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letter from the editor

CPER Readers:

During the summer, the “feeling” around the university and at *CPER* undergoes a transformation. The majority of students have packed up their belongings and headed home, camp counselors can be seen herding their young charges wearing Cal Berkeley T-shirts along Telegraph Avenue, and there suddenly are a welcomed surplus of parking spaces. Maintaining our focus during this time is always a bit of a challenge. But, once again, we’ve put together an August issue that reports on many exciting developments.

Starting with the Supreme Court’s decision in *Ledbetter*, Justice Alito stands firm on the statute of limitations’ application in pay discrimination cases. The State Supreme Court also took an unexpected move and depublished the Court of Appeal decision in the *Sacramento POA* case, which found retiree hiring beyond scope under the MMBA.

Teachers are primed to walk out in the fall in the West Contra Costa School District, and CSU tutors might hit the bricks over fee remissions. PERB’s exclusive jurisdiction was established by the Court of Appeal in a case bearing on the San Francisco charter’s interest arbitration process. And, an arbitration decision was vacated by the appellate court for clashing with provisions of the Dills Act.

With retiree health care costs making national news, we’ve included a follow-up article that offers additional insights into this matter of critical concern. And, don’t miss the valuable review of workplace investigations that outlines several important pointers.

I hope this piques your interest and encourages you to take us along as you enjoy the summer. Just remember to wear your sunscreen.

Sincerely,



Carol Vendrillo
CPER Editor

Further Storm Warnings in the Territory of Retiree Health Care Benefits

Richard Whitmore and Cepideh Roufougar

As reported in the last issue of *CPER*, the “storm” over post-retirement health care benefits is not going to abate anytime soon. As costs continue to rise and retirees live longer, public agency employers and employees are faced with a financial burden that few predicted and even fewer are currently able to meet. Changes in governmental accounting principles — namely the Governmental Accounting Standards Board’s GASB 45 — have brought the issue and the costs associated with providing retiree health care benefits to the forefront.

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In “Weathering the Gathering Storm Over Post-Retirement Health Care Benefits — Vested or Not,” Jeff Sloan, Genevieve Ng, and Merlyn Goeschl did a thorough job of discussing GASB 45 and the perils of the “pay as you go” approach, particularly in the context of the County Employees Retirement Law (CERL) and the Meyers-Milias-Brown Act. This article continues the discussion to focus on public employers that are covered by the Public Employees’ Medical and Hospital Care Act (PEMHCA). A solution to the retiree health care debacle may prove even harder to find under the PEMHCA’s more rigid statutory scheme.

What Are Retiree Health Care Benefits?

Pensions are the most widely known post-employment benefit provided by employers. Retiree health care benefits are the most common form of *other* post-employment benefits (OPEBs) provided by employers. Retiree health care benefits are generally established through a promise by an employer to provide an employee with a certain level of continued benefits upon retirement. Employees work for an employer for a number of years with the expectation that the employer will fulfill this promise of providing continued benefits.

For many public employers, the promise of retiree health care benefits is found in collective bargaining agreements, personnel policies, or resolutions or ordinances passed by the agency's governing body. The details of this promise, including the manner in which it is made and the exact language used to convey the benefit, all affect the employer's obligation toward its employees. For those public employers who are covered by the Public Employees' Medical and Hospital Care Act (PEMHCA),¹ the promise of retiree health care benefits is found, not only in the documents described above, but also in the statutory provisions of the PEMHCA.²

Why Are Retiree Health Care Benefits a Hot Topic?

In California, the cost of public pension benefits are funded traditionally through a combination of employer and employee contributions that are made on a regular basis during the term of an individual's employment. These regular contributions then are invested until such time as distributions occur in the form of pension payments. This method of funding pension benefits is commonly described as "pre-funding." Pre-funded contribution amounts are determined by an actuarial analysis of the financial status of the pension plan.

In sharp contrast, most retiree health care benefits have not been pre-funded. Instead, many public employers fund these retiree health care benefits on a "pay-as-you-go" basis. In other words, employers fund retiree health care benefits only in those years in which the benefits actually are being provided to a retiree. Thus, unlike traditional pension plans, neither the employer nor the employee contributes money to pre-fund retiree health care benefits before those benefits are provided.

