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## letter from the editor

Gentle *CPER* Reader,

In “An Inconvenient Truth,” Al Gore drives home the all encompassing effects of global warming. He has put the topic front and center in everyone’s mind. So it’s no wonder that it has become a metaphor for the changing climate in all sorts of areas...including public sector labor relations.

For example, in “The Gathering Storm Over Post-Retirement Health Care Benefits,” Renne Sloan Holtzman Sakai attorneys Jeff Sloan, Genevieve Ng, and Merlyn Goeshl write about the climate change in post-retirement benefits. They warn, “The convergence of new reporting standards by the Governmental Accounting Standards Board (GASB), the rising cost of health care, and the huge number of baby boomers nearing retirement age have knocked the public employment sector on its ear.” Coincidence? You decide!

And maybe global climate change can be credited for the “cooling-off period” granted to Governor Schwarzenegger over the bargaining stalemate between the Orange County Transportation Authority and Teamsters Local 952. Union members overwhelmingly had signaled their readiness to walk off their jobs.

In another instance of lowering the heat, L.A. Mayor Villaraigosa saw the temperature drop considerably when his bill to take over the Los Angeles Unified School District, A.B. 1381, was declared unconstitutional in a unanimous Court of Appeal decision.

Elsewhere around the state, issues are going from cold to hot. A year after the state sunshined its bargaining proposals to the California Correctional Peace Officers Association, DPA Director David Gilb admitted, “Without outside help, negotiations remain futile.” Accusations from both sides are flying back and forth faster than the Santa Ana winds. And, another hot spot that refuses to die down is the continuing debate over contracting out of state services. The Supreme Court has rejected an attempt by the Professional Engineers in California Government to limit the effect of Proposition 35. This is certainly not the end of this hot-button issue. PECG will continue to argue that outsourcing is more expensive than using state employees, and already has provided the legislature with its analysis of the case.

To give readers a breath of fresh air, we are providing a peek at a new pocket guide that will be out this fall: *Pocket Guide to Disability Discrimination*, by M. Carol Stevens and Alison Heartfield Moller. It’s an expanded version of our former ADA guide and will include a line-by-line, detailed comparison between the federal ADA and the state FEHA.

So remember the “three R’s,” reduce, reuse, recycle. But hang on to your copies of *CPER*...they will come in handy as we adapt to climate change.

Sincerely,

Stefanie Kalmin  
Managing Editor

P.S. Moving toward a paperless environment? Buy a copy of the *CPER* DVD, covering back issues Nos. 1-178, available at <http://cper.berkeley.edu>.

# Weathering the Gathering Storm Over Post-Retirement Health Care Benefits — Vested or Not

*Jeff Sloan, Genevieve Ng and Merlyn Goeschl*

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The convergence of new reporting standards by the Governmental Accounting Standards Board (GASB), the rising cost of health care, and the huge number of baby boomers nearing retirement age have knocked the public employment sector on its ear. In the past, public employers typically operated on a “pay as you go” model for other post-employment benefits (OPEBs), without reference to any future unfunded liabilities. However, the new GASB rules, which began taking effect in 2005, require public employers to account for and disclose their outstanding future OPEB liabilities, in much the same way they are required to do for pension benefits. Although OPEBs include benefits like post-employment life insurance plans, disability, and long-term care, retiree health care benefits account for the bulk of the unfunded OPEBs facing public employers today.<sup>1</sup>

GASB Statements 43 and 45 now require public agencies to report unfunded actuarial accrued liabilities, which will give ratings agencies like Standard & Poor’s real numbers with which to scrutinize public sector retiree health plans and the staggering liability such plans create. This is an epochal development. The ongoing failure to fund these benefits will adversely impact an agency’s credit rating and may severely restrict a public agency’s ability to sell debt.

The GASB rules already are having a huge impact on government employers — mostly because the new guidelines force employers to recognize the fatal flaws of the “pay as you go” approach. Employers must either reject this approach or face economic ruin for a generation to come.<sup>2</sup>

California’s public agencies are just starting to see the scope of the problem. Governor Schwarzenegger’s office announced that the “state’s unfunded liabilities for retiree health care benefits and their dependents are between \$40 billion and \$70 billion....”<sup>3</sup> Retiree health care costs also have exploded in the City and County of San Francisco. From 2001 to 2006, costs quadrupled from \$23 million

to a whopping \$101 million. The Orange County Board of Supervisors recently estimated a staggering \$1.4 billion in liabilities as a result of its unfunded retiree health care benefits.<sup>4</sup> The Bay Area Rapid Transit District likewise is estimating a potentially crippling burden of \$285 million in unfunded liabilities. In total, public employers in California — including the state government and nearly 6,400 local governments, school districts, and special districts — must begin reckoning with a total liability that could reach over \$200 billion.<sup>5</sup>

The problem is grave. The wildly increasing cost of health care and the ever increasing number of employees and retirees in their health care systems will take an even bigger toll on general fund budgets.<sup>6</sup> A “pay as you go” approach to funding retiree health benefits will be little more than a palliative for public agencies that are already straining to bear the weight of increasing liabilities as revenue growth diminishes.

Some governmental entities in California are taking steps to address the financial imbalances associated with unfunded retiree health benefits. Some of these measures are more definite and committal than others. On September 30, 2006, Governor Schwarzenegger signed into law an amendment to the County Employees Retirement Law of 1937 that enables counties to set up Post-Employment Benefits Trust Accounts to allocate monies for future retiree beneficiaries.<sup>7</sup> On March 1, 2007, the California Public Employees’ Retirement System launched a program permitting its members to opt into a plan to pre-fund their OPEB. Employers may begin placing funds to be held in trust, earning interest, to pre-fund their liabilities. Similarly, BART has reached an agreement with union representatives to set up a trust and create a payment schedule to cover ballooning liabilities.<sup>8</sup>

Santa Clara County has been prepaying a large portion of its future costs for several years and recently modified eligibility requirements to reduce future outlays.<sup>9</sup> San Diego’s Board of Supervisors worked aggressively to reduce the \$30

million it spends annually for retiree health care benefits by eliminating payments of health care premiums for most people who retired after March 2002.<sup>10</sup> The Peralta Community College District worked with union representatives to pass a bond measure to pay for future unfunded liabilities.<sup>11</sup> The Orange County Board of Supervisors also worked with its major unions and agreed to reduce the county’s estimated \$1.4 billion in unfunded retiree health care liabilities

by \$578 million.<sup>12</sup> Sonoma County recently passed a resolution amending the health plan design requiring a greater contribution from retired members.

The experiences of Orange County and Peralta Community College District provide varied examples of how public employers are moving to gain control of the massive unfunded liabilities that the GASB 43 and 45 guidelines bring to light without running afoul of public sector collective bargaining law.

Any solution to the problem will require some level of sacrifice, by employees and managers alike. For public managers, the burden will be especially weighty. As stewards of the public trust, managers and employers are

not only called on to implement tough solutions — and thereby engender the potential enmity of their employees — they also must accept the same sacrifices their employees are likely to vigorously oppose. Ultimately, the greater public good depends on the efforts and personal sacrifices of local agency managerial employees. For those who will bear the brunt of the storm, the following information may suggest the means to weather it.

***The Core Question: To What Extent Can Public Employers Lawfully Modify or Withdraw a Post-Retirement Health Care Benefit?***

Given the constellation of statutory and constitutional protections afforded to public employees and retired members, vesting rules severely limit public agencies’ options.

*Ultimately, the greater good of the public depends on the efforts and personal sacrifices of local agency managerial employees.*

The MMBA and similar statutes covering public employers may prove to be one of the key mechanisms by which retiree health benefits may be modified. In addition, employers under the County Employee Retirement Act of 1937 have stronger options than those under the California Public Employee Retirement Systems. Pension benefits for retired members are, generally, beyond the employer's control, but the 1937 Act may provide relief for their employers. Rules for post-retirement health care benefits for current employees, or future retirees, are in a state of flux, but recent case law suggests that employers may have room to move.

### ***'Vesting' in Public Employment in California: The Legal Terrain***

Among the array of constitutional and statutory obligations is the right of employees "to the payment of salary that has been earned."<sup>13</sup> Benefits like pensions may not be denied to an employee once vested and accrued.<sup>14</sup> Public employers face a number of complex statutory requirements in addition to constitutional obligations. One of the most important statutes is the Meyers-Milias-Brown Act,<sup>15</sup> which requires public agencies and exclusive representatives of recognized employee organizations to meet and confer in good faith regarding matters within the scope of representation. While the MMBA grants a number of rights above and beyond those protected by the state and federal constitutions, these rights are limited and may be superseded by other statutory obligations.<sup>16</sup>

### ***Pension Benefits for Already Retired Employees: Typically Beyond the Employer's Control***

Pension benefits are a form of deferred compensation. Even though the employee's right to receive pension benefits is commonly limited by vesting requirements, an employee's contractual right to *earn pension benefits on the terms offered* is vested on the first day of employment.<sup>17</sup> That

right is not subject to forfeiture.<sup>18</sup> Moreover, the retirement benefits of *already retired* employees are vested and no modifications are allowed.<sup>19</sup>

Case law *permits* modifications to a pension system if changes are necessary to protect the viability of the system.<sup>20</sup> For modifications to be deemed reasonable and therefore sustained, they must "bear some material relation to the theory of a pension system and its successful operation.

Changes in a pension plan that result in disadvantage to employees should be accompanied by comparable new advantages."<sup>21</sup> An increase in an employee's contribution to a pension fund from 2 to 10 percent of salary without comparable, off-setting benefits is unreasonable.<sup>22</sup>

### ***Retirement Health Care Benefits Under the 1937 Act: Shelter for Public Employers***

The County Employee Retirement Law of 1937 provides statutory authority and a mechanism by which many county governments have provided pension benefits for county employees.<sup>23</sup> A county must affirmatively adopt the act for it to be operative. Twenty counties and over

300,000 active employees and retired members in California are governed by the provisions of the act.<sup>24</sup> It grants sole authority for administration of the retirement system in a board of retirement, an entity independent from the county.<sup>25</sup> In addition to traditional pensions, some 1937 Act counties provide supplemental benefits, including cost-of-living adjustments and group life and medical insurance benefits.

California Government Code Sec. 31693 of the 1937 Act specifically permits health care benefits as a supplemental benefit provided along with retirement benefits. Under the 1961 amendments to the 1937 Act, employers were permitted to provide group insurance benefits at their discretion.<sup>26</sup> Section 31691 explicitly states that if a county chooses to provide retiree health benefits, the adoption of an ordinance or resolution doing so "*shall give no vested right to any member or retired member....*"<sup>27</sup>

*Case law allows for modifications to a pension system to the extent the changes are necessary to protect the viability of the system.*



When the legislature enacted the 1961 amendments to the 1937 Act, the Los Angeles County Employees Association sent a letter to then-Governor Edmund G. Brown urging him to sign the bill and stated:

Interpretations of existing law on the subject indicate that group insurance benefits may not presently be provided for retired personnel on a contributory basis. Your signing into law of Assembly Bill 1859 would remove any legal bar to inclusion of retired employees within public jurisdiction benefit programs after retirement in counties desiring to provide such benefits.

...

Further, this bill is so worded that it is not mandatory upon counties concerned, but makes permissive ordinances in this field of employee benefits.<sup>28</sup>

As the excerpt indicates, proponents of the bill believed that without its passage, counties would not have the authority to provide contributory benefits to *non-employees*. This legislative history, the non-vesting language of the statute itself, as well as the absence of any contrary case law or published opinions, suggests that a county board of supervisors has unfettered ability to repeal an ordinance passed pursuant to Sec. 31691. The provision of such benefits to both *current employees* and *retired members* may, therefore, be discontinued at the discretion of the county — provided the county follows proper legal procedures.<sup>29</sup>

The statute is silent as to any notice or timing requirements the county must provide for current employees. However, it specifies that the board's modification or repudiation of the ordinance will not be operative as to retired members until 90 days after the board notifies the retired members in writing.<sup>30</sup> (An exception is provided for in Los Angeles County.)<sup>31</sup>

Additionally, the board also may alter the supplemental benefits at any time by modifying the ordinance.<sup>32</sup> The 1937

Act is silent as to the process by which these benefits may be modified for *current employees*. However, as to *retired members*, a county may change the benefits as long as it provides reasonable advanced notice to the recognized group *representing the retired employees* of the county.<sup>33</sup> The recognized representative group is afforded the opportunity to comment prior to any formal action by the county.<sup>34</sup> As used in Sec. 31693, "proposed changes" means "significant changes affecting health care benefits, including but not limited to, changes in health care carriers, plan design, and premiums."<sup>35</sup>

In sum, unlike pension benefits conferred under the 1937 Act, post-retirement health care benefits neither vest immediately at employment, nor are they payable upon retirement if a county adopts a resolution revoking the benefits.

### ***The Vesting Status of Retirement Health Care Benefits for Active Employees: San Bernardino Provides Hopeful Shelter for Public Employers***

In 1978, the Second Appellate District of the California Court of Appeal held in *California League of City Employee Assn. v. Palos Verde Library Assn.* that "fundamental" public employee benefits, such as (1) longevity-based salary increases, (2) additional vacation awarded after 10 years continuous full-time service, and (3) a sabbatical awarded after six years of continuous service, were protected in the same manner as pension benefits.<sup>36</sup>

However, in 1998, the Fourth Appellate District reached the opposite conclusion. In *San Bernardino Public Employees Assn. v. City of Fontana*,<sup>37</sup> the court concluded that individual employees may not challenge changes to benefits, such as personal leave accrual, longevity pay, or retirement health benefits negotiated under California's collective bargaining statutes.<sup>38</sup> The *San Bernardino* court found gaps in the *Palos Verde* analysis and concluded that once the collective bargaining agreement expired, employees no longer had a le-

*Very few published cases in California directly address a public employer's right to modify health benefits of current employees.*



gitimate expectation that the benefits would continue unless renegotiated as part of a successor agreement.<sup>39</sup>

All in all, the *San Bernardino* court's analysis strikes a more harmonious tone with the purposes and nature of collective bargaining under the MMBA than *Palos Verdes*. As the court pointed out, the primary purpose of the MMBA is to provide a mechanism for collective action to resolve disputes between employees and employers.<sup>40</sup> A *Palos Verdes* approach, i.e. one focused on the expectations and effect on individual employees, provides an avenue for individuals to repudiate collectively bargained contract terms. Such an outcome dilutes the collective power of employee groups. It also would make employers fearful and therefore unwilling to make concessions in negotiations with employee representatives on the subject of post-retirement health care benefits.<sup>41</sup> The practical implications of *Palos Verdes* would, in short, lead to less effective negotiations between employers and unions and less collective action by employees. In contrast, *San Bernardino's* comprehension of the law encourages greater predictability because it relies not on the subjective expectations of every individual who might bring forth a contract claim, but rather on the terms of the collectively bargaining agreement and the statutory authority on which the benefit is based.

For these reasons, *San Bernardino* provides a stronger basis for concluding that post-retirement health benefits are non-vested and revocable at least as to *current employees*. Furthermore, *San Bernardino* also provides support for those employers who explicitly tie post-retirement health care benefits of retired members to the health care benefits of current employees. Thus, employers may be able to negotiate changes and modify benefits with the exclusive representative of current employees.<sup>42</sup>

### ***Health Care Benefits for Current, Not Future, Retirees: San Bernardino Provides Less Shelter for Public Employers***

Whether the *already retired* public employees (and those not explicitly tied to current employees) are subject to the same vesting protections as pension benefits is an unresolved issue.<sup>43</sup> There are very few published cases in California that directly address a public employer's right to modify health benefits of *current retirees*.<sup>44</sup> At least one court has concluded

that retired public employees have a vested interest in promised benefits, *Thorning v. Hollister School Dist.*<sup>45</sup>

In *Thorning*, the court decided in favor of elected school board members who had retired under a policy that granted post-retirement health benefits; the court concluded that the employer could not unilaterally terminate those benefits.<sup>46</sup> The soundness of this holding is subject to some doubt since the *Thorning* court relied on *Palos Verdes* and pre-dated *San Bernardino*. Its analysis, therefore, does not accord with *San Bernardino's* sounder reasoning and suffers from the same discord inherent in the *Palos Verdes* decision.<sup>47</sup>

A recent case suggests that the reach of *Thorning* is indeed limited, and

that employers may be able to modify benefits as long as they are not altogether eliminated. In 2004, in *Sappington v. Orange Unified School Dist.*,<sup>48</sup> retirees sued over a perceived reduction in a "vested retirement benefit"<sup>49</sup> when the school district changed a 20-year practice of funding the entire subscription cost of a retiree's chosen health plan; the change limited coverage to a maximum for the cost of a health maintenance organization. Retirees who wanted the more expensive preferred provider plan were required to pay the difference. The court held that the retirees did not have a vested right in full preferred-provider coverage. While allowing the change in benefits, the Court of Appeal also observed that the trial court "implicitly found that the policy obligated the District to provide at least one fully paid health

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plan, and [that] the District's provisions of free HMO coverage" satisfied that obligation.<sup>50</sup>

### ***The MMBA — A Pathway to Change Retirement Health Benefits***

The meet and confer requirements of the MMBA add complexity to the seemingly straightforward non-vesting language in the group insurance sections of the 1937 Act.<sup>51</sup> What if, for example, a county signs an agreement with a labor union pursuant to the MMBA and thereby promises a benefit that clearly exceeds the scope of the authority granted under Sec. 31691 of the 1937 Act. The terms of an employment contract or collectively bargained agreement cannot supersede the statutory requirements governing certain topics.<sup>52</sup> Moreover, it is questionable that an agency could agree to allow the benefits to be vested. If an agency were to purport to vest these benefits, such an action would be directly contrary to Sec. 31692, which expressly bars vesting of such benefits. Furthermore, MOU terms that confer benefits on retired members (i.e., formerly covered employees) may very well go beyond the statutory authority of the MMBA itself and might therefore be considered unenforceable.<sup>53</sup>

Outside of the 1937 Act, if an employee retires under existing contract language that clearly and unambiguously promises lifetime benefits, the promises create expectations and the contract terms could be enforceable. Employers need to exercise extreme caution when they negotiate with employee representatives about retirement health care benefits. Employers need to take stock of the promises they already have made, and should qualify and limit the promises they make in future contract negotiations.

### ***Weathering the Upcoming Storm — What's a Public Employer To Do?***

Employers must assess what benefits have been promised and to whom before the agency can scale back commitments and minimize its liability. To assess the extent to which already conferred retiree health benefits are vested, and to be equipped to prepare a strategy for containing these costs, employers should:

- Gather *all* memoranda of understanding, salary resolutions, and/or independent employment contracts;
- Gather all documents used and provided to current employees and retired members concerning their post-employment benefits;
- Gather ordinances, resolutions, or other legislative enactments;
- Analyze what the agency has promised and to what extent these promises are modified by rules, regulations, and other written or oral modifications;
- For employers operating under the 1937 Act, take advantage of the recently enacted amendments that enable counties to set up Post-Employment Benefits Trust Accounts and begin setting aside monies for future retiree beneficiaries.

■ For other public employers, especially those who tie their retiree medical benefits to those received by current employees, negotiate changes with the current employees' exclusive representative to modify benefit levels or shift a greater share of the cost to employees and retirees.<sup>54</sup>

■ For all public employers, consider whether the solutions adopted by other agencies fit your circumstances. For example, you might follow the lead of Peralta Community College District or the City of Gainesville, Florida, and issue bonds to fund accrued liabilities.<sup>55</sup>

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### **Conclusion**

GASB Statements 43 and 45 have blown public employers into uncertain waters. Although the non-vesting provision of the County Employee Retirement Act of 1937 gives county employers a firm legal perch from which to proceed, a word of caution is warranted: The non-vesting health insurance provisions of the 1937 Act have not yet been tested in the courts. Nevertheless, absent any other sort of verbal or written promises made by an employer, the language of the act gives employers a strong hand in negotiating with current employee groups.

Given some appellate court discord on the issue of vesting, employers outside the ambit of the 1937 Act face greater uncertainty. The *San Bernardino* decision provides a promising ray of legal hope and some guidance as to how to deal with current employees, unions, and retiree organizations. *San Bernardino* also may have repercussions for retired employees, especially if the active employees who control the retirees' former unions will be able to sell them out for pay raises.<sup>56</sup> In every instance, employers need to take every prudent measure to steer themselves away from financial disaster by negotiating away from unfundable and unsustainable promises and commitments. \*

**SAVE THE DATE**  
**in Southern California!**  
 Thursday, September 20

## **Unfair Practice Charge Processing**

CPER and PERB once again are cosponsoring this in-depth review of charge processing — from filing of unfair practices through board review of proposed decisions.

The program was a tremendous success when presented in Northern California, last fall.

The location, program information, and registration will be posted online this summer  
 at <http://www.perb.ca.gov>

1 “You Dropped a Bomb on Me; Uncovering \$1.5 Trillion in Hidden OPEB Liabilities for State and Local Governments” (Mar. 22, 2007) *Credit Suisse, Americas/United States, Equity Research, Accounting & Tax* (on file with author).

2 GASB 43 required governments whose total annual revenues were in excess of \$100 million to comply by December 15, 2005; governments whose total revenues exceeded \$10 million, but were less than \$100 million, were required to comply by December 15, 2006; and governments with less than \$10 million in total revenues are required to comply by December 15, 2007. GASB 45 required compliance effective December 15, 2006, for governments with annual revenues of \$100 million or more; December 15, 2007, is the compliance date for governments with more than \$10 million but less than \$100 million in annual revenues; governments with less than \$10 million in annual revenues face a deadline of December 15, 2008.

3 Press Release, Office of the Governor, “Gov. Schwarzenegger Establishes Commission Addressing Public Employee Pensions, Retiree Health Care Obligations” (Dec. 28, 2006) (on file with author) [hereinafter “December Press Release”]; see also Elizabeth G. Hill, *Retiree Health Care: A Growing Cost for Government, Legis. Analyst’s Off.*, at 1 (Cal. Feb. 2006).

4 “Health Care’s Perfect Storm,” *San Francisco Chronicle*, Nov. 13, 2006, at B6; See generally Christian Berthelsen, “O.C. Board Trims Benefits for County Government Retirees; With a Yawning Fund Gap Ahead, Supervisors Act Despite Pleas During a Packed Meeting,” *Los Angeles Times*, Sept. 13, 2006, pt. B, at 3, (reporting on the board of supervisors meeting at which the board decided to reduce funding for retiree medical benefits while simultaneously raising wages of current employees).

5 Bob Porterfield, “Retiree Health Care Could be a Backbreaker,” *San Diego Union-Tribune*, Sept. 25, 2006, at A1.

6 California Health Care Foundation, “Benefits in the Balance: The Uncertain Future of Public Retiree Health Care Coverage,” September 26, 2006 at <http://www.chcf.org/press/view.cfm?itemid=125092&printFormat=true> (October 23, 2006).

7 2006 Cal ALS 846; 2006 Cal A.B. 2863; Stats 2006 ch. 846.

8 Lynda Gledhill, “Mounting Benefits Tab Can’t be Ignored; Future in Flux for Retirees’ Costly Health Care,” *San Francisco Chronicle*, Nov. 13, 2004, at A-1 (reporting on San Francisco’s total unfunded liability of \$3 billion, the \$290 million a year that would be needed to begin addressing the problem, and possible ways to manage future costs, such as modifying eligibility requirements and contribution requirements) [hereinafter “Mounting Benefits”]; See also *Piombo v. Board of Retirement of San Mateo* (1989) 214 Cal.App.3d 329, 339.

9 Santa Clara increased the years of service eligibility requirements from 5 to 10 years, and requires employees to have retired

from the county in order to receive benefits and bases benefits on the lowest cost provider. In 1984, the county began setting aside money in investment accounts that now have \$320 million in net assets for retirement health care benefits. Santa Clara’s foresight notwithstanding, its accumulation of net assets has not kept pace with the increase in health care costs, and less than 50 percent of its expected costs are presently covered. “Mounting Benefits,” *supra* note 9, at A-1.

10 Gig Conaughton, “Governments to Struggle with Pension Accounting Rules; Service Benefit Cuts Could be Coming,” *West County Times*, Jan. 2, 2007, available at [http://www.nctimes.com/articles/2007/01/03/news/top\\_stories/1\\_03\\_421\\_2\\_07.txt](http://www.nctimes.com/articles/2007/01/03/news/top_stories/1_03_421_2_07.txt). ; See Leslie Wolf Branscomb, “County Supervisors Vote to Stop Paying Subsidies to Thousands of Retirees,” *San Diego Union-Tribune*, Dec. 6, 2006, at B-1.

11 The district also implemented a two-tiered benefit system that gives new hires medical benefits only until they become eligible for Medicare. Barbara Rose, “Retiree Health-Care Accounting Rule May Become Bitter Pill,” *Chicago Tribune*, Jan. 22, 2006, at 1; see also “PFT, District lead the way in protecting retiree medical benefits; OPEB Bond Sale Finalized in New York,” *The Peralta Teacher*, Feb 7, 2006, Vol. 48, No. 2 (explaining how the plan helps the district meet the GASB 45 requirements and describing the cooperative negotiations between the union and the district).

12 “Health Care’s Perfect Storm,” *San Francisco Chronicle*, Nov. 13, 2006, at B6; See generally Christian Berthelsen, “O.C. Board Trims Benefits for County Government Retirees; With a Yawning Fund Gap Ahead, Supervisors Act Despite Pleas During a Packed Meeting,” *Los Angeles Times*, Sept. 13, 2006, pt. B, at 3; Ilene Lelchuk, “Newsom Casts Eye on Retiree Benefits; Scrutiny Promised as Health Care Costs Triple in 3 Years,” *San Francisco Chronicle*, Apr. 26, 2004, at A-1; See also “Mounting Benefits,” *supra*, note 8, at A-1; *Piombo, supra*, 214 Cal.App.3d at 339.

13 *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853.

14 *Id.* at 855; *Miller v. State of California* (1977) 18 Cal.3d 808, 815.

15 Gov. Code Secs. 3500 et seq.

16 See e.g. *Round Valley Unified School Dist. v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269. (Under the Education Code, school districts have the absolute right to decide not to reelect probationary teachers without providing cause or other procedural protections to the terminated employees, and without regard to contrary provisions in a collective bargaining agreement.)

17 *Kern, supra* note 13, 29 Cal.2d at 855; *Miller, supra* note 14, 18 Cal.3d at 814.

18 *Kern, supra* note 14, 29 Cal.2d at 855.

19 *Terry v. Berkeley* (the exception allowing pension benefits to be modified to protect the flexibility of the pension system does not

apply to an “obligation due a pensioner after his status has become fixed by the happening of the contingency which made the pension due and payable” ([1953] 41 Cal.2d 698, 702-703 [emphasis added]), and “may not be changed to his detriment by subsequent amendment” (*Id.* at 703); *Wallace v. City of Fresno* (vested retirement benefits are “subject to an implied qualification that a governing body may make reasonable modifications before pensions become payable and that before that time the employee does not have a right to any fixed or definite benefits.” [1954] 42 Cal.2d 180, 183.). Once the contingency occurs that makes the pension due and payable, the promised benefits generally are not subject to modification.

20 *Wallace v. City of Fresno*, *supra*, 42 Cal.2d at 183.

21 *Allen v. City of Long Beach* (1955) 45 Cal. 3d 128, 131.

22 California Retired County Employee Association, 1937 Act Counties, available at [www.crcea.org/html/37\\_act\\_html](http://www.crcea.org/html/37_act_html).

23 Gov. Code Secs. 31450 et seq.

24 In addition to the 1937 Act, other statutes govern other classes of public sector employees. The California Public Employment Retirement System and the Public Employees’ Medical and Hospital Care Act provide retirement benefits to state employees. Over the years, CalPERS has expanded its coverage to include school and other non-state public agency employees. Gov. Code Secs. 20000 et seq. Nearly 1.5 million public employees, retired members, and their families are encompassed in CalPERS. CalPERS offers a defined benefit plan that calculates retirement benefits based on a member’s age, years of service, and highest wages. For additional information on CalPERS, see [www.calpers.ca.gov/eip-docus/about/facts/general.pdf](http://www.calpers.ca.gov/eip-docus/about/facts/general.pdf).

CalPERS also offers its members health benefits through contracts with health maintenance organizations and preferred provider organizations. Public agencies then contract with CalPERS for a variety of plans they offer to employees. Rates and services are set by CalPERS, and public agencies determine how these premiums are paid through the collective bargaining process. The public agency and each employee or retired member, or annuitant, generally contributes a portion of the cost of coverage. Gov. Code Sec. 22890.

The Public Employees’ Medical and Hospital Care Act enables the state to provide health benefit plans to employees through systems such as CalPERS. Gov. Code Secs. 22750 et seq. PEMHCA provisions control any memorandum of understanding or collectively bargained agreement reached pursuant to the Meyers-Milias-Brown Act. Gov. Code Sec. 22753. PEMCHA sets the statutory minimum for contribution by contracting agencies and allows a contracting agency to contribute unequal amounts for current employees and its retired members. See Gov. Code Sec. 22892(c). CalPERS also contains a complicated vesting

procedure based on years of service. Gov. Code Sec. 22893. Any MOU reached between a public employer and an exclusive employee representative is subject to the statutory provisions of PEMHCA. Gov. Code Sec. 22893(a)(2). Public employers who offer health benefits through CalPERS must comply with many more statutory minimums and are fairly constrained in the degree of flexibility it has in modifying its benefits. However, it does allow a public employer to contribute less for retired members than for current employees.

25 California Retired County Employee Association, 1937 Act Counties, available at [www.crcea.org/html/37\\_act\\_html](http://www.crcea.org/html/37_act_html).

26 *Ventura County Board of Retired Employees Assn. v. County of Ventura* (1991) 228 Cal.App.3d 1594.

27 Gov. Code Sec. 31691 (emphasis supplied); see also Opinion No. 86-707, 70 Op.Atty. Gen.Cal. 1, 9 (1987).

28 Letter from Frederick H. Ward, General Manager, Los Angeles County Employees Association, urging the governing to sign A.B. 1959 (July 10, 1961).

29 Gov. Code Sec. 31692 (emphasis supplied); see also 70 Op.Atty. Gen.Cal. 1, *supra*, note 53, at 9.

30 Gov. Code Sec. 31692.

31 The adoption of an ordinance or resolution pursuant to Gov. Code Sec. 31691 in Los Angeles County remains in effect for any current or retired member for as long as the board of supervisors or governing body provides similar benefits to any active member in the county’s service. *Id.*

32 Gov. Code Sec. 31693.

33 *Id.* (Emphasis added.)

34 *Id.*

35 *Id.*

36 *California League of City Employee Assns. v. Palos Verdes Library Dist.* (1978) 87 Cal. App. 3d 135, 140.

37 (1998) 67 Cal. App. 4th 1215, 1223.

38 *San Bernardino* also included a challenge to modification of post-retirement health benefits of current employees; however, the court refused to rule on that issue, finding it was not ripe because no actual benefit changes had yet been made. *Id.* at 1226-1227.

39 *Id.* at 1220, citing *Relyea v. Ventura County Fire Protection Dist.* (1992) 2 Cal.App.4th 875, 882.

40 *Id.*

41 *Id.*

42 The *San Bernardino* analysis is also consistent with a post-*Palos Verdes* opinion of the Attorney General, which found that a school district providing health and life insurance benefits to former board members “may discontinue such benefits upon the commencement of new terms of current board members or as to future new board members.” *Opinion No. 84-505*, 67 Op. Atty.



Gen. Cal. 510, 10 (1984); compare, *Opinion No. 97-103*, 80 Op. Atty. Gen. Cal. 119 (1997) (health and welfare benefits of city council may not be decreased *during current term of office*).

43 Under federal private sector precedent, it is settled law that the vesting of retiree medical benefits is a matter of contractual interpretation. Collectively bargained agreements that unambiguously terminate such benefits upon termination or expiration of the agreement will be enforced. *Murphy v. Keystone Steel and Wire Co.* (7th Cir. 1995) 61 F.3d 560, 565. Equally clear and unambiguous promises of lifetime benefits in a collective bargaining agreement also will be enforced. *Keffler v. H.K. Porter Co.* (4th Cir. 1989) 872 F.3d 60, 62-64.

44 An unpublished case, *Reger v. Orange Unified School Dist.*, addressed modification of the health benefits of current retirees. See 2001 Cal. App. Unpub. LEXIS 2242 or 26 PERC par. 33,010. The court in *Reger* ruled that such a claim was not preempted by the Educational Employment Relations Act because retirees were not “employees,” and therefore need not exhaust administrative remedies by filing an unfair practice charge with the Public Employment Relations Board. *Id.* The retirees’ claim was remanded to the lower court; there is no published record of the eventual outcome of that proceeding.

45 In *Thorning*, during the last meeting in the term of retiring board members, the board voted to grant post-retirement health insurance benefits for 10 years; at its first meeting, the new board voted to suspend payments and cancel the benefit. *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th at 1598.

46 *Id.*

47 *Thorning* also relied on California Attorney General *Opinion No. 84-505*, stating that a school district may not “in the absence of constitutional justification” discontinue the health and life insurance benefits of retired board members who already had qualified for lifetime benefits. *Opinion No. 84-505*, 67 Op. Atty Gen. Cal. 510.

48 (2004) 119 Cal.App.4th 949, 951 (*Sappington* did not cite *San Bernardino* in its analysis.)

49 *Id.*

50 *Id.* at 955.

51 *Glendale City Employees Assn. v. City of Glendale* (1975) 15 Cal.3d 328.

52 *Motevalli v. Los Angeles Unified School Dist.* (2004) 122 Cal.App.4th 97; *Zalac v. Governing Board of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 1070.

53 PERB has not addressed the issue of whether retirees are employees afforded protection under the MMBA. However, it has found that retirees are not employees under EERA. *El Centro Elementary School Dist.* (2006) 31 PERC 10. PERB also has found that retiree organizations are not entitled to collective bargaining rights. *Rincon Valley Union Elementary School Dist.* (1988) 12 PERC para. 19162.

