in the OTBS agreement and to credit OTBS unit employees with these benefits retroactive to the effective date of the agreement.

Disagreement with board representation ruling no basis for refusal to bargain: LAUSD.

(*Associated Administrators of Los Angeles v. Los Angeles Unified School Dist.*, No. 1884, 1-30-07; 5 pp. + 7 pp. ALJ dec. By Member Shek, with Chairperson Duncan and Member McKeag.)

Holding: The district violated EERA when it refused to bargain with association regarding employees whom the board had previously determined to be bargaining unit members.

Case summary: This unfair practice charge arose when the district refused to bargain with the association over job classifications previously found by PERB to be covered by EERA and represented by the association.

In *Los Angeles USD* (2004) No. 1665, 169 CPER 77, the board found the district had improperly designated seven classifications as managerial and ordered that they remain in the certificated supervisors' bargaining unit. Subsequent to this ruling, the association requested to meet and negotiate regarding these classifications, but the district refused. In defense of its actions, the district maintained that PERB had erred in placing these positions within the bargaining unit.

The ALJ noted that the charge represented a "technical refusal to bargain," a tactic used by private sector employees to obtain judicial review of labor board unit determination decisions. In *Regents of the University of California* (1989) No. 722-H, 80X CPER 16, PERB held that employing such a tactic is not an acceptable means for challenging the configuration of a bargaining unit. The ALJ therefore refused to re-address the disagreement regarding the disputed employees' managerial status.

The district admitted its refusal to bargain. Accordingly, the ALJ found it violated EERA by refusing to negotiate in good faith, by denying the association its statutory right to serve as the exclusive representative of unit members, and by interfering with employees' representational rights.

The board adopted the decision of the ALJ as the decision of the board itself. It reiterated that PERB decisional law does not permit an employer to refuse to recognize an exclusive bargaining representative based on the employer's unilateral determination that the unit is inappropriate. In the absence of newly discovered or previously unavailable evidence or special circumstances, relitigation of PERB's unit determination is not warranted.

PERB will not interfere with internal union affairs absent adverse impact on employment: Kern High Faculty Assn., CTA/NEA.

(*Maaskant v. Kern High Faculty Assn., CTA/NEA*, No. 1885, 2-14-07; 2 pp. + 7 pp. R.A. dec. By Member McKeag, with Chairperson Duncan and Member Shek.)

Holding: The charge alleging that the charging party was denied the opportunity to serve as a member of the association's representative council is an internal union affair into which PERB will not interfere unless there is an impact on the employer-employee relationship. Because no impact was shown, the charge was dismissed.

Case summary: The charging party alleged that the union violated EERA by not allowing him to serve on its representative council.

The charging party volunteered for the position, but the union told him that he was ineligible because he was an agency fee payer.

This action, the charging party alleged, breached the union's duty of fair representation and discriminated against him based on his status as an agency fee payer. He additionally alleged violation of his First Amendment right to freedom of association.

Although PERB has decided that an employee has a protected right to form, join, and participate in the activities

of an employee organization, it also has held that this protection does not apply to the internal relationship between a union and its members. In *United Teachers of Los Angeles (Seliga)* (1998) No. 1289, 133 CPER 66, the board stated that “matters concerning internal union affairs are generally immune from review, unless they have a substantial impact on the relationships of unit members to their employers so as to give rise to a duty of fair representation, or involve retaliations for protected activities.”

In that case, the board held that it did not have jurisdiction to hear a claim concerning a union decision to prohibit the charging party from participating in a chapter chair election. The board stated the union’s decision concerned an internal union matter that had no effect on the employee–employer relationship. The same reasoning applied here, and the R.A. found that PERB had no authority to decide the case.

Similarly, in *CSEA, Chap. 36 (Peterson)* (2004) No. 1733, 173 CPER 88, the board held that it was not unlawful discrimination for a union to deny a member the right to run for union office because this decision did not impact his employee–employer relationship. Here, the R.A. found that the charging party presented no evidence that the union’s action prohibited him from engaging in dialogue related to his working conditions. Nor did the union’s action affect his relationship with the district.

The charging party’s assertion that the union violated his First Amendment right to freedom of association also was rejected because PERB has no authority to hear constitutional claims.

Accordingly, the R.A. dismissed the charge. The board upheld the R.A.’s decision as the decision of the board itself, and dismissed the charge.

Representation Rulings

Board agent’s proposed decision vacated: East Whittier Administrators and Supervisors Association.

(East Whittier City Elem. School Dist. v. East Whittier Administrators and Supervisors Assn., No. 1887, 2-27-07; 2

pp. dec. By Member Neuwald, with Chairperson Duncan and Member McKeag.)

Holding: Because it was in the best interest of the parties and consistent with the purpose of EERA, the board granted the parties’ request to vacate a proposed board agent decision.

Case summary: This case came before the board on exceptions filed by the district to a B.A.’s proposed decision in which the association’s request for recognition in the classified supervisory unit and certified supervisory unit was granted.

Subsequently, the association withdrew its request for recognition as exclusive bargaining representative for both units, and the district withdrew its exceptions to the B.A.’s proposed decision. Consistent with this agreement, the parties requested that the board vacate the proposed decision.

The board found that withdrawal was in the best interest of the parties and consistent with the purpose of EERA. Accordingly, the board granted the parties’ request and vacated the B.A.’s proposed decision.

Judicial Review Rulings

New EERA definition of ‘confidential employee’ does not require judicial review: CSEA.

(Burlingame Elem. School Dist. v. CSEA, Order No. JR-24, 2-14-07; 5 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: Because the district did not present a unique issue of special importance, the board denied its request for judicial review.

Case summary: The district requested reconsideration and judicial review of the board’s decision in *Burlingame Elem. School Dist.* (2006) No. 1847, 179 CPER 86. In *Burlingame*, the board rejected the district’s petition to remove the benefits/payroll specialist position from the CSEA bargaining unit as a confidential employee under EERA Sec. 3540.1(c). The board ruled that position did not meet the definition of “confidential” because the incumbent did not

have regular access to, or possession of, information concerning employer-employee relations.

Requests for reconsideration are permitted under PERB Reg. 32410(a), where the decision of the board itself contains prejudicial errors of fact, or the party has newly discovered evidence that was not previously available and could not have been discovered with the exercise of reasonable diligence. Here, the board concluded the district did not satisfy this standard; it merely reasserted the arguments previously rejected by the board.