New governmental accounting standards have focused attention on the issue of retiree health care benefits. Under Statement Number 45, issued by the Governmental Accounting Standards Board, public employers now are

required to measure and report those costs associated with providing retiree health care benefits, and any other OPEB. Application of this new reporting requirement is being phased in, based on the total annual revenues of a governmental agency.³ The stated purpose of this reporting requirement is to:

...improve[] the relevance and usefulness of financial reporting by (a) requiring the systemic, accrual-basis measurement and recognition of OPEB cost (expense) over a period that approximates employees' years of service and (b) providing information about actuarial liabilities associated with OPEB and whether and to what extent progress is being made in funding the plan.⁴

GASB 45 requires only the *reporting* of unfunded OPEB liabilities. It does not require that employers immediately begin funding those liabilities. However, as a result of the GASB 45 reporting requirements, many public agencies have to examine the true costs of retiree health care benefits, including the costs of continuing to provide benefits to future retirees. As the number of retirees grows each year, almost all public employers can expect eventually to be paying more for health care benefits for their retirees than for their current employees.

To highlight the cost of providing retiree health care benefits, on May 7, 2007, the State of California reported that for the 2007-08 fiscal year, the state alone will spend approximately *\$1.4*

billion to provide those benefits to retired state employees and their dependents. In addition, the state reported an unfunded liability of approximately \$48 billion for future retiree health care benefits.⁵ While the financial liabilities faced by individual local agencies are not as great as the liabilities faced by the state, individual agencies that have not pre-funded may be looking at liabilities totaling in the tens of millions and hundreds of millions of dollars.

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Before discussing the limited actions that public agency employers can take to reduce the unfunded liabilities that must be reported under GASB 45, it is helpful to look at how retiree health care benefits are treated under both the general legal theories of vesting and in specific retirement statutes.

How Retiree Health Care Benefits Are Treated Under the Law

The California Supreme Court has long held that “public employment gives rise to certain obligations that are protected by the Contracts Clause of the Constitution, including the right to the payment of salary that has been earned.”⁶ Anticipated pension benefits have been described as “an integral portion of contemplated compensation.”⁷ Thus, a public employee’s right to “pension” or “retirement benefits” is one such protected obligation.⁸

The legal theory for granting constitutional protection to a public employee’s pension rights is based on the concept of vesting.⁹ The courts have held that the right to pension benefits vests upon employment.¹⁰ This holds true even if an employee has not satisfied the prescribed service period for receiving a full benefit.¹¹ The California Supreme Court has described the interplay of vesting for purposes of receiving a benefit and vesting for purposes of determining the amount of that benefit, along with the contractual nature of vesting generally, as follows:

It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer. [Citations.] He is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is

deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due.¹²

In other words, once an employee begins work for a public agency that provides pension benefits, the employee and the employer automatically enter into a constitutionally based “contract” for those benefits. The full benefit to be received by an employee will depend on the employee’s satisfaction of certain terms, which generally include a requirement that the employee perform services for a pre-

identified period of time. A public agency employer that changes the terms of this contract while the employee is engaged in satisfying the requirements to receive the full benefit of the contract may be deemed to have unconstitutionally impaired its “contractual” obligation to the employee.

So far, the discussion has focused on the legal treatment of traditional pensions; but what about retiree health care benefits? Are retiree health care benefits and other OPEBs treated in the same manner as traditional pensions? In one published California decision, the Court of Appeal answered this question in the affirmative, and held that retiree health care benefits do vest in

the same manner as pension benefits. The case, *Thorning v. Hollister School Dist.*,¹³ arose from a decision by a school district to discontinue paying health benefits to retiring school board members. In *Thorning*, the court decided that once the school board had adopted an “official declaration” of policy that provided fully paid health benefits to retired board members who had served a specified number of years, the school board could not suspend payment of those benefits as to those members who had retired while that policy was in effect.

In Thorning, the state appellate court held that retiree health care benefits vest in the same manner as pension benefits.

Making Changes to Vested Benefits

Once a public employee has vested in the right to a certain benefit, that benefit may not be altered without impairing the employer's contractual obligation.¹⁴ However, the existence of this contractual obligation does not mean that an employer may never change the type or level of benefits provided. In fact, over time, many employers have increased retirement benefits. But what about an employer who attempts to reduce benefits? To answer this question, it is helpful to look at the very limited manner in which courts have allowed employers to change pension benefits.

Circumstances in Which Changes Can Be Made

Once a retirement benefit has vested in an employee, it may be reduced in only two limited circumstances. The first circumstance occurs when both parties agree to the change. After all, there is no impairment of a contract if both contracting parties mutually agree to the change in contract terms.¹⁵ This mutual agreement may become especially important when the change being made affects individuals who are currently retired. Since the theory of vesting is based in contracts, an employer seeking to change the vested benefit of a group of retirees presumably will need to enter into a new contract with each and every one of the retirees affected.