54 If contract language does not explicitly tie the retiree benefits to the benefits of current employees, employers are not able to negotiate to modify the benefits of retirees because they are not employees and retiree organizations are not employee organizations under EERA. *El Centro, supra*; *Rincon Valley, supra*.

55 In July 2005, Gainesville issued bonds to fund its unfunded actuarial accrued liability, and it is believed to be have been the first city in the nation to do so. Michael L. Wiener, *State and Local Government’s Options for Complying with GASB 45’s OPEB Reporting Requirement, Section of State and Local Government Law of the American Bar Association*, Volume 29, No. 2 Winter 2006.

56 In *Mayer v. Orange Unified School Dist.*, 2003 Cal.App.Unpub. LEXIS 6346 (2003), an unpublished Court of Appeal case that followed *Sappington*, a school district’s health insurance plan tied the benefits of retired members to the benefits received by current members. The court found that the district did not have a continuing duty to provide retirees with a free-enrollment PPO plan if the district did not do the same for its active employees. The court, in dicta, spoke voluminously about the actual fears of retirees, though not articulated, that there remained a “theoretical possibility that one day the active employees who control the retirees’ former union will sell them out for a pay raise.” The court, exercising judicial restraint, did not address this “theoretical possibility,” but it is not difficult to imagine this occurring, thus engendering a court challenge where the question under review will be whether post-retirement health care benefits are vested in the same manner as pension benefits.

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# Who Do Disability Discrimination Laws Protect?

*M. Carol Stevens and Alison Heartfield Moller*

*This fall, CPER will publish an expanded edition of what formerly had been our ADA Pocket Guide. This new edition, by M. Carol Stevens and Alison Heartfield Moller, of the Palo Alto law firm of Kay and Stevens, has grown into the more encompassing **Pocket Guide to Disability Discrimination**. The following is an abbreviated version of a chapter in the upcoming guide.*

Disabled California workers generally turn to two basic laws to remedy discrimination in the workplace: the federal Americans with Disabilities Act of 1990 (ADA)<sup>1</sup> and the California Fair Employment and Housing Act (FEHA).<sup>2</sup> Both prohibit employers, including public employers, from discriminating against qualified employees on the basis of an employee's disability. Both enable aggrieved employees to obtain monetary damages and enjoin employers from future discriminatory conduct. This article explains the workings of both laws, their similarities, and their differences.

FEHA amendments adopted in 1999 and 2000<sup>3</sup> that expand the act to protect a wide range of individuals and impairments that the ADA does not cover, coupled with U.S. Supreme Court decisions limiting the ADA's impact,<sup>4</sup> make the FEHA an aggrieved employee's likely choice. The FEHA also authorizes higher monetary awards against employers.

The FEHA is administered by the Fair Employment and Housing Commission. Although the most important FEHA provisions appear in the statute itself, FEHC regulations further explain some of its terms.<sup>5</sup>

The ADA grants regulatory authority to different federal agencies in accordance with the law's varying purposes. Courts generally defer to a regulatory agency's interpretation of the laws it implements, as long as they are reasonable and based on the statute they interpret.<sup>6</sup> The ADA directs the Equal Employment Opportunity Commission to issue regulations implementing Title I (employment).<sup>7</sup> Although no agency is empowered to issue regulations interpreting the ADA's generally applicable introductory provisions — including the all-important definition of "disability" — or the provisions of Title IV, which include retaliation prohibitions, the EEOC has drafted regulations that explain the meaning of "disability," and most courts and commentators have deferred to those regulations.

Neither the ADA nor the FEHA recognizes all physical and mental impairments as legally protected “disabilities” or assumes that all persons with legally protected disabilities are “qualified” for employment. Determining who the laws are designed to protect is like solving a complex algebra problem: You must identify the employer, determine whether the employee is disabled, and assess whether the employee is capable of performing the essential functions of the job, with or without a reasonable accommodation (which cannot be determined until the nature of the disability *and* the job are understood).

These laws protect the *working disabled*. The ADA is designed to ensure “that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps.”<sup>8</sup> The laws do not protect persons with severe disabilities who cannot work<sup>9</sup> or persons with disabilities that are temporary.<sup>10</sup>

Both the ADA and the FEHA protect non-disabled persons from discrimination if they are perceived as having a disability, have a record of disability, or associate with disabled persons. And all applicants and employees are protected from non-job-related inquiries and medical examinations. The FEHA also protects individuals regarded or treated as having or having had a condition that is not presently disabling but might become a disability in the future.<sup>11</sup>

### ***Which Employers Do the Laws Cover?***

The FEHA covers substantially more employers than the ADA. It covers all employers with five or more employees, including state and city employers.<sup>12</sup> With respect to unlawful harassment because of a disability, the FEHA’s requirements extend to all employers who regularly employ at least one person.<sup>13</sup>

Title I of the ADA, which addresses employment discrimination, covers most private and public employers

with 15 or more employees.<sup>14</sup> The ADA does not cover the federal government<sup>15</sup> or entities that provide employee health benefits on behalf of employers.<sup>16</sup>

The Eleventh Amendment to the U.S. Constitution prevents employees of state agencies from suing their state employer for monetary damages under the ADA.<sup>17</sup> California school districts are state agencies for Eleventh Amendment purposes.<sup>18</sup> Some California special districts may enjoy Eleventh Amendment immunity. But the Amendment does not shield other local agencies, like cities and counties.

The Eleventh Amendment prohibits individuals from suing a state without the state’s permission. In California, the state has agreed to be sued under the FEHA, but not under the ADA.<sup>19</sup>

In the Ninth Circuit, which includes California, the Eleventh Amendment also prevents employees from suing the State of California in federal court for money damages for retaliation, at least when the retaliatory conduct relates to employment. It is not clear whether employees may pursue claims for money damages under the ADA in state court.<sup>20</sup>

The Eleventh Amendment does not prevent state employees from using the ADA to sue state officials for equitable relief, for example, to compel them to abandon discriminatory practices.<sup>21</sup> And employees can sue for monetary damages under the Rehabilitation Act of 1973, which provides employment protection for persons working for employers who accept federal funds, including state agencies.<sup>22</sup>

## ***Determining who the laws are designed to protect is like solving a complex algebra problem.***

### ***What Disabilities Do the Laws Cover?***

The basic rule is that a disability is a “physical or mental condition” (FEHA) or “impairment” (ADA) that “limits” (FEHA) or “substantially limits” (ADA) one or more major life activities. In addition, the FEHA definition of “disability” includes any coverage or protection that the ADA provides, if that coverage or protection is broader than what the FEHA appears to cover.<sup>23</sup>

**What is a ‘physical or mental condition’ under the FEHA?** “Physical disability” under the FEHA includes, but is not limited to, a physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of several statutorily specified “body systems,” namely the neurological, immunological, musculoskeletal, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, or endocrine systems or special sense organs.<sup>24</sup> These conditions must limit a major life activity to be a covered disability.

“Mental disability” under the FEHA includes a “mental or psychological disorder or condition,” including, but not limited to, mental retardation, organic brain syndrome, emotional or mental illness, and “specific learning disabilities.”<sup>25</sup> A mental disability must limit a major life activity to qualify as a covered disability.

These physical and mental disabilities include chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorders, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease.<sup>26</sup>

In addition, the FEHA covers some conditions whether or not they limit a major life activity. These include mental disorders or physical conditions that require special education or related services<sup>27</sup> and “medical conditions” that the FEHA defines as health impairments related to, or associated with, a diagnosis of cancer and genetic characteristics known to be a cause of a disease or disorder in a person or his or her offspring.<sup>28</sup> Normal pregnancy is not a disability under the FEHA, but discrimination on the basis of pregnancy is prohibited as sex discrimination.<sup>29</sup>

**What is an ‘impairment’ under the ADA?** The ADA states simply that “the term ‘disability’ means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”<sup>30</sup> This definition is located in the ADA’s “generally applicable” introductory provisions and applies

to all titles (or subchapters), including Title I, which addresses employment. Although the ADA directs the EEOC to issue regulations to carry out Title I,<sup>31</sup> it is silent regarding the authority to define terms included in introductory provisions, like the definition of “disability.”

Nevertheless, the EEOC has issued regulations explaining the meaning of “disability” as that definition applies to employment, and most commentators and litigators have accepted that explanation. The EEOC defines “physical or mental impairment” as:

- any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, or endocrine; or

- any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>32</sup>

The EEOC identifies HIV as a per se disability<sup>33</sup> but has not identified other per se disabilities, and several federal appellate courts have refused to consider alcoholism as a disability per se.<sup>34</sup>

In its Interpretive Guidance on Title I of the ADA,<sup>35</sup> the EEOC instructs that disability does not include “physical, psychological, environmental, cultural and economic characteristics that are not impairments.” For example, “impairment” does not include eye or hair color, left- or right-handedness, or height, weight, and muscle tone within the normal range *and* that do not result from a physiological disorder. Impairment also does not include “common personality traits” like poor judgment or a quick temper, unless these are symptoms of a covered disorder. Similarly, poverty, lack of education, prison records, and other environmental, cultural, and economic disadvantages are not impairments. Age, in and of itself, is also not an impairment, though diseases and conditions associated with age may be.

*The ADA definition  
of ‘disability’ is  
located in its  
‘generally applicable’  
introductory  
provision.*

Pregnancy and predisposition to disease also are excluded from the definition of disability.<sup>36</sup>

**What is a ‘major life activity’ under the FEHA?** The FEHA “broadly” defines major life activities to include “physical, mental, and social activities and working.”<sup>37</sup>

Major life activities identified by the FEHC regulations include activities like walking, speaking, hearing, seeing, breathing, learning, and working.<sup>38</sup> The regulations emphasize life activities that affect the individual’s “employability” or present barriers to employment.<sup>39</sup> The FEHA amendments declare the legislature’s intent to create “broader coverage” than provided by the ADA.<sup>40</sup>

**What is a ‘major life activity’ under the ADA?** In its regulations, the EEOC adopted the definition of “major life activities” used in regulations implementing the Rehabilitation Act of 1973.<sup>41</sup> Those define major life activities as basic activities the average person can perform with little or no difficulty. Examples include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.<sup>42</sup>

The touchstone for identifying a “major life activity” is its significance in the life of the average person, including both private and public acts, economic activities, and daily activities.<sup>43</sup> “Major life activities” are those permanent or long-term activities that are “of central importance to most people’s daily lives.”<sup>44</sup> The ADA does not protect individuals whose impairments preclude them from performing only isolated, unimportant, or particularly difficult manual tasks.<sup>45</sup> For example, the inability to travel extensively is not a major life activity.<sup>46</sup>

Courts have held that sleeping, engaging in sexual relations, interacting with others,<sup>47</sup> eating,<sup>48</sup> and reproduction<sup>49</sup> are major life activities under the ADA when substantially impaired compared to the average person’s ability. Reading is a major life activity under the ADA because it is necessary to perform major life activities such as learning and working; consequently, reading is of central importance to most people’s daily lives.<sup>50</sup>

*‘Major life activities’  
are those permanent  
or long-term activities  
that are ‘of central  
importance to most  
people’s daily lives.’*

**How does a physical or mental condition ‘limit’ a major life activity under the FEHA?** The FEHA covers persons with disabilities that limit at least one major life activity. A covered physical or mental condition limits a major life activity if it makes achievement of that activity difficult.<sup>51</sup> The Poppink Act, which amended the FEHA in 2000, clarified that California law provides broader disability protections than federal law, specifically stating that “the law of this state requires a ‘limitation’ upon a major life activity, but does not require...a ‘substantial limitation.’”<sup>52</sup>

**Mitigating measures under the FEHA.** Under the FEHA, whether a disability limits a major life activity is determined without regard to any mitigating measures the individual uses to cope with the disability, unless the mitigating measure itself limits a major life activity.<sup>53</sup> For example, to determine whether an individual who normally wears corrective lenses is limited in the major life activities of seeing, moving about, or caring for oneself, the individual’s visual impairment is assessed while the person is not wearing the lenses. If an uncorrected visual impairment limits the individual’s ability to engage in a major life activity, that person is protected by the FEHA.

**How does an impairment ‘substantially limit’ a major life activity under the ADA?** The ADA recognizes disabilities only if they *substantially* limit a major life activity.<sup>54</sup> A “substantial” limitation “refers to the inability to perform a major life activity as compared to the average person in the general population or [to] a significant restriction ‘as to the condition, manner, or duration’ under which an individual can perform the particular activity.”<sup>55</sup>

Determining whether an impairment is substantially limiting requires an individualized inquiry.<sup>56</sup> The question is not whether the individual’s impairment might, could, or would be substantially limiting, but whether it actually does substantially limit the individual. The ADA does not require employers and courts to speculate about a person’s condition

or to make a determination based on generalized information about the condition or how it might affect the average person. Instead, employers and the courts must determine the degree to which a person's actual impairment presently affects his or her major life activities.

According to the Ninth Circuit, to determine if an individual's impairment is substantially limiting under the ADA, a court must look at "the nature, severity, duration, and impact of the impairment [and must] consider the mitigating measures the person uses, their effectiveness, their side effects, and their burdens."<sup>57</sup>

***Mitigating measures under the ADA.*** The individualized inquiry used to determine whether an individual's impairment substantially limits a major life activity requires that the impairment be assessed in its mitigated state.<sup>58</sup> That is, a visually impaired individual who normally wears glasses must be assessed while wearing glasses. Even if the person cannot see well enough to drive without glasses, the person is not disabled if they have satisfactory vision with glasses to obtain a license.

However, if an individual does not use mitigating measures — if a hard-of-hearing person does not use a hearing aid — the impairment must be assessed in its unmitigated state.<sup>59</sup> Employers cannot require individuals to use mitigating measures, and courts cannot assess individuals based on mitigating measures they do not use.

Mitigating measures include an individual's physical ability to compensate for the impairment. And, if a compensating ability reduces the impact of the impairment on a major life activity, it must be considered when assessing whether the impairment substantially limits that activity. For example, an individual with monocular vision whose brain develops an ability to compensate for the deficiency must be assessed in terms of that ability.<sup>60</sup> But a mitigating measure that does not directly affect the individual's ability to perform the major life activity need not be considered. A hard-of-hearing person who lip-reads does not improve her ability to hear, and her lip-reading ability should not be considered in

assessing the impact of her impairment on the major life activity of hearing. But a hard-of-hearing person who asks people to address her better-hearing ear is improving her hearing ability, and that measure should be considered.<sup>61</sup>

***The ADA and temporary disabilities.*** The ADA does not cover *temporary* disabilities, which the courts and the EEOC have defined as one that lasts a short time and from which the individual fully recovers.<sup>62</sup> An impairment is substantially limiting if it significantly restricts the condition, manner, or *duration* of the performance of a major life activity.

If a short-term illness or injury, such as a broken arm or curable disease, results in permanent impairment, then whether the person is disabled must be determined in light of the permanent or long-term effects of the injury or illness. Under this interpretation, courts have allowed employers to terminate employees based on impairments that lasted as long as four months.<sup>63</sup>

It is unclear whether the amended FEHA, with its stated purpose to expand disability protection, will produce the same result. An impairment under the FEHA must limit only a major life activity. Arguably, even short-term injuries or illnesses may limit important activities. In enacting the amendments, the legislature intended the definitions of disability to be construed to protect employees from discrimination due to an actual or perceived impairment that is "disabling, potentially disabling, or perceived as disabling or potentially disabling."<sup>64</sup> An impairment that makes performance of any major life activity difficult, for even a short period, may be considered a disability under the FEHA.

***How the FEHA and the ADA differ with respect to the major life activity of 'working.'*** Another significant distinction between the ADA and the FEHA involves the activity of working. In drafting its ADA regulations, the EEOC considered working a major life activity, albeit one of last resort.<sup>65</sup> The EEOC believes that working should be considered only if an individual's impairment does not substantially limit other major life activities.

*Under the ADA,  
employers cannot  
require individuals  
to use mitigating  
measures.*



Courts interpreting the ADA, including the Ninth Circuit Court of Appeals, agree that an impairment which prevents an individual from performing a broad range of jobs is a disability that substantially limits the individual in the major life activity of working.<sup>66</sup> To prevail on a “working claim,” the Ninth Circuit requires employees to present evidence about the number and type of jobs available in the local labor market.<sup>67</sup> But the U.S. Supreme Court has questioned whether working is a major life activity under any circumstance and has invited employers to raise this issue in an appropriate ADA case.<sup>68</sup>

In *Toyota*, the Supreme Court rejected an analysis of impairment that emphasized workplace activities. After determining that major life activities are those central to daily life, the court stated, “Manual tasks unique to any particular job are not necessarily important parts of most people’s lives. As a result, occupation-specific tasks may have only limited relevance to the manual task inquiry.”<sup>69</sup> *Toyota* may signal the Supreme Court’s preference to focus on specific physical activities, rather than the global concept of working.

The California legislature has taken a different approach in the amended FEHA, specifically defining working as a major life activity and decreeing that an impairment is a covered disability if it prevents an individual from performing the essential functions of even one job (“a particular employment”).<sup>70</sup>

### ***Is the Employee Capable of Performing the Job’s Essential Functions?***

An individual who is disabled under the ADA also must be qualified to perform the job in question. To be protected, the individual must be able to perform the job’s essential functions with or without reasonable accommodation. The ADA does not require employers to hire or retain employees who cannot perform the job.

The FEHA also protects only qualified individuals from adverse employment decisions, but the statutory language requiring employers to engage in a good faith interactive process and offer reasonable accommodation protects all employees and applicants with known disabilities, not just qualified disabled individuals.<sup>71</sup>

The EEOC’s ADA regulations and the amended FEHA use the same definition of essential functions: “the fundamental job duties of the employment position the individual with a disability holds or desires.”<sup>72</sup>

A particular job function may be essential in at least three ways:

- The position exists for the purpose of performing the function; for example, if the individual is hired to type documents, typing is an essential function;
  - Only a few employees can be called on to perform the function; for example, in a small office setting, all employees may be required to greet office visitors, making that ability an essential function; or
  - Incumbents are hired specifically for their expertise or ability to perform a highly specialized function; for example, if an individual is hired to operate specific machinery, then operating that machinery is an essential function of the job.<sup>73</sup>

In determining whether a particular function is essential, both the

FEHA and the ADA look to:

- The employer’s judgment as to which functions are essential;
- Written job descriptions used to advertise for the job;<sup>74</sup>
- The amount of time spent performing the function;
- The consequences of not requiring the incumbent to perform the function;
- Terms of a collective bargaining agreement;
- Work experiences of past incumbents;
- The current work experience of incumbents in similar jobs;<sup>75</sup> and
- Other relevant evidence.

## ***The U.S. Supreme Court has questioned whether working is a major life activity under any circumstance.***



An employee who files a disability discrimination lawsuit against an employer must prove that he or she is disabled within the meaning of the law. Courts have disagreed on whether the plaintiff also must prove the capacity to perform the essential functions of the job, or whether the employer must demonstrate that the plaintiff could not perform the essential job duties.<sup>76</sup>

### ***Does the Employee Require Reasonable Accommodation?***

The determination as to whether an individual is capable of performing essential job functions must be made in light of reasonable accommodations that enable the individual to perform the job functions. And failure to reasonably accommodate a qualified individual with a disability (ADA) or a job applicant or an employee with a known disability (FEHA) is a separate violation of the law.<sup>77</sup>

Accommodation is any change in the work environment or the way the work is done that provides a disabled individual equal employment opportunities. Accommodation means modifications or adjustments:

- to a job application process to enable a disabled individual to be considered;<sup>78</sup>
- to the work environment where the job is performed so that a disabled individual can perform the position's essential functions;<sup>79</sup> or
- that enable disabled individuals to enjoy employment benefits and privileges equal to those enjoyed by similarly situated employees without disabilities.<sup>80</sup>

Accommodation includes making existing facilities and equipment readily accessible to, and usable by, disabled individuals.<sup>81</sup> Accommodation applies to work areas that must be accessible for the employee to perform essential job functions, as well as to non-work areas (e.g., break rooms, training rooms, restrooms).<sup>82</sup>

Accommodation is required when it would enable a

disabled individual who satisfies the job-related requirements to perform the position's essential functions. For example, raising the height of a desk may enable an engineer who uses a wheelchair to perform the essential functions of an engineering position. Reasonable accommodation also may include: job restructuring; establishing part-time or modified work schedules; acquisition of equipment for use on the job; modifying testing procedures, training protocols, or workplace policies; hiring qualified readers or interpreters;<sup>83</sup> granting leave to allow an employee to recover from a disability; and redesigning workload patterns.

That other employees might resent the apparent special treatment a particular accommodation provides does not make the accommodation "unreasonable."<sup>84</sup> Nor does the

fact that an accommodation requires the employer to violate its own "disability-neutral" work rules.<sup>85</sup> An employer may need to modify its policy even if it was intended to assist disabled persons. Whether an employer offers reasonable accommodation must be assessed on a case-by-case basis; it cannot be said that a particular policy or procedure always will constitute reasonable accommodation.<sup>86</sup>

An employer is not required to create a position as an accommodation. For example, the FEHA does not require an employer to convert a temporary light-duty accommodation into a permanent job for a disabled patrol officer.<sup>87</sup>

But reasonable accommodation may require reassignment to a vacant position, if the employee desires the position and can perform its essential functions. A position is "vacant" even though seniority rules might entitle other employees to the position.<sup>88</sup> Employers must consider currently available jobs, as well as those that will be available within a reasonable time period.<sup>89</sup>

An employer may modify workplace rules to reassign the disabled individual; for example, it would be a reasonable accommodation to reassign the disabled employee without requiring the employee to compete for the job.<sup>90</sup> But an

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employer is not required to eliminate a mandated civil service examination.<sup>91</sup> Nor was an employer required to assign an employee to a permanent position when doing so would violate a county ordinance limiting the number of hours for a temporary employee.<sup>92</sup>

Reasonable accommodation does not require an employer to violate or ignore the terms of a bona fide seniority system, whether included in a collective bargaining agreement or imposed unilaterally by the employer. An employer is not required to transfer a disabled employee to a vacant position if employees with greater seniority can bid for the vacant job. But employers may not rely on seniority systems or other negotiated work rules created for purposes of discrimination, or that contain so many exceptions or are so frequently altered that seniority loses its significance.<sup>93</sup>

The duty to accommodate does not require an employer to eliminate the essential functions from a disabled individual's job duties. For example, a peace officer who suffered a work-related injury was not entitled to a position that did not require grasping a gun.<sup>94</sup>

Nor does accommodation require adjustments that are for the disabled individual's personal benefit. The employer must, however, provide items that are designed specifically to meet job-related needs. For example, an employer does not have to provide an employee with a wheelchair, but when the employee needs transportation to get from the employer's parking lot to the employee's workstation, providing the wheelchair may be a reasonable accommodation.<sup>95</sup> Or an employer may have to provide an individual who has a vision impairment with eyeglasses designed to enable the individual to use the office computer monitors, but are not needed outside work.

Accommodation is not required under either the ADA or the FEHA if an employer does not know about the disability. The disabled individual must inform the employer that an accommodation is needed. But under both the

FEHA<sup>96</sup> and the ADA,<sup>97</sup> an employer has an affirmative duty to offer reasonable accommodation once it becomes known.

### ***When May an Employer Refuse to Provide Reasonable Accommodation?***

Under the ADA, an employer may refuse to reasonably accommodate a qualified individual with a disability when the proposed accommodation would impose an undue hardship.<sup>98</sup> This means that the employer will incur significant difficulty or expense in providing the accommodation; it refers to any accommodation that is unduly costly, extensive, substantial, or disruptive. Significant difficulty relates to the accommodation's impact on the nature and structure of the employer's operation. Whether the accommodation is too costly is reviewed in light of the operation's overall financial resources.<sup>99</sup>

Determining whether a proposed accommodation imposes an undue hardship requires an individualized assessment.<sup>100</sup> If the proposed accommodation produces undue hardship, the employer must provide a different reasonable accommodation, if one exists.

Although the FEHA's definition of undue hardship is similar to the ADA's, the FEHA applies it differently. Undue hardship is a *defense* to a charge of discrimination under the ADA; an employer can assert undue hardship to defeat an employee's assertion that he

or she is a qualified disabled individual who can perform the job's essential functions with or without reasonable accommodation.<sup>101</sup>

But under the FEHA, undue hardship is *not* a defense to disability discrimination; it is a defense only to a charge of failure to provide reasonable accommodation.<sup>102</sup>

This distinction has led to a difference in proof in ADA and FEHA cases. Under the ADA, the *employee* must show initially that a proposed accommodation is reasonable on its face. The employer then has the burden of showing that its

*Under the FEHA and ADA, an employer has an affirmative duty to offer reasonable accommodation once the disability becomes known.*

own unique or special circumstances make the accommodation unreasonable because it would impose undue hardship on its business.<sup>103</sup>

But the FEHA does not require the employee to put on evidence that the proposed accommodation will not produce undue hardship. The employee must show only that the accommodation is reasonable. The employer retains the burden of proving undue hardship.<sup>104</sup>

### ***How Are the Need for and Nature of Reasonable Accommodations Determined?***

Whenever an employee notifies an employer that he or she has a disability and requests accommodation, the ADA requires a “mandatory” dialogue between the employer and employee, called the “interactive process.”<sup>105</sup> Employers and employees have a reciprocal duty to engage in this process in good faith.<sup>106</sup> The FEHA specifically requires employers to “engage in a timely, good faith, interactive process” with an employee to determine if effective reasonable accommodation is available.<sup>107</sup> The FEHA continues to rely on the articulation of the interactive process in the EEOC’s interpretive guidance to the ADA.<sup>108</sup> Both laws make failure to engage in an interactive process a separate basis for finding unlawful discrimination.<sup>109</sup>

Employers need not provide every accommodation requested. The law requires employers to accommodate only job applicants and employees with known disabilities. Therefore, employers may require employees who request accommodation to produce evidence that they are in fact disabled.

Accommodation requests need not take any particular form; an employee need not even deliberately request accommodation. But an employer must respond to a request for changes in workplace procedures, equipment, facilities, or rules related to an employee’s disability.

An accommodation need not be the best one possible, as long as it sufficiently meets the disabled individual’s job-related needs. If the individual refuses a reasonable accommodation, he or she is not considered qualified for the job.<sup>110</sup>

But an employee may reject a proposed accommodation that will not, in fact, enable the individual to perform the job’s essential functions. In that case, or where the employee accepts the proposed accommodation but it is not effective, the employer must consider whether an alternative reasonable accommodation exists.<sup>111</sup> An employer cannot wait for an employee to request an alternate accommodation if the employer is aware that the initial accommodation is failing.<sup>112</sup>

In addition to proving undue hardship, an employer may defend against charges that it failed to provide reasonable accommodation on the grounds that: (1) the employee refused an offered accommodation that was reasonable; (2) no position that the employee could perform existed or was vacant; or (3) the employee caused the breakdown in the interactive process.<sup>113</sup>

*Both acts protect an individual who is not disabled when the individual has a record of a disability or is regarded as disabled.*

### ***When Does the Law Protect Non-Disabled Persons?***

Both the FEHA and the ADA protect an individual who is not disabled when the individual has a record of a disability or is regarded as disabled.<sup>114</sup> In both cases, the disability must have an impact on major life activities. Both laws also protect persons who associate with disabled individuals.<sup>115</sup> The FEHA protects individuals who are regarded or treated as having or having had a condition that is not presently disabling but may become one. Because non-disabled individuals do not actually have limiting disabilities, they are not entitled to reasonable accommodation.<sup>116</sup>

***Record of a disability.*** The term “disability” covers individuals with a history of an impairment and persons who have been diagnosed, correctly or incorrectly, as having an impairment.<sup>117</sup> The ADA and the FEHA protect individuals

who have recovered from a physical or mental impairment that previously limited a major life activity. The ADA and the FEHA also protect individuals who have been misclassified as having an impairment such as mental retardation.

**Regarded as having a disability.** The term “disability” also covers an individual treated by an employer as having an impairment even though that individual either does not have an impairment or has an impairment that does not (substantially) limit major life activities.<sup>118</sup>

There are two ways in which individuals may fall within the ADA definition: (1) a covered entity mistakenly believes 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, nonlimiting 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 which one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.<sup>119</sup>

The rationale behind the “regarded as” prong is to protect individuals who may be rejected from a job due to myths, fears, and stereotypes associated with disabilities.<sup>120</sup> Prejudice may stigmatize an individual as having an impairment even though no impairment exists. For example, the assumption that a male homosexual applicant is infected with HIV or the assumption that a disfigured person is (substantially)

limited in major life activities could trigger FEHA (or ADA) coverage.

An employer’s perception of an individual’s impairment need not be well-founded. On the contrary, a “regarded as” claim typically “rests on the assertion that the [employer is] acting irrationally, rather than on the basis of the true facts and rational economic calculation.”<sup>121</sup> But an employer’s reliance on a doctor’s assessment of an individual’s physical abilities is not an indication that the employee is “regarded as” disabled.<sup>122</sup>

Under the FEHA, an employer must engage in an informal interactive process with an applicant or employee it regards as physically disabled, whether or not the individual actually is disabled.<sup>123</sup> Federal courts addressing the issue under the ADA are split.<sup>124</sup>

**Associates of disabled individuals.** The ADA and the FEHA also protect individuals who have an association with a disabled person.<sup>125</sup> The ADA prohibits an employer from reducing an employee’s benefit level because the employee has a disabled dependent.