Under EERA Sec. 3542(a), requests for judicial review are limited to situations the board determines are of special importance. A case has special importance if there is a novel issue presented, which primarily involves construction of a statutory provision unique to EERA, and the issue is likely to arise frequently.

The district claimed that it met this standard because the legislature changed the definition of confidential employee under Sec. 3540.1(c), and judicial interpretation of the new definition has not occurred.

The previous language defined a confidential employee as one who possesses or has access to employer/employee relations. The revised language defines as confidential any employee required to develop management positions with respect to employer/employee relations, or whose duties require access to confidential information used to develop managerial positions.

The district argued that this change demonstrated the legislature's intent that an employee may be confidential even if the position only requires access to confidential information and not the actual performance of confidential duties, as was required by PERB in the underlying decision. Because this change had not yet been interpreted, the district argued it presented a unique issue of special importance.

The board disagreed, noting that the new definition did not include a statement that an employee must perform confidential duties to be considered a confidential employee. Additionally, in *Burlingame*, the board agent did discuss the new definition, and found that HEERA contains a virtually identical definition of confidential employee. Under

HEERA, confidential employee status requires more than access to confidential information. Because the virtually identical HEERA provision has been judicially interpreted, the district did not demonstrate an issue of special importance warranting judicial review. Nor did it demonstrate that the statutory language at issue is unique to EERA.

The district's requests for reconsideration and judicial review were denied.

PERB modified remedial order to avoid bankrupting school district: King City Joint Union High School Dist.

(*King City High School Teachers Assn., CTA/NEA v. King City Joint Union High School Dist.*, No. 1777a, 2-16-07; 6 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: Because the parties later discovered that the cost of complying with the board's order could bankrupt the school district, and because the parties reached a fair remedy to address the situation, the board granted the modification request.

Case summary: The parties jointly requested reconsideration of the board's decision in *King City Union High School Dist.* (2005) No. 1777, 175 CPER 75. In that case, the board found that the district violated EERA when it improperly calculated a negotiated salary formula. The board ordered the district to make affected employees whole for lost wages plus interest. The district later discovered that compliance with this order would cost \$5.2 million, the payment of which would likely bankrupt the school district and subject it to state receivership. Based on this projection, the parties requested that the board modify its order and allow the district to repay its debt over an extended period of time.

PERB Reg. 32410(a) provides that a party may, because of extraordinary circumstance, file a request to reconsider a board decision within 20 days. In the present case, the parties waited almost one year before filing their request. However, the board has discretion to excuse untimely filings for good cause. The board found that good

cause existed in this instance because the expense of compliance was unforeseeable.

The board strictly applied PERB Reg. 32410, which sets forth limited grounds for reconsideration. Reconsideration is allowed if new evidence is discovered that was not available at the time of the hearing or could not have been found with the exercise of reasonable diligence.

In this case, if the parties were to comply with the board's order, the district would likely become bankrupt. This information was not available at the time of the hearing, nor could it have been discovered with reasonable diligence because the district's financial condition had worsened considerably since that time.

The board determined that the parties' compromise and proposed remedy would adequately address the affected employees and was necessary under the extraordinary circumstances in this case. Accordingly, the board granted the parties' joint request and modified its previous order.

Duty of Fair Representation Rulings

When rational basis and honest judgment exist, no failure of representation found: SEIU.

(*Jones v. SEIU, Loc. 99*, No. 1882, 1-25-07; 2 pp. + 9 pp. ALJ dec. By Member McKeag, with Chairperson Duncan and Member Neuwald.)

Holding: The charging party failed to present evidence that SEIU acted without rational basis or honest judgment, and the duty of fair representation charge was dismissed.

Case summary: The charging party filed an unfair practice charge against SEIU, Loc. 99, alleging that it breached its duty of fair representation by failing to investigate his grievance against the Los Angeles Community College District, failing to attend meetings regarding the grievance, relying on the district's findings in its decision not to pursue the grievance, and failing to respond to requests for new union representation.

The underlying complaint concerned the employee's allegation that the district failed to protect him from hostile acts. He requested monetary damages as compensation for

the fear, anxiety, and distress he suffered as a result. Before filing the grievance, the charging party contacted SEIU and was told that his allegations did not provide grounds for a grievance; the charging party nevertheless initiated the grievance process.

The employee requested that an SEIU representative be present with him at a meeting with the district. The representative did not return his phone calls, and the charging party attended the meeting without union representation. Following the meeting, the district began to investigate the charging party's allegations but denied his request for monetary damages.

The charging party informed SEIU that he wished to proceed to a step-four grievance meeting and provided SEIU with the necessary information. SEIU opted to wait until the district's investigation was complete before deciding whether to proceed to arbitration. However, it advised the employee to file his grievance so he would not miss the 10-day deadline.

Following these actions, the employee requested new union representation. SEIU declined since the grievance was being held in abeyance. The district subsequently determined to hold the request for arbitration in abeyance because the charging party did not verify that SEIU agreed with the step-four filing. The employee then brought this charge against the union.

To find a breach of the duty of fair representation, a charging party must show that the exclusive representative's conduct was arbitrary, discriminatory, or in bad faith, and, at a minimum, must demonstrate how the complained-of action or inaction was without rational basis or devoid of honest judgment. Mere negligence or bad judgment is not enough unless the employee can demonstrate that the individual interest at stake is strong and the union's failure to act completely extinguishes the employee's right to pursue his claim.

While there was some evidence of a negligent failure to communicate, SEIU's actions did not extinguish the charging party's right to pursue a claim. Moreover, SEIU's decision to hold the grievance in abeyance was not without ratio-

nal basis. Nor was it devoid of honest judgment since there were two investigations underway. It was reasonable for SEIU not to conduct its own investigation because the charging party already had provided the union with the necessary facts and there was no evidence that these facts were insufficient. Further, the two ongoing investigations might provide SEIU with the same information as its own investigation.

Accordingly, the ALJ dismissed the charge. The board agreed and upheld the decision of the ALJ as the decision of the board itself.

Charge dismissed where union's actions were not arbitrary, discriminatory, or in bad faith: United Teachers of Los Angeles.

(*Okereke v. United Teachers of Los Angeles*, No. 1888, 2-27-07; 2 pp. + 13 pp. R.A. dec. By Member Neuwald, with Chairperson Duncan and Member McKeag.)