The second circumstance in which a change to a pension benefit may be implemented occurs when, *prior to the time of retirement*, the employer makes reasonable modifications to benefits to maintain the integrity of the pension system.¹⁶ The reasonableness of a modification is determined on a case-by-case basis.¹⁷ However, in order to be deemed "reasonable," the courts have held that (1) modifications "must bear some material relation to the theory of a pension system and its successful operation"; and (2) modifications "which result in disadvantage to employees should be accompanied by comparable new advantages."¹⁸

In order for a modification to be considered reasonable, both prongs of the test must be satisfied. A modification satisfies the first prong when it relates "to considerations internal to the pension system, e.g., its preservation or protection or the advancement of the ability of the employer to meet its pension obligations."¹⁹ The courts have struck down modifications that are unrelated to the purpose and operation of a pension.

For example, in *Wilson v. City of Fresno*,²⁰ the Court of Appeal disallowed an amendment to a pension plan that terminated all pension rights upon conviction of a felony after retirement. In striking this amendment, the court held:

The courts have struck down modifications that are unrelated to the purpose and operation of a pension.

The termination of all pension rights upon conviction of a felony after retirement does not appear to have any material relation to the theory of the pension system or to its successful operation. Rather, the change was designed to benefit the city and, as stated in the city's brief, to meet the objections of taxpayers who would be opposed to contributing funds for the maintenance of a pensioner who had been convicted of a felony.²¹

Although a modification may satisfy the first prong of the test, employers proposing to reduce a vested benefit may have difficulty satisfying the second prong. The judicially imposed requirement that reductions in vested benefits must be offset by "comparable new advantages" to employees can render any attempt to substantially reduce costs illusory. In determining if a modification results in a comparable benefit or comparable new advantage, the courts "must focus on the particular employee whose own vested rights are involved."²² The courts will consider evidence of the effects of the modification and resulting benefit on the particular employees whose vested rights are involved in determining if the modification is permissible.

For example, in *Barrett v. Stanislaus County Employees Retirement Assn.*,²³ the Court of Appeal upheld a retirement

board requirement that employees who were reclassified from miscellaneous members to safety members pay the difference in employee contributions between the two classes. The court held that the requirement to pay these arrears contributions was a permissible change because the cost of the arrears payments was far outweighed by the enhanced retirement benefit associated with receiving a safety retirement.

Similarly, in both *Townsend v. County of Los Angeles*²⁴ and *Amundson v. Public Employees' Retirement System*,²⁵ the courts upheld modifications to pension plans that related to changes in retirement ages. In *Townsend*, the court upheld a modification that reduced the mandatory retirement age from 70 to 65. This change was offset by an increase in the percentage of benefits provided for each year of service, which resulted in enhanced benefits. In *Amundson*, the court upheld a modification that imposed a later retirement age. The court held that the disadvantage of the later retirement age was offset by a decreased employee contribution and a substantially higher pension upon retirement.

The Language of the Benefit Could Be Key

Before an agency looks at modifying retiree health care benefits, it first should look to its contractual obligation. The exact terms of that obligation will impact the employer's ability to make changes. The courts will interpret the language that created the benefit when evaluating the permissibility of a modification.

In 2004, the court issued a decision allowing an employer to limit the health care benefits it offered retirees based on the language of the agreement that authorized the benefit. In *Sappington v. Orange Unified School Dist.*,²⁶ the district had been providing retirees fully paid PPO and HMO plans for 20 years. Due to increasing health insurance costs, the district decided to require a contribution for the PPO plan. However, the district continued to provide fully paid HMO benefits.

The retirees filed suit, alleging that the district was obligated to continue providing fully paid PPO benefits.

In support of their position, the retirees relied on language in a district policy that stated, "The District shall underwrite the cost of the District's Medical and Hospital Insurance Program for all employees who retire from the District provided they have been employed in the District for the equivalent of ten (10) years or longer."

In finding for the district, the court in *Sappington* held that the language relied on by the retirees required only that the district provide some type of insurance coverage, not a

specific type of coverage. The court held that the district's actions in providing full coverage for both HMO and PPO plans did not create a contractual obligation to do so, stating, "Generous benefits that exceed what is promised in a contract are just that: generous. They reflect a magnanimous spirit, not a contractual mandate."²⁷ Thus, based on the language of the policy, the court found that the district's decision to provide only fully paid HMO benefits did not constitute an impermissible change.