**Other individuals.** Both the ADA and the FEHA protect all job applicants and employees, regardless of disability, by limiting employers’ use of pre-employment and on-the-job inquiries and medical examinations and by requiring employers to keep employees’ medical information confidential.<sup>126</sup> And both laws prohibit employers from retaliating against disabled and non-disabled persons who oppose prohibited practices or who participate in the enforcement process.<sup>127</sup> \*

- 1 42 USC Secs. 12101 et seq.
- 2 Gov. Code Secs. 12900 et seq.
- 3 A.B. 2222, Stats. 2000, Ch. 1049, effective January 1, 2001 (“Prudence Kay Poppink Act”) (“2001 amendments”). Legislation enacted in 1999 also amended the FEHA. A.B. 101, Stats. 1999, Ch. 592 (California Civil Rights Amendments of 1999).
- 4 E.g., *Sutton v. United Airlines, Inc.* (1999) 527 U.S. 471, 119 S.Ct. 2139, 137 CPER 21 (disability claims must be assessed while an employee is using the mitigating measures — including prescription glasses, hearing aids, medications, and prosthetics — the employee normally uses); *Toyota Motor Mfg., Kentucky, Inc. v. Williams* (2002) 534 U.S. 184, 122 S.Ct. 681, 152 CPER 30 (claims that an impairment substantially limits an individual’s ability to engage in manual tasks must focus on tasks that are of central importance to the person’s life, not only to their work); *U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 403-406, 122 S.Ct. 1516, 1521, 154 CPER 73 (employers are not required to violate or ignore the terms of a bona fide seniority system when determining whether a job assignment constitutes reasonable accommodation); and *Board of Trustees of the University of Alabama v. Garrett* (2001) 531 U.S. 356, 121 S.Ct. 955, 147 CPER 50 (state employees may not sue the state for monetary damages under the ADA).
- 5 See Cal. Code Regs., title 2, sections 7285-8504.
- 6 *Alexander v. Sandoval* (2001) 532 U.S. 275, 121 S.Ct. 1151.
- 7 42 USC Sec. 12116.
- 8 *Halparin v. Abacus Tech. Corp.* (4th Cir. 1997) 128 F.3d 191, 200.
- 9 *Kennedy v. Applause, Inc.* (9th Cir. 1996) 90 F.3d 1477, 1481, 1482, 120 CPER 83; *Weyer v. Twentieth Century Fox Film Corp.*, *supra*, 198 F.3d at p. 1112.
- 10 *Sanders v. Arneson Products, Inc.* (9th Cir. 1996) 91 F.3d 1351, 1353-1354, 120 CPER 82, cert. den. (1997) 520 U.S. 1116, 117 S.Ct. 1247.
- 11 Gov. Code Sec. 12926, subs. (i)(5), (k)(5).
- 12 Gov. Code Sec. 12926(d): “Employer” includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except that “employer” does not include a religious association or corporation not organized for private profit.
- 13 Gov. Code Sec. 12940(j)(4)(A).
- 14 42 USC Sec. 12111(5)(A). Exceptions are the United States, corporations wholly owned by the United States government, Indian tribes, and bona fide private membership clubs (other than labor organizations) that are exempt from taxation under Sec. 501(c) of Title 26. 42 USC Sec. 12111(5)(B).
- 15 42 USC Sec. 12111(5)(B)(i); but see 42 USC Sec. 12209, providing protections to employees of “Instrumentalities of Congress.”
- 16 *Van Hulle v. Pacific Telesis Corp.*, *supra*, 124 F.Supp.2d at p. 644, n. 4.
- 17 *Board of Trustees of the University of Alabama v. Garrett*, *supra*, 531 U.S. at p. 374, n. 9, 121 S.Ct. at p. 968, n. 9, 147 CPER 50.
- 18 *Mingo v. Oakland Unified School Dist.*, *supra*, 2002 U.S. Dist. LEXIS 2538; *Belanger v. Madera Unified School Dist.*, *supra*, 963 F.2d 248, cert. den. (1993) 507 U.S. 919, 813 S.Ct. 1280.
- 19 Gov. Code Sec. 12926(d).
- 20 *Demshki v. Monteith* (9th Cir. 2001) 255 F.3d 986, 989.
- 21 *Ex parte Young* (1908) 209 U.S. 123, 29 S.Ct. 441; *Hason v. Medical Board* (9th Cir. 2002) 279 F.3d 1167, 1171, reh’g. den. en banc (9th Cir. 2002) 294 F.3d 1166, and cert. dismissed (2003) 538 U.S. 901, 123 S.Ct. 1385.
- 22 29 USC Sec. 794 (Sec. 504 of the Rehabilitation Act of 1973).
- 23 Gov. Code Sec. 12926(l).
- 24 Gov. Code Sec. 12926(k)(1)(A).
- 25 Gov. Code Sec. 12926(i)(1).
- 26 Gov. Code Sec. 12926.1(c).
- 27 Gov. Code Sec. 12926, subs. (i)(2), (k)(2).
- 28 Gov. Code Sec. 12926(h).
- 29 Gov. Code Sec. 12926(p).
- 30 42 USC Sec. 12102(2)(A).
- 31 42 USC Sec. 12116.
- 32 29 CFR Sec. 1630.2(h).
- 33 29 CFR Sec. 1630 Appendix, *supra*, Sec. 1630.2(j).
- 34 *Burch v. Coca-Cola Co.* (5th Cir. 1997) 119 F.3d 305, 316, cert. den. (1998) 522 U.S. 1084, 118 S.Ct. 871; *Reg’l. Econ. Cmty. Action Program, Inc. v. City of Middletown* (2d Cir. 2002) 294 F.3d 35.
- 35 29 CFR Part 1630 Appendix, *supra*.
- 36 29 CFR Part 1630 Appendix, *supra*, Sec. 1630.2(h).
- 37 Gov. Code Sec. 12940, subs. (i)(1)(C), (k)(1)(B)(iii).
- 38 29 CFR Sec. 1630.2(i); Cal. Code Regs., title 2, section 7293.6(e)(2)(a).
- 39 Cal. Code Regs., title 2, section 7293.6(e)(1)(A)(2)(a).
- 40 Gov. Code Sec. 12926.1(c).
- 41 34 CFR Part 104.
- 42 29 CFR Sec. 1630.2(i); 29 CFR Part 1630 Appendix, *supra*, Sec. 1630.2(i).
- 43 *Bragdon v. Abbott*, *supra*, 524 U.S. at p. 638, 118 S.Ct. at p. 2205, 131 CPER 59.
- 44 *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, *supra*, 122 S.Ct. at pp. \_\_\_\_, 152 CPER 30.
- 45 *Ibid.*



- 46 *Coons v. Secretary of the U.S. Department of the Treasury* (9th Cir. 2004) 383 F.3d 879.
- 47 *McAlindin v. County of San Diego*, *supra*, 192 F.3d at p. 1230.
- 48 *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032.
- 49 *Bragdon v. Abbott*, *supra*, 524 U.S. at p. 638, 118 S.Ct. at p. 2205, 131 CPER 59.
- 50 *Head v. Glacier Northwest, Inc.* (9th Cir. 2005) 413 F.3d 1053, 174 CPER 66.
- 51 Gov. Code Secs. 12940(i)(1)(B), (k)(1)(B)(ii).
- 52 Gov. Code Sec. 12926.1(c).
- 53 Gov. Code Sec. 12926, subs. (i)(1)(A), (k)(1)(B)(i), 12926.1(c).
- 54 42 USC Sec. 12102(B); *Sutton v. United Airlines, Inc.*, *supra*, 527 U.S. at 482, 119 S.Ct. at 2146, 137 CPER 21.
- 55 *Thompson v. Holy Family Hospital*, *supra*, 121 F.3d 537 at pp. 539-540, citing 29 CFR Sec. 1630.2(j)(1)(i)-(ii), 126 CPER 52..
- 56 *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, *supra*, 534 U.S. 471, 119 S.Ct. 2139, 137 CPER 21; *Sutton v. United Airlines, Inc.*, *supra*, 527 U.S. at p. 482, 119 S.Ct. at p. 2146, 137 CPER 21.
- 57 *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032; *Wong v. Regents of the University of California* (9th Cir. 2005) 410 F.3d 1052.
- 58 *Ibid.*
- 59 *Finical v. Collections Unlimited, Inc.* (D.Ariz. 1999) 65 F.Supp.2d 1032, 1037-1038.
- 60 *Albertsons, Inc. v. Kirkingburg* (1999) 527 U.S. 555, 565-566, 119 S.Ct. 2162, 2168-2169, 137 CPER 21.
- 61 *Finical v. Collections Unlimited, Inc.*, *supra*, 66 F.Supp.2d at p. 1041.
- 62 29 CFR Sec. 1630.2(j)(2)(ii); see discussion in 29 CFR Part 1630 Appendix, *supra*, Sec. 1630.2(j).
- 63 *Sanders v. Arneson Products, Inc.*, *supra*, 91 F.3d at p. 1354, 120 CPER 82.
- 64 Gov. Code Sec. 12926.1(b).
- 65 29 CFR Sec. 1630.2(i).
- 66 *Thompson v. Holy Family Hospital*, *supra*, 121 F.3d at pp. 540-541, 126 CPER 52.
- 67 *Coons v. Secretary of the U.S. Department of the Treasury* (N.D.Cal. 2002) 2002 U.S. Dist. LEXIS 2551.
- 68 *Sutton v. United Airlines, Inc.*, *supra*, 527 U.S. at p. 492, 119 S.Ct. at p. 2151, 137 CPER 21.
- 69 *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, *supra*, 534 U.S. 471, 119 S.Ct. 2139, 137 CPER 21.
- 70 Gov. Code Secs. 12926.1(c), and 12926, subs. (i)(1)(C) (mental disabilities), (k)(1)(B) (physical disabilities).
- 71 Gov. Code Sec. 12940, subs. (m), (n); *Bagatti v. Department of Rehabilitation*, *supra*, 97 Cal.App.4th at pp. 360-361, 118 Cal.Rptr.2d at pp. 453-454, 154 CPER 79; but see *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256, 102 Cal.Rptr.2d 55, 63, review den. (2001) 2001 Cal.LEXIS 1629.
- 72 29 CFR Sec. 1630.2(n); Gov. Code Sec. 12926(f).
- 73 29 CFR Sec. 1630.2(n)(2)(i)-(iii); Gov. Code Sec. 12926(f)(1)(A)-(C).
- 74 *Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 887, 150 CPER 66.
- 75 29 CFR Sec. 1630.2(n)(3)(i)-(vii); Gov. Code Sec. 12926(f)(2)(A)-(G).
- 76 The California Supreme Court may resolve the conflict in a pending decision, *Green v. State of California* (2005) 132 Cal.App.4th 97, 33 Cal.Rptr.3d 254, review granted (2005) 36 Cal.Rptr.3d 124.
- 77 ADA: 42 USC Sec. 12112(b)(5)(A); FEHA: Gov. Code Sec. 12940(m).
- 78 29 CFR Sec. 1630.2(o)(1)(i).
- 79 29 CFR Sec. 1630.2(o)(1)(ii).
- 80 29 CFR Sec. 1630.2(o)(1)(iii).
- 81 29 CFR Sec. 1630.2(o)(2)(i).
- 82 29 CFR Sec. 1630.2 (o)(2); Gov. Code Sec. 12926(n)(1)-(2).
- 83 42 USC Sec. 12111(9); see also Cal. Code Regs., title 2, section 72939(a)(2).
- 84 *Cripe v. City of San Jose*, *supra*, 261 F.3d at pp. 892-893, 150 CPER 66.
- 85 *U.S. Airways, Inc. v. Barnett*, *supra*, 122 S.Ct. at p. 1521, 154 CPER 73.
- 86 *Sokol v. New United Motor Manufacturing, Inc.* (N.D.Cal. 2000) 2000 U.S. Dist. LEXIS 6714.
- 87 *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 37 Cal.Rptr.3d 899, review den. (2006) 2006 Cal.LEXIS 4472.
- 88 *U.S. Airways, Inc. v. Barnett*, *supra*, 122 S.Ct. at pp. 1521-1522, 154 CPER 73.
- 89 *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078.
- 90 *Barnett v. U.S. Air, Inc.*, *supra*, 228 F.3d at 1120, vacated on other grounds, and remanded *sub nom.*, *U.S. Airways, Inc. v. Barnett*, *supra*, 122 S.Ct. at p. 1521, 154 CPER 73; *McAlindin v. County of San Diego*, *supra*, 192 F.3d at pp. 1236-1237.
- 91 *Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 2 Cal.Rptr.3d 329, 162 CPER 49.
- 92 *Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 41 Cal.Rptr.3d 686.
- 93 *U.S. Airways, Inc. v. Barnett*, *supra*, 122 S.Ct. at pp. 1524-1525, 154 CPER 73 (seniority systems); *Cripe v. City of San Jose*, *supra*, 261 F.3d at pp. 891-892, 150 CPER 66 (negotiated transfer policy).
- 94 *Kaplan v. City of North Las Vegas* (9th Cir. 2003) 323 F.3d 1226.

- 95 *Bagatti v. Department of Rehabilitation, supra*, 97 Cal.App.4th at pp. 368-369, 118 Cal.Rptr.2d at p. 460, 154 CPER 79.
- 96 *Prilliman v. United Air Lines, Inc.* (1977) 53 Cal.App.4th 935, 950-951, 62 Cal.Rptr.2d 142, 150, review den. (1997) 1997 Cal.LEXIS 4264.
- 97 *Humphrey v. Memorial Hospitals Assn., supra*, 239 F.3d 1128, 147 CPER 52.
- 98 42 USC Sec. 12112(5)(A).
- 99 29 CFR Part 1630, Appendix, *supra*, Sec. 1630.2(p).
- 100 *Morton v. United Parcel Service, Inc.* (9th Cir. 2001) 272 F.3d 1249, 1262, cert. den. (2002) 535 U.S. 1054, 122 S.Ct. 1910.
- 101 42 USC Sec. 12112(6); *Cripe v. City of San Jose, supra*, 261 F.3d at p. 885, 150 CPER 66.
- 102 Compare Gov. Code Sec. 12940(a), disability discrimination, with Gov. Code Sec. 12940(m), failure to provide reasonable accommodation.
- 103 *U.S. Airways, Inc. v. Barnett, supra*, 532 U.S. 970, 122 S.Ct. at p. 1523, summarizing process many federal courts use.
- 104 *Bagatti v. Department of Rehabilitation, supra*, 97 Cal.App.4th at p. 356, 118 Cal.Rptr.2d at pp. 450-451, 154 CPER 79.
- 105 ADA: 42 USC Secs. 12111(3), 12113(b); FEHA: 12940(a)(1), (2).
- 106 *Stephenson v. United Air Lines* (N.D.Cal. 2002) 2002 U.S.Dist.LEXIS 6937.
- 107 Gov. Code Sec. 12940(n).
- 108 Gov. Code Sec. 12926.1(e); see 29 CFR Part 1630, Appendix, *supra*, discussing 29 CFR Sec. 1630.2(o).
- 109 Gov. Code Sec. 12940(n); 29 CFR Sec. 1630.2(o)(3); *Barnett v. U.S. Air, Inc., supra*, 228 F.3d at 1114, vacated on other grounds and remanded *sub nom.*, *U.S. Airways, Inc. v. Barnett, supra*, 535 U.S. 970, 122 S.Ct. at p. 1525, 154 CPER 73; see Stevens, J., concurring, explaining that the Ninth Circuit's holding regarding an employer's obligation to engage in an interactive process is "untouched" by the majority opinion, 122 S.Ct. at p. 1526.
- 110 29 CFR Sec. 1630.9; 56 Fed.Reg. 35747-48 (1991).
- 111 EEOC: Enforcement Guidance on Reasonable Accommodation, *supra*, BNA 70 at p. 7625.
- 112 *Humphrey v. Memorial Hospitals Assn., supra*, 239 F.3d 1128, 147 CPER 52; *McAlindin v. County of San Diego, supra*, 192 F.3d at p. 1237.
- 113 *Allen v. Pacific Bell; SBC Communications, Inc.* (9th Cir. 2003) 348 F.3d 1113.
- 114 29 CFR Secs. 1630.2(g)(2), (g)(3); Gov. Code Secs. 12926(i)(4), (i)(5), (k)(4), (k)(5), (m); *Zenor v. El Paso Healthcare System, Ltd.* (5th Cir. 1999) 176 F.3d 847, 856.
- 115 29 CFR Sec. 1630.8; Gov. Code Sec. 12926(m).
- 116 *Fontinella v. City and County of San Francisco* (N.D.Cal. 2001) 2001 U.S.Dist.LEXIS 6919, text beginning at n. 13, noting split between circuits.
- 117 29 CFR Sec. 1630.2(k).
- 118 29 CFR Sec. 1630.2(l).
- 119 *Sutton v. United Airlines, Inc., supra*, 527 U.S. at p. 489, 119 S.Ct. at pp. 2149-2150, 137 CPER 21.
- 120 *Harshbarger v. Sierra Pacific Power Co.* (D.C.Nev. 2000) 128 F.Supp.2d 1302, 1307, citing 29 CFR Part 1630, app. 1630.2(1) (1996), *affd.* in relevant part and *revd.* in part in unpublished opinion at (9th Cir. 2002) 2002 U.S.App.LEXIS 796.
- 121 *Johnson v. Paradise Valley Unified School Dist., supra*, 251 F.3d 1222.
- 122 *Harshbarger v. Sierra Pacific Power Co., supra*, 128 F.Supp.2d at p. 1307.
- 123 *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 43 Cal.Rptr.3d 874.
- 124 Compare *Williams v. Philadelphia Housing Authority Police Dept.* (3d Cir. 2004) 380 F.3d 751 (finding a reasonable accommodation duty for a "regarded as disabled" plaintiff under the ADA) and *Kaplan v. City of North Las Vegas* (9th Cir. 2003) 323 F.3d 1226 (refusing to find a reasonable accommodation duty for a "regarded as disabled" plaintiff under the ADA).
- 125 29 CFR Sec. 1630.8; Gov. Code Sec. 12926(m).
- 126 29 CFR Secs. 1630.13, 1630.14(d).
- 127 42 USC Sec. 12203(a); Gov. Code Sec. 12940(h).



## Recent Developments

# Public Schools

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### Villaraigosa's Bill to Take Over L.A. Schools Ruled Unconstitutional

A unanimous decision by the Second District Court of Appeal may have ended Los Angeles Mayor Antonio Villaraigosa's hard fought plan to gain some control over the Los Angeles Unified School District through legislation. The court struck down A.B. 1381, known as the Romero Act, signed into law last September. The statute provides for a Council of Mayors to participate in the selection of the district's superintendent and to have an advisory role in determining the budget. It also gives the mayor direct control over three high schools and their feeder schools through an entity called the Mayor's Partnership. (For a full discussion on the background of the political and legal struggle regarding the enactment of A.B. 1381, see *CPER* No. 179, pp. 43-47; No. 180, pp. 32-33; and No. 182, pp. 35-37.)

In *Mendoza v. State of California*, the Court of Appeal upheld Los Angeles Superior Court Judge Dzintra Janavs' ruling that A.B. 1381 was unconstitutional. Because the California Constitution grants to voters within a school district the right to determine whether their board of education is to be elected or appointed, and those voters within LAUSD decided that they wanted to

elect their board members, the legislature cannot overrule that decision, reasoned the court. The court also found that the legislation violates the California Constitution's prohibition against transferring authority over any part of the school system to entities outside of the public school system. The court determined that "the Romero Act is an unconstitutional attempt to do indirectly what the Legislature is prohibited from doing directly."

### *Voters within LAUSD decided that they wanted to elect their board members.*

The court reviewed the controlling constitutional provisions which, it instructed, are found in Article IX of the California Constitution. This article provides for state, county, and district agencies to govern education in California. At the county level, Secs. 3 and 7 stipulate that there shall be a superintendent of schools and a board of education, that a county's charter may

provide for an elected county board of education, and that the voters of each county determine whether the superintendent is to be elected by the voters or appointed by the board of education. Section 16 of Article IX permits charter cities to establish in their charters "the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed." Los Angeles is a charter city, and Sec. 801 of its charter provides for an elected board of education. The superintendent of LAUSD is appointed by the board.

#### Article IX, Section 16, Violation

The court found that the Romero Act violated Article IX, Sec. 16, of the California Constitution. This section "guarantees to charter cities, the right to provide 'for the manner in which, the time at which, and the terms for which members of the boards of education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such boards,'" said the court. Section 14 of the same article provides that "the Legislature may authorize *the governing boards of all school districts* to initiate and carry on any program, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established," noted the court. "In other words," it summarized, "while the Constitution does not *require* that the Legislature delegate any powers to the governing

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boards of local school districts, the *only entities* to which the Constitution *expressly* permits the Legislature to delegate powers regarding education are the very same governing boards which the Constitution *mandates* charter cities have the right to elect.”

The court concluded, “[I]t cannot seriously be disputed that the Romero Act substantially interferes with the Board’s control of the district.” The act’s provisions giving control of three high

### *Romero Act provisions ‘completely divest’ the board of its powers.*

schools and their feeder schools to the mayor “*completely divest*” the board of its powers of control over those schools, said the court. The provisions regarding the Council of Mayors “work a somewhat more subtle, but no less insubstantial, interference,” it continued. “A great many of the powers otherwise accorded to the Board are, by the Romero Act, transferred to the District Superintendent.” This strips the board of “its otherwise statutory right to ‘employ’ a district superintendent, in that the approval and removal of that individual is now subject to the ratification of the Council of Mayors,” said the court. This interference in the board’s control violates the right of the citizens of Los Angeles to elect their board of

education as guaranteed by Sec. 16, it explained, stating:

It would be a clear violation of the plain language of article IX, section 16, if the Legislature passed a law giving the Mayor the right to appoint the members of the Board. But the constitutional provision would be annulled if the Legislature could simply bypass it by taking the powers of the Board away from that entity and giving them to the Mayor, or the Mayor’s appointee. This is nothing more than an end-run around the Constitution. If article IX, section 16 is to mean anything, it must mean that charter cities cannot only choose the composition of their boards of education, but that charter cities are guaranteed freedom from legislative interference even when the Legislature is of the opinion that they have made the wrong choice.

Villaraigosa and the state argued that the Constitution’s grant of power to choose whether to elect the school board is limited only to that power, and does not mean that any such elected board would have any particular powers or duties. They pointed to *State Board of Education v. Honig* (1993) 13 Cal.App.4th 720, and *Cobb v. O’Connell* (2005) 134 Cal.App.4th 720, in support of their position. The issue presented in *Honig* was whether, under the California Constitution, the legislature had the plenary power to define the duties of the superintendent of education. The superintendent argued that it did not, but the *Honig* court disagreed. The Court of Appeal did not find *Honig* con-

trolling in this situation. “This case does not present a challenge to the Legislature’s plenary power to limit the authority of local boards of education; it is a challenge to a legislative attempt to act where the voters of Los Angeles are given the exclusive power to act — to determine the composition of its local board of education,” said the court. “The Legislature cannot transfer a local board of education’s powers to a *different entity* and then say the charter city has no right to determine the composition of *that* entity since it is not a board of education.”

In *Cobb*, the legislature stepped in with emergency legislation providing a \$100 million loan when the Oakland Unified School District discovered it was facing a deficit of \$81 million, and temporarily transferred control of the schools to the state, demoting the local school board to an advisory capacity. The Court of Appeal found *Cobb* distinguishable because, here, unlike in *Cobb*, there was no emergency situation that threatened the students’ constitutional right to basic equality of educational opportunity. The appellate court explained:

The Romero Act makes no findings of crisis in the LAUSD schools. Indeed, it could not, as LAUSD schools are not the worst in the state by any measure. Instead, the Romero Act purports to justify its interference with the Board’s authority on the basis that the LAUSD “has unique challenges and resources that require and deserve special attention to ensure that all

pupils are given the opportunity to reach their full potential.” In the absence of any looming constitutional crisis, the “unique” circumstances of the LAUSD do not, alone, constitute a basis for depriving the citizens of Los Angeles of their right to an elected Board running their school district.

### Article IX, Section 6, Violation

Article IX, Sec. 6, of the California Constitution provides as follows:

The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and State colleges, established in accordance with law and, in addition, the school districts and the other agencies authorized to maintain them. No school or college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System.

The Court of Appeal cited a number of cases for the proposition that the general purpose of Sec. 6 was to adopt a single, uniform system of public school education and to “guarantee that the ability of that system to discharge its duty fully is not impaired by the dissipation of authority and loss of control that would result if parts of the system were transferred from the system or placed under the jurisdiction of some other authority.”

The court first addressed the issue of whether the Council of Mayors and

the Mayor’s Partnership established by the Romero Act are agencies authorized by Sec. 6 to maintain schools. It acknowledged that the act itself specifically declares that they are. The court, however, found that “while this determination is entitled to great weight, it is not controlling.” “A court may not simply abdicate to the Legislature, especially when the issue involves the division of power between local government and that same Legislature,” said

### *The general purpose of Sec. 6 was to adopt a single, uniform system of public school education.*

the court, quoting from *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 160 CPER 19. “The critical question, therefore, is whether the Council of Mayors and the Mayor’s Partnership can be deemed to be a part of the public school system for any reason *other* than the Legislature’s bald declaration that they are.” The court concluded that the answer to that question is “no.” It pointed out that the council of mayors is directed by the mayor of Los Angeles because he controls 85 percent of the vote, and, therefore, the council cannot act without his agreement. Similarly, the act provides that

the Mayor’s Partnership is “directed” by the mayor. “Yet the Mayor is not part of the public school system,” said the court. He is an elected official who is “the Chief Executive Officer of the City,” according to the city charter. The court instructed that Article IX provides only for a state superintendent and board of education, county superintendents and boards of education, and local school districts with governing boards. “*These* are the entities *constitutionally authorized* to maintain public schools, and we conclude they are, therefore, the only entities referred to in article IX, section 6,” said the court. “As the Council of Mayors and the Mayor’s Partnership are not article IX entities, they are not part of the public school system”

Next, the court turned to the issue of whether the Romero Act transferred part of the school system to the Mayor’s Partnership and Council of Mayors, in violation of Sec. 6. The key to making this determination, instructed the court, is whether there has been a transfer of control. With respect to the three clusters of schools in the demonstration project, the act transfers all authority exercised by the LAUSD board of education and the superintendent to the Mayor’s Partnership, the court concluded. The superintendent retains no authority to terminate the project, and neither the board nor the superintendent has any oversight or monitoring powers. The court found, “it is apparent that the very *purpose* of the demonstration project is to give complete op-

erational control over these schools, for six years, to the Mayor's Partnership." It concluded that "in the absence of any real oversight by public school system authorities, this is unconstitutional."

The question of constitutionality was less clear where the Council of Mayors was concerned, said the court. It noted that the Romero Act transferred many elements of management and control of the LAUSD schools from the board to the superintendent. "Standing alone, these provisions do not work a violation of article IX, section 6...in that the District Superintendent, as a Board

cannot be severed from the rest. It noted that the legislature, during its deliberations, had inserted a severability clause. However, the clause was removed after the legislative counsel issued opinions stating that the Council of Mayors and Mayor's Partnership provisions might be found unconstitutional. "Since the severability clause was removed in light of concerns that some proponents of the bill did not, in fact, want the provisions

of the Romero Act to be severable, we conclude that the Legislature *had* considered the possibility of partial invalidity of the Romero Act, and had concluded that it would not, in fact, want the remainder of the law to be effective," reasoned the court. (*Mendoza v. State of California* [4-17-07] B195835 [2d Dist.] \_\_\_Cal.App.4th\_\_\_, 2007 DJDAR 5137.) \*

### *The unconstitutional provisions of the act cannot be severed from the rest.*

employee, is a part of the public school system." However, the act gives the Council of Mayors the power to ratify the "appointment, contract term, contract renewal, refusal to renew a contract, or removal of the district superintendent." It is this grant of effective veto power over the selection of the superintendent to an entity that is not part of the public school system that manifests an unconstitutional transfer of part of the public school system, concluded the court.

The court also determined, after a review of the legislative history, that the unconstitutional provisions of the act

On April 5, approximately 98 percent of the 1,300 members of the Hayward Education Association went on strike, refusing to show up to their jobs at the Hayward Unified School District. The union and the district finally reached a tentative agreement on April 26, three weeks after the employees walked out.

The strikers were supported by many parents and students, some of whom stood shoulder to shoulder with teachers and other employees on the picket line. Less than 20 percent of the district's 21,800 students attended classes during the strike, the first in the district since 1994.

Union members have been working under a three-year contract ending June 2008 that allows for mid-contract negotiations. The job action was called after the district's offer — a 7 percent pay raise beginning May 1, with 1.6 percent more beginning in July if cer-

tain other savings are realized — was rejected by the union. The night before the first day of the strike, the district also offered a one-time 3 percent bonus, which also was rejected. The union was calling for a 16 percent increase over two years. Hayward teachers had received only 3.7 percent in raises over the last four years. A neutral factfinder issued a report in March stating the district could afford only a 5 percent increase retroactive to January.

Negotiations resumed on April 17, following spring vacation, but broke down again the next day after the district offered the teachers a 5.5 percent raise retroactive to July 1, 2006, and another 1.6 percent starting in July 2007, if other savings are realized. It also offered a salary boost for 30-year employees, whose pay is the lowest in the county.

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## **Hayward Teachers Get Contract After 10-Day Strike**



On April 19, the sixth day of the strike, district officials announced they were asking the Public Employment Relations Board to seek a superior court injunction to force teachers back into the classroom. The district asserted that the strike was illegal and an ob-

*The agreement will increase beginning teachers' pay to \$52,863 from \$42,750.*

stacle to providing safe schools for thousands of children because only 180 substitutes were available to replace the striking teachers. The district accused the union of bargaining in bad faith, asserting that the association raised its salary demands and never intended to bargain fairly. The district claimed that the strikers harassed employees crossing the picket lines and broke the window of a school bus transporting substitute teachers.

The union filed a point by point opposition to the district's injunction request, stating, "there is no showing that HEA's strike is unlawful based on the parties' behavior in bargaining and the impasse procedures — the union has not engaged in bad-faith bargaining." Hundreds of parents marched and demonstrated in opposition to the district's request for an injunction.

But before PERB could rule on the issue, the two sides reached a tentative agreement, which was ratified by 89 percent of the 1,000 members voting on April 26. The agreement provides for an 8 percent raise effective immediately, with a bonus of 1 percent in July. There will be an additional 3 percent raise next February.

The agreement will increase beginning teachers' pay to \$52,863 from \$42,750, elevating them from 13th place to third among the county's 17

districts. It also increases the pay package from \$75,000 to \$88,000 for the most experienced teachers, those who have taught for at least 18 years and have a master's degree. This will boost them from last place to the middle range of the county districts, after the cost of health benefits is figured in. Hayward is one of only seven East Bay districts where teachers pay their own health benefits.

The parties will be back at the bargaining table next spring. \*

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### **Community College's Administrative Reorganization Does Not Require Consultation With Faculty Senate**

The president of a community college is not required to consult with the faculty prior to changing the management of academic divisions from faculty members to full-time professional administrators, according to the First District Court of Appeal's decision in *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.*

In the spring of 2001, Charles Spence, chancellor of the Contra Costa Community College District, determined that it would be advantageous for the three colleges in the district, including Diablo Valley College, to change their system of managing the various academic divisions. Instead of relying on faculty members to serve as part-time "division chairs," Mark Edelstein, president of DVC, announced that in September 2001, the

district would opt to have professional administrators provide full-time management services.

The DVC faculty senate objected and filed a formal complaint with statewide Chancellor Thomas J. Nussbaum, arguing that state regulations required the district to consult with faculty before imposing the reorganization. It maintained that the change was an "academic or professional matter" requiring collegial consultation because it would alter faculty roles in governance. The faculty senate relied on district board policy and on Secs. 53203(a) and 53200(c)(6) of Title 5 of the California Code of Regulations, two regulations promulgated to implement A.B. 1725. The bill created a statewide board of governors charged with establishing minimum standards to govern aca-

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

By Dale Brodsky

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democratic matters, hiring, administration, and governance in the community colleges. The bill also amended the Education Code to create Sec. 70901, which required the establishment of minimum standards for shared governance between community college governing boards, faculty, staff, and students.

Chancellor Nussbaum concluded that no collegial consultation was required. He determined that the regulations require collegial consulting only for “matters that go to the heart of faculty expertise,” based on “their exper-

*The chancellor concluded that no collegial consultation was required.*

tise as teachers and subject matter specialists and their professional status.” The reorganization was not such a matter, he reasoned, because it concerned only management of the colleges and did not affect “governance structures related to faculty roles.” The faculty senate filed a petition for writ of mandate, which the trial court denied, interpreting the regulations to require collegial consultation only when a change in a college’s governing structure diminishes the faculty’s ability to perform their unique “faculty roles,” as opposed to roles they might serve in management.

The Court of Appeal upheld the trial court’s decision. It determined that the question came down to whether the reorganization comes within Sec. 53200(c)(6), “which identifies ‘district and college governance structures, as related to faculty roles,’ as an academic and professional matter requiring collegial consultation.”

In analyzing the question, the court determined that Chancellor Nussbaum’s opinions should be given some weight because the regulations under consideration are “part of a complex regulatory system of shared governance that is very familiar to the Chancellor’s office but essentially foreign to the courts.” It also found persuasive the fact that the chancellor had consistently interpreted Sec. 53200(c)(6) as not requiring collegial consultation during other administrative reorganizations.

Upon its own independent review, the court found reasonable the chancellor’s conclusion that choosing managers of college divisions was administrative in nature. It also concluded that, whether or not management by division chairs or deans constitutes a district or college governance structure, it is not “related to faculty roles.” The court interpreted this phrase as applying to curriculum or faculty hiring committees for example, or “the traditionally understood” faculty roles:

Faculty members are uniquely qualified to instruct students and assess their work, to design and

implement curriculum, to develop the college’s educational offerings, and to address broader institutional issues such as accreditation and budgeting to the extent these issues depend upon or impact student instruction. No evidence in the record, however, suggests faculty members at DVC are uniquely qualified to manage their peers or to decide which management structure the college should use.

The court rejected the faculty’s argument that the district’s management structure is related to faculty roles be-

*No evidence suggests faculty members are uniquely qualified to manage their peers.*

cause the faculty had had a “role” in selecting their managers and in serving as managers themselves. The court found such a broad interpretation would “undermine the independent statutory authority of local governing boards to manage the colleges in their districts.”

The court also was not persuaded by the faculty’s assertion that Sec. 53200 must be interpreted broadly consistent with the purpose of A.B. 1725 which, it argued, was to expand the role of faculty in shared governance. The court disagreed, finding “no indication in the legislative history to support the Senate’s view that a primary purpose of the statute was to increase faculty’s abil-

ity to participate in purely administrative decisions concerning their colleges.” (*Diablo Valley College Faculty Sen-*

*ate v. Contra Costa Community College Dist.* [3-21-07] 148 Cal.App.4th 1023.) \*

## Notice of Probationary Release Untimely: Teacher Reelected

Under the California Education Code, when a school district with 250 or more students determines not to reelect an employee on probationary status, it must notify the employee of its decision prior to March 15 by personal service or some other equivalent method, ruled the Third District Court of Appeal in *Hoschler v. Sacramento City Unified School Dist.* If it fails to do so, the employee is deemed reelected for the following school year.

*The controlling statute  
does not specify the  
method for providing  
the required notice.*

Stephen Hoschler was employed by the district as a probationary teacher for the 2002-03 and 2003-04 school years. On March 11, 2004, the district decided that Hoschler would not be reelected for the 2004-05 school year, and on March 12, 2004, it sent him a “Notice of Probationary Release” by certified mail, return receipt requested.

Hoschler claimed he did not receive the notice from the district and did not see it until May 8, when he received a copy from his attorney. The district had no evidence to dispute his claim. The trial court found that service by certified mail was proper, and denied Hoschler’s petition for writ of mandate requesting that the court declare him reelected.

The Court of Appeal disagreed. Under the Education Code, a certificated teacher in a school district with more than 250 employees is a probationary teacher for the first two years of his employment, the court explained. “As long as [the district] notifies the teacher by March 15 of the second year of his employment of its decision not to hire him for the next year, the district may release him in its complete discretion,” said the court. “However, if a second-year teacher is not so notified, he is deemed reelected for the third year and achieves permanent status (tenure.)”

The controlling statute, Education Code Sec. 44929.21, does not specify the method for providing the required notice. “Under settled principles of statutory construction, a statute requiring that a notice shall be given, but which is silent as to the manner of giving such

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*Gloria Steinem*

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notice, contemplates personal service thereof,” said the court, quoting from *Long v. Chronicle Publishing Co.* (1924) 68 Cal.App. 171. “Since the District claims it sent notice of Hoschler’s nonretention by certified mail, and the evidence is undisputed that he did not receive the notice until well after March 15, the notice of nonrenewal was untimely,” reasoned the court.

### *The trial court ignored the rules of statutory construction.*

In reaching this conclusion, the court rejected the rationale of the trial court. “The trial court ruled that a certified mail method of giving notice must be read into section 44929.21 because it is featured as an optional method of notice in other Education Code statutes dealing with nonretention and dismissal,” said the Court of Appeal. In coming to this conclusion, the trial court ignored the rules of statutory construction, said the court. “Under accepted canons of statutory interpretation, where a statute does not prescribe the method of notice, personal service is contemplated,” it reiterated. “Thus, unless a different purpose is found within the statutory scheme to justify an *exception*, the presumption of the personal service method of notice applies.”

One justification given by the trial court for its ruling was that “the Education Code consistently provides for the service of notices of dismissal, suspension, non-reemployment and reduction in numbers by either personal service or registered mail.” This premise is incorrect, said the Court of Appeal, pointing to a number of sections dealing with the dismissal or nonretention of employees that do not specify that manner of notice.

The trial court also reasoned that, because the legislature gives school districts *the option* of using certified mail to notify teachers who are subject to dismissal only for cause and who have due process procedural rights to contest dismissal, the legislature could not have intended to place a greater burden on districts terminating probationary employees, who have no right to object. The Court of Appeal disagreed, stating:

This logic is not persuasive. Since a probationary teacher has no procedural due process rights under section 44929.21, notification of his nonreelection is the “end of the line” for that teacher. One of the primary purposes for requiring that probationary employees be given timely notice of a decision not to retain them is so that they can make alternate plans, apply for other jobs, and have time to relocate if necessary.