Holding: Because the union's actions were not arbitrary, discriminatory, or in bad faith, it did not breach its duty of fair representation and the charge was dismissed.

Case summary: The charging party, a substitute teacher represented by United Teachers of Los Angeles, alleged that the union violated EERA by failing to meet its duty of fair representation.

The charging party was issued a written reprimand for momentarily leaving his classroom while his students were watching a movie. When he returned, he was chastised in front of the class by the teacher's aide. Following the incident, the principal and two assistant principals came to the classroom, an act the charging party classified as racially motivated. He alleged that the administrators aligned themselves with the teacher's aide because she is white and he is black.

The day the reprimand was issued, the charging party contacted the union. A union representative told the charging party to fax the union a statement of facts, and that he would contact him at a later date. The representative did not, however, recommend to the charging party that he file a grievance, nor did he ever contact the charging party again.

Subsequently, the charging party met with the middle school principal, who declined to rescind the reprimand. In his written decision, the principal referenced a step-one conference; however, no step-one conference had been held. When this was discovered, the charging party was told that the reprimand would be removed from his file.

Later in the school year, the charging party received another written reprimand that resulted in termination. The charging party again contacted the union. The representative he spoke with twice attempted to have the reprimand removed and was told that the district had taken it from the file; she later discovered that the district had not done so. The union representative relayed to the charging party the district's stance that, regardless of whether the reprimand remained in his file, he would not be rehired as a substitute teacher. Further, because no grievance had been filed, the charging party had no "legal leverage" to have the reprimand removed. The charging party then attempted to contact another union representative, but the union took no additional action.

In order to state a prima facie violation of the duty to provide fair representation, the charging party must demonstrate that the complained of conduct was arbitrary, discriminatory, or in bad faith.

The charging party's summary of facts, presented to the union immediately following the reprimand, alleged racial motivation, made a complaint against the teacher's aide, and stated that the incident should be thoroughly investigated. Claims of discrimination and claims against a coworker's conduct are not grievable. As such, the union's decision not to file a grievance was rational. In addition, even if the action did rise to the level of a violation, the charging party filed his complaint after six months had passed, and PERB is prohibited from issuing a complaint regarding actions transpiring more than six months prior to the claim being filed.

Further, the union did attempt to have the reprimand removed, and only ceased to do so when it became clear that the district would not remove the report. This does not

amount to arbitrary or discriminatory action, nor does it demonstrate bad faith.

As such, the charging party failed to establish a prima facie case and the R.A. dismissed the charge.

On appeal, the charging party presented new allegations that were known to him when he first filed his charge. New allegations cannot be presented on appeal without good cause, which the charging party failed to show. The board therefore upheld the R.A.'s decision as the decision of the board itself and dismissed the charge.

HEERA Cases

Unfair Practice Rulings

Bargaining unit placement of new position remanded for additional evidence: CSU.

(*California State University v. Academic Professionals of California and California State Employees Assn.*, No. 1881-H, 1-23-07; 23 pp. dec. By Member Neuwald, with Chairperson Duncan; Member Shek dissenting.)

Holding: Proper bargaining unit placement of a new classification requires additional evidence relevant to the criteria set forth in Sec. 3579 to determine appropriate units under HEERA.

Case summary: In February 2004, CSU filed a unit modification petition seeking to create a new library services specialist classification. CSU also sought to eliminate the classifications of library assistants I, II, III, and IV from unit 7, the clerical and administrative support unit; and the lead library assistance II, III, and IV from unit 4, the academic support unit. In *Unit Determination for Employees of the California State University and Colleges* (1981) No. 173-H, 51 CPER 84, PERB placed the LLAs in unit 4; LAs were placed in unit 7 by stipulation. California State University Employees Union is the exclusive representative of unit 7 employees, while Academic Professionals of California represent employees of unit 4. Both unions argue that the new LSS position belongs in their unit.

An administrative law judge determined that the classification belonged in unit 4. He concluded that PERB's 1981 decision that placed the lead library assistants in unit 4 was applicable to the new LSS employees, reasoning that the new employees would be performing work similar to that performed by the LLAs of unit 4.

The ALJ then applied the rebuttable presumption test set forth in *State of California (Dept. of Personnel Administration)* (1990) No. 794-S, 84X CPER 15, which requires a party petitioning for unit modification to show that the proposed modification is more appropriate than the status quo. He concluded that the petitioning parties, CSU and CSUEU, had not met their burden. The LSS classification did not share a community of interest with the administrative employees in unit 7. Further, the ALJ disagreed with CSU's argument that placing the LSS classification in unit 7 would impact a minimal number of employees because there were only 23 LLA employees in unit 4 and 502 employees in unit 7. It was more appropriate, the ALJ reasoned, to leave 23 employees in unit 4, which PERB determined to be appropriate, than to leave 502 employees in a unit that may never have been suitable.

On appeal, CSUEU argued that the ALJ mistakenly determined that CSU failed to meet its burden of proof. CSUEU also asserted that the ALJ misapplied HEERA Sec. 3579, which sets forth the factors to consider when determining the appropriateness of unit placement. CSUEU also contended that the ALJ contradicted the holding in *Department of Personnel Administration* and violated PERB Reg. 32781 by ignoring the established procedures for employees to choose their exclusive representative.

APC argued that the ALJ's holding was correct. It maintained that CSUEU failed to meet its burden, that the decision should not focus on the units' bargaining histories, that the ALJ did not abuse his discretion by placing the LSS classification in unit 4 without requiring proof of majority support, and that *Department of Personnel Administration* was distinguishable because that case involved a pre-existing classification, not a new one.

On appeal, the board instructed that the ALJ had misapplied the rebuttable presumption test because the test is used when parties seek to move an existing classification from one bargaining unit to another. Here, the issue was the appropriate placement of a new classification and thus there was no presumption to rebut. Instead, the board looked to HEERA Sec. 3579, which delineates the factors to be used in forming appropriate bargaining units. Because the parties focused on the alignment of the new classification to the former positions, the board found sparse evidence set forth in Sec. 3579. Accordingly, the board directed that the record be reopened to allow the parties to introduce additional evidence.