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Comparing Retirement Laws

One of the sources for determining the scope of a benefit will be the statute under which that benefit is provided. Depending on the applicable retirement law, this statute may allow an employer to take action to modify, or even eliminate, a vested benefit. As described below, the two statutory schemes under which most public agency employers provide retiree health care benefits are very different. Employers who provide retiree health care benefits under the provisions of the County Employees Retirement Law may have much more flexibility with regard to reducing and/or eliminating retiree health care benefits. In contrast, employers covered by provisions of the PEMHCA may be more limited and face greater obstacles.

Specific vesting rules under the CERL. Government Code Sec. 31691 allows for the provision of retiree health care benefits by two different methods. Under Sec. 31691, benefits can be provided either by an ordinance or resolution adopted by the governing body of an agency covered by the CERL, or by action of a board of retirement (the trustees of a retirement plan under the CERL).²⁸

The ability of an employer to reduce or eliminate a retiree health benefit granted under Sec. 31691 is expressly addressed by the CERL. Specifically, Sec. 31692 states:

The adoption of an ordinance or resolution pursuant to Section 31691 *shall give no vested right* to any member or retired member, and the board of supervisors or the governing body of the district may amend or repeal the ordinance or resolution at any time except that as to any member who is retired at the time of such an amendment or repeal, the amendment or repeal shall not be operative until ninety (90) days after the board or governing body notifies the member in writing of the amendment or repeal. In counties with a population of 5,000,000 or more, the adoption of an ordinance or resolution pursuant to Section 31691 shall remain in effect for any member heretofore or hereafter retired for as long as the board of supervisors or governing body provides similar types of benefits to any active member in current county service. [Emphasis added.]²⁹

While there currently are no published cases discussing application of Gov. Code Sec. 31692, this may change as more and more agencies look to reduce or eliminate retiree health care benefits and agencies attempt to take advantage of this statute. For example, on May 17, 2007, the board of supervisors for the County of Sacramento voted to eliminate retiree health care benefits for approximately 12,800 current employees but left benefits unchanged for current retirees.³⁰ Whether the affected employees will seek judicial review of the county's actions

and whether the county's action will be upheld remains to be seen.

Issues unique to PEMHCA covered agencies. The statutory requirements relating to retiree health benefits for those agencies covered by the PEMHCA vary significantly from the CERL. Under the PEMHCA, employers have two options for providing those benefits: either under the equal contribution rule or pursuant to a vesting schedule.³¹ Each option poses unique issues for public employers.

The equal contribution rule requires that an employer's contribution under the PEMHCA "shall be an equal amount" for both employees and retirees.³² Employers who provide benefits under the equal contribution rule are required to provide a minimum contribution of \$80.80 per employee and retiree during calendar year 2007, and a minimum contribution of \$97 per employee and retiree during calendar year 2008. Beginning in 2009, this minimum contribution will be adjusted annually.³³

The effect of the equal contribution rule is, in essence, to decrease an employer's ability to reduce retiree health care benefits. This barrier exists even if the employees were to agree to the reduction and the reduced contribution amount satisfies the minimum contribution requirements.

The effects of the equal contribution rule are most obvious when considering a common technique used by employers to reduce pension liabilities, namely the creation of a second tier of benefits that will be applicable only to future employees. Since current employees and current retirees must receive the same contribution amount under the PEMHCA, a tier that provides some employees a lesser contribution than retirees appears to violate the equal contribution rule. Employers subject to the PEMHCA that seek to create multiple benefit tiers may face legal challenges from new employees who are hired and provided benefits at the lower levels.

Under the PEMHCA, employers can provide retiree benefits either under the equal contribution rule or pursuant to a vesting schedule.

As an alternative to the equal contribution rule, employers covered by the PEMHCA might consider adopting a vesting schedule.³⁴ Under this option, the actual contribution paid on behalf of each retiree for health care benefits need not be equal to current employees or other retirees. Instead, the actual contribution paid to a retiree is determined by the individual's years of service. The vesting schedule provides that an employee who has 10 years of service credit at the time of retirement is entitled to receive a benefit equal to 50 percent of the employer's contribution towards retiree health care benefits upon retirement. Employees receive an additional 5 percent of contribution for each additional year of service after 10 years of employment. Thus, employees who retire with 20 or more years of service are entitled to receive an amount equal to 100 percent of the employer's contribution for health care benefits.