On the other hand, in cases where a teacher does enjoy procedural due process rights, a district’s notice is not the end of

the line, but the *beginning* of a process, which may or may not lead to the loss of his job. The Legislature could well have believed that personal notice by March 15 should be given to probationary employees who have no procedural recourse, since it is essential they have actual knowledge of a district’s decision early enough to prepare for the future.

### *The presumption of the personal service method of notice applies.*

The court also found the history of probationary dismissal statutes persuasive. After reviewing a number of statutes, dating back to 1917, the court discovered that for decades, statutes regulating dismissal and nonretention of probationary employees provided for registered mail service as an alternate form of service of notices. “Yet,” it found, “when the Legislature overhauled the Education Code in 1983 to allow probationary teachers to be released at the complete discretion of a district, it required that they be ‘notified’ of their nonreelection by the March 15 deadline, without affording larger districts the option of sending the notice by certified or registered mail.”

The court concluded that the legislature’s deletion of the certified mail option in later statutes “signifies

a deliberate intention to change the law with respect to notice,” and that, when it did so, it “must be presumed to have been aware of prior decisions holding

*The legislature deleted the certified mail option in later statutes.*

that where a statute requires the giving of notice but fails to specify a method, notice by personal service is required.”

The Court of Appeal held that the district was required to give Hoshler notice by personal service or by “some other method equivalent to imparting actual notice.” Because it failed to do so, Hoshler was entitled to the relief he requested. However, realizing that many school districts have relied on certified mail as a means of giving notice, and that retroactive application of its decision would cause severe hardship, the court specified that its decision would apply only to Hoshler and to those probationary teachers receiving notice after its decision becomes final. (*Hoshler v. Sacramento City Unified School Dist.* [4-3-07] 149 Cal.App.4th 258.) \*

out Pay and Dismissal from Employment.” The notice stated that Perez had a right to request a hearing on the charges against him within five days after service of the notice. Attached was a copy of the district’s personnel policy providing that the notice “shall be deemed sufficient” when delivered to the employee in person or when deposited in the “U.S. Certified Mail” addressed to the employee’s last known address.

Perez received his mail at a post office box. Perez’ wife signed for the notice on July 8, 2004. On July 13, Perez delivered a demand for a hearing to the district and explained that he had been out of town. The district found that Perez waived his right to a hearing because he did not request one within five days of the date the notice was mailed. He was terminated.

Perez and his union, the California School Employees Association, filed a petition for preemptory writ of mandate arguing that service of the

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**Five-Day Limit to Request Hearing Violates Due Process**

A school district employee was denied due process when his request for a hearing on his termination was denied because it was made more than five days after the notice of his right to a hearing was mailed, according to a recent decision by the Fifth District Court of Appeal. Due process requirements must be based on an evaluation of the totality of the circumstances in each situation, said the court in *California School Employees Assn. v. Livingston Union School Dist.* Here, the notice was sent during summer vacation, when the teacher was not working. Because in-

person delivery was precluded, the school could not maintain that service was completed upon mailing.

Mike Perez was employed by the district as a bus driver and custodian during the school year. A parent complaint about him resulted in an investigation and a recommendation for immediate termination. On June 24, 2004, after the school year ended and Perez was off work until the start of the next school year, the district sent him by certified return receipt mail, a “Notice of Statement of Charges and Recommendation for Immediate Suspension with-

*The school could not maintain that service was completed upon mailing.*

notice should be deemed complete only upon actual delivery of the notice to him and that his request for a hearing was timely. The trial court denied the peti-

tion, concluding that the district's policy did not deprive Perez of due process.

In reversing that ruling, the Court of Appeal noted, "[T]he due process clause of the Fourteenth Amendment to the United States Constitution requires that if a person is entitled to notice in a governmental proceeding, the method of giving that notice must be reasonably calculated to actually notify; giving notice cannot be merely a token

*The method of giving the notice must be reasonably calculated to actually notify.*

or formalistic gesture," and "the requirements of due process in a particular setting must be based on an evaluation of the totality of the circumstances." Further, said the court, "if the notice permits or requires action by the person notified, the notice must be given in time to reasonably permit action." And, when an important issue such as a government employee's loss of permanent employment is involved, the notice "should be clear, concise and easily understandable."

In this case, the court found that the district's policy was not clear and understandable. "It is, instead, ambiguous and confusing." The relevant board policy requires that the notice to the employee contain a statement "that the

employee has a right to a hearing on such charges if demanded within five (5) days after service of the notice to the employee." The same policy states that such a notice is "sufficient" upon mailing. "The rule does not, however, define when 'service' is complete," concluded the court.

The court found that even if the policy could be construed as setting forth a "complete upon mailing" rule for service in a clear and understandable way, such a rule would violate due process. However notice is given, it must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," instructed the court, quoting from *Mullane v. Central Hanover Trust Co.* (1950) 339 U.S. 306. The court determined that the district did not meet that requirement, stating:

"All the circumstances," in the present case, must include the fact that many, perhaps a majority, of respondent's classified employees are not year-round employees. Thus, while respondent has daily access to employees during most of the year, there will be extended periods during each year when respondent knows it will not be able to deliver notices in person through normal work channels. Due process requires that respondent's system of notice take this reality into account.

The court pointed to the case of *Coburn v. State Personnel Board* (1978) 83 Cal.App.3d 801, in support of its conclusion that "the governmental

employer must take into account the actual circumstances that might impair the giving of sufficient notice of adverse action and a realistic opportunity to respond."

The district's failure in this case to take into account the circumstance that permanent employees will be away from their jobs for months at a time, on a regular basis, violates due process, concluded the court because it did not take this circumstance into account in

*The district's policy was not clear and understandable.*

establishing and administering the procedures required by Education Code Sec. 45113. Those procedures must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," said the court, quoting from *Mullane*. The court concluded by stating:

Both under the Education Code and under the Constitution, respondent has great latitude in establishing its policies for giving notice and permitting employees to respond and request a hearing. Respondent might, for example, adopt a different timeframe for personal service and service by mail, and it might adopt a different timeframe for notice to em-



ployees during the school year and during summer breaks. But respondent cannot do what it did here, administering its policy in such a manner that the notice became a mere formality and the opportunity to respond and request a hearing vanished altogether.

*(California School Employees Assn. v. Livingston Union School Dist. [4-4-07] 149 Cal.App.4th 391.) \**

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## Teachers Serving Under Provisional Credentials Are Probationary Employees Entitled to Rights

In *California Teachers Assn. v. Vallejo City United School Dist.*, the First District Court of Appeal has determined that teachers serving under provisional credentials are probationary employees entitled to statutory rights to notice and a pre-termination hearing when dismissed for economic reasons.

The district sent a letter to 43 provisionally credentialed teachers, notifying them of impending layoffs as part of a districtwide reduction in force and advising them of their right to request a hearing to determine if the district's decision to terminate their employment was supported by cause. The district later sent another letter that rescinded the prior layoff notice but nevertheless terminated their employment. The sole reason for their release was economic circumstances.

The California Teachers Association filed a petition for writ of mandate alleging that the teachers were probationary employees who were denied their rights to notice and a pre-termination hearing under Education Code

Secs. 44949 and 44955 and, therefore, were entitled to reinstatement with backpay and benefits. The trial court denied the petition. It reasoned that the statutory scheme establishing the rights of probationary employees in a layoff presupposes that a teacher is on track to permanent status. Because these employees were not on that track, and were not automatically entitled to employment for the following year, the district could release them in the manner it did.

The Court of Appeal disagreed, finding that, because there was no evidence that the teachers came within any of the categories of temporary employment defined in the Education Code, they fell within the default classification of "probationary" under Sec. 44915. And, because the code gives probationary teachers a number of rights and protections in the event of a layoff regardless of the nature of their credentials, these teachers were denied rights and protections to which they were entitled.

## Teacher Classification

The court first addressed the issue of classification, basing its analysis in large part on the recent case of *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260. (For a full discussion of this important decision, see *CPER* No. 183, pp. 5-13.) The Education Code sets out four possible classifications for certified employees, instructed the court: permanent, probationary, substitute, and temporary. Section 44915 states, "Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring classification qualifications for the school

*The teachers fell within the default classification of 'probationary.'*

year, who have not been classified as permanent employees or as substitute employees." The court pointed out that although this section does not mention temporary employees, other provisions of the code authorize that classification in certain specified situations. Therefore, concluded the court, Sec. 44915 "establishes probationary status as the default classification for teachers whom the Education Code does not require to be classified otherwise."

The district did not take the position that the 43 teachers fell into any of the statutorily defined categories of temporary employees. Rather, it argued, they must be classified as temporary due to the terms of their contracts and the provisional nature of their credentials. The Court of Appeal found no merit in either argument.

The teachers were hired pursuant to a contract of “provisional/emergency employment,” which provided they would be serving under a “provi-

*‘Provisional’ is not  
an employment  
classification  
recognized in the  
Education Code.*

sional/emergency credential” and would be classified as a “provisional employee pursuant to Education Code section 44911.” The label “provisional” was not determinative, found the court:

“Provisional” is not an employment classification recognized in the Education Code. The contract’s characterization of these teachers as “provisional” thus referenced only the status of their credentials, not their employment classification. Moreover, contract terms cannot supersede the statutory protections for teachers set

forth in the Education Code, including provisions governing their classification and termination.

The district also maintained that the teachers could not be classified as probationary because time spent teaching under a provisional credential does not count towards attaining permanent status, so they are not truly “probationary.” The court rejected this argument, noting that the same one had been made and rejected by the Fifth District Court of Appeal in *California Teachers Assn. v. Governing Board of Golden Valley USD* (2002) 98 Cal.App. 4th 369, 155 CPER 40. That decision was reaffirmed by another Fifth District panel in *Bakersfield*, instructed the court:

Just as the District does in this appeal, the school district in *Bakersfield* conflated the concepts of teacher credentialing with classification, reasoning that since teachers working under a provisional credential do not earn credit toward permanent status (Sec. 44911), whereas probationary employees generally do earn such credit (Sec. 44929.21, subd. [b]), a person working under a provisional credential must by definition be something less than probationary. However, *Golden Valley* and *Bakersfield* make it clear that a provisionally credentialed teacher may possess some of the rights of probationary employees, such as protections against mid-year dismissals and layoffs, although she does not possess others, such as progress towards tenure. The Education Code mandates that teachers be classified as probationary employees if they are not per-

manent and do not fall within one of the narrowly defined classes of temporary employees. (Sec. 44915.) School districts have *no discretion* to deviate from the Code’s classification scheme. The fact that provisionally credentialed teachers do not accrue credit toward tenure (Sec. 44911) is merely an exception to the general rule that after two years a probationary employee attains permanent status. (Sec. 44929.21, subd. [b].) Nothing in the Education Code suggests the lesser status of their credentials removes such teachers from the rule — i.e., probationary classification — entirely.

The district also argued that cases interpreting Sec. 44929.21(b), as it applies to teachers serving under an emergency permit, require a different result. Sec. 44929.21(b) provides that a probationary employee becomes permanent when reelected to a third year after two consecutive years in a position requiring certification. It also requires districts to notify probationary employees on or before March 15 of their second consecutive year of employment as to whether or not they will be employed for a third year. If the notice is not timely, the teacher is deemed reelected. In *Motevalli v. Los Angeles Unified School Dist.* (2004) 122 Cal.App.4th 97, 168 CPER 28, and *Culbertson v. San Gabriel Unified School Dist.* ((2004) 121 Cal.App.4th 1392, 168 CPER 35, the Second District Court of Appeal determined that provisionally credentialed teachers are not automatically reelected if they do not receive a notice of nonreelection by March 15 of their sec-

ond consecutive year. Therefore, contended the district, by logical extension, provisionally credentialed teachers are not entitled to notice and hearing in the event of economic layoff.

The court was not persuaded by this argument. It noted that neither *Motevalli* nor *Culbertson* suggested that teachers with provisional credentials are something less or other than probationary employees, and that, in fact, the *Motevalli* court “expressly concluded that the provisionally credentialed teacher in that case was a probationary employee based on the default rule of section 44915.” The courts in those cases based their opinions on the fact that the notice provision of Sec. 44929.21(b) was closely related to the tenure provision in the same code section, whereas that is not the case with the statutes providing for economic layoff rights, said the court. It also found, “the conclusion that provisionally credentialed teachers do not have automatic reelection rights under section 44929.21, subdivision (b) does not mean *all* rights the Code affords probationary employees are similarly off limits.”

### **Termination for Economic Reasons**

The court then turned to the issue of whether the teachers had rights to notice and a hearing in the event of termination for economic reasons. “The procedures required for economic layoffs are described in sections 44949, 44955 and 44957,” instructed the court. These statutes require that permanent employees be released after probation-

ary employees and that terminations proceed in reverse order of seniority. Both permanent and probationary employees are entitled to notice of termination and a hearing upon demand to determine if there is cause for not re-employing them. For two years after an economic layoff, a probationary employee has a right to reappointment, subject to the prior rights of permanent

## *Both permanent and probationary employees are entitled to notice of termination and a hearing.*

employees and those probationary employees with more seniority.

The court recognized that “arguably, these statutory layoff protections are inconsistent with the conditional nature of probationary employment,” noting that Sec. 44929.21 provides districts with the power to nonreelect probationary employees without cause. The question of which of these conflicting statutory schemes has primacy was addressed in *Cousins v. Weaverville Elementary School Dist.* (1994) 24 Cal.App.4th 1846, 107 CPER 45. In that case, the court concluded that the broad nonreelection provisions of Sec. 44929.21 are qualified by the more specific requirements of Secs. 44949 and

44955 in the context of an economic layoff. The district in this case did not distinguish *Cousins* except to reiterate its argument that it does not apply because the 43 teachers were temporary, not probationary. The court rejected that analysis and could find no reason to disregard *Cousins* when the probationary employees involved held less than full credentials.

The court also rejected the district’s assertion that layoff protections are available only to teachers who have a reasonable expectation of continued employment. The district argued that the layoff statutes “presuppose that a certificated employee’s term of employment continues to the ensuing year and the employee is on track to permanent status.” This goes too far, said the court, noting that districts have discretion to nonreelect any probationary employee, regardless of the type of credential he or she holds. “Only as of March 15 of a probationary employee’s second consecutive year does a district lose that discretion,” said the court. “Until then, *no* probationary employee has a reasonable ‘expectation of continued employment,’ nor any reason to believe his or her ‘term of employment continues to the ensuing year.’” Further, “if the Legislature had meant to limit these rights to probationary employees with full credentials, it could have easily said so,” reasoned the court.

The court noted that the Education Code’s only limitation on provisionally credentialed teachers appears in Sec. 44911, which provides that em-

ployment under a provisional credential may not be counted in computing an employee's time toward achieving permanency. "Beyond this limitation, however," said the court, "the Code does not restrict provisionally credentialed teachers from enjoying rights afforded to their fully credentialed colleagues of the same classification." The *Golden Valley* court, in the context of a midyear dismissal, determined that, where matters of tenure were not involved, a teacher holding an emergency permit is entitled to the same statutory protections as other probationary employees. This holding was extended to year-end layoffs in *Bakersfield* where the court held that "a probationary employee working under an emergency teaching or specialist permit does not accrue credit toward permanent status, but is entitled to the statutory protections accorded such employees in the event of a dismissal for cause or unsatisfactory performance." Similarly, the statutory rights of prior notice, a hearing, and preferential reappointment after an economic layoff are not related to the acquisition of tenure, determined the Court of Appeal. "Providing such rights to provisionally credentialed teachers would not contradict the directive in section 44911 that time served under such a credential shall not count toward achieving permanent status," it reasoned.

The district argued that it would be unfair and contrary to public policy to require it to provide layoff rights to teachers who lack full credentials. Be-

cause Sec. 44955 requires layoffs to be conducted based on teachers' classification and seniority, and Sec. 44957 gives teachers a right of preferred reappointment based only on classification and seniority, the district could be forced to retain or reappoint provisionally credentialed teachers ahead of fully credentialed ones with less seniority. The court was not persuaded and noted that the *Bakersfield* court had rejected the same argument, reasoning that, "if

*School districts have tools at their disposal enabling them to rehire the most qualified teachers.*

the Legislature had intended that only probationary and permanent employees *with a preliminary or clear credential* shall acquire seniority, it would not have been difficult to say so...."

In this situation, contrary to the district's contention, the code does give school districts some discretion in determining which teachers are released or rehired, said the court. Where many employees share the same start date, such as the beginning of a school year, Sec. 44955(b) provides that the district "shall determine the order of termination solely on the basis of needs of the

district and the students thereof," noted the court. And, districts may take account of a teacher's "qualifications" in making assignments and reassignments as part of a layoff under Sec. 44955(c). "Similarly," said the court, "while teachers are generally to be rehired based on their level of seniority, districts must take account of whether a 'probationary or temporary employee...is *certified and competent to render*' the service for which he or she is being rehired," under Sec. 44957(a). Further, according to the holding in *California Teachers Assn. v. Mendocino Unified School Dist.* (2001) 92 Cal.App.4th 522, 150 CPER 42, school districts have the right not to reelect probationary employees lacking a full credential who have been laid off for economic reasons, said the court. "Thus, school districts have tools at their disposal enabling them to retain and rehire the most qualified teachers, and no pressing policy reason requires us to read an exclusion into the layoff provisions that is not supported by statutory language," it concluded.

Even if this were not the case, said the court, it would not be inclined to find such an exception. Quoting from the *Golden Valley* decision, the court distinguished its role from that of the legislature:

The question before us is not whether, as a matter of policy, our construction of the statutes achieves the optimal balance of competing societal interests. Our role is confined to construing the statutes in a manner that effectuates the apparent intent of the



Legislature. The current Legislature is free to weigh the competing public policies affected by this decision and amend the statutes to strike a different balance among those policies.

The court reversed the trial court's judgment and sent the case back to the lower court for a determination of damages and reappointment rights of the 43 teachers. (*California Teachers Assn. v. Vallejo City Unified School Dist.* [3-29-07] 149 Cal.App.4th 135.) \*

awarded Carter damages in excess of one million dollars. The district appealed.

The Court of Appeal reversed. It concluded that "the policy against teachers recommending weight-gaining substances to students" was not a policy that was "fundamental," "well-established," and "carefully tethered" to a constitutional or statutory provision. This is the required showing for an employer to be found liable for wrongful termination according to the Supreme Court's decision in *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 93 CPER 42. Further, there was no law barring the conduct. "Thus, while EUHSD's decision to terminate Carter may have been arbitrary, misguided, and petty, said the court, "it was not prohibited by law or in contravention of established public policy, and thus

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## Teacher's Termination Not Prohibited by Law or Contrary to Public Policy

The Fourth District Court of Appeal found no liability where a school district terminated a probationary teacher because, while employed at another district, he had informed the athletic director that a football coach had recommended a nutritional supplement to a student. The court concluded that the termination was not wrongful because it did not violate any well-established public policy and was not prohibited by law.

James T. Carter was employed by the Grossmont Union High School District as a teacher and basketball coach at Monte Vista High School during the 1999-2000 school year. While there, Carter learned that the football coach, Ed Carberry, had suggested to one of the football players that he consume protein shakes containing creatine to gain weight. The football player followed his advice and began having problems with his kidneys. Carter told the school athletic director that Carberry had recommended the pro-

tein shake to the athlete. The athletic director said that he was not going to do anything unless the parents got involved. Carter told him that if nothing was done, he would be looking for a job elsewhere.

Carter applied to teach in the Escondido Union High School District and received a probationary appointment to Orange Glenn High School. After accepting the position, he learned that Carberry's wife was the interim principal at Orange Glenn. Carter taught at Orange Glenn for the 2000-01 and 2001-02 school years. On March 13, 2002, he received a letter from the district advising him that he would not be reelected for the following year.

Carter sued EUHSD, claiming that the district had wrongfully terminated him in violation of public policy for reporting Carberry to the athletic director when at Grossmont. The jury found that the report was "a motivating reason" for the termination and

### *There was no law barring the conduct.*

provides no basis for liability under California law."

Carter argued that Education Code Sec. 49423 sets out the public policy on which the district's liability is based. Section 49423 states:

Any pupil who is required to take, during the regular schoolday, medication prescribed for him or her by a physician or surgeon, may be assisted by the school nurse or other



designated school personnel...if the school district receives a written statement from the physician detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken and a written statement from the parent...indicating the desire that the school district assist the pupil in the matters set forth in the statement of the physician.

The court concluded that Sec. 49423 did not support Carter's contention because the public policy that it establishes was not violated by his termination. "Section 49423 by its terms does not prohibit *any* conduct," said the court. "Instead it is expressly permissive, delineating a circumstance under

*Virtually every portion  
of the statute is  
inapplicable.*

which the school nurse 'may' assist in the administration of medication to a student during the school day." The fact that the code section does not prohibit any conduct and contains no sanctions for noncompliance "strongly" suggests it does not establish a fundamental public policy that could support a wrongful termination claim, the court reasoned. Because it is difficult to determine precisely what employer conduct Sec. 49423 prohibits, "the statute does not sufficiently describe any prohibited

conduct to enable an employer to know the fundamental public policies that are expressed in that law as is required for wrongful termination liability," said the court, citing *Sequoia Insurance Co. v. Superior Court* (1993) 13 Cal.App.4th 1472.

The trial court reasoned that what the legislature *really* meant to do in enacting Sec. 49423 was to *prohibit* assistance by school personnel in giving medication without parental consent. But, even if it were to adopt the lower court's construction, "the action allegedly taken here...would still not fall within its scope," said the Court of Appeal:

In fact, virtually every portion of the statute is inapplicable. The protein shake was not "medication" "prescribed for [Edison] by a physician or surgeon"; Edison was not "required to take [the shake], during the regular schoolday"; and Edison was not "assisted" in taking it "by the school nurse or other designated school personnel." Thus, even if the statute is intended to implicitly prohibit the actions it describes absent written parental authorization, those actions would not include Coach Carberry's suggestion that a student could improve his college football recruitment prospects if he consumed a protein drink at some unspecified time in the future.

The court also did not find support for the trial court's judgment in the Department of Education regulations implementing the statute. While the regulations do include "nutritional supplements" in the definition of

"medication," the court found that "the regulatory framework as a whole further demonstrates the inapplicability of the underlying statute to this case." It noted that the implementing regulations are expressly "limited to addressing a situation where a pupil's parent or legal guardian has initiated a request to have a local educational agency dispense medicine to a pupil..., as prescribed by a physician or other authorized medical personnel."

The court also rejected Carter's "implicit" argument that the judgment against the district was supported by Labor Code Sec. 1102.5, California's general whistleblower statute. Section 1102.5 prohibits termination of an

*Protein shakes  
containing creatine  
are not unlawful.*

employee "for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." The court determined that Carter's conduct was not covered by the statute. Protein shakes containing creatine are not unlawful, noted the court. It found nothing in the record to support a conclusion that Carter believed

them to be illegal and nothing to support a conclusion that such a belief, even if it existed, would be “reasonable.”

The situation presented by this case is closely analogous to that in *Patten v. Grant Joint Union High School*

*This was a  
disagreement about  
the proper advice to  
give student  
athletes.*

*Dist.* (2005) 134 Cal.App. 4th 1378, said the court, where a teacher claimed he was fired because he told his supervisor about some inappropriate actions by other teachers. The *Patten* court de-

termined that the disclosures were not protected by Sec. 1102.5 because they were made in “the context of an internal personnel matter based on a student complaint, rather than in the context of a legal violation.” The Court of Appeal stated:

As in *Patten*, Carter’s disclosure here was not whistle-blowing under section 1102.5, but rather a routine “internal personnel disclosure” that was, at its core, a disagreement between the football and basketball coaches about the proper advice to give to student athletes. This type of disclosure is not encompassed by section 1102.5, and consequently cannot support a wrongful termination action.

(*Carter v. Escondido Union High School Dist.* [3-21-07] 148 Cal.App.4th 922 .) \*

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## Local Government

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### Governor Gets Cooling-Off Period in Orange County Transit Strike

On Monday, May 7, at the request of the California Attorney General, Orange County Superior Court Justice Dennis Choate ordered a 60-day "cooling-off period" in the bargaining stalemate between the Orange County

*The union asked transit district maintenance workers not to cross picket lines.*

Transportation Authority and Teamsters Local 952. The judge's restraining order enjoins both the transit authority and the union from threatening or engaging in any strike or lockout for a period of 60 days, or until July 6.

The statutory cooling-off period was prompted by a vote on April 23, of union members who overwhelmingly signaled their readiness to walk off their jobs as coach operators of the transportation authority. With their three-year contract set to expire on May 1, union secretary-treasurer Patrick Kelly called on the transit authority to bring a more generous wage offer to the table. Among the transit district's 1,100 drivers, the strike authorization vote was

917-42. The union also asked transit district maintenance workers not to cross any picket lines set up by the drivers. County buses carry approximately 200,000 people a day.

Without delay, on April 25, OCTA asked Governor Schwarzenegger to appoint a board of investigation, the first step in the process spelled out in Labor Code Sec. 1137.2 that led to the cooling-off period. The transit authority told the governor that, if permitted to strike, public transportation services in Orange County would be significantly disrupted and would endanger the public health and safety. Because the law prohibits a strike during the period of the board's investigation, OCTA asked the governor to take immediate action to appoint a board before the May 1 contract expiration date.

Schwarzenegger obliged. On April 30, he appointed a board of investigation to meet and write a written report within seven days. The board members were Kelly Montgomery, formerly the City of Sacramento's human relations manager; Edna Francis, a labor arbitrator; and Justice Harry Low, a retired appellate court judge. Union leaders said that they would honor the governor's action.

On May 2, the board of investigation met with union members, who said the offer made by the transit authority was inadequate to keep up with inflation. Bus drivers testifying at the board's hearing told the panel that they were living paycheck to paycheck in an expensive area of the state. Union spokesperson Kelly told the board that the transit authority needs to "find the money" to increase its wage offer or "we're going to rock and roll." For its part, OCTA told the board that its of-

*The law prohibits a strike during the period of the board's investigation.*

fer was fair and based on economic projections prepared by Chapman University. The authority told the board it had "delivered a strong package" of proposals and expressed hope that the parties would return to the table and reach a resolution of the bargaining impasse.

Once the board issued its report calling the strike disruptive to public transportation and likely to endanger public health and safety, the governor took the next step and asked the attorney general to petition the court for an injunction against the strike for a 60-day period.

The parties have been negotiating for approximately four months and

**“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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worked with a mediator for part of that time. The transit authority's board of directors proposed a 30-day extension to the prior agreement, but the union resisted that move and countered with a proposal for a day-to-day contract extension including a 72-hour notice to strike.

At the time of the strike vote, OCTA had proffered a 13 percent increase in wages and benefits over three years, but union officials claim that this offer would increase wages by only 8 percent. Union officials assert that wages for Orange County bus drivers are below those of Los Angeles and San Diego.

In reaction to the court's injunction, the transit authority called on union leaders to return to the bargaining table for "good faith and rational discussions for the good of their 1,100 members, their families, and the 68 million riders a year who depend on the transit system. "The union pledged to continue to press for a fair and equitable wage increase. In a bulletin to its members, the union indicated that rallies will be scheduled to mobilize community support. And, it looks forward to negotiating an agreement "that can be ratified by our members. To this end, we will continue to work." \*

At the conclusion of the investigation, during which more than 75 current and former employees were interviewed, Division Chief Kenneth Bayless informed Benach that he was permanently reassigned out of the Aero Bureau based on "overwhelming evidence" that

*The work environment was characterized by a lack of harmony and cooperation.*

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## **Involuntary Transfer Based on Deficient Performance Not Punitive Absent Reduction in Pay, Rank**

The Public Safety Officers Procedural Bill of Rights Act does not constrain a law enforcement agency from ordering the transfer of an employee to compensate for his deficient performance. Based on evidence that the transfer was not punitive in nature and that the officer suffered no downgrade in rank or loss of pay, the reassignment did not trigger Bill of Rights Act protection.

The Court of Appeal ruling in *Benach v. County of Los Angeles* arose out of a long-standing dispute between the Los Angeles County Sheriff's Department and Francisco Benach, who served as a pilot at the department's Aero Bureau at the Long Beach airport. Benach was fired by the department back in 1993,

appealed, and was reinstated. A settlement agreement resolved that dispute.

In October 2000, about 16 department employees presented Sheriff Lee Baca with a memorandum signed by more than 30 department personnel complaining that Benach had created an unsafe and hostile work environment at the Aero Bureau. They accused him of engaging in reckless and unsafe flying and physical violence, and of threatening fellow deputies and their families. An internal affairs investigation was initiated by Baca and, while that inquiry was underway, Benach was transferred out of the Aero Bureau. He continued to be paid at the same rate.

his presence there "coincided with a less-than-harmonious working environment." Bayless told Benach that the decision was not based on a determination of fault or a finding that Benach had violated any department policy. He stressed that the transfer was non-punitive and informed Benach that he would continue to receive the same rate of pay.

Benach challenged the department's transfer decision based on a number of legal theories, including that it ran afoul of the Bill of Rights Act. The trial court granted the department's motion to summarily dismiss the case, finding that Benach had not been demoted or subjected to a punitive transfer.

The Court of Appeal affirmed the lower court's determination. First, the court took note of undisputed evidence that Benach retained the same rank and rate of pay in his new position as a de-



# Lucky 13!

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tective. The record also revealed that the involuntary transfer of Benach was not imposed for a punitive purpose. Rather, the court explained, the year-long internal affairs investigation revealed that the work environment at the Aero Bureau was characterized by a lack of harmony and cooperation among employees when Benach was present. When he was transferred pending the

*It was in the  
department's best  
interest to  
permanently remove  
Benach.*

outcome of the investigation, friction dissipated and working conditions became more civil and respectful. Therefore, concluded the court, even though Bayless determined that Benach had not violated any department policy or committed any wrongdoing, Bayless reasonably found it was expeditious and in the department's best interest to permanently remove Benach from the Aero Bureau rather than transfer numerous other employees to new posts.

The court found support for its decision in *Orange County Employees Assn. v. County of Orange* (1988) 205 Cal.App.3d 1289, 79X CPER 3, where the director of a county facility for delinquent boys was transferred because of his supervisor's concerns about his

performance. Although the director retained the same compensation and benefits, he filed a lawsuit claiming he was entitled to an administrative hearing under the Bill of Rights Act. He argued that the transfer was necessarily punitive since it resulted from concerns about deficiencies in his performance. The court in that case disagreed, stating:

Deficiencies in performance are a fact of life. Right hand hitters sit on the bench against certain pitchers, some professors write better than they lecture, some judges are more temperamental with criminal cases than others. The manager, chancellor or presiding jurist must attempt to find the proper role for his personnel. Switching Casey from shortstop to second base because he can't throw to first as fast as Jones is not in and of itself a punitive transfer.

In the present case, the court praised the decision in *Orange County* for aptly observing a difference between a transfer intended to punish for a deficiency in performance and one intended to compensate for deficient performance. Here, said the court, Bayless concluded that Benach's continued presence at the Aero Bureau was not conducive to a cooperative, productive working relationship with approximately 30 other members of the staff, and Bayless properly exercised his supervisory discretion to make a change to best serve the department's needs. (*Benach v. County of Los Angeles* [certified for publication 4-13-07] 149 Cal.App.4th 836.) \*

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## **Workers' Comp Antidiscrimination Law Violated by City Policy**

The City of Santa Barbara ran afoul of the antidiscrimination provisions of workers' compensation law by requiring city employees who sustain industrial injuries to use vacation leave when they obtain medical care for those injuries while permitting workers who suffer non-industrial injuries to use sick leave for their medical appointments. The Second District Court of Appeal in *Andersen v. Workers' Compensation Appeals Board* ruled that while local governments and unions have the plenary

power to provide sick leave, they may not create policies that discriminate against industrially injured employees.

The challenge to the city's policy was raised by John Andersen, who sustained injuries while working as a finance supervisor. A doctor examined Andersen and determined that he suffered from carpal tunnel syndrome and other infirmities, and that about 80 percent of this injury was the result of cumulative trauma at work.

When Andersen returned to work, he needed to obtain medical care for these injuries. The city required him to use his earned vacation leave to attend the medical appointments. Workers with non-industrial injuries were permitted to use their sick leave for these visits.

Andersen filed a workers' compensation claim alleging that the city discriminated against him in violation of Labor Code Sec. 132a. That provision declares as the policy of the state that

*The city did not establish a reasonable, legitimate business purpose for its policy.*

"there should not be discrimination against workers who are injured in the course and scope of their employment" and that any employee who is discriminated against for filing a workers' compensation claim is entitled to reimbursement for lost wages and benefits.

The Workers' Compensation Appeals Board concluded that the city had not violated Sec. 132a, and Andersen took the matter to the Court of Appeal for review.

First, the court looked at the city's memorandum of understanding covering general city employees. Section 59 of the MOU prohibits employees from using sick leave benefits "in lieu of or

to supplement workers' compensation benefits" provided by the state. The city construed this provision to require industrially injured workers to charge vacation time, rather than sick leave, when attending a medical appointment for the work-related injuries.

The court noted that the antidiscrimination provision of the law is not limited to protecting only the rights related to the workers' compensation system itself. An employer action that "in any manner discriminates" against an industrially injured employee to the detriment of his or her employment rights is a violation. And, the court added, discriminatory and detrimental actions taken by a local government pursuant to a collective bargaining agreement also are prohibited by Sec. 132a.

The court summarily concluded that Andersen established that the city's policy required only industrially injured workers to use earned vacation time for attending medical appointments and that the city did not establish a reasonable, legitimate business purpose for this discriminatory policy.

The court rejected the city's contention that state workers' compensation law does not apply to its policy because sick leave is a creature of local law. "We disagree," said the court. "Local government entities and unions may not create policies that discriminate against their industrially injured employees to their detriment, even if they have plenary power to provide sick leave. The creation and use of such policies contravene the mandate of section 132a."