The board also noted that the ALJ's proposed decision would have moved 502 employees to a unit comprised of 2,000 employees, thus increasing the size of the unit by 25 percent. In *State of California (Dept. of Personnel Administration)* (1989) No. 776-S, 83 CPER 56, the regional director ordered proof of majority support where the proposed unit modification would have increased the unit by 22 percent. She relied on PERB Reg. 32781(f), which permits PERB to require a petition to modify a unit to include proof of majority support.

In the present case, the board commented, where the unit modification envisioned by the ALJ would have increased the unit by 25 percent, the ALJ should have required proof of majority support from the appropriate unit.

In dissent, Member Shek wrote that there was sufficient evidence to support a decision on the merits, that the petitioners did meet their burden of production, and that there was sufficient evidence to determine whether the ALJ properly denied the joint petition. Therefore, the case should not be remanded to the ALJ for a further hearing. Shek further asserted that the ALJ's decision neither placed the new LSS position in unit 4 nor moved 502 employees to a unit comprised of 2,000 employees. Instead, the ALJ merely concluded that the LSS classification belonged in unit 4. Even if this conclusion were construed as an order, the board should not treat it as one because, absent a unit modification peti-

tion, it would be premature for the board to address placement of the classification.

PERB rejects request to vacate prior decision: UTPE.

(*Davis et al. v. UTPE, CWA Loc. 9119*, No. 1817a-H, 1-24-07; 7 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

Holding: Because the motion to vacate was premised solely on a settlement agreement between the parties, the motion was denied. The motion to dismiss as moot was granted.

Case summary: The parties requested that a previous board decision be vacated because they had reached a settlement agreement on the issue in dispute.

The unfair practice charge arose when the charging parties alleged UTPE violated HEERA by unlawfully collecting agency fees prior to providing a *Hudson* notice, by unlawfully benefiting from an interest-free loan between the collection and refund of the challenged fees, by issuing a defective *Hudson* notice, and by forcing speech in violation of the First Amendment. The board found in favor of the employees on all charges except for the allegation regarding defective notice. The board agent issued a partial dismissal of this allegation and the charging parties appealed. The finding was affirmed on appeal, and reconsideration was requested. After the board's decision but prior to the board's response to the request for reconsideration, the parties reached a settlement agreement. This agreement provided that the parties would file a joint motion with PERB to vacate its decision, as well as request that the pending motion for reconsideration be dismissed as moot.

The board rejected the parties' reliance on *ABC USD* (1991) No. 831b, 84X CPER 13, as authority for their motion to vacate. In that case, the issue concerned PERB's authority to vacate a *proposed* decision. Here, the parties wished to vacate a final decision. In neither of the two other instances where PERB vacated its decisions did it do so based solely on a settlement agreement entered into by the parties after the board had issued its decision. Thus, vacating a deci-

sion of the board has occurred only in unique circumstances not presented in this case.

Although PERB policy favors voluntary settlement of disputes, the board found that settlement at the earliest level possible will be encouraged by denying motions to vacate rendered decisions, except under unique or extraordinary circumstances, even when the parties to a settlement agree otherwise.

The parties also requested that the board dismiss as moot the pending requests for reconsideration. The board understood this to be a request for withdrawal of the motion for reconsideration based primarily on the settlement agreement reached by the parties. The board found withdrawal to be consistent with the purposes of HEERA and in the interests of the parties.

PERB rejects request to vacate prior decision: UTPE.

(*Hawley v. UTPE, CWA Loc. 919*, No. 1818a-H, 1-24-07; 6 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

See *Davis v. UTPE, CWA Loc. 9119*, No. 1817a-H, above, for a complete summary and discussion.

PERB rejects request to vacate prior decision: UTPE.

(*Jimenez-Newby v. UTPE, CWA Loc. 9119*, No. 1819a-H, 1-24-07; 6 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

See *Davis v. UTPE, CWA Loc. 9119*, No. 1817a-H, above, for a complete summary and discussion.

PERB rejects request to vacate prior decision: UTPE.

(*Yaron v. UTPE, CWA Loc. 9119*, No. 1820a-H, 1-24-07; 6 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

See *Davis v. UTPE, CWA Loc. 9119*, No. 1817a-H, above, for a complete summary and discussion.

PERB rejects request to vacate prior decision: UTPE.

(*Ball v. UTPE, CWA Loc. 9119*, No. 1821a-H, 1-24-07; 6 pp. dec. By Chairperson Duncan, with Members Shek and McKeag.)

See *Davis v. UTPE, CWA Loc. 9119*, No. 1817a-H, above, for a complete summary and discussion.

No consistent past practice for use of released time: CSU.

(*California State University Employees Union v. California State University*, No. 1886-H, 2-20-07; 4 pp. + 17 pp. ALJ dec. By Chairperson Duncan, with Members McKeag and Neuwald.)

Holding: The university's grant of released time to attend PERB informal conferences was the result of confusion about university policy and following improper procedures, and only occurred seven times. This did not establish a past practice, and the unilateral change charge was dismissed.

Case summary: The union filed an unfair practice charge against CSU, alleging unilateral repudiation of a policy granting released time for employees to attend PERB proceedings.

The parties' MOU grants released time for participation in union activities, sets forth the procedure for requesting such time, and establishes when released time will be charged to the university or the union. It does not refer to the use of released time to attend PERB informal settlement conferences.

On several occasions, the university allowed released time for employees to attend PERB conferences. The granted time was never charged to the union.

Two university employees requested released time to attend an informal conference regarding contracting out student housing services. The university questioned the right of employees to attend informal conferences, stating there was no such provision in the MOU. The request for university-paid released time was denied. The university instructed that

the time was instead to be charged to the union, an act the union claimed would change a past practice.

To demonstrate a prima facie case of unilateral change, the union must show that a change in policy was taken without notice to the union or an opportunity for the union to bargain. The charging party also must demonstrate that the action is not an isolated incident, but has a generalized effect on terms and conditions of employment and concerns a matter within the scope of representation.

It is undisputed that the university's alleged cessation of released time for PERB proceedings was done without formal notice or an opportunity for the union to bargain. Further, the evidence made clear that if there was a prior practice of allowing uncharged released time for PERB proceedings, that practice was no longer in effect. This, the ALJ found, had a generalized effect and continuing impact on terms and conditions of employment. Released time is also a matter within the scope of representation.

The union claimed that the MOU terms should be construed as authorizing uncharged released time for attendance at informal conferences. The ALJ disagreed, explaining that PERB informal conferences do not involve the continuation of bargaining, and the MOU expressly limits released time to meet and confer sessions.