Employers considering a vesting schedule should be aware of two issues. First, a vesting schedule generally is applicable only to those individuals hired after the vesting schedule is adopted.³⁵ The retirement health care benefits of current employees or current retirees are generally not affected by the adoption of a vesting schedule. Thus, the adoption of a vesting schedule establishes a two-tier benefits program based on an individual's date of hire, with one level of future medical benefits for current employees and a different level of benefits for employee's hired after the date on which the vesting schedule is adopted. The creation of this two-tier benefits system through application of a vesting schedule is the only exception to the PEMHCA's equal contribution rule.

The second issue that employers should keep in mind regarding vesting schedules is the effect on the required employer contribution. Contracting agencies that adopt a vesting schedule are required to provide a minimum contribution that satisfies the requirements of the 100/90 formula set forth in Gov. Code Sec. 22893.³⁶ This formula is dependent on the weighted average premium of the four largest health benefit plans offered under the California

Public Employees Retirement System. Employers then are required to provide a contribution that is equal to at least 100 percent of the average cost of employee-only benefits. The employer contribution for dependents is an additional 90 percent of the weighted average for dependents. The employer contribution under this formula is adjusted annually.³⁷ Based on the formula, a maximum contribution is established. The applicable percentage of the maximum that must be paid to a retiree is determined by a retiree's years of service, as discussed above.

Based on increases in health care premiums, application of the 100/90 formula results in a required employer contribution amount that is higher than the minimum contribution amount set forth in Gov. Code Sec. 22892. Notably, because the 100/90 formula is based on PERS' premiums, the adoption of a vesting schedule by those employers that currently provide a fixed amount could result in unexpected increases in required contributions over time.

Finally, employers will need to consider the interplay between the equal contribution rule and a vesting schedule. Unlike the equal contribution rule that provides the minimum contribution for both employees and retirees, the vesting schedule option only addresses the minimum contribution that must be made for retirees. This leaves open the question of the minimum contribution for current employees of an employer who has adopted a vesting schedule. In answer to this question, employees are likely to assert that the equal contribution rule should be read in conjunction with the provisions that allow for adopting a vesting schedule. Thus, these employees can be expected to argue that the employer's contribution for current employees should be an amount that is no less than the maximum contribution amount required under the 100/90 formula for retirees. While there are no cases discussing the relationship between these statutes, this pro-employee approach to contributions appears to have been adopted by CalPERS in guidelines contained in a circular letter.³⁸

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Looking to the Future: What Can Public Employers Do?

Given that reducing or eliminating retiree benefits may be a difficult undertaking, many public employers are exploring a variety of options to help minimize the future impacts of benefits promised today.

One option is to maximize pre-funding of retiree health care benefits. By setting aside money now for future obligations, employers are able to take advantage of the financial benefits associated with long-term investing. In order to assist employers with the pre-funding option, CalPERS has created the California Employers' Retiree Benefit Trust Fund. In early May of 2007, the City of Thousand Oaks became the first public agency employer to participate in this newly created trust.³⁹

Another strategy being used by employers is to try to negotiate reduced benefits. Given the unique constraints of the PEMHCA, the ability to negotiate a reduction may be feasible only for employers covered by the CERL. This strategy of negotiating reductions has been successful for the County of Orange, which is covered by the CERL. The County of Orange has entered into agreements with the exclusive representative of most of its employees. Based in part on these negotiated changes, the County of Orange has been able to reduce its unfunded liability by more than one-half, from \$1.4 billion to \$598 million.⁴⁰

Employers covered by the PEMHCA do not appear to have the statutory ability to do what the County of Orange did under the CERL. PEMHCA employers may want to consider pursuing statutory changes to the PEMHCA that would allow them to create multiple benefit tiers, either

through unilateral action or through the meet and confer process.