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

*Winston Churchill*

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

(11th edition, 2004)

*See back cover for price and order information*

The court clarified that the city could choose not to provide sick leave to any of its employees, but it cannot refuse to permit its use for industrially related medical appointments when non-industrially injured workers are

not subject to the same restriction. (*Andersen v. Workers' Compensation Appeals Board and City of Santa Barbara* [4-19-07] B191064 [2d Dist.] \_\_\_ Cal.App.4th\_\_\_, 2007 DJDAR 5403.) \*

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## Commission's Reduction of Discipline Was Abuse of Discretion

The San Diego County Civil Service Commission abused its discretion when it reduced the disciplinary action that had been imposed on a detention processing technician by the county sheriff. The Court of Appeal found that the commission singled out the technician's inaccurate evaluation rating without giving appropriate consideration to the considerable enumerated areas in which she was deficient and failed to give adequate weight to the sheriff's concerns for public safety.

The employee, Margaret Gant, worked for the Sheriff's Office as a detention processing technician for 10 years before she was promoted to a supervisory position in 1998. She supervised seven detention processing technicians or assistants.

Beginning in 2004, Gant made sentencing miscalculations in two individuals' cases. In one, she miscalculated the custody time for one individual to be 91 days instead of 57 days. In another case, Gant's miscalculation caused an inmate to serve fewer num-

bers of weekends than were specified in the sentencing order.

Following an internal affairs investigation, Gant was served with an order of demotion. At the same time, Gant was appealing her 2004-05 annual evaluation, which identified over 20 areas of performance as "needing improvement." After the internal appeal, a rating of "fully competent" was issued.

Gant also appealed her demotion to the civil service commission. At the hearing, Gant stipulated to the facts underlying the two sentencing miscalculations, but argued that these types of errors were common. She also asserted that other supervisors had made similar sentencing errors but received lesser discipline. The record also showed that there had been nine erroneous releases at the county detention facilities within the past three months. Gant also relied on her "fully competent" performance evaluation.

Sheriff William Kolender opposed the appeal, arguing that the performance evaluation erroneously re-

flected that Gant was a competent supervisor. He urged the commission to uphold the demotion in order to prevent harm to the public.

The hearing officer appointed by the commission acknowledged that Gant's errors were serious and that some level of discipline was appropriate. However, he relied on the department's own overall rating of Gant as "fully competent" to support his conclusion that the penalty should be modified from a permanent demotion to a temporary demotion of four months. The commission found that the sheriff had proved that Gant had engaged in acts inimical to the public service, but it went along with the hearing officer's recommendation to reduce the penalty to a temporary demotion.

*The grievant asserted that other supervisors had made similar sentencing errors.*

The sheriff challenged the commission's action in court, arguing that he should not be precluded from trying to raise department standards — even if an inaccurate performance review had been conducted — in order to protect the public. The trial court agreed that the commission had abused its discretion, finding that "to condone sentencing errors, failing to report

over-detentions to supervisors and ignoring Department directives regarding staffing would directly result in harm to the inmates, departmental staff and the public at large.”

The Court of Appeal was careful to note that its role was not to conduct an independent review of the evidence, but to review the administrative decision of the commission to determine if it was supported by substantial evidence. The issue on appeal, therefore, was limited to whether the commission abused its discretion when it reduced the discipline imposed on Gant and reinstated her as a supervisor after only a temporary suspension.

### *The sheriff urged the demotion to prevent harm to the public.*

In making this assessment, the court underscored, the inquiry must include whether the commission adequately addressed the possibility of harm to the public service from Gant’s conduct. In that regard, the court noted that Gant’s erroneous sentencing calculations “can undisputedly result in harm to the public service.” The public has an interest in ensuring that convicted persons will serve correct terms of custody, and the sheriff has a duty to protect public safety by improving the accuracy of the sentencing calculations directed by court order. “Even assum-

ing the Sheriff is not entitled to ‘substantial deference’ on such disciplinary decisions regarding detention facility employees,” said the court, “these public safety factors are entitled to full consideration by the Commission.”

The court also instructed that Gant could not rely on errors by fellow employees to excuse her own misconduct. “When it comes to a public agency’s imposition of punishment, there is no requirement that charges similar in nature must result in identical penalties,” said the court.

At the heart of the court’s analysis was Gant’s evaluation. Although it labeled her a “fully competent” supervisor, the court called it inconsistent on its face, citing numerous areas in which it indicated that improvement was needed. Gant’s performance was characterized as less than satisfactory in approximately 23 specific areas, including demonstrating required technical skills, keeping abreast of current procedures, exhibiting sound judgment, providing direction and monitoring progress, maintaining objectivity, completing tasks correctly and on time, quality of work, and acting in accordance with management direction. In addition, Gant’s evaluation included comments indicating that she failed to follow training instructions and lacked the knowledge required of the subordinate staff she supervised. The evaluators took note that Gant behaved in ways that caused others to lose respect and trust in her, showing deficiencies in leadership and conflict resolution.

Other comments described the quality of her work as in need of improvement and inconsistent with the department’s mission and core values.

Reflecting on these comments, the court reasoned that the “categorical result of the evaluation (rating) must be read in light of the remainder of the evaluation that gave rise to it (commentary)... These comments may not be entirely discounted merely because the rating is on its face favorable to the employee’s position.”

The court concluded that the commission abused its discretion by singling out the admittedly inaccurate performance evaluation to support its de-

### *The issue was limited to whether the commission abused its discretion.*

cision to reduce the level of discipline to a temporary demotion. “Such an interpretation of the evidence fails to adequately account for the overriding goal of preventing harm to the public service.” (*Kolender v. San Diego County Civil Service Commission; Gant, RPI* [certified for publication 4-6-07] 149 Cal.App.4th 464.) \*



# State Employment

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## DPA Declares Impasse in CCPOA Talks

A year after the state sunshined its bargaining proposals to the California Correctional Peace Officers Association, it has requested that the Public Employment Relations Board appoint a mediator. "Without outside help, negotiations remain futile," said David Gilb, director of the Department of Personnel Administration, in the department's announcement, claiming that CCPOA has never offered a single counterproposal. DPA's call for a mediator to help resolve negotiations "is just another example of this administration's pattern of lies and bad faith dealing when it comes to corrections," charged CCPOA president Mike Jimenez.

### Concessions Demanded

In April 2006, the state publicized its goals for the negotiations. Nearly three months later, the union sunshined 38 pages of proposals. Negotiations started out on a bad note, when the state refused to let the union videotape bargaining. (See story in *CPER* No. 179, pp. 64-65.)

The state has proposed reversing many provisions that CCPOA fought hard to gain, but that outsiders, such as the Bureau of State Audits and the Cali-

fornia Performance Review panel on corrections, have criticized. DPA proposes eliminating sick leave from the definition of hours worked for the purpose of determining when overtime pay is due, a provision that several other

*DPA would restrict  
the kinds of grievances  
that are subject  
to arbitration.*

unions reluctantly accepted in the last round of negotiations. It also wants to remove language from the contract that forbids management from imposing discipline for excessive sick leave.

The administration proposes reducing the number of positions on which officers could bid for transfer, a change that would allow management to fill positions based on suitability rather than seniority. It hopes to clarify management's ability to reassign employees temporarily to meet short-term needs.

Under DPA's proposals, four distinct avenues for grievance and arbi-

tration would be condensed into a single grievance-arbitration procedure. DPA would restrict the kinds of grievances that are subject to arbitration and clarify timelines in the grievance and arbitration procedures. Arbitrator selection methods would change, and there would be more restrictions on arbitrator authority.

Initially, DPA also proposed that the union waive the right to negotiate the effects of policy changes at individual prisons. In its most recent offer, however, the agency demanded that all side agreements not be incorporated as terms of the collective bargaining agreement unless they are the result of court orders or the parties have agreed in writing to incorporate them into the contract. If not incorporated into the collective bargaining agreement, the sideletters would be treated as "institutional operational guidelines."

### Formula Under Fire

Compensation also has become a major point of contention since the union won a 3.125 percent raise in arbitration earlier this year. The award was the result of contract language that ties monthly compensation of correctional officers to \$666 below the pay and benefits of California Highway Patrol officers. The arbitration decision prompted the Legislative Analyst's Office to recommend that compensation agreements for a bargaining unit be decoupled from the pay of other employees. (See story in *CPER* No. 183, pp. 64-67.)

In addition, the California Association of Highway Patrolmen thinks the linking of the two contracts is an unfair practice. In April, it filed a charge with PERB claiming that the arbitrator's interpretation of the CCPOA agreement renders CAHP unable to bargain effectively for any compensation items. In essence, when CAHP and the state bargain CAHP unit issues, they will be bargaining CCPOA issues. The cost of an item for CCPOA's

*CAHP thinks the linking of the two contracts is an unfair practice.*

unit of 30,000 employees overwhelms the cost of providing the benefit to CAHP's unit of 6,000. Therefore, CAHP charges, the state cannot bargain in good faith with CAHP. The contract compensation link interferes with CAHP's right to bargain exclusively for the employees in its unit, and none of the three parties any longer has an incentive to reach agreement on economic terms, it says.

The department claims its current offer resumes the \$666 total compensation formula beginning July 1, 2007, and ending July 2, 2010, as long as the language and details of the formula are transparent enough to allow the legis-

lature to predict the agreement's fiscal impact. DPA proposes no salary increase for 2006-07, beyond the increase that resulted from the arbitration decision. It estimates that officer pay will rise 18 percent over the next three years.

The administration also offered to settle another grievance that is based on the formula. CCPOA claims that economic enhancements of an agreement DPA reached with CAHP last July must be added to correctional officers' compensation under the terms of the formula. But DPA points out that the CCPOA agreement called for a final increase on July 1, 2006, and then expired before the CAHP tentative agreement was reached. It argues that CCPOA should not be able to have a greater assurance of receiving a pay increase from an expired contract than it has of gaining a raise through bargaining.

Nevertheless, DPA's offer would settle the dispute by adding 1 percent to the general salary increase for 2007-08 for pre- and post-shift activities. It would boost shift differential pay, uniform allowances, employer health premium contributions, the mileage reimbursement rate, and incentive pay for employees who recruit new officers.

**CCPOA Offended**

The union claims that DPA's package proposal does not maintain the \$666 monthly compensation differential that existed in the expired contract. CCPOA questions why the administration would want to use a single grievance process and delete an expedited process for cer-

tain kinds of cases, when there are more than 700 grievances pending arbitration.

The union responded to the declaration of impasse with allegations of deception and a list of the administration's bad acts. A new protective vest was in storage when one correctional officer was killed by an inmate, CCPOA reminded the public. Recently, management hid renovations of San Quentin from the legislature, the union continued. "This isn't anything

*There are more than 700 grievances pending arbitration.*

different than what we've experienced in negotiations," it charged.

CCPOA asserts that DPA secretly recorded bargaining sessions last July. A letter from the court reporting service that was hired to take bargaining notes explained, however, that reporters routinely tape-record proceedings in order to ensure an accurate transcription and then delete the recordings as soon as the transcript is completed. CCPOA's attorney acknowledged the court reporter's claim that DPA did not request recording, but the union is still suspicious. "The recorder was hidden under the table. Only a tiny piece of equipment came up through a crack between the tables. We discovered it

after DPA left," CCPOA spokesperson Ryan Sherman told *CPER*.

The union flatly denies that it has never made a counterproposal during the last year. It claims it made a proposal on April 13, when it suggested that DPA representatives present their package to the union's board of directors, who would then decide whether to have union members vote whether to accept the package. When asked if there was ever a written counterproposal, Sherman replied, "There's been nothing to counter yet." He explained the union is frustrated that DPA continues to present their proposals in conceptual terms, rather than in contract language. But DPA spokesperson Lynelle Jolley told *CPER*, "We presented detailed language months ago, and they said we were rushing the process, that they wanted to deal with concepts." Sherman was unable to confirm or deny this assertion.

DPA's declaration of impasse contains an unusual twist — a request for a federal mediator. Usually, the parties agree on a mediator, or PERB appoints a mediator from the State Mediation and Conciliation Service. \*

*CCPOA asserts that DPA secretly recorded bargaining sessions last July.*

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## Supreme Court Backs Caltrans and Private Contractors in Prop. 35 Case

The Supreme Court has rejected an attempt by the Professional Engineers in California Government to limit the effect of Proposition 35. Passed by the voters in 2000, the proposition exempted architectural and engineering services from the California Constitution's restrictions on the use of private contractors for work that state civil service employees perform. The court held that several statutes governing Caltrans' use of private contractors were implicitly repealed by the proposition, but it also upheld contractor selection procedures that the agency had used prior to Prop. 35. The ruling may not end litigation about contracting with engineering and architectural firms, since PECCG believes the decision leaves some unanswered questions.

### Decades of Litigation

The California Constitution establishes a civil service system that requires appointment and promotions in state employment be based on merit. While the Constitution does not expressly outlaw contracts for services with private entities, courts have found that the civil service provisions limit private contracting because contracting out traditional state services would eventually erode the civil service system. Case law recognizes three exceptions to the general ban on contracting for state services — when the contractors are to

perform a new state function, when the state agency cannot obtain staff to perform the work in a timely manner, or when the agency can show it would achieve cost savings without displacing civil service employees or ignoring other civil service mandates, such as competitive bidding and pay rates.

*Several times in the last few decades, PECCG won lawsuits challenging Caltrans' use of private contractors.*

Several times in the last few decades, PECCG won lawsuits challenging Caltrans' use of private contractors. The Supreme Court reviewed two of those cases. In 1990, PECCG was successful in invalidating several contracts when Caltrans failed to meet the statutory prerequisites for contracting out. (See case summary in *CPER* No. 85, pp. 48-50.) In 1997, the Supreme Court struck down the legislature's 1993 attempts to bypass constitutional strictures on contracting by declaring the use of private contractors a new state

# *cper*

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

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## **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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function that did not duplicate Caltrans' existing functions. It also found unconstitutional legislation that defined seismic retrofit work as a short-term workload demand and relieved Caltrans of the obligation to staff at a level sufficient to meet its needs. The court suggested, however, that policy reasons might support a constitutional amendment to lessen the legal strictures on services contracts. (See *Professional Engineers in California Government v. Department of Transportation* [1997] 15 Cal.4th 543, 124 CPER 58.)

Proposition 35 amended the Constitution by adding Article XXII. It provides that the "State of California...shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement." It also states, "Nothing contained in Article VII of this Constitution shall be construed to limit, restrict or prohibit the State...from contracting with private entities for the performance of architectural and engineering services." Another provision states the proposition should not be applied in a manner that would result in loss of federal funding. In addition, Prop. 35 enacted a new chapter of the Government Code that declares it prevails over conflicting acts of the legislature. Proponents wrote in the ballot materials that one purpose of the initiative was to remove then-existing restrictions on Caltrans' use of private contractors in order to complete construction projects in a timely, cost-efficient, and safe manner.

After Prop. 35 was approved by the voters, Caltrans stopped complying with pre-existing statutes that incorporated the three exceptions to the prohibition on contracting out services. For example, one statute allowed the agency to contract out when it could demonstrate a cost savings, but only if the work was a new state function or civil service employees could not perform the work satisfactorily. However, Caltrans continued to use a pre-existing qualifications-based statutory procedure for selecting contractors.

*After Prop. 35 was  
approved by the voters,  
Caltrans stopped  
complying with  
pre-existing statutes.*

In court, PEGC argued that the pre-existing statutes remained in effect, and that if they did not, Caltrans had no statutory authority to enter into services contracts. It also challenged the qualifications-based selection procedure on the basis of a statutory provision of Prop. 35 that requires a "fair, competitive selection process" which safeguards against conflicts of interest. The trial court denied the union's petition for writ of mandate, and PEGC appealed.

The Court of Appeal held that Prop. 35 impliedly repealed pre-exist-

ing statutes which allowed use of contractors only when certain guidelines applied. The court found that the qualifications-based selection procedure for contractors was consistent with Prop. 35 because it entails competition on the basis of qualifications and mandates rejection of firms that do not agree to a fair and reasonable price. PEGC asked the Supreme Court to review the Court of Appeal's decision.

**Implied Repeal**

The Supreme Court acknowledged that Prop. 35 was silent about its effect on statutes on the books when the initiative passed. But, it emphasized, it is very clear that the voters intended to remove the constitutional restrictions on contracting for private architectural and engineering services.

The court agreed with Caltrans that Prop. 35 implicitly repealed statutes that required the agency to meet certain criteria before it could enter into contracts for the services. Courts will not infer that a new law repeals a pre-existing law absent clear evidence of an intent to supersede the earlier enactment, or unless the two laws are so inconsistent that they cannot operate concurrently. For one law to repeal another, the court instructed, the new provision must fully revise the area of law.

The court found indicators of an implied repeal in the proposition. The statement of intent in the voter guide to eliminate "existing restrictions" is evidence that the voters intended to remove both constitutional and statutory



constraints on using private contractors, said the court. One section of the initiative states that it seeks “to comprehensively regulate” the matter of contracting for architectural and engineering services. Another provision states that the initiative “prevails” over conflicting acts of the legislature and restricts lawmakers from amending Prop. 35 unless the amendments will further the purposes of the proposition. The proposition also states that it is to be construed liberally to accomplish its purposes.

*‘If the rule no longer has any force, neither should its exceptions.’*

The voters were aware that statutory conditions would be eliminated, the court found. The Attorney General’s summary and the Legislative Analyst’s discussion of the proposition referred to the then-existing exceptions to the ban on contracting out state services. The A.G. noted that Caltrans would be able to use private individuals in all situations, and not have to meet any conditions. The general rule prohibiting services contracts was abrogated by Prop. 35, declared the court, and “if the rule no longer has any force, neither should its exceptions.” It concluded that compliance with the pre-existing statutes was not necessary since they had been implicitly repealed.

### Caltrans’ Power to Contract

PECG’s major contention was that the proposition actually expanded the legislature’s power to decide whether to contract for services by removing constitutional restrictions. If so, the union argued, then the statutes that Caltrans had been ignoring are still in effect until the legislature uses its expanded power to amend them, which it has not done. It also contended that, if the pre-existing statutes were repealed, there was no statute authorizing Caltrans to enter into contracts for services.

The court agreed that the legislature had plenary power to regulate contracting prior to Prop. 35, subject to constitutional restrictions. But, it pointed out, the legislature shares law-making power with the electorate, which exercises its authority by initiative. The electorate’s power is just as broad as the legislature’s, instructed the court, and it used that power to enact Prop. 35.

The court rejected the contention that the purpose of Prop. 35 was to expand the legislature’s power. The phrase “the State of California...shall be allowed to contract” does not refer exclusively to the legislature, the court concluded. It refers to all three branches of government, including the executive branch. If the initiative’s drafters had intended to refer to the legislature, they would have done so, as they did in other provisions of the proposition, the court reasoned.

The union argued that, if Caltrans, as part of the executive branch, were

**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.

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**Pocket Guide to the Fair Labor Standards Act**

*See back cover for price and order information*

able to enter into contracts without implementing legislation, the proposition would violate the separation of powers doctrine by allowing an executive agency to regulate contracting. The court turned aside this contention. While the court agreed that regulation of private contracting involves a core legislative function, “this legislative function is not the exclusive province of the Legislature.” In this case, the electorate exercised its legislative authority to set policy on contracting for services, the court concluded.

In addition, instructed the court, Caltrans does not need new acts from the legislature to enter contracts for services. Constitutional provisions are presumed to be self-executing unless a contrary intent is expressed. The proposition itself gives Caltrans the authority to contract for architectural and engineering services. Since Caltrans is still empowered by statute to plan, design, construct, operate, and maintain transportation projects that the legislature authorizes, it may enter private engineering and architectural contracts to carry out these tasks now that Prop. 35 has given it that power, the court found.

The court declined to decide how much power the legislature retained over contracting, but observed that Prop. 35 allows the legislature to amend its provisions consistent with its purposes.

### **Not a Constitutional Revision**

The court also rejected the contention that Prop. 35 so fundamentally restructured California government that it amounted to a revision which could not be accomplished without a constitutional convention. The proposition did not entirely strip the legislature’s power to legislate in the area of contracting, the court reiterated. Another legislative authority, the electorate, merely lifted restrictions on agencies in the architectural and engineering field.

### **Selection Criteria Valid**

After passage of Prop. 35, Caltrans continued to use the qualifications-based selection procedure to choose private architectural and engineering firms, a procedure which requires the agency to use the best-qualified firm that will perform the work for “fair and reasonable” compensation. Qualifications, rather than cost, is the primary consideration of the “QBS” procedure, the court observed, but cost is not irrelevant. The procedure requires the agency to negotiate with the second-best qualified firm if the best one will not agree to a fair and reasonable price. And, Caltrans must prepare its own cost estimate using market surveys or other data when calculating a fair and reasonable price.

Because Prop. 35 requires that Caltrans use a “fair, competitive selection process” for choosing contractors, PEGG argued that the QBS process would be consistent with Prop. 35 only if Caltrans adds a cost savings mecha-

nism to the procedure. The court agreed with the Court of Appeal that the QBS procedure was not inconsistent with the proposition. The process is competitive, and cost is a consideration, the court observed.

The court also found the QBS procedure was valid as a safeguard against the loss of federal highway funding. Federal law requires a qualifications-based selection process for federally funded projects, and Prop. 35 provided

*The court declined to decide how much power the legislature retained over contracting.*

that its terms were not to be applied in a manner which would result in the loss of federal funding. At the very least, the process would be allowed on federally funded projects, the court ruled.

Third, cost savings was not the paramount reason for Prop. 35. The court pointed to ballot materials which disclosed that the initiative might not result in savings if contractors, rather than state employees, were used to avoid delaying a project, and that the proposition did not require competitive bidding. The ballot argument in favor of the proposition stated that Caltrans would continue to use the “same fair

selection process...to select the most qualified architects or engineers," the court observed.

The court concluded that Caltrans' use of the QBS procedure was not improper. It suggested that the union could ask the legislature to require Caltrans to give costs greater consideration in contractor selections, but declined to advise whether such legislation would be valid.

#### PECG's Focus

In its discussion of Caltrans' powers, the court noted that the legislature

still may regulate contracting and may amend Prop. 35 consistent with its purposes. The union reads this section of the opinion to permit the legislature to control contracting for architectural and engineering services through the budget process. Undoubtedly, PECG will continue to argue to the legislature that outsourcing is more expensive than using state employees. It already has provided the legislative body with its analysis of the case. (*Professional Engineers in California Government v. Kempton* [4-12-07] 40 Cal.4th 1016.) \*

late a miscellaneous benefit. Retroactivity would require greater employer pension contributions to make up for the higher benefit.

The legislature passed a bill approving the agreement. Senate Bill 183 (Burton-D, San Francisco) contained a provision that states, "The department [of personnel administration] shall notify the [Public Employees' Retirement System] board as new classes or positions become eligible for state safety membership...and specify how service prior to the effective date shall be credited."

CSLEA thought it had an understanding that prior service would be credited as safety member service. After all, DPA published some questions and answers relating to S.B. 183 in October 2002, that stated, "All of your past State service in those positions recognized for reclassification that are subject to Bargaining Unit 7 will be changed to the State Safety retirement classification if you continue employment in a position subject to reclassification as of July 1, 2004."

By June 2004, Arnold Schwarzenegger was governor, and restraining mounting pension costs was one of his goals. DPA issued a memorandum indicating the transferred employees would not be granted retroactive credit for past service. DPA argued that S.B. 183 and other statutes gave it sole discretion to determine how prior service would be treated.

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## Safety Union Still Fighting for Pension Retroactivity

A battle tinged by recall politics and the pension reform movement soon will be fought on its merits after a series of legal skirmishes. Years ago, the Davis administration agreed that all unit members represented by the California Statewide Law Enforcement Association (formerly CAUSE — the California Union of Safety Employees) would be entitled to safety retirement membership rather than miscellaneous membership. The union understood that past service as a miscellaneous employee would be credited as safety service. But the Schwarzenegger administration disagreed and refused to arbitrate a grievance that claims the safety membership transfer was retroactive. In an unpublished decision, the

Court of Appeal ordered the matter to arbitration.

#### Side Agreement Silent

On March 22, 2002, the union and the Department of Personnel Administration, which negotiates collective bargaining agreements for the state employer, signed an agreement that the classifications within bargaining unit 7 were related to public safety and that most of the classifications then in the miscellaneous retirement category would be "moved" to the safety retirement category on July 1, 2004. A safety pension benefit is more lucrative since it is based on 2.5 percent of the employee's final compensation rather than the 2 percent factor used to calcu-

### Forum Skirmish

The union filed a grievance, but DPA did not respond and refused to proceed to arbitration. The department argued that the dispute was governed by statutory law, not the sideletter agreement that the Davis administration reached with the union on safety retirement. Alternatively, it contended that the sideletter did not amend the contract. Even if it did modify the contract, the retroactivity issue was not arbitrable, DPA argued, because there was no express term that referred to retroactivity.

*DPA argued that S.B. 183 gave it sole discretion to determine how prior service would be treated.*

In December 2004, CSLEA filed a motion to compel arbitration in San Francisco, but six months passed before its motion was heard. DPA wanted the matter transferred to a court in Sacramento. Only after DPA's motion for a change of venue was denied did the trial court address the question of arbitrability. It denied the union's motion, and the matter spent the next year-and-a-half in the appellate court.

This spring, the Court of Appeal agreed with CSLEA that the dispute

should go to arbitration. Although the collective bargaining agreement requires arbitration only of disputes involving the "interpretation, application, or enforcement of express terms" of the contract, the court rejected DPA's argument that the grievance was not arbitrable because the contract did not expressly promise prior service credit. It was sufficient that the union had cited four contract provisions in support of its grievance and that, in the March sideletter, the parties plausibly could have intended to make the safety retirement status retroactive, said the court. What "contract provisions" mean is a question for the arbitrator to decide, the court reminded DPA.

DPA also lost the argument that the court should decide the retroactivity question because statutory law superseded the labor contract. Although the statutes DPA cited might support its position on retroactivity, the court held that the legal question could wait for another day. The arbitrator might decide that the agreement was intended to be prospective only or that the parties never agreed on retroactivity, and there would be no need to go to court. If the arbitrator decides in favor of the union, DPA can challenge the award in court based on its supersession contention, the court said, citing *SEIU Loc. 1000 v. Department of Personnel Administration* (2006) 142 Cal.App.4th 866, 180 CPER 85. (*CAUSE Statewide Law Enforcement Assn. v. State of California [DPA]* [3-28-07] A112365 [1st Dist.], not certified for publication.) \*

## *Higher Education*

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### **Whistleblower Must File Petition for Writ of Mandate to Test if CSU ‘Satisfactorily Addressed’ Complaint**

In a recent decision, the Court of Appeal addressed a provision of the California Whistleblower Protection Act that applies only to the California State University. Generally, quasi-judicial determinations of public agencies are final unless overturned by writ of administrative mandamus. While sections of the act applicable to the state employer and the University of California allow a lawsuit for damages only after the employer has failed to make a timely response to the employee’s administrative complaint, Sec. 8547.12 also allows a “remedy” if CSU does not “satisfactorily address” a complaint. The appellate court did not establish a standard for determining whether a whistleblower complaint has been satisfactorily addressed. It instead concluded that allegations that CSU failed to meet the standard do not entitle a whistleblower to avoid filing a mandamus petition to challenge CSU’s decision. The court remanded the case to the trial court to allow the whistleblower to attempt to amend his court complaint by adding a petition for writ of mandate challenging the university’s response to his administrative complaint. The court also held that he could not proceed with new claims of retaliation because he had

not exhausted administrative remedies by filing a second complaint with the university.

#### **Cooperation With Auditor**

David Ohton was a strength and conditioning coach at San Diego State University. He worked at times with the head football coach, Tom Craft. In response to a request from a university auditor in 2002, and in reliance on assurances of confidentiality, Ohton reported to the auditor that athletic department personnel were mishandling and misappropriating athletic department property. The auditor requested additional information, and Ohton complied with a 103-page report that contained allegations ranging from violation of the National Collegiate Athletic Association rules to a second-hand report of Craft being drunk in public the night before a game.

The auditor issued a report in April 2003. The university’s president advised athletics department employees soon afterward that anyone who retaliated against any fellow employee who may have provided information to the auditor would be subject to discipline. Ohton discovered that Craft had obtained a copy of his report a month later.

Ohton filed an internal administrative complaint. He alleged that Craft began a campaign to have him removed. Craft did not invite him to work at summer football camps as planned. Ohton had not been invited to an annual booster dinner. Craft requested and hired a new strength and conditioning coach for football. After the hire, Ohton was told to work only from 6 a.m. to 2 p.m. so that he would not be around the football players.

*The investigator concluded that Ohton’s lengthy report was not a protected disclosure.*

CSU retained an outside investigator to look into Ohton’s claims. The investigator concluded that Ohton’s lengthy report was not a protected disclosure, apparently because he viewed it as having been filed for personal reasons rather than to remedy the improper equipment handling issues that the auditor was pursuing.

The investigator concluded that employees in the football program knew Ohton was the source of the negative audit. He believed that Ohton’s exclusion from football camps was not retaliatory because Ohton was not a football coach and no coaches were paid for camp participation. Although the



investigator found that Ohton's allegations of NCAA rule violations were a factor in his removal from football conditioning, he found that the equipment room allegations did not motivate the removal. The investigator viewed Ohton's exclusion from the booster dinner as following naturally from his removal from football duties. His change in hours was a reassignment due to his hostility toward the football program and his refusal to voluntarily give up

*Ohton provided evidence that McClain had changed the language of her final report.*

football duties. The investigator observed that the change in hours negatively affected Ohton's ability to work with 16 athletic teams other than football. Ohton complained of a negative evaluation and a counseling memorandum after the audit, which the investigator blamed on his long-term data gathering that he did not disclose to the university in a sufficiently timely way.

After receiving the investigator's report, Ohton asked the university's vice chancellor for human resources, Jackie McClain, to disregard the report and reopen the investigation. He pro-

tested that his disclosures were protected by the California Whistleblower Protection Act.

McClain concluded that most of Ohton's disclosures were protected. However, because she viewed Ohton's allegations that Craft was drunk as knowingly and maliciously false, she determined that the drunkenness claim was not protected. An SDSU vice president had investigated the allegation and concluded it was false, according to McClain, because the eyewitness to the coach's condition denied having seen the coach drunk and no one else corroborated the claim. Having found the allegation false, she concluded that Ohton's removal from the football program was not illegitimate because it was based on the unprotected false drunkenness claim. She also found that the removal was based on two factors that preceded the audit — Ohton's antipathy toward Craft and Craft's desire to change the emphasis of strength and conditioning for football.

McClain acknowledged that the decision to change Ohton's hours was minor retaliation because there was no legitimate reason for the decision. As a result of the complaint, CSU reinstated Ohton's hours of access to the weight room.

#### **No Writ Petition Filed**

Ohton filed a lawsuit in court that reiterated the claims he made to the university and added allegations that CSU conducted an inadequate investigation, failed to take any disciplinary

action based on the retaliation it found, and continued to retaliate against him after it responded to his administrative complaint. He did not file a petition for a writ of mandate to challenge CSU's final action.

CSU and the individual defendants argued in motions for summary judgment that Ohton had failed to exhaust his judicial and administrative remedies. In opposition to the motion, Ohton filed a declaration of a booster who confirmed that he had seen Craft

*The court suggested that the law of mandamus could provide standards.*

drunk in public. The booster revealed that he had told the SDSU vice president about the claim, but asked her to keep it confidential unless no one else would corroborate his information. Ohton also provided evidence that McClain had changed the language of her final report from acknowledging that a booster had corroborated the drunkenness claim to the conclusion that the booster denied having seen the coach drunk in public. The trial court granted summary judgment on the sole ground that CSU had timely responded to Ohton's administrative complaint.

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### 'Satisfactorily Addressed'

Section 8547.12 forbids a whistleblower from filing a lawsuit for damages unless CSU fails to make a timely decision in response to the administrative complaint. It also states that the section does not prohibit a remedy "if the university has not satisfactorily addressed the complaint within 18 months." The appellate court held that the trial court's focus on timeliness effectively read the words "satisfactorily addressed" out of the statute. Because of the additional language in Sec. 8547.12, the Court of Appeal observed that case law interpreting provisions that applied to other employers did not rule out Ohton's contentions that he was entitled to file a suit for damages.

Ohton argued that the term "satisfactorily addressed" should be analyzed from the viewpoint of the whistleblower. But the court found that an interpretation that depended on the subjective satisfaction of the whistleblower would render the requirement inconsequential since the whistleblower easily could claim he was dissatisfied with the decision.

More acceptable was an objective, good faith standard for determining whether a complaint has been satisfactorily addressed. The court suggested that the law of mandamus could provide standards for judging administrative proceedings. It looked at standards of review under both ordinary mandamus — in which the court reviews an action that was not taken pursuant to a hearing — and administrative manda-

mus, in which the court reviews the sufficiency of an administrative hearing. The court never settled on a standard for reviewing CSU's response to whistleblower complaints.

The court did not analyze whether CSU's response to Ohton met any standard, despite its long recitation of the findings of the CSU investigator and McClain. In a murky area of the opinion, the court seems to have concluded

### *A complainant could file a complaint for damages with a writ petition.*

that, whether or not CSU satisfactorily addresses a complaint, a whistleblower cannot avoid filing mandamus proceedings if he wants to sue for damages. This conclusion sprang from the principle that the legislature is not presumed to have overthrown well-established legal doctrines unless that intent is clear.

The doctrine of exhaustion of judicial remedies holds that the findings of the quasi-judicial body are binding in later lawsuits unless overturned by a writ of administrative mandamus. The reasons that complainants who want to challenge quasi-judicial administrative actions must do so by writ petition are to avoid undermining the administra-

tive agency, to give certainty to the proceedings, to conserve judicial resources, and to prevent repetitious litigation.