The union also argued that it never before had been required to charge released time against the hours provided by the MOU. The ALJ agreed that the MOU did conflict with previously granted leave. However, the evidence demonstrated that the university's uncharged released time was an aberration or mistake. Further, the union representative did not follow the proper procedure when he made requests for released time, which may have led to the grant of uncharged time. These facts did not demonstrate an unequivocal practice by the parties.

Nor did the evidence demonstrate a clearly enunciated policy, but instead demonstrated confusion of proper university procedures. This led to seven instances of improperly granted released time, which is insufficient to establish clear recognition of a policy.

The ALJ advised that a mistaken or unintentional beneficial practice does not prevent the employer from subsequently reverting to strict enforcement of the terms of the collective bargaining agreement. Accordingly, the ALJ found that the union failed to demonstrate a binding past practice, and dismissed the charge. The board agreed and upheld the decision of the ALJ as the decision of the board itself, subject to further discussion.

In its exceptions to the ALJ's decision, the union argued that informal conferences should be treated as meet and confer sessions. The union relied on *Willits USD* (1991) No. 912, 44 CPER 92, where the board found that the district violated EERA when it failed to grant paid released time for a union representative to attend a PERB settlement conference concerning an unfair practice charge. In that case, the informal conference was in fact converted to a meet and confer session. The settlement conference here had not, and *Willits* did not establish that all PERB informal conferences are meet and confer sessions. Additionally, the collective bargaining agreement in *Willits* did not include provisions for released time.

In dismissing the charge, the board also noted that any dispute between the parties regarding released time would be subject to the MOU's grievance and arbitration process.

Duty of Fair Representation Rulings

No DFR breach where decision to forego arbitration is not arbitrary, discriminatory, or in bad faith: CFA.

(*Wunder v. California Faculty Assn.*, No. 1889-H, 3-1-07; 2 pp. + 29 pp. ALJ dec. By Member Shek, with Chairperson Duncan and Member Neuwald.)

Holding: An association may decline to pursue arbitration unless the decision is arbitrary or discriminatory, or made in bad faith. Because the association made its decision in good faith and with a reasonable basis, the charge was dismissed.

Case summary: The charging party, a professor for California State University, filed a grievance against the university when it assigned her to teach a low-level undergradu-

ate class for which she felt overqualified. She sought assistance from the association, which represented her in the grievance process.

The charging party provided well-documented and thorough evidence to support her claim, but after reviewing the evidence and relevant contract provisions, the association representative did not feel there was a strong case against the university. The level-one grievance was denied, and the case proceeded to level two.

According to the agreement, the university must issue its response to the level-two meeting within 14 days. However, it did not do so. The agreement also provides that grievants may request arbitration if the claim is not settled at level two. This must be done within 42 days of the level-two meeting. The association failed to request arbitration within this period, contending that the university seldom objected when the association filed beyond the deadline, and that the request was nonetheless timely because of the university's failure to respond following the level-two meeting.

When it later filed the request for arbitration, the association explained to the charging party that this action did not necessarily signal an intention to further pursue the claim. The association ultimately decided not to proceed but explained that the charging party could appeal this decision. The charging party did so, and the appeal was denied. The charging party claimed this decision was a breach of the association's duty of fair representation.

To demonstrate such a breach, the charging party must establish that the association's conduct was arbitrary, discriminatory, or in bad faith. At a minimum, the charging party must assert facts sufficient to establish how or in what manner the association's action or inaction was without a rational basis or devoid of honest judgment.

The charging party argued that the association did not make a worthwhile effort to research her claim. Nor did it fully understand the terms of her claim. The ALJ disagreed. The association was fully aware of the issues presented by the charging party's grievance and undertook adequate review of her claim. The ALJ explained that an association does not breach its duty of fair representation by failing to advance every

possible argument or exhaust every avenue of inquiry, absent an arbitrary or discriminatory decision, or one made in bad faith. Here, the decision was none of these, but instead was based on an honest interpretation of the agreement.

The charging party further argued that the association's decision was an attempt to conceal its failure to timely appeal. The ALJ again disagreed, noting that the association had maintained throughout the grievance process its judgment that the claim lacked sufficient merit. Because these assessments occurred prior to the appeal deadline, they could not have been improperly motivated. Further, evidence did not support the claim that the association failed to timely appeal. The university had not consistently enforced the deadline provision, and the association relied in good faith on this prior practice.

The charging party additionally claimed that by placing her prior representatives on the association appeal board, the decision process was prejudiced because of the representatives' previous assertions that the claim lacked merit. The ALJ found otherwise. The standard is whether a rational basis exists for an association's decision. The association reviewed all the evidence in the grievance and found no indication of arbitrary or discriminatory behavior. Nor was there evidence that the prior representatives unduly influenced the decision.

The board stated in *American Federation of State, County and Municipal Employees, Intl. Council 57* (1996) No. 1152-H, 119 CPER 85, that an "association's honest, reasonable determination not to pursue a grievance does not breach the duty of fair representation, regardless of the merits of the grievance." Applying this standard, the ALJ found that the association did not violate its duty of fair representation, and he dismissed the charge. The board upheld the decision of the ALJ as the decision of the board itself.

MMBA Cases

Unfair Practice Rulings

Absent questioning, no right to union representation: County of Santa Clara.

(*Seeley v. County of Santa Clara*, No. 1877-M, 1-10-07; 2 pp. + 7 pp. B.A. dec. By Member Shek, with Chairperson Duncan and Member McKeag.)

Holding: Absent evidence that an investigatory interview was conducted or that the charging party was discriminated against, the charge was dismissed.

Case summary: The charging party alleged that the county violated the MMBA by denying her union representation and by failing to reasonably accommodate her illnesses and injuries.

The grievant was on unpaid medical leave from her employment for two years. She returned to work, subject to accommodations for her condition, between August 2002 and June 2004; she then again went on unpaid medical leave. The county thereafter informed the charging party that it could no longer accommodate her work restrictions and, with her agreement, moved her to another office.

One month later, the charging party alleged she was abused by a coworker and called in sick for several days. The county instructed the employee to report to work and provide medical clearance. When the charging party appeared at the office as requested, she asked that a union representative be present. The county declined her representation request but did not question her.