Finally, other agencies are waiting to hear the recommendations of the Public Employees Post-Employment Benefits Commission before taking any major action. The commission was created by Governor Schwarzenegger and consists of 12 members: six, including the chairperson, appointed by the Governor, three appointed by the Speaker of the Assembly, and three appointed by the

Senate President Pro Tem. The commission is responsible for preparing a report that (1) identifies the unfunded OPEB liability for California's governmental entities; (2) evaluates and compares approaches for addressing these unfunded liabilities; and (3) proposes recommendations for addressing these unfunded liabilities. The commission is required to provide this report to the Governor and the legislature by January 1, 2008.⁴¹

Conclusion

There are no easy solutions to reducing the growing costs of retiree health care benefits. No one approach will apply to all public employers since each faces unique obstacles. These

obstacles include the financial status of each agency (including the amount of any unfunded OPEB liability), the language of the benefit provided, and the statutes by which the agency is governed. These factors, combined with the increasing costs of premiums, the decreasing levels of plan benefits, and the real pressures that are placed on public employers, suggest there may be a long and difficult legal, financial, and emotional battle ahead. Only time will tell if public sector employers will be successful in reducing or eliminated retiree health care benefits. *

*In order to assist
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California Employers'
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Fund.*

- 1 See Gov. Code Secs. 22750 et seq.
- 2 See Gov. Code Secs. 22892.
- 3 The effective date of GASB 45 for various public employers depends on an agency's annual revenue. GASB 45 began to take effect on December 15, 2006, for those agencies with total annual revenues of \$100 million or more; after December 15, 2007, for agencies with annual revenues of \$10 million or more, but less than \$100 million; and after December 15, 2008, for agencies with annual revenues of less than \$10 million. (*Id.*)
- 4 See GASB Summary of Statement 45, www.gasb.org/st/summary/gstsm45.html.
- 5 "Questions and Answers: California's First Retiree Health Valuation," dated May 9, 2007, Legislative Analyst's Office, http://www.lao.ca.gov/2007/ret_health_val/ret_health_val_050907.pdf.
- 6 *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 853.
- 7 *Id.*
- 8 *Miller v. State of California* (1977) 18 Cal.3d 808, 815-16.
- 9 *Kern v. City of Long Beach*, *supra*, 29 Cal.2d at 855.
- 10 *Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749; *Miller*, *supra*, 18 Cal.3d at 817.
- 11 *Kern v. City of Long Beach*, *supra*, 29 Cal.2d at 855.
- 12 *Ibid.*
- 13 *Thorning v. Hollister School Dist.* (1993) 11 Cal.App.4th 1598.
- 14 *Kern v. City of Long Beach*, *supra*, 29 Cal.2d 848, 852-53.
- 15 *Mulcahy v. Bardin* (1932) 216 Cal. 517, 526; See also *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1223 ("There can be no impairment of a contract by a change thereof effected with the consent of one of the contracting parties").
- 16 *Betts v. Board of Administration of PERS*, (1978) 21 Cal.3d 859, 864.
- 17 *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131.
- 18 *Betts v. Board of Administration of PERS*, *supra*, 21 Cal.3d at 864.
- 19 *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 666.
- 20 *Wilson v. City of Fresno* (1954) 42 Cal.2d 180.
- 21 *Id.* at p. 185.
- 22 *Betts v. Board of Administration of PERS*, *supra*, 21 Cal.3d at 864 (citing to *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 449-453).
- 23 *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593.
- 24 *Townsend v. County of Los Angeles* (1975) 49 Cal.App.3d 263.
- 25 *Amundson v. Public Employees' Retirement System* (1973) 30 Cal.App.3d 856.
- 26 *Sappington v. Orange Unified School Dist.* (2004) 119 Cal.App.4th 949.
- 27 *Id.* At 955.
- 28 See Gov. Code Sec. 31691.
- 29 Gov. Code Sec. 31692.
- 30 "Retiree Benefit Curbed" by Ed Fletcher, *Sacramento Bee*, May 18, 2007.
- 31 A variation of the equal contribution rule, referred to as the "unequal contribution rule," allows employers to provide retirees with a contribution that is less than the contribution provided to current employees, so long as employers' annually increase the amount provided to retirees until the employers contribution for retirees is equal to that of current employees. Since, over time, this variation will have the same effect as the equal contribution rule, the unequal contribution rule is not discussed for purposes of this article. Moreover, this method is likely available only for employers first contracting with CalPERS for health care benefits. See Gov. Code Sec. 22892(c).
- 32 See Gov. Code Sec. 22892(b).
- 33 *Id.*
- 34 See Gov. Code Sec. 22893.
- 35 See Gov. Code Sec. 22893(a)(1). However, pursuant to Gov. Code Sec. 22893, subd. (a)(6), an employer may choose, once per year, to allow any previously hired employees the option to elect to be subject to the vesting schedule.
- 36 Gov. Code Sec. 22893, subd. (a)(1).
- 37 *Id.*
- 38 See Guidelines issued by CalPERS in Circular Letter No. 600-006-02 regarding the repeal of Gov. Code Sec. 22825.5 and its replacement with Gov. Code Sec. 22893. ("For retirees and active employees, the employer's contribution may be the amount calculated using the 100/90 formula up to 100 percent of the total premium.")
- 39 CalPERS Press Release, dated May 7, 2007, titled "City of Thousand Oaks First to Join CalPERS Retiree Health Prefunding Plan."
- 40 "County's Retiree Medical Debt Reduced," by Peggy Lowe, *Orange County Register*, March 21, 2007.
- 41 Governor's Executive Order S-25-06.