The court rejected the contention that the legislature did not contemplate writ proceedings since some complainants want restoration of their positions or privileges rather than damages. Those wanting both, noted the court, could file a complaint for damages with a writ petition.

The court also turned aside Ohton's attempt to escape from the writ of mandate requirement by attacking the sufficiency of CSU's whistleblower procedures. Ohton relied on a case in which the court found a hospital's complaint procedure had denied a doctor due process, *Payne v. Anaheim Memorial Medical Center* (2005) 130 Cal.App.4th 729. But, unlike the process in *Payne*, CSU's procedure required investigation of the complaint. Because the procedure allowed Ohton a meaningful opportunity to fully present his complaint, have it investigated, and receive a final decision, he was not excused from petitioning for a writ.

The court observed that Ohton should not confuse the question of the sufficiency of CSU's written procedure with the sufficiency of the manner in which the investigation was conducted and the decision was reached. Deficiencies in the processing of his individual complaint were reviewable pursuant to a petition for writ of administrative mandamus. Since Ohton had failed to file a writ petition, CSU's actions were, for legal purposes, proper.

### Second Administrative Complaint Necessary

Ohton claimed that CSU continued to retaliate against him after the administrative decision, including giving him an inaccurate and unjustified performance evaluation, and taking steps to replace him with a newly hired coach. He had never filed a complaint with CSU containing these allegations. The appellate court held that the doctrine of exhaustion of administrative remedies rendered the trial court without jurisdiction to act on these claims since Ohton had not exhausted the complaint process that CSU regulations provide.

### Claims Remanded

Because the “satisfactorily addressed” requirement never before had been interpreted and was difficult to apply, the court decided to remand Ohton’s case back to the trial court so that he could ask to amend his court complaint by adding a petition for a writ of mandate. The court did not voice an opinion on whether Ohton would be able to amend his pleadings. (*Ohton v. Board of Trustees of the California State University* [2007] 148 Cal.App.4th 749, rehearing den. [4-10-07] D046617.) \*

ing to reach agreement with its unions to restart pension contributions, which neither U.C. nor its employees have paid since 1990, due to a funding surplus. Since that time, employees have been paying about 2 percent of salary into defined contribution accounts. A major concern of the unions is that wages have not been keeping pace with the cost of living or salaries available in the job market, even though U.C. has saved money on contributions. In addition, employee contributions for health care skyrocketed in January. Unless accompanied by a raise sufficient to cover both the new contributions and cost-of-living increases, argues the union, new retirement contributions would be tantamount to a pay cut.

In early February, the university separated the wage increase offer from pension negotiations. It offered raises of 1 to 2 percent for workers who earn under \$35,000 annually, in addition to the 2006-07 raises already secured by union contracts. U.C. proposed larger increases for those earning less than 30,000 than for those with salaries between \$30,000 and \$35,000.

At a March pension bargaining session, the university proposed a second round of sliding scale raises for low-wage employees if the unions agreed that U.C. could redirect the employees’ 2 percent defined contribution plan payments to UCRS. Those negotiations temporarily stalled while the parties waited for the governor’s revised budget in May.

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### Lowest Paid U.C. Employees in Line for Raises

The University of California is offering raises on a sliding scale to employees who earn less than \$40,000 a year. About half of the proposed increases are tied to the university’s demand that three unions agree to reinstitute employee contributions to the U.C. Retirement System after a “holiday” of 16 years. The second half of U.C.’s proposal is not connected to the ongoing pension negotiations. The university has reached agreement with the union representing its clerical and child-care workers, the Coalition of University Employees, for the stand-alone raises and has implemented a similar package for unrepresented low-wage workers. Two other unions continue to spar with U.C. over the amount of money

available for raises and the number of employees who will benefit. Pension negotiations drag on, despite the university’s desire to restart both employee and employer contributions July 1.

### Double Offer

During pension negotiations last December, the university first proposed small raises for workers earning less than \$30,000. U.C. has been bargaining over employee retirement contributions since last fall with a coalition of the three unions — CUE, the University Professional and Technical Employees, and the American Federation of State, County and Municipal Employees. (See story in *CPE* No. 181, pp. 42-45.) The university has been try-

### Agreement with CUE

CUE was the first union to settle for raises for 11,800 of the 16,500 employees it represents. The union succeeded in increasing the number of its unit members who would receive a pay boost and in gaining extra raises for employees at three campuses. Employees in the clerical unit earning less than \$30,000 received a 1.5 percent salary

*Employees in the clerical unit earning less than \$30,000 received a 1.5 percent salary increase.*

increase effective April 1, 2007. Those earning at least \$30,000 but under \$32,000, had their wages raised 1 percent, and those with annual salaries of \$32,000 to less than \$40,000 received a .75 percent raise.

U.C. also agreed to raise the minimum salaries for all clerical unit members at its Santa Cruz campus to \$25,000 and the minimum hourly wage at the Berkeley and Santa Barbara campuses to \$11.70. Any member at U.C. Santa Cruz who did not receive at least a 4 percent raise got an extra boost that would provide a total 4 percent increase.

Soon after reaching the agreement with CUE, U.C. announced it was providing a similar wage increase program

to 4,000 unrepresented employees at the university and its medical centers. Non-student employees earning less than \$30,000 annually received a 2 percent salary increase on April 1. Those earning \$30,000 up to \$35,000 per year received a 1.5 percent raise. Employees with salaries of at least \$35,000 but less than \$40,000 had their pay boosted .5 percent. The raises will not be extended to employees at the laboratories that U.C. manages until the federal Department of Energy has agreed.

In addition, the campus administrations at Santa Cruz, Berkeley, and Santa Barbara also provided to their low-wage workers the same package as CUE had negotiated for clerical employees. The Santa Cruz wage increases were retroactive to October 1, 2006. The minimum full-time annual salary at UCSC is now \$25,000, and raises of up to 4 percent went to those earning under \$35,000 annually. At the Santa Barbara campus, the \$11.70 per hour minimum wage was established for all non-represented employees, effective January 1, 2007. The Berkeley administration implemented the same hourly wage, effective January 1, for all its staff employees.

### Disputed Source of Funds

UPTE and AFSCME have been unable to reach an agreement on the proposed unlinked raises, in large part because they believe that the state provided more funding for employee raises than U.C. is offering. UPTE claims that the state gave the university more

money for ongoing costs than was expected to result from U.C.'s 2004 compact with the governor. Instead of a 3 percent increase in its base budget, UPTE charges, the university received 4 percent. A 1 percent raise for UPTE-represented unit employees would be \$2.9 million, says UPTE negotiator Kevin Rooney, but U.C.'s most recent offer would cost only \$1.2 million.

*U.C. also agreed to raise the minimum hourly wage at the Berkeley and Santa Barbara campuses to \$11.70.*

Raises of 2 percent would go to those earning less than \$30,000. Employees earning under \$35,000 and under \$40,000 would receive 1 percent and .5 percent increases, respectively. The union is demanding that the pay boost be provided to all unit members, not just the half earning less than \$40,000. Researchers' salaries are about 30 percent below market rates, Rooney emphasized.

UPTE has made a request to U.C. for information on the source of the funds. U.C. spokesperson Nicole Savickas told *CPER* that she was unable to find any information that the money for the new raises came from state funds. "Funding for wage in-



creases for non-represented employees and CUE will come from a redirect of existing resources,” she continued. CUE negotiator Amatullah Alaji-Sabrie said the union was informed that the money for its agreement came from non-state funding at the campuses and medical centers.

While the state announced last July that the university was receiving the expected 3 percent increase to base budget support, official university descriptions of the state’s 2006-07 final budget said that money would be available

*AFSCME has been trying to boost custodial salaries substantially for the last two years.*

from state funds and “other revenue sources” for total compensation increases averaging 4 percent. Some U.C. employees already have received increases in that range. Before the final state budget was known, U.C. agreed to a 4 percent general raise for employees in AFSCME’s patient care technical unit, but other units received various compensation configurations that added up to different amounts. Last October, CUE unit members received only 3.25 percent general raises and equity money amounting to about .25 percent of payroll for half-step increases for library assistants. UPTE-represented employees received raises

of less than 3 percent, but those whose performance was satisfactory or better also got step increases of 2 percent.

UPTE is not the only union speculating the state provided extra money for employee compensation. AFSCME President Lakeesha Harrison told *CPER* that the union has been trying to boost custodial salaries substantially for the last two years. Finally, last summer, the legislature provided an extra \$8.9 million to the university, she claims. U.C. has not agreed to pass along the money for its intended purpose, she says.

AFSCME believes that the additional money was intended only for hiring contract groundskeepers at U.C. Irvine and raises for custodians at three campuses — Santa Cruz, Santa Barbara, and Berkeley — whose wages AFSCME claims are about 25 percent below nearby community college custodians’ wages. The union is asking for a raise of \$4 an hour at U.C. Berkeley, for example, but U.C.’s April offer would benefit 14,300 AFSCME-represented employees at all campuses. The university would boost pay 2 percent, 1 percent, and .5 percent for all employees in three salary bands under \$40,000, which will amount to raises of about 20 cents an hour. For the custodians in Berkeley, Santa Cruz, and Santa Barbara, U.C. proposes an extra \$.75 in hourly pay. One-time bonuses that do not build base pay would be provided to custodians at all campuses except Davis and San Francisco. The university’s offer would distribute the \$8.9 million that AFSCME claims was intended for custodians.

U.C. spokesperson Savickas had no information that corroborates the union’s extra funding assertion. Staff at Senate President Pro Tem Don Perata’s office did not back up the claims of extra state funding for salaries, although they did confirm the discussions with AFSCME about custodians at the three campuses.

### **Graduation Disruptions**

Last year, the issue of custodians’ low wages disrupted graduation ceremonies at the U.C. Berkeley campus. (See story in *CPER* No. 178, pp. 54-

*The university proposed that former Senator John Burton mediate the dispute.*

55.) And last month, two commencement speakers warned they would respect a union-called boycott. Hoping to avoid cancellations, the university proposed that former Senator John Burton mediate the dispute. When Burton was unable to broker a deal, he issued a mediator’s proposal. As *CPER* went to press, AFSCME announced that it would accept the terms contained in that proposal, even though they were less than the union initially had demanded. Burton proposed a \$1.75 per hour increase for custodians at the three campuses and a \$.75 raise for custodi-

ans at other campuses. The contract groundskeepers at U.C. Irvine would be brought in-house, and other low-wage unit members would receive small pay boosts.

The university had not responded by press time. It blames AFSCME for the stalemate. Characterizing the union's proposal as discriminatory, U.C. claims that the average custodian salaries at UCB, UCSC, and UCSB are higher than market rates in those areas while custodians on other campuses are paid below market rates. U.C. claims the average salary in the Berkeley area

is just under \$14 per hour, while AFSCME compares the \$14 average hourly wage of UCB custodians to the \$18 hourly wage paid to custodians at nearby community colleges.

William Schlitz, AFSCME's political/communications director, scoffed at the charge of discrimination. "The contract allows U.C. to grant equity increases here and there at different campuses, and it has provided increases to classifications of employees in the past. In early May, U.C. gave cafeteria workers at its Riverside campus a raise." \*

factfinding, the university was offering guaranteed across-the-board raises of about 15 percent over four years, 3 percent increases conditioned on extra funding from the state, step increases equal in cost to a 4 percent raise, and merit increases worth about 3 percent. The offer reflected CSU's expectation

## *CSU and the union credit the factfinding report for enabling a settlement.*

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### Factfinding Report Leads to New Faculty Contract

The California Faculty Association announced an agreement with the California State University in early April, just three days before a union-set deadline for a deal. CFA had postponed its threatened rolling two-day strikes in late March after a factfinding report favorable to the union was made public. In a pact similar to the factfinding panel's recommendations, the university agreed to pay salary increases of 20.7 percent over four years ending June 30, 2010, with additional step increases for eligible faculty.

#### Strike Averted

CFA, which represents about 23,000 professors and lecturers at the 23-campus university, had been bar-

gaining with CSU for a year-and-a-half when the parties reached impasse last fall. Mediation was unsuccessful, and the parties began the factfinding process in late January, with arbitrator Sylvia Skratek.

While waiting for the tripartite factfinding panel to issue its report, the union held a strike vote. The results — 94 percent of the voting members favored a strike — were announced after the report was issued but before it was released to the public. (See story in *CPER* No. 183, pp. 51-55.) Soon after the report was released, however, CFA agreed to delay any job actions for 10 days while the parties resumed bargaining.

Both CSU and the union credit the report for enabling a settlement. Before

that it would receive state funding increases, which the governor promised in a compact he reached with CSU in 2004 — 3 percent in 2006-07, and 4 percent in each of the following three years.

CFA was demanding 18 percent in guaranteed across-the-board increases, 3.75 percent in step increases, and equity/post-promotion increases equal in value to a 3.5 percent raise over the four years. The equity increases in CFA's proposals were intended for some probationary faculty who were being paid less than more newly hired faculty due to market demands. Another pot of money would have gone to professors and lecturers at the top of their salary scales.

The factfinding panel, with the CSU representative dissenting, recommended 20.37 percent in guaranteed general increases and another 1.5 percent in raises contingent on extra funding from the state over four years. The

panel sided with the union on step increases for faculty whose performance is evaluated as at least satisfactory. Addressing an ongoing battle between the parties, the panel found it “puzzling” that CSU would resist step increases based on minimum satisfactory performance while it emphasized the importance of merit pay. The panel noted that the step increases would be partially

*A percentage of the increase is conditional on extra state funding.*

offset by turnover savings when faculty retire or resign, and it recommended funds equivalent to a 4 percent raise be paid in step increases over four years. It suggested that equity and post-promotion pay boosts worth a 3 percent increase be distributed during the last three years of the contract.

#### **Pay Package Worth \$400 Million**

The parties’ agreement provides slightly more compensation to the faculty unit than the factfinders proposed, but with a greater percentage increase (3 percent) conditional on extra state funding. Staggering the raises over the year reduces their impact in that fiscal year while continuing to build faculty base pay.

Faculty will receive a 4 percent general raise for 2006-07 — 3 percent effective July 1, 2006, and 1 percent due June 30, 2007. The salaries of eligible unit members will be boosted another 2.65 percent when they receive step increases on their service anniversaries. Only about one-third of faculty members are eligible for step increases each year.

In 2007-08, faculty will receive a 3.7 percent general raise on July 1, followed by a 2 percent increase on June 30, 2008. As in 2006-07, there will be service step increases for those with satisfactory performance. In addition, a pot of \$7 million for equity increases will be distributed by a union-management committee, with priority to probationary professors, librarians, coaches, and counselors who are being paid less than more newly hired employees due to market conditions.

In 2008-09, a 3 percent raise will be effective July 1, 2008, and another 2 percent increase will occur June 30, 2009. The step increases and another \$7 million of equity money will be distributed. In addition, \$7 million in funds will be available to half of the senior faculty and lecturers at the top of the salary scale who no longer are eligible for step increases. The increases are scaled to evaluations, with 2.5 percent going to those whose performance “meets expectations” and boosts of 2.75 to 3.5 percent for those who have exceeded expectations.

In 2009-10, a 4 percent raise goes into effect July 1, 2009, followed by a 2 percent increase on June 30, 2010. Step

increases will be paid to eligible faculty. No further equity funds are provided, but another \$7 million will be paid in post-promotion increases to topped-out faculty who were hired later than those who received the boost in 2008-09. At the expiration of the contract, the average salary for a tenure-track faculty member will have risen from \$74,000 to \$90,749, and the aver-

*The university has an escape clause if the legislature does not provide the increases.*

age salary of a full professor will have been boosted from \$86,000 to \$105,000.

Parking fee increases also were submitted to factfinding, as CSU wanted to increase the faculty parking rates to match the student rates. In accordance with the factfinders’ recommendation, fee increases will be limited to the same percentage as the general salary increases.

Although the union describes the general increases as guaranteed, there is an escape clause for the university if the legislature does not provide the increases in base support promised in the governor’s compact and CSU determines that the lower level of funding requires a decrease in the across-the-board raises. In that case, the parties agreed to meet and confer only over the

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

*Richard Bach*

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## **Pocket Guide to the Family and Medical Leave Acts**

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general increases and proceed to mediation and binding arbitration if they are unsuccessful in reaching a new understanding. CFA has the option to strike.

### **Salary Structure Committee**

The factfinding report observed that there were flaws in the compensation structure to such an extent that the "salary schedules ... defy logical explanation." The parties already have been studying the problems in a joint salary structure reform committee created under the last contract. Because there was insufficient time during the factfinding process to analyze how to fix the salary structure, the panel suggested formation of a new joint committee that would meet with a neutral third-party who has expertise in higher education and compensation.

The CSU panel member dissented from the panel's recommendation that, if ratified by the parties, the committee's recommendations would replace the 2009-10 salary provisions. As a result, the new contract, which adopts the committee concept, provides that the parties will request additional funding from the state to implement the ratified salary structure changes.

### **Dispute Resolution Procedures**

Entering negotiations, CFA had several concerns that related to grievance and arbitration procedures. Grievances were taking an average of two-and-a-half years to reach arbitration. And the university was insisting on limiting the authority of arbitrators.

The Education Code requires CSU to have a grievance and arbitration procedure for allegations that an employee "was directly wronged in connection with the rights accruing to his or her job classification, benefits, working conditions, appointment, re-appointment, tenure, promotion, reassignment, or the like." The statute requires a hearing by a faculty committee, but that statute had been superseded by CFA's collective bargaining agreement for many years. A change in the superses-

## *CSU agreed to eliminate restrictions on arbitral authority.*

sion law in 2002 set the statutory procedures as minimum rights that could not be superseded by a labor contract.

CFA insists that the Education Code does not allow limits on the arbitrator's authority, but in prior negotiations the university resisted eliminating restrictions on arbitrator awards of appointment, promotions, or tenure. Last spring, the Public Employment Relations Board ruled that the university's insistence on arbitral authority limits was an unfair practice, a decision that is at the Court of Appeal for review. (See story in *CPER* No. 177, pp. 45-48.) But the issue persisted in this round of bargaining. CSU would not back down, offering only to abide



by the appellate court's future decision. The factfinder described the CFA as "more than patient" during the period since the statutory change and found the university's position "unreasonable." In the end, CSU agreed to eliminate restrictions on arbitral authority, but the union agreed to reopen the issue if the appellate court sustains CSU's legal position.

The new agreement allows faculty to choose either the contractual grievance and arbitration procedure or a faculty hearing procedure that derives

*CSU must give  
ACR 73 funding  
'priority status' in its  
budget submission.*

from the Education Code. The statutory procedure uses committees of local faculty members to make recommendations to the campus president. If a committee decision in favor of the faculty member is rejected by the president, the grievant may take the case to arbitration. Lecturers may take their cases to an umpire for an expedited decision.

#### **Lecturer Gains**

Under the prior contract, a lecturer was automatically entitled to a three-year contract at the end of six years of employment. The new contract allows a lecturer to be denied a three-year contract if evaluations are unsatisfactory.

Lecturers' rights to preference for classes they have taught in the past and for new class offerings are strengthened, but the university gained flexibility in assigning work to visiting professors who teach for no longer than a year. Although they are still temporary faculty, lecturers on three-year contracts now have greater protection from layoff than less-senior lecturers and have recall rights if laid off.

#### **Workload**

The parties agreed to renew their commitment to increase the proportion of tenured and tenure-track faculty and improve the student-faculty ratio. In 2001, CFA's evidence that the university was replacing retiring tenured professors with part-time lecturers led the legislature to pass Assembly Concurrent Resolution 73. The resolution urged CFA and CSU to design a plan to increase the percentage of tenure/tenure track faculty from 63 percent to 75 percent without terminating lecturers. In response, the parties came up with an eight-year plan in 2002, but that plan required extra state funding to conduct faculty searches and hire faculty, money that was not available in recent years. (See story in *CPER* No. 157, pp. 42-44.)

Lecturers still account for about 37 percent of full-time equivalent faculty. The new contract commits the parties to jointly request from the state the money necessary to fully implement the plan. CSU must give the funding "priority status" in its budget submission to the state each year.

To allow tenured faculty members to retire, but continue to work part-time, the university has a Faculty Early Retirement Plan. CSU initially proposed eliminating the plan and then demanded a reduction in the maximum number of years that a faculty member may continue in the plan. CFA insisted on retaining the current five-year maximum. The union asserts the program saves money by eliminating the employer pension contributions that would be necessary if the professor remained fully employed and freeing up

*The parties agreed not  
to reopen the contract  
unless the state does  
not provide the  
expected funding.*

half of the professor's salary to hire newer faculty at lower pay. CSU provided anecdotal evidence to the factfinding panel of difficulty coordinating sabbatical leaves with FERP schedules, but the panel was not convinced any change in the program was necessary. As recommended, the new agreement does not change the five-year maximum.

#### **Contingent Reopeners**

The parties agreed not to reopen the contract unless the state does not



provide the amount of funding expected from the governor's 2004 compact with the university. If the compact is not fulfilled and CSU finds that its funds are insufficient to implement the general salary increases, the parties will meet and confer on the issue of general raises. If state funding is reduced so that other contract costs cannot be met, the parties will reopen the contract on the economic items and a total of four non-economic items.

*The CSU  
administration  
believes the  
compact funding is  
insufficient.*

CFA President John Travis is confident that the compact will be honored, but CSU administration believes the compact funding is insufficient. Chancellor Charles Reed observed, "Even with the full funding provided in the compact with the governor, which assumes a 4 percent increase in state funding and a 10 percent student fee increase, the combination of all compensation agreements with our employees and increased health benefit premiums will cost approximately \$40 million more than the proposed 2007-08 CSU budget. We will continue working with the legislature and the governor to secure additional funding." \*

# Discrimination

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## No Adverse Action Where Disabled Employee Assigned Less-Than-Ideal Job

In *Malais v. Los Angeles City Fire Dept.*, the Second District Court of Appeal found no disability discrimination where a disabled fire captain was refused the command of a fire station but was offered other positions with comparable pay and promotion opportunities.

Gregory Malais, a captain II with the Los Angeles Fire Department, was injured in a work-related accident, and his leg was amputated below the knee. He returned to work in a light-duty capacity. Six months later, when he returned to work as a full-time captain II, he was assigned to in-service training, a position designated as a special-duty assignment.

Within the department, captain IIs may be assigned to either special-duty or platoon-duty work. The special-duty assignment typically involves a 40-hour work week with duties performed in an environment resembling a business office. Those assigned to platoon-duty generally work in a team of firefighters, with one 24-hour day on, alternating with one 24-hour day off, followed by several consecutive days off. The two job-duty categories receive equal pay and possess equal promotional opportunities. Overtime is available to firefighters in both positions.

When Malais returned to the force, he believed he was able to perform the duties of the platoon position with his prosthesis, and asked to be given that assignment. He also preferred firefighting, the platoon work schedule, and the atmosphere of working as part of a team. The department refused because it believed that working platoon duty with a prosthesis posed an unacceptable risk to Malais, other firefighters, and the public.

Malais filed a lawsuit claiming disability discrimination in violation of California's Fair Employment and Housing Act, and an adverse employment action in violation of public policy. The trial court dismissed the case, finding that Malais did not suffer an adverse employment action, and Malais appealed.

The Court of Appeal concluded that the trial court was correct in finding that Malais had not suffered an adverse employment action by restricting him to special-duty assignments. "The determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the

significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee," said the court, quoting from the Supreme Court's decision in *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 174 CPER 23. Minor or relatively trivial conduct by employers that, from an objective perspective, is reasonably likely to do no more than anger or upset an employee does not materially affect the terms, conditions, or privileges of employment and is not

*Not every change in conditions constitutes an adverse employment action.*

actionable, instructed the *Yanowitz* court. Only treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of the FEHA.

Thus, not every change in the conditions of employment constitutes an adverse employment action, cautioned the court. Quoting from *McRae v. Department of Corrections* (2006) 142 Cal.App.5th 377, 180 CPER 78, the court clarified the principles involved in making this determination:

A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient. Workplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action. If every minor change in working conditions or trivial action were a materially adverse action then any action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The plaintiff must show the employer's...actions had a detrimental and substantial effect on the plaintiff's employment.

Applying those principles to this case led the court to conclude that the placement of Malais in a special-duty

assignment instead of platoon duty was not an adverse employment action. Both positions afforded equal pay, benefits, and promotional opportunities, and no hostile environment existed in either position. "Indeed," said the court, "the only reason Malais was dissatisfied with special as opposed to platoon duty was that he preferred the work, schedule, and camaraderie of platoon duty to that of special duty, not that he suffered any adverse employment consequences from being limited to special duty." (*Malais v. Los Angeles City Fire Dept.* [3-29-07] B189575 [2d Dist.] \_\_\_Cal.App.4th\_\_\_, 2007 DJDAR 5974. \*

cent of the county sheriff's staff. Deputy sheriffs are paid better and receive better benefits, including safety retirement benefits not available to county police officers. The police and the sheriffs are separately classified under the county civil service rules. Separate unions represent the county police officers and the deputy sheriffs in collective bargaining.

*The county had not erected racial barriers to deter minorities from applying.*

Deputy sheriffs must work in the county jails for up to six years before moving to other assignments, whereas county police officers have no responsibilities with respect to jail prisoners. Unlike the sheriffs department personnel, county police officers are not part of the general 911 emergency system.

The class action case was filed in 1998, alleging causes of action for violations of the FEHA and federal law, including Title VII. The class members sought back pay, front pay, equal pay, and pension and workers' compensation benefits equal to those received by the deputy sheriffs, and equal promotional and assignment opportunities. The court certified the class in 2000, but only with respect to the claims of systemic racial discrimination.

The jury rendered a verdict in favor of the class at the liability phase of

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## Race Discrimination Verdict in Favor of L.A. County Police Officers Overturned

The Second District Court of Appeal rejected a jury verdict in favor of minority officers of the Los Angeles County Police in *Frank v. County of Los Angeles*, a race discrimination class action lawsuit. The basis of the claim was that county police, the majority of whom are minorities, are paid less than county sheriffs, the majority of whom are white. A jury found the county police officers were disparately treated because of their race and that this had an adverse impact on a protected group in violation of California's Fair Employment and Housing Act.

The Court of Appeal reversed, finding that because the county had not erected racial barriers to deter minorities from applying to the position of county sheriff, there was no disparate impact. Underlying this finding was the court's determination that the fact that most of the county police officers were minorities did not make them a protected group. It also concluded that there was insufficient evidence to prove disparate treatment.

### Factual Background

Minorities make up 70 percent of the county police force, but only 30 per-



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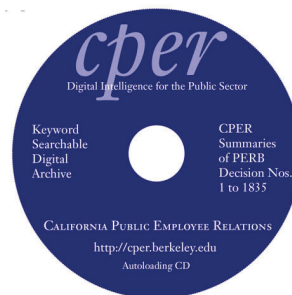
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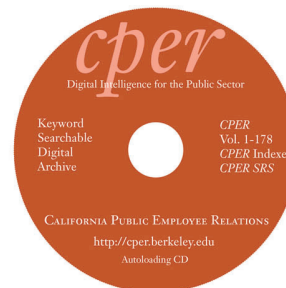
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the trial, finding, among other things, that the county's employment practices caused a significant disproportionate adverse impact on the class members and other members of their protected group, and that race was a motivating factor in the establishment of their pay and benefits. There followed a trial before the judge on damages. The judge denied relief to class members above the rank of police lieutenant on the ground that the plaintiffs had failed to prove these class members were similarly situated to persons holding comparable positions in the sheriff's department. The court denied the plaintiffs' request for reclassification, for additional workers' compensation benefits, and for front pay. The court awarded back pay and attorneys' fees and costs. Both parties appealed.

### Court of Appeal Decision

The appellate court recognized that the standard of review to be applied here "is simply to determine whether the jury had before it substantial evidence from which it reasonably could conclude the challenged employment actions were motivated in substantial part by reasons of race." Quoting from *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 180 CPER 78, it said:

In determining whether a judgment is supported by substantial evidence, we may not confine our consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing

all reasonable inferences in favor of the decision of the trial court. We may not substitute our view of the correct findings for those of the trial court [or jury]; rather, we must accept any reasonable interpretation of the evidence which supports the [factfinder's] decision.

The court noted that "*McRae* emphasized that 'substantial' evidence is not synonymous with 'any' evidence," and that an inference supporting a judgment "cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork," and "cannot stand if it is unreasonable when viewed in light of the whole record."

## *County police officers are not a protected group under the FEHA.*

### ***Disparate impact discrimination.***

The plaintiffs' disparate impact theory of discrimination was that the facially neutral employment practice of paying the county police officers less than the deputy sheriffs had a disproportionately adverse impact on the minority officers who make up the vast majority of the county police, explained the court.

The county argued that the disparate impact claim must fail as a matter of law because county police officers are not a protected group under the FEHA. The class responded by arguing that the fact that some county po-

lice officers are white and some are minority does not defeat their claim as a matter of law because bottom-line racial balance is not a defense.

The court identified the issue as whether the plaintiffs' evidence that all county police officers (70 percent of whom are minority) were paid less and received fewer benefits than the deputy sheriffs (70 percent of whom are white) established a basis for a disparate impact claim. The court determined that it did not.

In reaching that conclusion, the court relied on *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 169 CPER 54, in which the plaintiff alleged that a reorganization that demoted administrative managers had a disparate impact based on gender and age because all but one of the administrative managers were women and about half were over 40. The *Carter* court held that the plaintiff failed to prove a prima facie case of discrimination as a matter of law, stating:

Women were not affected as a group. Persons over 40 were not affected as a group. Rather, administrative managers were affected as a group. The evidence reveals nothing more. *And the law does not prohibit discrimination against administrative managers....* The mere fact that each person affected by a practice or policy is also a member of a protected group does not establish a disparate impact.

In addition, the court pointed to the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio* (1989) 40 U.S. 642, 82 CPER 12, a case on which



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the *Carter* court also relied. In *Wards Cove*, the employers had two types of jobs: unskilled cannery jobs on the cannery lines, which were filled primarily by minorities, and non-cannery jobs, most of which were filled by whites. The non-cannery jobs were classified as skilled positions and paid more than the cannery jobs. The court summarized the Supreme Court's rationale underlying its reversal of the lower court's finding of discrimination:

The Supreme Court held that measuring alleged discrimination in the selection of skilled non-cannery positions "by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical. If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not the employers' fault) the employers' selection methods or employment practices cannot be said to have a 'disparate impact' on nonwhites."

The *Wards Cove* court recognized that if the lack of qualified minorities in the non-cannery positions was due to employers' practices that deterred minorities from applying for those positions, the analysis would be different. The appellate court also noted the Supreme Court's holding that where there is no evidence of employment practices which deter qualified applicants for the higher paid positions, "the percentage of non-white workers found in other positions in the employer's labor force is irrelevant to the question of a prima facie statistical case of disparate impact."

In this case, the court found no evidence that minorities were deterred from applying for the position of deputy sheriff and that the plaintiffs' reliance on *Liberles v. County of Cook* (7th Cir. 1983) 709 F.2d 1122, was misplaced. In that case, 85 percent of the lower paid case aides and case aide trainees were African American while 81 percent of the higher paid caseworker I employees were white. The evidence showed that both groups were assigned the same

*There was no evidence  
that minorities were  
deterred from applying  
for the position of  
deputy sheriff.*

tasks and that the only distinction was in the compensation paid. The county required a four-year college degree and a successful examination for the caseworker I position. Evidence was presented that three times as many whites as blacks in the county had a bachelor's degree, and that the examination was biased toward applicants with a B.A. "Thus in *Liberles*, there was evidence that the employer's policies *created* a deterrent to application to the higher paid positions, unlike the policies at issue in *Wards Cove*," or in this case, said the court.

We conclude that the jury's special verdict on the disparate impact theory must be reversed because plaintiffs failed to establish a prima facie case of racial discrimination. As in *Wards Cove*, there was no showing that the County's policies had a disproportionate adverse impact on the class members because they are minorities and thus members of a protected group. Instead, the evidence established that the County's policies were to pay the class members, Caucasian and minority alike, less because they were members of the County police rather than the LASD. Plaintiffs presented no evidence that the County established policies which worked as a barrier or deterrent to minority application to and hiring by the LASD.

**Disparate treatment.** The plaintiffs' allegations of disparate treatment fared no better than their disparate impact theory at the hand of the appellate court. The court could find no evidence in the record from which the jury could reasonably infer that the police officers were paid less than the deputy sheriffs because of intentional racial discrimination.

Preliminarily, the court determined that the jury could not reasonably rely on the plaintiffs' expert's opinion testimony that the duties of the two positions were functionally equivalent or comparable because the expert's study was flawed. This evidentiary omission undermined the rest of their experts' testimony because those experts assumed the duties were comparable.

An examination of the record did not reveal any evidence admitted at the liability phase of the trial that sup-

ported a finding of intentional race discrimination, concluded the court:

In summary, plaintiffs' claim of racial intent is not supported by the record. It may be that County police officers should be better compensated as a class. That abstract issue is not before us. The question is whether the pay disparity was the product of intent to discriminate based on race. We conclude that the jury could not reasonably infer such intent from the record. Without it, the special verdict on disparate treatment must be reversed.

The court denied the plaintiffs' request for a new trial, finding that they "had a full opportunity to present their evidence, which was insufficient as a matter of law." (*Frank v. County of Los Angeles* [4-12-07] 149 Cal.App.4th 805.) \*

## General

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### Supreme Court: Pay for Missed Meal, Rest Breaks Is Wage, Not Penalty

In a long-awaited decision, the California Supreme Court has determined that an additional hour of pay awarded to compensate an employee for denied meal or rest periods is a premium wage subject to the three-year statute of limitations period. The issue became highly politicized in December 2004, when the Division of Labor Standards Enforcement withdrew four opinion letters discussing Sec. 226.7 and then issued proposed regulations and a precedent decision interpreting the pay remedy as a penalty that carries only a one-year limitations period.

The case was brought by John Paul Murphy, who worked as a store manager in a clothing store. He typically worked nine or ten hours a day during which he was able only to take an uninterrupted, duty-free meal period approximately once every two weeks. He rarely had the opportunity to take a rest period.