The county subsequently informed the charging party that her unpaid leave was set to expire and that unless she received medical clearance and returned to work, she would be terminated.

An employee is entitled to union representation at an investigatory meeting the employee reasonably believes may result in disciplinary action. Here, the board agent explained, the charging party did not provide any facts showing an interview was conducted. Without this assertion, a violation cannot be found. Further, the charging party failed to ex-

plain how the county's notice that her two years of administrative leave was expiring and that she needed medical clearance to return to work was a discriminatory act. Therefore, the board agent dismissed the charge.

The board upheld the board agent's decision as that of the board itself, subject to further discussion. On appeal, the charging party set forth new allegations and evidence. Because the employee did not have good cause for so doing, the board refused to consider the new claims.

Withdrawal granted to effectuate purpose of MMBA: City of Lompoc.

(*Teamsters Loc. 381 v. City of Lompoc*, No. 1879-M, 1-11-07; 2 pp. dec. By Member Shek, with Chairperson Duncan and Member Neuwald.)

Holding: Because it would effectuate the purpose of the MMBA, the board granted the request for withdrawal.

Case summary: This charge alleged that the city violated the MMBA by failing to provide certain requested documents unless the union agreed to pay the photocopying costs. After filing its appeal of a board agent's dismissal, the union informed the board that the parties had entered into a settlement agreement in a related unfair practice charge, and that as part of that agreement, the union agreed to withdraw this charge. The board construed the letter as a request to withdraw the unfair practice charge and appeal.

PERB reviews each request for withdrawal to determine whether granting it will effectuate the purposes of the governing statute. In this case, allowing withdrawal would effectuate the purpose of the MMBA to promote communication between public employers and employees. Accordingly, the board granted the union's request.

Activity Reports

ALJ Proposed Decisions, November 1, 2006 – February 28, 2007

Sacramento Regional Office — Final Decision

SEIU Loc. 1000, CSEA v. State of California (Department of Motor Vehicles), Case SA-CE-1502-S. ALJ Fred D’Orazio. (Issued 12-20-06; final 1-17-07; HO-U-912-S.) The state violated its duty to bargain by unilaterally implementing a 24-hour notice requirement for union representatives to visit the worksite even though the change lasted only five or six months. No unilateral change was shown with respect to the 24-hour notice requirement for meetings between stewards and employees where the union failed to demonstrate a change from past practice. And there was no unilateral change where the security badge of a steward on extended union leave was deactivated when the leave began; evidence did not show a generalized effect or continuing impact on access.

San Francisco Regional Office - Final Decisions

City of Sonoma Employees Assn. v. City of Sonoma, Case SF-CE-236-M. ALJ Donn Ginoza. (Issued 11-30-06; final 12-27-06; HO-U-910-M.) The city did not violate its duty to meet and confer when it unilaterally implemented its decision to contract police services (including non-sworn employee services) to the county. Although the decision was negotiable because it met the balancing test and did not involve “core restructuring of operations,” the association’s inaction caused it to waive its right to bargain. The association asked to bargain the effects of the decision from the time the change was proposed in the summer of 2003 to approval of the contract for contracting out in April 2004. The parties bargained effects during successor contract negotiations, during which the city manager maintained the decision to contract out was not negotiable. The association was unaware of the claim of the right to negotiate the decision and never made a demand to do so.

Grayson and McGruder v. Transport Workers Union, Case SF-CE-114-M. ALJ Fred D’Orazio. (Issued 12-27-06; final 1-23-07; HO-U-913-M.) No violation was found where the union suspended the membership of two employees who it

determined had made comments to a reporter that disparaged the union. The comments also were found to advocate a strike where a no-strike clause existed and a strike would subject the union to potential liability. The union has the right to establish reasonable rules and regulations for membership. The union procedures were fair and reasonable on their face and as applied. No disparate treatment was found.

Los Angeles Regional Office — Final Decisions

Grossmont-Cuyamaca Community College District Administrators Assn. v. Grossmont-Cuyamaca Community College Dist., Case LA-CE-4885-E. ALJ Fred D’Orazio. (Issued 11-03-06; final 11-30-06; HO-U-909-E.) The district did not breach its duty to meet and discuss with the association, a non-exclusive representative that had a petition for representation on appeal before PERB. The new vice chancellor had operational concerns regarding the practice of conducting association membership meetings during the workday. He sent an email to the association stating that the meetings must be held after work hours, and he ended the message with, “call if you have any questions.” Rather than meet and discuss, the association filed an unfair practice charge. The district had the duty to meet and discuss changes with the non-exclusive representative; the duty requires only notice and an opportunity to be heard. The email satisfied that duty.

Teamsters Loc. 517 v. Golden Empire Transit Dist., Case LA-CE-289-M. ALJ Thomas J. Allen. (Issued 1-17-07; final 2-14-07; HO-U-914-M.) A violation was found where the complaint alleged unlawful failure to provide information despite notice. The district failed to file an answer to the complaint. Under PERB Reg. 32644, the claim was deemed admitted and the defenses waived.

Sacramento Regional Office — Decisions Not Final

Franz v. Sacramento City Teachers Assn., Case SA-CE-492-E. ALJ Christine A. Bologna. (Issued 12-13-06; exceptions filed 1-12-07.) There was no violation of the duty of fair representation where most of the allegations contained in the complaint were untimely. The timely allegations — that the mediator was not present at a level-two grievance meeting and that the union representative made two misrep-

resentations regarding that meeting — were not supported by the evidence.

SEIU Loc. 535 v. Fresno County Superior Court, Case SA-CE-6-C. ALJ Christine A. Bologna. (Issued 1-3-07; exceptions filed 1-23-07.) There was no breach of the court's duty to bargain over the decision or its effects when the court created a job classification requiring new court reporters and existing court reporters receiving a real-time differential to provide real-time reporting services. The decision to create a new job class of court reporter is not within the scope of bargaining. The union's request to bargain did not put the court on notice regarding a demand to bargain over impact or effects of the non-negotiable decision. There was no unlawful bypassing of the union when new reporters were required to sign conditional offers of employment, as there was no conflict with the negotiated MOU or side letters and the court did not negotiate with the new hires.