“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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Truth & Consequences: The Practical and Legal Impact of a Good Investigation

Rebecca Speer

An employee accuses a coworker of offensive sexual comments and overtures. A DFEH or EEOC complaint makes its way onto a manager's desk. A valued, long-term employee alleges racial and gender bias in opportunities for advancement. Faced with these formal and informal complaints — and many like them — an employer in the public sector will be left to consider whether, and how, to conduct an investigation. The answers to these questions rely on both practical and legal considerations that, if handled well, can successfully move an organization toward informed and effective problem-solving and help the organization avoid difficulties that might otherwise derail productivity and create significant legal exposure.

Rebecca Speer is the founder of Speer Associates, a San Francisco-based firm that specializes in helping employers prevent and manage employee misconduct and complaints. Speer's practice is focused on conducting workplace investigations, and providing advice and counsel related to internal complaint resolution practices and employee behavioral management.

Importance of Investigations

First and foremost, a sound investigation helps ensure that management considers the right facts in making decisions affecting someone's employment. When one employee accuses another of illegality or impropriety, an investigation that fairly and accurately determines whether the employee has engaged in wrongful behavior — and the nature, frequency, and impact of that behavior — helps management make good decisions in response. Armed with the facts, management can determine the appropriate discipline and, more broadly, can consider steps to restore morale and productivity. Similarly, when an investigation — fairly and accurately conducted — exonerates an employee accused of wrongdoing, the quality of the investigation fosters confidence in the decision to forego discipline and retain the employee in question.

In addition to its pure factfinding function, an investigation sends the right messages: namely, that the employer takes employee complaints seriously; that it has a systematic and predictable method for resolving complaints; and that, as a

matter both of policy and action, it remains firmly committed to resolving questions of impropriety in an effective, fair, and thoughtful manner. In these ways, sound investigations become the cornerstone of good decisionmaking and effective management practices.

Beyond their practical impact though, investigations carry significant legal consequences in the discrimination and harassment context. When complaints of discrimination and harassment progress to litigation, an employer's earlier response to an internal complaint or suspected misconduct can greatly affect liability and damages. Indeed, investigations often garner the spotlight in litigation. Beyond addressing underlying questions of liability (i.e. did the alleged conduct occur?), plaintiffs in employment-related litigation will heavily scrutinize the employer's efforts to investigate an earlier complaint made to HR; they will point to an employer's failure to investigate, or to investigate well, as evidence of a permissiveness towards — and tacit approval of — misconduct. Alternatively, an employer who earlier had conducted a proper and effective investigation will offer the investigation as proof that it had adequately discharged its duty to promote a harassment- and discrimination-free environment.

The discussion below examines the benefits and legal import of investigations.

Avoiding Liability and Damages Stemming From Harassment and Discrimination Claims

Federal and California law requires employers to take steps to prevent and properly respond to complaints of discrimination and harassment. Under Title VII, harassment or discrimination complaints trigger an employer's duty to take prompt corrective action that is reasonably calculated to end the misconduct;¹ California's Fair Employment and Housing Act deems it a separate statutory violation for an employer to fail to take "all reasonable steps necessary to prevent discrimination and harassment from occurring."²

Courts have emphasized that, among other actions, an investigation can play an important role in demonstrating an employer's effort to prevent and correct offending behavior.

Indeed, in *Swenson v. Potter*,³ the Ninth Circuit Court stated, "The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified." In so holding, the *Swenson*

court emphasized the deterrent effect of an investigation: "An investigation is a key step in the employer's response and can be a powerful factor in deterring future harassment....By opening a sexual harassment investigation, the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace. An investigation is a warning, not by words but by action."⁴ In *Swenson*, the court reversed a judgment in the plaintiff's favor in a case involving coworker harassment on grounds that, while the employer had not disciplined the employee accused of wrongdoing,

it had conducted an effective investigation that revealed insufficient evidence to warrant discipline.