Murphy filed a wage claim with the state Labor Commissioner, seeking payment for meal and rest periods, and eventually was awarded payment by the trial court, which applied a three-year statute of limitations. The company appealed, and the Court of Appeal reversed the lower court's ruling, finding that payments assessed for meal and rest

period violations are penalties subject to a one-year statute of limitations period.

The Supreme Court faced the task of interpreting the language of Labor Code Sec. 226.7. Section 226.7(a) mandates that employees be provided meal and rest periods. Section 226.7(b) then states that if an employer fails to provide an employee with a meal period or rest period in accordance with applicable laws, "the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." If the additional hour is considered a wage, then by operation of Code of Civil Procedure Sec. 338(a), a three-year statute of limitations applies. If it is considered a penalty, then under Sec. 340(a), a one-year limitations period applies.

To resolve this conundrum, the Supreme Court first looked to the Labor Code's definition of "wages" as "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other methods of calculation." A "penalty," on the other hand, is that "which an individual is allowed to recover against a wrongdoer, as a satisfaction for the wrong or

injury suffered, and without reference to the actual damage sustained." The high court reasoned that the directive found in Sec. 226.7(b) — that an employee must be given "one additional hour of *pay*" — "is in keeping with the Labor Code definition of 'wages.'"

But the court also acknowledged that the language of Sec. 226.7(b) is reasonably susceptible to an interpretation that the additional hour of pay is

### *The Senate amended A.B. 2509 to delete the penalty provision.*

a penalty intended to punish the employer for denying the employee his meal and rest periods. Because of this, the court looked beyond the statutory language itself and examined the administrative and legislative history of the pay remedy.

Before the enactment of Sec. 226.7(b), the only remedy available to employees was injunctive relief aimed at preventing future abuse. In 2000, however, the Industrial Welfare Commission and the state legislature added the pay remedy as a means of boosting compliance with the meal and rest period provisions of the law. In the legislature, Assembly Bill 2509 initially proposed a dual strategy to address the problem, calling for an explicit penalty provision and a separate payment to

employees. The fact that the Senate later amended the bill to delete the penalty provision persuaded the court that lawmakers did not intend to impose a penalty on non-compliant employers.

In addition, the court took note that when the bill was amended to provide for one additional hour of pay rather than twice the hourly rate, the legisla-

*The legislature chose to eliminate penalty language in Sec. 226.7.*

ture referred to the proposed remedy as “one hour of *wages* for each work day when rest periods were not offered.” And, the court observed, the Senate’s amendments eliminated the requirement that an employee file an enforcement action to collect the additional hour of pay. This, said the court, “is akin to an employee’s immediate entitlement to payment of wages or for overtime.” In contrast, Labor Code provisions imposing penalties require the employee or the Labor Commission to first take some action. “The right to a penalty, unlike section 226.7 pay, does not vest until someone has taken action to enforce it,” the court noted.

Moreover, the court found that the legislature’s decision not to label Sec. 226.7 as a penalty is “particularly instructive” because it simultaneously es-

tablished explicitly labeled penalties in other provisions of A.B. 2509. “That the Legislature chose to eliminate penalty language in section 226.7 while retaining the use of the word in other provisions of Bill No. 2509 is further evidence that the Legislature did not intend section 226.7 to constitute a penalty,” said the court.

Also noted was the legislature’s awareness that remedies which constitute penalties are typically governed by a one-year statute of limitations. Therefore, reasoned the court, had the legislature intended Sec. 226.7 to be governed by a one-year limitations period, it could have done so by unambiguously labeling it a penalty.

The word penalty does appear in the legislative history of Sec. 226.7 and the IWC hearings, the court acknowledged, but it concluded that the hour of pay remedy was referenced as a “penalty” the same way that overtime pay can be characterized as a penalty. In providing overtime pay, the legislature created both a premium pay to compensate employees for working in excess of eight hours and a device to shape the employer’s behavior and put a limit on the maximum number of hours worked. In referencing the additional pay provision as a penalty, both the legislature and the IWC recognized the fact that, like overtime, “the meal and rest period remedy has a corollary disincentive aspect in addition to its central compensatory purpose.”

The court concluded that the administrative and legislative history of the stat-

ute indicates that, “whatever incidental behavior-shaping purpose section 226.7 serves, the Legislature intended section 226.7 first and foremost to compensate employees for their injuries.”

The court also addressed what the employer asserted as the “functional analysis” of the payment’s effect. The fact that Sec. 226.7 serves the function

*The legislature intended first and foremost to compensate employees for their injuries.*

of shaping employer behavior in addition to compensating the employee does not automatically render the remedy a penalty, said the court, citing IWC wage orders that require the payment of additional compensation for split shifts. Like overtime, split-shift pay provisions do not become penalties for statute of limitations purposes just because they seek to shape employer behavior in addition to compensating employees.

The employer also argued that the additional hour of pay is a penalty because it is imposed without reference to actual damage — an hour of pay is owed whether the employee has missed a 30-minute meal period or two 10-minute rest periods. The court was not persuaded. “Section 226.7 is not trans-



formed into a penalty merely because a one-to-one ratio does not exist between the economic injury caused by meal and rest period violations...and the remedy selected by the Legislature,” said the court. Noting that monetary harm to employees can be difficult to ascertain,

*Employers are  
required to keep all  
time records for  
a minimum of  
three years.*

the court remarked: “Where damages are obscure and difficult to prove, the Legislature may select a set amount of compensation without converting that remedy into a penalty.”

By focusing on the lack of a perfect correlation between the Sec. 226.7 remedy and the employee’s economic injury, the Court of Appeal ignored the non-economic injuries that employees suffer when forced to work through rest and meal periods. While it is difficult to assign a value to these injuries, said the court, the legislature has selected an amount of compensation it deems appropriate. In fact, said the court, construing the one additional hour of pay as a penalty “would illogically result in an employer being ‘penalized’ less or more, depending on the affected employee’s rate of pay. Employers of the low-wage workers likeliest to suf-

fer violations of section 226.7 (and, arguably, at greatest risk of injury) would be ‘penalized’ less than employers of highly paid workers.”

Accordingly, the Supreme Court concluded, “That the amount of the payment is linked to an employee’s rate of compensation, rather than a prescribed fixed amount, further supports the position that section 226.7 payments are a form of wages.” Neither the behavior-shaping function of Sec. 226.7 nor the lack of a perfect fit between the pay remedy and the injury persuaded the court that the pay remedy should be construed as a penalty.

Finally, the court noted, the primary purpose of a statute of limitations

is to prevent plaintiffs from asserting stale claims once the evidence is no longer fresh and witnesses are no longer available. However, said the court, because employers are required to keep all time records for a minimum of three years, they will have the necessary evidence to defend against workers’ claims.

As a practical matter, the high court’s decision to view the pay remedy of Sec. 226.7 as a wage entitles an injured worker to monetary compensation for missed meal and rest periods going back three years instead of just one. (*Murphy v. Kenneth Cole Productions* [4-16-07] 40 Cal.4th1094.)\*

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## **No Invasion of Privacy or Defamation Where Principal Criticized in the Press**

The Second District Court of Appeal sided with the Los Angeles Unified School District in upholding the trial court’s dismissal of a school principal’s lawsuit in which he claimed invasion of privacy and defamation arising out of statements made to the press about his performance. The Court of Appeal found that the challenged statements were constitutionally protected and revealed no private information.

### **Factual Background**

On June 1, 2005, the *Los Angeles Times* reported that Norman K. Mor-

row, principal of Jefferson High School, would be replaced “amid criticism by city and school district officials over his handling of a spate of student brawls that many say have been fueled by racial tensions.” Local superintendent Rowena LaGrosa reportedly stated that Morrow would be replaced six months before his planned retirement. The *L.A. Times* also reported that Superintendent of Schools Roy Romer “voiced the need for stronger leadership at Jefferson, saying in an interview that Morrow ‘had retirement plans that did not fit with the district’s needs.’” In addition, the

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*Albert Einstein*

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article continued, “The principal’s handling of the recent violence had ‘accelerated’ a decision to replace him, Romer said.” Morrow was removed as principal of Jefferson and reassigned to a desk job. He retired on January 27, 2006, claiming that he was “forced out” of the district.

Morrow sued the district, Romer, and LaGrosa, claiming that their statements to the press invaded his privacy and constituted defamation. He asserted that he was falsely blamed for the violent campus disturbances, which he attributed to the district’s failure to provide sufficient security personnel despite his repeated requests for assistance. He claimed the negative comments by Romer and LaGrosa, and the decision to remove him as principal caused him humiliation, embarrassment, pain and suffering, and damage to his professional reputation. The trial court dismissed the invasion of privacy and defamation claims pursuant to Code of Civil Procedure Sec. 425.16, known as the anti-SLAPP statute. The court found that neither Romer nor LaGrosa revealed any private information about Morrow. Alternatively, to the extent that any such information was revealed, its disclosure was constitutionally protected, said the court, finding that “a principal’s leadership or lack thereof in handling student violence and melees on a campus is the subject of legitimate public concern.” Morrow appealed.

### **Court of Appeal Decision**

The Second District agreed with the trial court’s reasoning. Section 425.16 provides for a special motion to strike a cause of action contained in a complaint brought against a person “arising from any act of that person in furtherance of the person’s right of petition or free speech....” “In evaluating an anti-SLAPP motion, the trial court first determines whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity,” instructed the court, quoting from *Equilon Enterprises v. Consumer Cause, Inc.*

*A principal’s leadership is the subject of legitimate public concern.*

(2002) 29 Cal.4th 53. “If the court finds the defendant has made the threshold showing, it determines then whether the plaintiff has demonstrated a probability of prevailing on the claim.”

The Court of Appeal rejected Morrow’s argument that the statements to the *L.A. Times* “concerning his handling of the student violence, leadership abilities, and retirement plans did not concern an issue of public interest, but were private personnel details that could be divulged only within a formal personnel evaluation” subject to the

protections of the applicable collective bargaining agreement. It noted that Morrow conceded that the incidents of student violence on campus were of public interest, and stated:

Nevertheless, Morrow contends the challenged statements did not concern the student violence, but merely revealed matters of private interest — his retirement plans and the reasons for a personnel action. A fair reading of the relevant newspaper articles shows, however, Morrow's assertion is untenable. While it is possible to imagine an instance in which a school administrator's retirement plans would be of purely private interest, that was not the case here. To the contrary, Romer and LaGrosa only mentioned Morrow's retirement plans to the extent they directly concerned the school district's solution to the student violence. There is no evidence that any gratuitous details were offered to the press and certainly none were published.

The court pointed to *Stevens v. Tillman* (7th Cir. 1988) 855 F.2d 394, where an elementary school principal sued the president of the parent-teacher association and her supporters for defamation. The *Stevens* court found that the principal was a public figure under the standard of *New York Times Co. v. Sullivan* (1964) U.S. 254, explaining, "Stevens was not an elected public official, but as principal she possessed great discretion over the operation of Mollison School," and "how she used that discretion was the subject of legitimate public debate...." It concluded, "The statements at issue here dealt with the way Stevens ran Mollison School,

not with her private life." "The same was true of Morrow," said the Court of Appeal.

Morrow claimed that the collective bargaining agreement prohibited Romer from making the challenged statements except in a closed session of the board of education. The court was not persuaded, noting the contract specifically provided that the district retains all rights not enumerated in the agreement or otherwise placed outside its scope by Government Code Sec. 3543.2:

That code section limits the CBA's scope of representation "to matters relating to wages, hours of employment, and other terms and conditions of employment," and its definition of "terms and conditions of employment" does not encompass the right of the district's executive officers to make public comments on a represented administrator's performance when it impacts on issues of public concern.... Moreover, the CBA identifies the right to "assign personnel to any location" as one of the rights *retained* by the school district. In short, the challenged statements were not the kind of formal personnel evaluation contemplated by...the CBA.

Morrow also argued that the "personnel exception" to the Brown Act, found at Government Code Sec. 54957, created a right to privacy violated by the defendants' statements to the press. The personnel exception authorizes a local legislative body to hold a closed session to consider "personnel matters," defined as the appointment, evaluation

of performance, discipline, or dismissal of a public employee. It also provides that a local legislative body may hold a closed session to hear complaints or charges brought against a public employee unless the employee requests a public session.

The court found the personnel exception inapplicable because the statements were not the equivalent of a personnel evaluation under the contract. Further, said the court, "Morrow's ar-

*Morrow argued that  
the 'personal exception'  
to the Brown Act  
created a right  
to privacy.*

gument turns the Brown Act on its head, because the general purpose of the Brown Act is to *increase* public awareness of issues bearing on the democratic process." The court quoted from *Fischer v. Los Angeles Unified School Dist.* (1999) 70 Cal.App.4th 87, in support of its position:

The Brown Act requires open public meetings and gives people the right to attend meetings of local legislative bodies, subject to statutory exceptions. The Brown Act establishes the general rule that "meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meet-

ing of the legislative body of a local agency, except as otherwise provided in this chapter. The Brown Act has the objective of facilitating public participation in local government decisions and curbing misuse of the democratic process by secret legislation.

The *Fischer* court also specified that the personnel exception to the Brown Act “should be narrowly construed,” noted the court. “The statute’s plain meaning, as bolstered by the Brown Act’s overarching purpose and the requirement that the personnel exception be read narrowly, forecloses an interpretation that would equate the kind of generalized criticism Roemer made to the press with a formal ‘evaluation of performance’ as contemplated under Government Code section 54957,” said the court. “Stated another way...while the Brown Act allows public employees to demand that a governing body air complaints about the employee in public, it does not grant the employees the right to force the conflict behind closed doors.”

Morrow was no more successful in his attempt to meet the second part of the anti-SLAPP test: whether he demonstrated a probability of prevailing on the invasion of privacy and defamation causes of action.

Regarding the first cause of action, the court instructed that, in order to prevail on a claim for invasion of privacy by means of the publication of private facts, “Morrow must prove a (1) public disclosure (2) of a private fact (3) which would be offensive and ob-

jectionable to a reasonable person, and (4) which is not of legitimate public concern,” citing *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200. In that case, the California Supreme Court explained, “lack of newsworthiness is an element of the ‘private facts’ tort, making newsworthiness a complete bar to common law liability.”

The court found that Morrow could not prevail on his privacy invasion claim. “The trial court was correct in finding that to the extent the challenged disclosures included any

*The challenged statements were protected by the executive officer privilege of Civil Code Sec. 47(a).*

private fact, the disclosure was logically relevant to the newsworthy subject of the violence at Jefferson and the school district’s response to it,” said the court. “Even if Morrow’s retirement plans were considered to be a purely private concern, the disclosure was highly relevant to the district’s response and not particularly intrusive,” it continued.

The court also concluded that Morrow could not prevail on the defamation claim. It ruled that the chal-

lenged statements were protected by the executive officer privilege of Civil Code Sec. 47(a), which states, “A privileged publication or broadcast is one made: (a) In the proper discharge of an official duty.” While the court recognized that “some appellate decisions have refused to apply the privilege to officials below cabinet rank,” it elected to join the First District in finding that “the weight of authority follows federal precedents in extending the privilege to lower ranking officials.”

In coming to its determination, the Court of Appeal relied heavily on the Supreme Court’s decision in *Barr v. Matteo* (1959) 360 U.S. 564. In that case, the absolute privilege was extended to the acting director of the Office of Rent Stabilization, “an office well below cabinet rank.”

As the Supreme Court explained in *Barr*: “It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted...which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.” Indeed, the published statement found privileged in *Barr* cannot be meaningfully distinguished from that made by Romer. In that case, there was a widely reported scandal developing at a federal administrative agency concerning its employees’ accumulated leave payments. The defendant, the acting director of the agency, suspended two of his subordinates and released a press release “implying in a press release that they were responsible for the misdeeds.” In finding the

defendant's statements absolutely privileged, the Supreme Court stated: "We think that under these circumstances a publicly expressed statement of the position of the agency head, announcing personnel action which he planned to take in reference to the charges so widely disseminated to the public, was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." Romer, in his capacity as the chief executive officer of the governing board of the district, announced the impending transfer of a district employee as part of the school district's response to a notorious crisis in a public high school.

The court dismissed Morrow's argument that the executive privilege could not apply to Romer because he was not exercising a policymaking function when he made the statements, noting that, consistent with the decision in *Barr*, "the executive privilege broadly encompasses all discretionary acts essential to the proper exercise of an executive function decision." "Romer's statements to the press cannot be deemed ministerial or unrelated to a legitimate policy-making function," concluded the court. "Rather, as superintendent he was publicly explaining the district's response to a matter of widespread concern, which was one of his official duties."

Morrow maintained that evidence showing that Romer later regretted his decision to replace him precluded application of the privilege. Not so, said the court, quoting from Judge Learned Hand's opinion in *Barr*:

Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation....

The court also gave an alternative basis for its decision: that Romer's statements were all protected opinions, citing *Botos v. Los Angeles County Bar Assn.* (1984) 151 Cal.App.3d 1089, and *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720. (*Morrow v. Los Angeles Unified School Dist.* [4-20-07] B192627 [2d Dist.] \_\_\_ Cal.App.4th \_\_\_, 2007 WL 1168432.) \*



# Public Sector Arbitration

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## Conflicts in Evidence Result in Reinstatement of Grievant

Finding inconclusive evidence that the grievant's desk had been locked and unoccupied during his lengthy medical absence from the workplace, Arbitrator Paul Staudohar reinstated an employee after a small quantity of marijuana was found in his desk drawer.

The grievant, an office assistant at the Monterey County Department of Social and Employment Services, was involved in a drive-by shooting on his way home from work in July 2005. He was hospitalized and remained off work during a long period of rehabilitation. In March 2006, the department copy center, where the grievant had worked, began to prepare for a remodeling project and, as a result, all desks had to be emptied. The grievant's supervisor instructed the grievant's coworker to empty the grievant's desk, and gave her a key to open it because it was locked. A small plastic bag of marijuana was discovered in a drawer. The bag was turned over to a manager in the human resources department who, in turn, gave the bag to the county sheriff's department. The contents of the bag was tested and found to be marijuana, about enough to make one cigarette.

That same day, a sergeant from the sheriff's department interviewed the grievant at his home. The grievant told the sergeant that he had a medical marijuana card, however the sergeant discovered that the card had expired in May 2005. Section 11362.5 of the California Health and Safety Code permits persons to obtain a card that allows them to possess a limited amount of marijuana where a physician has determined the substance will provide relief from certain specified illnesses. The grievant had obtained the card because of a back injury and a bulging disk.

The county maintains a drug-free workplace, and possession of a controlled substance violates the policy. Pursuant to this policy, the grievant was informed of the county's intention to terminate his employment. Following a *Skelly* hearing, the county terminated the grievant for unlawful possession of a controlled substance, failure to observe work rules, violation of the drug-free workplace policy, and conduct discrediting the agency.

The county asserted that the grievant should be held accountable for the marijuana in his desk and urged the arbitrator to reject the grievant's contention that the marijuana had been

planted there. The union, on the grievant's behalf, asserted that the grievant had been gone from the workplace for eight months and others could have had access to his desk during that time.

The arbitrator first found no evidence that the grievant's desk had been locked during his eight-month absence from the workplace. His coworker testified that she found the desk locked when she went to empty it, but she acknowledged that she did not know whether it had been locked during the

*A duplicate key to employee desk drawers was kept in the supervisor's office.*

entire course of his absence. She also claimed that no one had used the grievant's desk while he was recovering. Another coworker, however, testified that while the grievant was away, a temporary employee had occupied the desk for a few weeks.

The arbitrator also took note of testimony that there is a duplicate key to employee desk drawers, kept in a cabinet in the supervisor's office. There was contradictory testimony about whether the door to that cabinet was kept locked or unlocked during working hours.

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Molly Ivins

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Based on this evidence, Staudohar concluded that it was possible the marijuana did not belong to the grievant. Staudohar noted, however, that the grievant told the deputy sheriff he perhaps "could have thrown the marijuana into his desk inadvertently." While labeling this comment as "more conjecture than reality," the arbitrator nonetheless concluded it was "quite likely" that the marijuana did belong to the grievant. He was an acknowledged marijuana user who had been issued a cannabis card that entitled him to lawfully purchase marijuana to reduce his back pain.

*It was 'quite likely' that the marijuana did belong to the grievant.*

And, Staudohar reasoned, while the cannabis card had expired at the time the marijuana was found, the grievant provided a viable defense and, according to the deputy sheriff, a criminal conviction was not likely. "Thus," Staudohar concluded, "while the Grievant may technically have been in 'possession' or at least 'constructive possession' and in this sense violated the County's policy for a drug-free workplace, the fact that the Grievant provided a 'viable defense' of medical usage means that there is no violation."

The arbitrator also referred to the grievant's last four performance evaluations, each indicating that he fully met overall expectations and characterizing him as a hard worker who got along well with his coworkers. His evaluations also noted he had good work ethics, was organized, and had a great attendance record. These qualities would not be determinative had the county proved a clear violation of their drug-free workplace policy, Staudohar said, but "this is not the case and [the grievant] deserves an opportunity to return to his job."

To remedy the improper termination, Staudohar ordered backpay less earnings from other employment, and reinstatement with full restoration of seniority. (*Monterey County and Service Employees International Union, Loc. 817* [2-23-07; 12 pp.]. *Representatives:* Ellen Jahn [deputy county counsel] for the county; K.C. Snodgrass [contract enforcement specialist] for the union; *Arbitrator:* Paul Staudohar, CSMCS Case No. ARB-05-0590.) \*

# Arbitration Log

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

**County of Tuolumne and Tuolumne County Deputy Sheriffs Assn.** (9-20-05; 12 pp.). *Representatives:* Sarah Carrillo (deputy county counsel) for the county; Gary Messing (Carroll, Burdick & McDonough) for the association. *Arbitrator:* Philip Tamoush.

*Issue:* Did the county violate the parties' collective bargaining agreement by assigning the task of performing background investigations to individuals other than full-time, permanent sheriff investigators?

*Association's position:* (1) The county historically has allocated eight full-time sheriff investigator positions to perform background checks, although only one performed background investigations on a full-time basis.

(2) The parties' side-letter agreement to permit an outside vendor to assist in performing background investigations only concerned investigations of non-sworn personnel and expired in 2002.

(3) When the full-time investigator retired, the county rehired the same individual as a special services deputy (not in the classified service) and thereafter improperly eliminated the investigator position from its budget.

(4) The parties' MOU specifies that investigations must be performed by full-time, permanent sheriff investi-

gators and any past practice permitting the use of special services deputies ceased to be binding when the parties negotiated this specific contract language.

(5) The county cannot unilaterally alter the clear language of the contract without negotiating with the association.

*County's position:* (1) The county has used special services deputies and management personnel to conduct background investigations for more than 12 years. The association cannot now challenge this well-established binding past practice.

(2) Management has the unrestricted right to eliminate a staff person from its budget, and the arbitrator lacks the authority to restore a position.

(3) The contract language was included to address the assignment of deputies on a rotational basis, and the association failed to timely file a grievance to challenge the provision.

(4) The parties' side-letter agreement was negotiated only to clarify a

deviation from past practice, but did not eliminate it.

*Arbitrator's holding:* Grievance sustained.

*Arbitrator's reasoning:* (1) The county retains the authority to eliminate budgeted positions, and the arbitrator may not restore the eliminated investigative position.

(2) Through negotiation, however, the parties have imposed some limitations on the use of personnel other than full-time deputies to execute background investigations.

(3) The side-letter agreement signed by the parties allowed the county to employ outside entities to conduct background investigations "in order to clear the backlog of pending background checks." However, the agreement provides that once the backlog is cleared, the county "shall resume using current Sheriff's Department personnel exclusively...."

(4) The county's argument that the contract does not limit management's ability to use retirees to perform background checks is at odds with the clear language of the MOU, which requires that "all authorized assignments in investigation shall be full-time permanent Sheriff Investigators."

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(5) The contract language eliminated the past practice of assignment of special services deputies and management personnel to conduct background investigations.

(6) The fact that the association did not immediately challenge the county's use of retirees to conduct background checks when the MOU took effect only affects the appropriate remedy because the utilization of special services deputies is a continuing violation.

(7) The appropriate remedy includes financial reimbursement for work not performed by full-time permanent investigators, running from the date the grievance was filed.

*(Binding Grievance Arbitration)*

- Released Time
- Bargaining History
- Past Practice

**University of California and Coalition of University Employees** (1-19-06; 25 pp.). *Representatives:* Debra Cohen (labor relations coordinator) for the university; Kate Hallward (Leonard Carder) for the employee organization. *Arbitrator:* Bonnie Bogue.

*Issue:* Did the university violate the parties' collective bargaining agreement when it denied a bargaining team member's request for reasonable amounts of paid released time to travel to a bargaining session on the day before the session?

*Pertinent contract language:* "Travel time included in the released time without loss of straight-time pay status is the reasonable amount of time for direct travel to and from the bargaining team member's place of employment."

*Union position:* (1) The grievant was entitled to three hours of released time for travel from the Berkeley campus, where she is employed, to the Riverside campus, where a bargaining session was scheduled. The contract permits travel time that occurs on the day before a bargaining session.

(2) The university's consistent past application of the contract language has been to grant such requests for released time.

*University's position:* (1) Bargaining history demonstrates that the parties did not agree that the university was required to provide paid released time on a day other than a scheduled bargaining day.

(2) Special accommodations have been made to permit an employee to receive paid released time for travel on the day before a scheduled bargaining session only occasionally, not on a routine basis. There is no consistent past practice of granting paid released time on a day other than the bargaining day.

*Arbitrator's holding:* Grievance sustained.

*Arbitrator's reasoning:* (1) On its face, the contract language supports the union's interpretation that employees are entitled to reasonable released time to travel to and from the bargaining location, regardless of whether the travel takes place on the same day or the day before or after the bargaining sessions.

(2) In light of other restrictions that the parties placed on the use of released time, i.e., for caucuses only on the same day as a scheduled bargaining session, only for hours the employee is sched-

uled to work, the parties did not intend to include other conditions not listed.

(3) At the time the parties were negotiating their contract, it was foreseeable that some bargaining team members would have to travel on a day other than the day of the bargaining session because team members may have to fly to bargaining sessions at campuses hundreds of miles away from their worksite.

(4) Limiting released time only to travel on the day of the bargaining session would render the travel time provision illusory in the common instances where bargaining sessions exceed the maximum of eight hours (the customary full-time work day).

(5) Bargaining history is insufficient to refute the plain meaning of the contract language. Assuming bargaining team members were not granted released time for travel on the day before a bargaining session under the prior contract, this information was not communicated to the union when it was negotiating a successor agreement. There is no evidence that the parties discussed past application of the released time provision when they were negotiating.

(6) CUE's failure to include a proposal calling for paid travel time before bargaining sessions lends credence to the union's assertion that negotiators understood the language in the prior contract to provide released time for pre-bargaining travel.

(7) Testimony from members of the CUE bargaining team established that the parties understood (but did not specifically discuss) that released time

would be provided for pre-bargaining session travel. The record is devoid of any evidence that there was a mutual understanding that paid travel time was limited to the day of bargaining.

(8) Evidence of past practice is not sufficient to overcome the plain meaning of the contract language. Beginning in 1998 until the present grievance was filed, bargaining team members were granted paid released time for travel the day before bargaining in order to arrive in time for the session. Payroll records substantiate these assertions. The understanding of university labor relations professionals is not controlling.

*(Binding Grievance Arbitration)*

• **Discipline — Just Cause**

**Los Rios Community College Dist. and Service Employees International Union, Loc. 760**, (6-10-06; 22 pp.). *Representatives*: Matthew Ruggles (Littler Mendelson) for the district; Matthew Gauger (Weinberg, Roger and Rosenfeld) for the union. *Arbitrator*: Katherine Thomson.

*Issue*: Was there just cause for terminating the grievant?

*District's position*: (1) Without authorization, the grievant accessed the electronic database maintained by the

Peace Officer Standards and Training Commission and changed the records of two district employees who lacked POST certification but were working as peace officers.

(2) The grievant's employment history includes numerous absences, late-absence notifications, and tardy arrivals. He told his superior that he did not like being assigned to Saturday shifts and that he would not show up on Saturdays if his assignment did not change.

(3) The grievant inappropriately asked for "professional courtesy" from a Sacramento County sheriff's deputy who made a vehicle stop, telling the deputy that he also was a police officer.

(4) In disregard of a request from a dispatcher, the grievant failed to respond to a call to assist a college administrator who was locked out of her office.

*Union's position*: (1) The grievant secured access to POST records only to determine the employees' status as peace officers and forgot to change the records back.

(2) The grievant's absences were due to serious health conditions of himself and/or his family members, and cannot be the basis of discipline in con-

travention of family and medical leave rights. The grievant never was absent on a Saturday. His attendance has since improved.

(3) The grievant did not try to secure a favor from the Sacramento deputy sheriff by telling him he was a Los Rios officer; he honestly answered questions about his employment.

(4) When the grievant was dispatched to assist the administrator, he lacked appropriate keys and was uncertain as to whether he was authorized to respond.

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

*Arbitrator's reasoning*: (1) The grievant's discharge was based on multiple violations of district policy, including conduct for which he previously was suspended and demoted.

(2) Absent evidence that the grievant put the district on notice of his need for family and medical leave the grievant's absences were not protected. However, the grievant's attendance record improved after he received a counseling memo and, by itself, is not sufficient cause for termination.

(3) The grievant's threat to call in sick on Saturdays unless his schedule was changed raises questions about his reliability and was an inappropriate way to challenge workplace rules and assignments.

(4) The grievant inappropriately demanded professional courtesy from the deputy sheriff. The grievant's denial was not deemed credible.

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(5) The grievant's testimony did not adequately explain why he failed to respond to the directive to assist the administrator. The grievant did not have the discretion not to respond to the dispatch order, which was made pursuant to the authority of the chief. This conduct showed dereliction of his duty as a police officer.

(6) The grievant previously was demoted and suspended for altering the POST records and for dishonesty during the investigatory interview, a decision grieved but not arbitrated. It was considered in determining the propriety of the discharge. His access to the POST system showed poor judgment. At the very least, his failure to correct the information concerning his two coworkers was careless, and the evidence suggests that he may intentionally have changed the records. During the investigatory interview into the matter, he was evasive and mischaracterized his activity.

(7) The series of events relied on by the district evidences that the grievant repeatedly disregarded district policies and showed a lack of candor and ethical behavior. Most importantly, his failure to respond to the dispatch order demonstrated dereliction of his central duty as a police officer — to safeguard persons from harm.

*(Advisory Grievance Arbitration)*

- **Contracting Out**
- **Overtime Assignments**

**Service Employees International Union, Loc. 715, and Cupertino Union School Dist.** (6-16-06; 12 pp.). *Representatives:* Anne Yen

(Weinberg, Roger & Rosenfeld) for the union; Lawrence Schoenke (Miller, Brown & Dannis) for the district. *Arbitrator:* William Riker. (CSMCS Case No. ARB-03-2190).

*Issue:* Did the district violate the parties' agreement by using on-call workers to move and store items to be moved from one school site to another?

*Union's position:* (1) The district violated the parties' agreement to use on-call workers only as a supplement to regular bargaining unit workers when moving work is performed. Regular bargaining unit workers should have been offered overtime work to perform tasks associated with the relocation.

(2) The use of on-call persons for the move was a departure from their agreement and past practice. Management may augment the workforce by using on-call workers to provide additional help, but must first offer the work to district employees in the warehouse department.

(3) Teachers may elect to be assisted by on-call workers and other non-bargaining unit personnel to pack classroom materials. However, moving work, such as loading and transporting material and furniture to the moving trailers, is bargaining unit work.

(4) The district had ample opportunity to offer the work to the five core warehouse workers and those on the moving overtime list.

*District's position:* (1) The district has used a variety of personnel when accomplishing prior moves, including contract agencies, warehouse employees, employees on the overtime list, on-

call temporary employees, and substitute workers. Consistent with this past practice and the parties' agreement, the district elected not to use overtime workers to accomplish the move.

(2) The option of having the loading work done during the regular workweek with on-call workers, instead of offering overtime to regular warehouse workers, is a vested management right.

(3) Moving an entire school is not exclusively within the regular duties of district employees, and there is no established past practice concerning this type of move. It is not an unfair practice to shift the proportion of work between types of workers or contractors.

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

*Arbitrator's reasoning:* (1) The district failed to give the union accurate and timely notice of any upcoming move. Full disclosure of staffing plans is mandated.

(2) The parties' collective bargaining agreement, side letters, and past practice require that loading and unloading work first be offered to employees of the warehouse department before using on-call, non-bargaining unit personnel.

(3) The district retained the discretion to use outside moving agencies only where special equipment is required and the work cannot be accomplished by regular bargaining unit employees.

(4) The argument that the outside workers were needed because the move was planned for the regular school day is not persuasive. Warehouse workers

are entitled to be given the option of performing the packing and transportation work. The district cannot defeat this right by electing to have the work performed during the regular work-week.

(5) Each of the five core warehouse workers is entitled to 30.4 overtime hours to be made whole for the district's failure to offer them the work associated with the move.

*(Binding Grievance Arbitration)*

- **Contract Interpretation**

- **Past Practice**

**Professional & Technical Employees, AFSCME Loc. 512, and Contra Costa County** (3-9-07; 15 pp.). *Representatives:* Andrew H. Baker (Beeson, Tayer & Bodine) for the union; Esther Milbury (deputy county counsel) for the county. *Arbitrator:* Frank Silver.

*Issue:* Were the three grievants improperly denied payment for overtime hours worked?

*Union's position:* (1) The grievants, eligibility work supervisors in the Department of Employment and Human Services, all worked overtime hours at their superiors' requests.

(2) County payroll records reflect that from January 2000 through September 2005, eligibility work supervisors and other employees in the clerical supervisory unit have been paid overtime on approximately 850 occasions.