Sacramento County Attorneys Assn. et al. v. County of Sacramento, Cases SA-CE-387-M and SA-CE-388-M. ALJ Christine A. Bologna. (Issued 1-22-07; exceptions filed 2-9-07.) No violation occurred where the county rescinded a change prior to implementation, making the dispute moot. In January 2006, the county board of supervisors proposed eligibility changes to retiree health insurance for current and future employees effective January 1, 2007. Within a day, the associations representing attorneys and accountants sent letters to the county requesting to negotiate changes. On March 28, the county board approved the eligibility changes. The associations filed unfair practice charges. On September 12, 2006, the board of supervisors adopted the staff's recommendation to continue current eligibility requirements while the staff continued discussions with labor organizations. The disputed changes did not go into effect.

San Francisco Regional Office — Decisions Not Final

Coalition of University Employees v. Regents of the University of California (Los Angeles), Case SF-CE-753-H. ALJ Ann L. Weinman. (Issued 11-21-06; exceptions filed 1-8-07.) No violation was found where the president/steward union activist was laid off. There was evidence of anti-union animus by supervisors whose actions were not alleged in the

complaint in references to the level of union activity and grievances filed. There was no evidence of animus by the manager who alone made the layoff decision. The decision was based on low seniority and lack of cross-training.

International Federation of Professional and Technical Engineers, Loc. 2, AFL-CIO v. San Francisco Unified School Dist., Case SF-CE- 2282-E. ALJ Donn Ginoza. (Issued 12-22-2006; exceptions filed 1-11-07.) There was no violation of the obligation to bargain when the district refused to participate in binding interest arbitration as provided for in the city charter. The charter provisions for interest arbitration have no force and effect because the Educational Employment Relations Act governs labor relations matters and pre-empts local legislation in conflict with its impasse procedure (mediation followed by factfinding). Interest arbitration conflicts with EERA's impasse procedures.

SEIU Loc. 707 v. County of Sonoma, Case SF-CE-293-M. ALJ Donn Ginoza. (Issued 1-17-07; exceptions due 3-12-07.) A violation occurred when the county failed to meet and confer by unilaterally implementing a new policy regarding placement of employees on involuntary unpaid leave in cases of disputed ability to work under existing disability accommodations. The county failed to establish it had a prior existing policy or practice of placing such employees on unpaid leave status. The county's claim of no generalized effect or continuing impact was rejected because it claimed the prerogative to continue making such determinations.

Los Angeles Regional Office — Decisions Not Final

Jurupa Community Services District Employees Assn. v. Jurupa Community Services Dist., Case LA-CE-224-M. ALJ Ann L. Weinman. (Issued 11-17-06; exceptions filed 11-27-06.) The district unlawfully discharged an employee who filed a grievance over travel time. The employee told his supervisor of the grievance and, later that day, the operations manager discussed the grievance with the employee, stating that he first should go through the "chain of command" and that the district had an "open door policy." The employee responded that the "grievance is filed and I'll let my representatives handle it." The operations manager later accused the employee of insubordination for pursuing the grievance.

A notice of proposed termination issued the following December, and termination became effective in January. The ALJ found the termination's timing a factor and found nexus in the district's reaction to the grievance. The district's seven reasons for termination were not credited.

California Federation of Interpreters/TNG/CWA v. Region 4 Court Interpreter Employment Relations Committee and Superior Court of California, County of Riverside, Case LA-CE-6-I. ALJ Thomas J. Allen. (Issued 12-18-06; exceptions filed 1-12-07.) The committee unlawfully refused the federation's request for relevant information regarding the court's refusal to hire an interpreter without giving specific cause. Trial Court Interpreter Employment and Labor Relations Act, Sec. 71802, gives interpreters certain rights to be offered employment except for "cause." Section 71802(f) provides that disputes concerning a violation of this section shall be submitted to binding arbitration unless the parties agree on other procedures.

California State Employees Assn. v. Trustees of the California State University, Case LA-CE-899-H. ALJ Ann L. Weinman. (Issued 1-22-07; exceptions filed 2-16-07.) CSU unlawfully failed to rehire a technician who had been employed for three years under one-year renewable contracts, one year short of gaining permanent status. Two months after filing a grievance to receive higher pay, he was told by his supervisor that his contract would not be renewed; no reason was given. He filed a termination grievance, and the supervisor stated only that changes must be made in the department. The university then filled the job on an emergency basis with an acquaintance performing the same duties. The unfair practice charge was filed by the discriminatee over CSU's refusal to process his termination grievance. The supervisor posted a new job description that allegedly required new skills, and an emergency employee was chosen. Indicia of improper motive included timing; contradictory reasons given for termination; pretext (a new job description similar to the previous one); and departure from past practice in the makeup of the job selection committee, which included an individual known to be hostile to the discriminatee. Reinstatement was ordered as the violation was failure to hire, not failure to consider for hire.

Torres v. Los Angeles Unified School Dist., Case LA-CE-4936-E. ALJ Thomas J. Allen. (Issued 2-13-07; exceptions due 3-12-07.) There was no violation of the right to union representation when a probationary special education employee was called into a meeting with the assistant principal because she was seen as siding with a student against other staff. The employee's request for representation was denied. The assistant principal credibly testified that she told the employee the meeting was not disciplinary. The meeting did not result in discipline as defined in the MOU, although the assistant principal reassigned the employee, who lost hours and pay as a result. The employee's testimony that the assistant principal threatened to terminate her was not credited.

Report of the Office of the General Counsel

Injunctive Relief Cases

Five requests for injunctive relief were filed between November 1, 2006, and February 28, 2007. Of these, two were denied by the board and three were withdrawn.

City of San Jose v. Operating Engineers Loc. 3, IR No. 504, Case SF-CO-132-M. Issue: Should the board seek an injunction to prevent essential employees from participating in a strike? On June 9, 2006, the city filed a UPC, complaint for permanent injunction, TRO, with exhibits and declarations. The request subsequently was placed in abeyance at the city's request. On November 22, 2006, the city withdrew its request.

Amalgamated Transit Union Loc. 1700 v. Omnitrans, IR No. 510, Case LA-CE-323-M. Issue: Should the board seek an injunction against the employer for interference with union activity? On November 2, 2006, the union filed a UPC; the charge was amended by the union on November 3, 2006. On November 8, 2006, the union filed a request for injunctive relief. On November 20, 2006, the board denied the request.

Sacramento County Aircraft Rescue Firefighters Assn. v. County of Sacramento, IR No. 511, Case SA-CE-453-M. Issue: Should the board seek an injunction against the county to prohibit it from interfering with contract ratification? On

January 5, 2007, the union filed a notice of request for injunctive relief. On January 8, 2007, PERB mediated a settlement and the request was withdrawn.

Menaster v. California Department of Social Services, IR No. 512, Case SF-CE-240-S. Issue: Should PERB seek an injunction against CDSS to cease and desist from initiating and/or continuing action against Menaster? On January 29, 2007, Menaster filed a notice of request for injunctive relief and a second amended charge. On February 6, 2007, the board denied the request.

Fairfield-Suisun Teachers Assn. v. Fairfield-Suisun School Dist., IR No. 513, Case SF-CE-2594-E. Issue: Should PERB seek an injunction against the district from hiring or assigning teachers to Cordelia Hills Elementary and Rolling Hills Elementary Schools, and opening, reopening, or closing any school sites or programs without first negotiating with the union? On January 30, 2007, the union filed a UPC, a request for injunctive relief, and declarations. On January 31, 2007, the request for injunctive relief was withdrawn.

Litigation Activity

Three new cases were opened between November 1, 2006, and February 28, 2007.

California Faculty Assn. v. Public Employment Relations Board, 3d DCA Case No. C054725 (PERB Cases SA-CE-191-H, SA-CE-194-H; No. 1876-H). On January 29, 2007, CFA filed a petition for writ of review pertaining to the board's decision that parking location is outside the scope of representation. On January 31, 2007, the court approved an extension of time to file the administrative record.

Oakland Unified School Dist. v. Public Employment Relations Board, 1st DCA Case No. A116687 (PERB Case SF-CE-2282-E; No. 1880-E). On February 7, 2007, the district filed a petition for administrative writ of mandate pertaining to the board's decision to grant tenure to a probationary certificated employee who had been issued a notice of non-re-election. On February 21, 2007, the court dismissed the action at the district's request.

Magner v. Public Employment Relations Board et al., Sacramento County Superior Court Case No. 07-CS00173

(PERB Case SA-CE-1547-S; No. 1862-S). On February 8, 2007, Magner filed a petition for administrative writ of mandate pertaining to the board's decision not to issue an unfair practice complaint. PERB's response to the petition was submitted March 9, 2007.

Report of the Representation Division

Selected Representation Decisions and Determinations (by Board Agents)

Leadership Public Schools, Case SF-RR-882-E. (Issued 11-13-06; final 12-12-06; HO-R-163-E.) Regional Director Les Chisholm. LPS is a non-profit public benefit corporation that operates five public charter schools, including a high school in Richmond, pursuant to a charter approved by the West Contra Costa Unified School District. The California Federation of Teachers sought recognition in a unit of certificated employees. A jurisdictional dispute arose with the National Labor Relations Board concluding in NLRB Case No. 32-RM-800, that it lacks jurisdiction over LPS, as LPS is a "political subdivision" under the test established in *National Labor Relations Board v. Natural Gas Utility District of Hawkins County, Tennessee* (1971) 402 U.S. 600.

Department chairs at LPS-Richmond effectively recommend the hiring of new teachers, are involved in the evaluation of teachers and the selection of curriculum and textbooks, and help develop and monitor departmental budgets. The counselor-college counselor provides both short-term counseling services to students and performs college counseling duties, and assists with academic and disciplinary interventions. The resource specialists do not teach separate classes but their duties include direct instruction to special education students in the classroom, working with the regular classroom teacher.

Pursuant to *Hawkins and Options For Youth-Victor Valley, Inc.* (2004) PERB Dec. No. 1701, and Gov. Code Sec. 3540.1(k), LPS was found to be a public school employer and subject to PERB jurisdiction. The appropriate unit includes counselor-college counselor and resources specialists; differences in such areas as credentialing, evaluation, duties, and supervision are not sufficient to overcome the

presumption under *Washington Unified School Dist.* (1977) EERB Dec. No. 27. Department chairs are excluded as supervisory employees, based on their authority to effectively recommend hiring and other duties.

Education for Change, Case SF-RR-881-E. (Issued 12-12-06; final 1-10-07; HO-R-165-E.) Regional Director Les Chisholm. EFC operates three Oakland elementary schools under charters approved by the Oakland Unified School District. Two schools are co-located at one site. Teachers are evaluated and supervised by a site administrator, but hiring, firing, and transfer decisions are made by the EFC chief executive officer. Teachers at the three sites work on the same calendar, deliver the same curriculum, receive common training, are compensated on the same schedule, receive the same benefits, have the same or similar background and education requirements, and are evaluated on the same standards. Policies and budgets are set by the EFC board of directors and CEO, although principals and parent/teacher/community groups at each school make some site-based decisions within the boundaries of overall policy. Classroom teachers, prep teachers, and reading coaches are assigned to specific schools. EFC also employs a lead reading coach and full-time substitute teachers who are based in the home office but who work at all school sites.

The California Teachers Association petitioned for a unit including teachers at only one school, East Oakland Community Charter School (EOCC). The association argued that each charter school is a separate public employer within the meaning of EERA Sec. 3540.1(k), and that denial of the requested unit would deny employees their right to be represented. EFC argued that a comprehensive unit of its certificated employees should be established under the statutory presumption favoring a single unit of classroom teachers. The decision held that EFC is a “single employer” as that term is used both in federal and PERB decisions, and is a public school employer. The association failed to rebut the *Peralta* presumption, as the facts show that certificated employees share a community of interest, and there is no separate and distinct community of interest of EOCC employees. EERA guarantees the right of employees to have an opportunity to choose whether to be represented and does

not guarantee that the unit will be configured to maximize that opportunity. The appropriate unit includes all classroom teachers, prep teachers, substitute teachers, reading coaches, and the lead reading coach employed by Education for Change.

Regulation Adoption and Modification

On December 1, 2006, the board issued a notice of proposed rulemaking concerning agency fee regulations (PERB Regs. 32990 through 32997). A public hearing on the proposed changes was held on February 8, 2007. Based on written and oral comments received, the board issued a notice of proposed modifications to interested parties on February 26, 2007, and will further consider the proposed rulemaking at its public meeting on April 12, 2007.

On February 16, 2007, the board issued a notice of proposed rulemaking concerning proof of support, revocation of proof of support, and various technical changes to other regulations. A public hearing on these proposed changes will be held on April 12, 2007.