(3) A longstanding, mutually accepted past practice establishes that eligibility work supervisors receive compensation for overtime work performed

at the request of their superiors. This practice is an implied contract term that stands on equal footing with provisions of the MOU.

(4) The past practice is unequivocal, established by stipulated facts and payroll records. It is clearly enunciated and acted on, as it has been in existence for at least 15 years, spanning several collective bargaining agreements. Management was well aware of the practice when it entered into the most recent negotiations and did not propose a contract change.

(5) The county unilaterally rescinded the past practice after the union refused to accept its proposal that employees forfeit personal paid leave in exchange for overtime pay.

(6) Arbitral precedent recognizes the binding nature of a past practice that conveys a benefit of personal value to employees even where the subject matter of the practice is addressed in the contract.

(7) The contract requires adherence to requirements of the Fair Labor Standards Act and, since eligibility work supervisors are not listed as exempt employees, they are subject to FLSA overtime rules.

*County position:* (1) The contract provides that employees in specifically identified units (such as the eligibility work supervisors) are entitled to additional benefits, including paid personal leave, in recognition that these employees do not receive overtime compensation or compensatory time off. The grievants' superiors did not have the authority to alter this term of the parties' agreement.

(2) An arbitrator must give effect to the clear and unambiguous language of the contract, establishing the parties' intent without reference to any arguably inconsistent past practice.

(3) The employer is entitled to abandon any past practice in order to conform to the clear, bargained-for contract language.

*Arbitrator's holding:* The grievances were sustained.

*Arbitrator's reasoning:* (1) The past practice is unequivocal, clearly defined in scope and application. Eligibility work supervisors have claimed and have been paid for overtime when asked to work overtime by their managers. They also work extra hours without being asked by their managers and are not paid overtime. This practice is consistent with expectations of a first-level supervisor.

(2) Their need to be flexible in their work hours is recognized by the contractually authorized paid personal leave to which they are entitled. However, when asked to work on special projects outside their normal workload, management authorizes overtime.

(3) The past practice has been clearly enunciated and acted on. Eligibility work supervisors submit payroll forms requesting overtime pay or compensatory time off and the department director has requested and has been authorized to pay overtime compensation to supervisors listed in the contract as exempt from overtime compensation. The practice of paying overtime involved high-level managers who cannot claim they were unaware of the practice.

(4) The practice has been readily ascertainable over a reasonable period of time. Management has authorized overtime as far back as 2000 and, when it negotiated the current MOU in 2002, it did not seek to change the ongoing practice.

(5) The unambiguous language of the contract reflects an understanding at the time it was negotiated that eligibility work supervisors were not eligible for overtime. To overcome the effect of that language, very strong evidence of a clear, ongoing, and mutually accepted past practice is necessary. In this case, the well-documented past practice is strong enough to amend the MOU.

(6) The contract does not list eligibility work supervisors among those employees exempt from FLSA overtime provisions. This recognizes that FLSA considerations may modify conditions of employment as defined by the MOU.

(7) In a dispute involving the same parties, another arbitrator recognized a binding past practice of paying certain employees for holidays beyond those provided in the MOU.

(8) The three grievants are entitled to overtime pay for the hours they worked in excess of their normal work hours at the request of management, along with prejudgment interest at the legal rate.

*(Binding Grievance Arbitration)*

# Resources

## E-Government Information

Major changes are taking place in the way government information is created, disseminated, accessed, and preserved. This includes a tremendous shift in the workings of government libraries and the way government document librarians offer reference services in the new electronic environment. Experts discuss the impact electronic materials have had on the Government Printing Office (GPO), reference services within the Federal Depository Library Program, and new opportunities in the transition from paper-based information policy to an e-government.

The book details the GPO's plans to provide perpetual access to both electronic and tangible information resources, and the strategies to authenticate government publications on the Internet. Other topics include increasing access to federally funded technical report literature, the Patriot Act's effect on the status of libraries in the aftermath of 9/11, and information about catalogs, indexes, and full text databases.

**The Changing Face of Government Information: Providing Access in the Twenty-First Century**, edited by Suhasini L. Kumar (2007) 290 pp. Haworth Press, <http://www.haworthpress.com/>. Hardcover, \$49.95; softcover, \$29.95

## HR and Labor Scholars

For students of public personnel and labor relations, this textbook is meant to enlighten and enliven more standard public administration texts covering human resource management. Selected mainly from the pages of *Public Administration Review* and *Review of Public Personnel Administration*, these articles trace the historical and evolutionary development of the fields of public personnel administration and labor relations from the point at which the first civil service law was passed — the Pendleton Act in 1883 — through the 21st century. The collection covers everything from the seminal concerns of civil service (e.g., keeping spoils out) to topics that early reformers never would have envisioned (e.g., affirmative action and drug testing).

**Public Personnel Administration and Labor Relations**, edited by Norma M. Riccucci (2007) 476 pp.

M.E. Sharpe, <http://www.mesharpe.com/index.htm/>. Hardcover, \$89.95; softcover, \$34.95.

## Challenges in Higher Ed

Today, institutions of higher learning have to reconcile academic decisionmaking with contemporary, cutting-edge challenges for which no simple solution exists. Ongoing issues in the 21st century include entrepreneurial and commercial strategies, changing research infrastructure, inter-institutional cooperation, evolving expectations for student involvement and campus community, and technology and its required investments. Campus leaders have to look beyond their wealth of experience and time-tested processes.

The authors illustrate how colleges and universities are creating more effective decisionmaking processes by moving beyond the traditional arena of stakeholder responsibilities. For instance, in this new environment, students may play stronger roles, as may trustees or outside stakeholders including faculty from other institutions involved in joint academic degree programs. As institutions become more entrepreneurial, faculty may take the lead as negotiators and marketers. And, the venues in which decisionmakers come together may change, as important strategic decisions are made in departments and institutes outside the traditional institutional core.

**The Shifting Frontiers of Academic Decision Making: Responding to New Priorities, Following New Pathways**, by Peter D. Eckel (2006) 168 pp. Praeger Publishers, Greenwood Publishing Group, <http://www.greenwood.com/>. Hardcover, \$45.

## A Safe Workplace

Even with post-Sept. 11 security improvements, there are nearly two million violent workplace incidents a year. Employers should be prepared to quickly identify and neutralize potential hazards. While there is no one-size-fits-all strategy, there are proactive steps an employer can take to create a safe, productive working environment. The authors provide best practices to develop effective workplace violence

prevention programs, including concrete ideas that immediately can be put into action, and tips to recognize potentially dangerous situations. In addition, this pamphlet combines violence prevention techniques with details on case law — so employers understand the legal boundaries when taking action against a violent or potentially violent employee.

**From Warning Signs to Aftermath: Preparing for Violence in the Workplace** (2006) 73 pp. LRP Publications, <http://www.lrp.com/>. Pamphlet, \$26.95.

### Gender Matters

Women now comprise the majority of the working class, yet this fundamental transformation largely has gone unnoticed. However, in this book, 20 scholars, labor leaders, and policy analysts look at the implication of this “sexual revolution” for labor policy and practice. Their articles demonstrate how the sex of workers matters in understanding the jobs they do, the problems they face at work, and the new labor movements they are creating in the United States and globally.

The book covers several forward-thinking social movements of our era: the clerical worker protests of the 1970s; the emergence of gay rights on the auto shop floor; the upsurge of union organizing in service jobs; worker centers and community unions of immigrant women; successful campaigns for paid family leave and work redesign; and innovative labor NGOs (non-governmental organizations), cross-border alliances, and global labor federations.

Contributors offer ideas on how government can help reduce class and sex inequalities; they assess the status of women and sexual minorities within the traditional labor movement; and they provide case studies of how women workers and their allies are inventing new forms of worker representation and power.

**The Sex of Class: Women Transforming American Labor**, edited by Dorothy Sue Cobble (2007) 352 pp. Cornell University Press, <http://www.cornellpress.cornell.edu/>. Hardcover, \$65; softcover \$22.50.

### Religion in Public Schools

Debates over the proper role of religion in public schools frequently are featured in the news (i.e. the main articles in the last several issues of *CPER*). For example, current newsworthy conflicts in the U.S. include teaching evolution, removing the word “God” from the Pledge of Allegiance, conducting school holiday celebrations, posting the Ten Commandments in schools, and praying at school functions.

The author organizes the subject into seven major types of conflicts that have become particularly confrontational during the first decade of the 21st century. While not taking sides in the debate, he lays out the arguments, puts them in their historical and cultural contexts, and discusses the groups that debate them and their goals.

**God in the Classroom: Religion and America's Public Schools**, by R. Murray Thomas, (2007) 296 pp. Praeger Publishers, Greenwood Publishing Group, <http://www.greenwood.com/>. Hardcover, \$49.95.

### Sleep Rx for Managers

Here's practical help for the day-to-day concerns that keep managers awake at night. The author, a noted scholar in both cognitive psychology and organizational studies, strives to reduce the stress of management by providing insight into why employees do what they do, and what to do about it. His focus fills the gap between the legal and policy issues — the mainstay of human resources and supervision courses — and the real-world needs of managers as they attempt to cope with the human side of their jobs.

The book is organized around six fundamental commitments that good employee managers make in order to succeed. Practical examples and step-by-step guidelines demonstrate how to effectively perform important tasks and deal with common problems — from conducting a meeting or writing a code of conduct, to diagnosing the cause of performance problems.

**The Human Element: Understanding and Managing Employee Behavior**, by Lee Roy Beach (2007) 208 pp. M.E. Sharpe Publishers, <http://www.mesharpe.com/index.htm/>. Hardcover, \$69.95; softcover, \$29.95.



# 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.

### EERA Cases

#### Unfair Practice Rulings

##### District administrators' actions not unlawfully motivated by employee's protected activities: Lodi USD.

(California School Employees Assn. and its Local Chap. 77 v. Lodi Unified School Dist., No. 1893, 3-20-07; 2 pp. + 44 pp. ALJ dec. By Member Neuwald, with Members Shek and McKeag.)

**Holding:** Although a district custodian engaged in protected activity, the evidence failed to demonstrate that district administrators made decisions affecting his employment because of that conduct.

**Case summary:** The association alleged that the district discriminated against Leo Del Carlo, a custodian, by withholding an overtime assignment, denying his vacation request, removing a telephone from his office, issuing letters of reprimand and a “needs improvement” evaluation, transferring him from a school site, and sending an unsatisfactory recommendation to a prospective employer.

An administrative law judge concluded that Del Carlo's protected activities were limited to complaints about the conduct of his coworkers and protests about the letters of reprimand and negative memos written by the vice principal. The ALJ found that these actions “have the color of protected activities,” but were “overshadowed by [Del Carlo's] own employment circumstances.”

Applying the *Novato* test for retaliation, however, the ALJ found that the overtime assignments were offered to Del Carlo and his coworkers pursuant to a contractually mandated rotation system; therefore, the assignments were not unlawfully motivated. Moreover, the weight of the evidence failed to establish that Del Carlo submitted his vacation request before another custodian had done so; the principal's decision to honor the first vacation request submitted was permissible. Likewise, the ALJ found that the principal did not remove a telephone from Del Carlo's office because of his protected activity. In his analysis of the allegations regarding the letters of reprimand, evaluations, and involuntary transfer, the ALJ found insufficient evidence to infer that the principal's actions were motivated by protected activity. Concerning these allegations, the ALJ noted that Del Carlo had never been involved in any “CSEA issue not involving his own employment status.” The ALJ found insufficient evidence to demonstrate that a district administrator provided a negative evaluation of Del Carlo to a prospective employer as a result of his protected activity.

The charge also included allegations that the district's action concerning assignments and vacation requests evidenced a unilateral change. However, the ALJ found that the district acted in conformity with the contractual overtime

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



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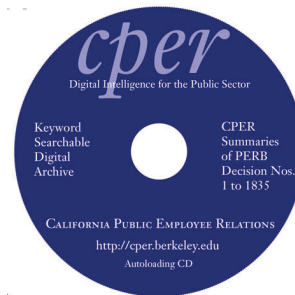
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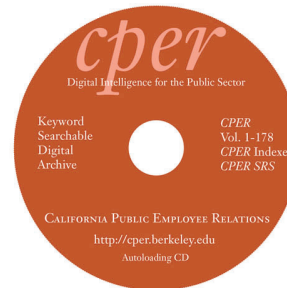
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rotation provision and that, if it initially was executed in conflict with the contract, this was an isolated breach of the agreement, not a change in policy with a generalized effect or continuing impact on bargaining unit members. The manner in which Del Carlo's vacation request was handled by the district did not unilaterally alter a contract term. The charge that the district's actions concurrently denied rights to CSEA also was dismissed by the ALJ based on his conclusion that no evidence demonstrated the district was unlawfully motivated in its relationship with its employees.

On appeal, the board adopted the ALJ's proposed decision. It noted, however, that Del Carlo had engaged in protected activities through his service as CSEA site representative and job steward, when he notified the district of his contact with his union representative, and when he asserted his right to union representation at meetings with district administrators. CSEA also objected to the harassment of head custodians and filed an unfair practice charge on behalf of Del Carlo. Therefore, the board concluded, Del Carlo's actions constituted protected activity, thereby expressly rejecting the ALJ's comment that Del Carlo's behavior had the "color of protected activity."

**Board upholds ALJ's rulings on scope, refusal to bargain: Newark USD.**

(*Newark Teachers Assn., CTA/NEA v. Newark Unified School Dist.; Newark Unified School Dist. v. Newark Teachers Assn., CTA/NEA*, No. 1895, 3-27-07; 15 pp. dec. + 46 pp. ALJ dec. By Chairman Duncan, with Members McKeag and Neuwald.)

**Holding:** The district failed to meet and negotiate in good faith when it refused during reopener negotiations to bargain over the selection of a health insurance carrier.

**Case summary:** During the 2003-04 reopener negotiations, the association and the district engaged in conduct that drew unfair practice charges. In one case, an administrative law judge found that the district unlawfully refused to negotiate concerning the selection of a health insurance carrier. In a second matter, the ALJ dismissed the association's charge that the district unilaterally implemented a pre-paid

legal program because the program did not have a generalized and continuing impact on the bargaining unit. In a third case, the ALJ found that the association violated its obligation to meet and negotiate in good faith when it insisted to impasse on its proposal related to the manner in which the district received its STAR test results. The ALJ also found that the association violated the act when it attempted to bypass the district representatives and proposed a procedure to resolve pending grievances.

In sum, however, applying the totality of conduct test, the ALJ found that the association's overall conduct did not demonstrate a lack of subjective intent to reach agreement and dismissed the district's claim that the association had engaged in bad faith bargaining.

The ALJ also rejected the district's contention that the association engaged in unlawful conditional bargaining and engaged in surface bargaining when it reneged on a tentative agreement. Although the association took a neutral position when it presented the parties' tentative agreement to the representative council, the ALJ concluded that the association's failure to endorse the agreement did not show that the negotiators had reneged on the agreement. The ALJ found that the parties have no obligation to endorse a tentative agreement.

The board addressed the district's exceptions to the ALJ's proposed decision on appeal. First, the board rejected the district's analysis that the association had waived the right to negotiate the health carrier by virtue of language in the parties' collective bargaining agreement. The agreement expressly provided for reopeners in compensation and the health care carrier language was part of the compensation article subject to reopeners. Therefore, the board concluded, the district should have negotiated the proposal submitted by the association notwithstanding the fact that the proposal itself did not include language that repudiated the waiver. The board disagreed with the ALJ's reasoning that, by identifying CalPERS as the health carrier, the association intended to supplant the waiver provision. However, it upheld his conclusion that the health care carrier was subject to negotiations because it was included in the compensation ar-

ticle and that the district acted in bad faith when it advanced its position that the matter of the health care carrier was non-negotiable.

The district also contested the ALJ's conclusion that the pre-paid legal services plan was subject to negotiations. The board agreed with this result but relied on EERAs definition of "terms and conditions of employment," which incorporates the definition of health and welfare benefits as defined by Government Code Sec. 53200. That section includes in Sec. 53200(d), "legal expenses or related benefits...whether provided on an insurance or a service basis." The board specifically rejected the ALJ's reasoning that pre-paid legal services are a form of insurance providing future economic security. However, it agreed with the ALJ's ultimate conclusion that the district had not violated the act because the program did not have a generalized and continued impact on the bargaining unit.

The board upheld the ALJ's conclusion that the association had not engaged in surface bargaining, extending deference to the ALJ's credibility findings.

The board upheld the ALJ's determination that the association's proposal regarding the make up and dissemination of the STAR results was not negotiable and impinged on managerial rights. The board characterized the ALJ's determination that STAR test results *could be* a negotiable subject of bargaining based on their relation to evaluations as unwarranted speculation.

#### **Appeal of dismissal untimely filed: SFUSD.**

(*Gillead v. San Francisco Unified School Dist.*, No. Ad-360, 4-10-07; 3 pp. dec. By Member Neuwald, with Members Shek and McKeag.)

**Holding:** Charging party's appeal was untimely filed.

**Case summary:** The board's appeals assistant informed the charging party that he had 20 days from service of the dismissal of his unfair practice charge to file an appeal; the appeals assistant also explained the process to be followed should the charging party wish to seek an extension of time. After the due date for the appeal, the board received a letter

from the charging party disagreeing with the appeals assistant's calculation of the due date for the appeal and seeking "reasonable, equitable and statutory date" for filing his appeal. Finding that the charging party did not file his appeal in advance of the filing deadline and failed to request an extension of time three days in advance of that deadline as prescribed by PERB Reg. 32132, the board declined to entertain an appeal of the dismissal of the charge.

#### ***Duty of Fair Representation Rulings***

##### **Decision to consolidate charging party's grievance with class action grievance does not breach fair representation duty: UESF.**

(*Gillead v. United Educators of San Francisco*, No. 1897, 4-10-07; 2 pp. + 9 pp. R.A. dec. By Member Neuwald, with Members Shek and McKeag.)

**Holding:** The union's decision to consolidate the charging party's individual grievance with a class action grievance contesting the same employer policies did not breach the duty of fair representation.

**Case summary:** The charging party filed an unfair practice charge against the union, alleging that it breached its duty of fair representation by electing to consolidate his grievance with a class action grievance rather than proceed separately. The regional attorney dismissed the charge, concluding that the charging party's grievance and the class action grievance both alleged that the San Francisco Unified School District violated its seniority and transfer policies by reducing the work hours of elementary advisors. The R.A. noted that the union is the exclusive representative of all employees in the charging party's classification and, as such, must represent the interests of the entire class. It is not required to garner individual consent to pursue a grievance if preservation of a unitwide interest is at stake. Thus, the R.A. concluded that the charge failed to demonstrate arbitrary, capricious, or discriminatory behavior by the union, and she dismissed the charge. The board affirmed the dismissal.

## MMBA Cases

### *Unfair Practice Rulings*

#### **City's impasse procedure not an unreasonable local rule: City and County of San Francisco.**

(*Stationary Engineers Loc. 39 v. City and County of San Francisco*, No. 1890-M, 3-12-07; 12 pp. by Member Shek, with Chairman Duncan and Member Neuwald.)

**Holding:** The city charter provision authorizing arbitration of bargaining impasses is not an unreasonable local rule, and the union's assertions of bad faith bargaining failed to state a prima facie case of surface bargaining.

**Case summary:** Local 39 filed an unfair practice charge alleging that the city failed to bargain in good faith by prematurely declaring impasse and by pressing the union to use the arbitration procedures set out in the charter. Specifically, the city demanded that the union name its representative to the three-member arbitration board before negotiations began on a successor agreement. The union asserted that it was not required to make such a selection because the parties were not at impasse. Thereafter, while negotiations were underway, the city filed a petition to compel arbitration. The superior court denied that petition, asserting that PERB had jurisdiction over the parties' conduct under the charter.

The parties engaged in 12 negotiation sessions during which the union made an initial basic wage proposal. The union alleged that representatives of the city arrived late or called caucuses immediately at the start of six bargaining sessions and attended sessions without being prepared, and that the city negotiator lacked the authority to bargain. The parties exchanged proposals, but the city believed the parties were at impasse due to the substantial gap between their economic proposals. The union responded that it had every intention of bargaining to obtain a contract rather than have an agreement imposed by a third party. At that point, the city declared that it would not resume bargaining unless the union agreed to use the impasse procedure. After the union filed its unfair practice charge, the city's director of employee relations proposed that the union agree to the "crafts deal," which

was offered to other crafts unions, as a means of settling the contract dispute. The union declined to accept this offer.

The board agent dismissed the union's charge, finding that it failed to state a prima facie case of surface bargaining.

On appeal, in addition to asserting that the city engaged in surface bargaining, the union argued that the charter unlawfully conflicts with the MMBA because it authorizes one party to declare impasse whether or not the parties are truly at impasse or whether the party that declares impasse has bargained in bad faith.

In assessing the reasonableness of the local rule, the board presumed that the city's regulations are reasonable and placed the burden of proving otherwise on the attacking party. The board noted that the MMBA permits local agencies to craft their own impasse resolution procedures and allows resort to an impasse procedure "after a reasonable period of time."

The board found that the city charter is reasonable on its face because use of the impasse procedure is restricted to situations where disputed issues remain unresolved after good faith bargaining. Consistent with the MMBA, the charter instructs that negotiations continue for a reasonable period of time to permit the free exchange of information, opinions, and proposals, and to endeavor to reach agreement.

The board also rejected the union's contention that the charter was unreasonably applied to the parties' bargaining process because the city declared impasse prematurely. The board concluded that the city engaged in good faith bargaining during the course of 12 bargaining sessions, exchanged information and proposals, and reached tentative agreement on at least eight different subjects. Analyzing the totality of the circumstances, the board concluded that, despite the union's allegations of dilatory tactics, the parties made progress in their negotiations and the city's behavior did not frustrate the bargaining process. The board observed that the parties conducted substantive discussions, exchanged proposals and information, and asked and responded to questions. The city's lawsuit to compel arbitration did not frustrate the bargaining process or constitute bad faith.



**No absolute union right to employee disciplinary information: City of Los Altos.**

(*Teamsters Loc. 350 v. City of Los Altos*, No. 1891-M, 3-14-07; 5 pp. + 7 pp. R.A. dec. By Chairman Duncan, with Members Shek and McKeag.)

**Holding:** Absent a request for information from the union, there is no basis for the charge that the city interfered with the union's right to represent bargaining unit employees by failing to provide information concerning employee discipline.

**Case summary:** The union filed an unfair practice charge alleging that the city violated the MMBA by failing to provide the union with disciplinary information of bargaining unit members absent express authorization from the employee. The union charged that this policy interfered with its ability to carry out its representational duties. The city asserted that this was a longstanding policy intended to protect the privacy rights of employees.

The regional attorney dismissed the charge, citing the absence of any facts that the city was deliberately concealing information from the union or refusing to provide information on request.

On appeal, the board considered the union's contention that, even absent consent by the employee and with no pending request for information by the union, the city policy on its face interferes with the union's ability to carry out its representational duties. The board found no authority to support the union's contention that it is entitled to all information that conceivably could aid in its representational duties. Siding with the city, the board found that the union does not have unfettered access to employees' personal information. Further, the board found that there is no duty to provide information absent a request for such information from the union. And, the board added, even if there were a request from the union, that request must be considered in light of the privacy considerations of employees subject to discipline. The board dismissed the union's interference claim, finding that because the city had no duty to provide the information to the union absent a request, the city's conduct failed to result in any harm to employees' rights.

**Insufficient evidence to establish countywide layoff scheme: County of Siskiyou.**

(*Siskiyou County Employees Assn./AFSCME Loc. 3899 v. County of Siskiyou*, No. 1894-M, 3-27-07; 18 pp. By Member Shek, with Members McKeag and Neuwald.)

**Holding:** The association did not establish that the county unilaterally altered employment terms when it failed to implement layoffs on a countywide basis.

**Case summary:** The association filed an unfair practice charge alleging that the county made a unilateral change in its layoff policy when it eliminated the position of probation collections officer, held by a 16-year, permanent, full-time employee, and laid off the museum assistant from her permanent .6 full-time-equivalent position. The association argued that the county was required to implement layoffs on a countywide basis, regardless of classification. The administrative law judge found that, owing to the ambiguity in the parties' memorandum of understanding and the county's personnel policies, the association failed to establish any unilateral change.

On appeal, the association underscored the fact that, during the course of the negotiations that preceded the layoffs, the county unsuccessfully urged acceptance of its bargaining proposal, which would have provided for layoffs within classifications, thereby demonstrating its understanding that the status quo requires layoff on a countywide or departmentwide basis. Thus, the association asserted, the language included in the MOU, which provides that any layoffs "shall be in accordance with County ordinances, rules, regulations, and policies," mandates that layoffs be based on countywide seniority.

The board first noted that the MOU, the county code, and the personnel policies do not mention whether the reduction in force shall be implemented on a countywide basis. And, the board concluded, the parties intended to conform the language of their MOU with the personnel policies and the county code, and intended to defer to the more specific terms and provisions of the code and personnel policies rather than to the relatively brief provisions of the MOU.

The board reviewed various code provisions that refer to the abolishment of positions and provisions which calculate seniority by classification within a department. In addition, it cited personnel policies that refer to the order of layoffs, noting references to classifications and performance of duties “on the job.” Based on these regulations, the board concluded that the association failed to establish that the MOU provides for layoffs on a countywide basis. The board, like the ALJ, was not persuaded by the association’s contention that the county’s bargaining proposal, which sought to add language to the MOU to provide for layoff by classification, was sufficient evidence to establish that layoffs must be implemented on a countywide basis and that the county unilaterally changed past practice when it failed to do so.

### ***Representation Rulings***

#### **District’s rejection of representation petition complied with local rules, MMBA: Turlock Irrigation Dist.**

*(Turlock Irrigation District Technical Employees Assn. v. Turlock Irrigation Dist., No. 1896-M, 3-28-07; 8 pp. By Member Shek, with Members McKeag and Neuwald.)*

**Holding:** The district’s employee relations officer complied with local rules and the MMBA when he offered to consult with the association following rejection of the association’s representation petition.

**Case summary:** The association filed a petition for recognition under the district’s local rules. It sought to establish a separate unit for employees in the electrical control and electronic technical service and repair fields. An existing bargaining unit included clerical, construction, water distribution, customer service, and maintenance employees. The district rejected the association’s petition but offered to consider any input the association might provide and referenced local rule Sec. 13.B, which provides that the employee relations officer will modify units “after notice to and consultation with affected employee organizations.”

The association appealed the rejection of the petition to the district’s board of directors, stating that it accepted the

ERO’s invitation to meet and consider additional input under Sec. 13.B. Although the association received no response to this communication, it provided further written information to the board of directors and offered to discuss the matter at the board’s next meeting.

The board of directors denied the association’s appeal, and the association filed an unfair practice charge with PERB alleging that the district had denied association members their statutory right of representation, had unreasonably withheld recognition of an employee organization, and had failed to meet with the association to engage in “meaningful dialogue” regarding its petition. A board agent dismissed the charge.

On appeal, the board reviewed the requirements of local rules and determined that they require the district to make a determination as to the appropriateness of the petitioned-for unit, “offer to consult” with the petitioning organization concerning an adverse determination, and, after consultation, “inform” the organization in writing of the reasons for the adverse ruling. The board noted that at the time the ERO rejected the association’s petition, he detailed the reasons for rejection and made an offer to consult. Under local rules, the term “offer to consult” does not require the district to meet and confer or bargain over the decision regarding the petition and does not require face-to-face meetings. Instead, the local rules define “consult” to mean communicate orally or in writing for the purpose of presenting and obtaining views. The local rules specifically distinguish the consultation obligation from meeting and conferring in good faith.

The board also commented that the MMBA does not require the district to meet and confer with employee organizations regarding unit determination decisions made pursuant to local rules. Citing *SEIU v. City of Santa Barbara* (1981) 125 Cal.App.3d 459, the board noted that the MMBA requires a public agency to bargain with a recognized employee representative prior to adopting or modifying the rules themselves, but the public agency need not do so when determining whether an individual proposed bargaining unit is appropriate under rules previously adopted.

In the present case, the board observed, rather than providing further information to the ERO, the association appealed his decision to the board of directors. PERB concluded that the ERO's actions were sufficient to satisfy the local rules. It found no evidence that the association attempted to schedule a meeting with the ERO or otherwise provide any further input to the ERO. The board concluded that the association's "apparent failure to provide additional information to the ERO, in addition to its immediate appeal of the matter to the Board of Directors, excused the ERO from any further obligation to 'inform' the Association of its determination after consultation."

The board rejected the district's contention that the association's unfair practice charge was barred by the six-month statute of limitations period. The statute began to run when the board of directors denied the association's appeal, reasoned the board, that is, the point when the association exhausted local administrative remedies. It was not when the ERO initially rejected the petition or when the association filed its appeal with the board of directors. Beginning the statutory period at the time the administrative remedies were exhausted furthers the purpose of encouraging resolution of disputes through collectively bargained procedures, the board instructed.

### ***Duty of Fair Representation Rulings***

#### **Refusal to seek arbitration of termination not DFR breach: SEIU Loc. 790.**

(*Chan v. SEIU Loc. 790*, No. 1892-M, 3-15-07; 4 pp. By Member Shek, with Members McKeag and Neuwald.)

**Holding:** The allegations did not demonstrate that the union's failure to seek arbitration concerning the charging party's termination was arbitrary, discriminatory, or motivated by bad faith.

**Case summary:** The charging party alleged that the union breached its duty of fair representation by failing to seek arbitration of his termination by the City and County of Sacramento Recreation and Park Department. The charging party was dismissed by the city after he was accused of

sexual harassment. Following a *Skelly* hearing, the city moved forward with his termination. However, the charging party then requested and was granted a medical leave of absence.

After a year, the city scheduled a meeting with the charging party and his lawyer to review the termination recommendation. That meeting was postponed twice at the charging party's request, and he failed to appear at the third scheduled meeting. After the city issued a notice of dismissal, the charging party contacted the union and requested that it seek arbitration of the termination. The charging party asserted that the union failed to return his telephone calls and that when he subsequently went to the union office, he was informed that the deadline for requesting arbitration had passed.

A board agent dismissed the unfair practice charge, finding it "extremely likely" that the deadline for requesting arbitration had elapsed by the time the charging party asked the union to seek arbitration.

On appeal, the board cited precedent establishing that the duty of fair representation is not breached by mere negligence and that a union must be accorded wide latitude in the representation of its members absent a showing of arbitrary exercise of power. In contrast to *San Francisco Classroom Teachers Assn. (Bramell)* (1984) Dec. No. 430, 64 CPER 56, where the board found the union had breached its duty of fair representation because it promised to obtain an extension of time to file a grievance and failed to do so, the union in this case never promised to request arbitration of the charging party's termination. The union's failure to return the charging party's phone calls is not sufficient evidence that the union acted in an arbitrary, discriminatory, or bad faith manner. In addition, the board took note that the charging party failed to allege the dates when he phoned the union, whether the termination was eligible for arbitration under the relevant contract provisions, and whether the charging party asked the union to seek arbitration within the time limit for doing so.

**Union's breach of fair representation duty found, but make-whole remedy not ordered: ATU.**

(*Buck v. Amalgamated Transit Union, Loc. 1704*, No. 1898-M, 4-10-07; 5 pp. + 19 pp. ALJ dec. By Member McKeag, with Chairman Duncan and Member Neuwald.)

**Holding:** The union breached its duty of fair representation by failing to file a timely grievance challenging an employee's termination where its failure to do so completely extinguished the employee's right to pursue his grievance.

**Case summary:** The charging party alleged that the union breached its duty of fair representation when it failed to file a timely grievance challenging the charging party's termination. The charging party was terminated based on the results of an alcohol test administered while the charging party was at work; his blood alcohol level was in excess of that permitted by drivers in safety-sensitive positions.

The PERB administrative law judge first concluded that the union, as the exclusive representative, owed a duty to the charging party notwithstanding the fact that the charging party was entitled to pursue the grievance on his own. In addition, noting that the union representative promised the charging party he would pursue the grievance, the ALJ found the union reaffirmed its union's representational responsibilities and thereby breached its duty, citing *San Francisco Classroom Teachers Assn., CTA/NEA (Bramell)* (1984) Dec. No. 430, 64 CPER 56.

The ALJ also found that the union's failure to file a timely grievance on behalf of the charging party was not mere negligence based on miscalculation of the filing deadline. The union representative's failure to file the grievance was based on his view that the grievance lacked merit and that the employer did not violate the contract when it fired the charging party. Had the union decided not to file the grievance for these reasons and notified the charging party in time for him to file on his own, the ALJ said, the union would have acted lawfully, in accord with its wide discretion to decline to pursue a grievance that lacks merit or has minimal chance of success. Based on credibility findings, the ALJ also relied on a statement made by a union representative

that the union would not represent an employee who came to work drunk.

Finding that the union's conduct completely extinguished the charging party's right to file a grievance, the ALJ ordered the union to cease and desist from such conduct and to timely file employee grievances. However, citing *United Teachers of Los Angeles (Valadez)* (2001) Dec. No. 1453, 150 CPER 94, she declined to order a make-whole remedy absent a showing that the employee would have prevailed on the merits if the grievance had been properly processed. She characterized as speculative the charging party's ability to prove that he had not exceeded the legal alcohol limit, that he should have been disciplined at a lower-level than discharge, and that his 10-year employment record and the explanation for his drinking would have mitigated against discharge. The ALJ also noted that, even if the charging party prevailed, the arbitration decision is advisory only under the terms of the MOU and would not have required reinstatement by management.

On appeal, the board affirmed the ALJ's decision, but further addressed the circumstances under which the duty of fair representation attaches, specifically the union's contention that because the charging party was contractually permitted to pursue a grievance on his own, the union was not his exclusive representative. Citing provisions of the contract, the board noted that while the union has the right to participate in the grievance proceedings, it also controls all requests for grievance arbitration. Therefore, it possessed the exclusive means by which the charging party could obtain his contractually based remedy and was under a duty to provide fair representation.