This role of investigations in helping employers demonstrate an effective response to discrimination and harassment complaints can influence liability and damages in several ways.

Avoiding an argument that the employer ratified misconduct. The U.S. Supreme Court has determined that an employer who fails to adequately respond to misconduct allegations can be deemed to have tacitly approved the misconduct: that is, to have "adopted the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy."⁵ As an overarching principle, an investigation helps an employer sidestep liability stemming from inaction.

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Bolstering the ‘Faragher/Ellerth’ defense to certain claims of supervisor harassment under Title VII. Interpreting Title VII, the U.S. Supreme Court has held that when no tangible employment action has been taken against a plaintiff employee, a defending employer may assert an affirmative defense to claims of supervisor harassment by establishing that (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.⁶ An effective investigation helps demonstrate that the employer took meaningful steps to prevent and correct harassment, bolstering this critical defense to certain claims of supervisor harassment under Title VII.

Mitigating damages under the FEHA for supervisor harassment. The California Supreme Court has ruled that when no tangible employment action has been taken against a plaintiff employee, a defending employer in claims brought under the FEHA may limit damages for sexual harassment by asserting the “avoidable consequences doctrine.” To limit damages, the employer must show that (1) the employer took reasonable steps to prevent and correct workplace harassment; (2) the employee unreasonably failed to use the preventive and corrective measures the employer provided; and (3) the reasonable use of the employer’s procedures would have prevented at least some of the harm in question.⁶ Under this ruling, conducting an investigation and otherwise responding appropriately to claims of harassment — while not sufficient to avoid liability for supervisor harassment altogether under California law — nonetheless can help limit damages.

Avoiding liability for coworker and non-employee harassment. An employee seeking damages against an employer for harassment by a coworker or non-employee must show that the employer knew or should have known of the harassment and that it failed to take immediate and appropriate

corrective action.⁸ Among other steps, conducting an investigation when it learns of possible misconduct helps an employer to avert claims that it knew or should have known of impropriety by a coworker or non-employee and failed to do anything about it.

Avoiding punitive damages when liability for discrimination has been established. The U.S. Supreme Court has ruled that an employer who makes “good faith efforts to comply with Title VII” is not liable for punitive

damages, even when — contrary to those efforts — a managerial agent engages in discriminatory conduct.⁹ Anti-discrimination practices also may help an employer to avert punitive damages under the FEHA by showing that the employer did not meet wrongdoing with inaction.¹⁰ When combined with other preventive steps, performing an effective investigation may assist an employer in avoiding punitive damages for discrimination and harassment claims.

The U.S. Supreme Court has ruled that an employer who makes ‘good faith efforts to comply with Title VII’ is not liable for punitive damages.

Avoiding Liability for Wrongful Termination Following the Dismissal of an Accused Employee

The California Supreme Court has held that a proper and effective internal investigation which produces a reasonable, “good faith belief” in grounds for termination can insulate an employer from liability for wrongful termination.

Namely, in *Cotran v. Rollins Hudig Hall International, Inc.*,¹¹ the court held that where good cause is required to terminate an employee, the employer must show that it acted reasonably and in good faith in firing an alleged harasser. In cases involving an implied contract to dismiss only for cause, the employer need not prove that the alleged harassment (or other wrongdoing) actually occurred. Rather, to avert liability for wrongful termination, the employer simply must show (1) it conducted an investigation that was appropriate under the circumstances; and (2) it based its decision to terminate the employee on substantial evidence that it reasonably

believed to be true.¹² Under *Cotran*, then, an employer in situations involving an implied contract to dismiss only for cause can avoid liability by showing that it terminated an employee pursuant to a reasonable, good faith investigation.

In sum, in the discrimination and harassment context, a properly conducted investigation can (1) help ensure that an employer meets its legal obligation to properly respond to a complaint of misconduct; (2) bolster certain legal defenses and protections to liability offered under both federal and state laws; and (3) help an employer avoid liability for implied contractual claims of wrongful termination.

What Constitutes an Adequate Investigation?

Courts have yet to provide a checklist or formula to guide an investigation. They have, however, produced broad commentary that collectively illuminates general standards which should apply in conducting an investigation. A review of cases — illustrating both successful and not-so-successful investigations — provides a helpful starting point in defining the general parameters of a good investigation.

Adequate investigations.

■ *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184. In discussing the sufficiency of the employer's investigation, the court in *Swenson* cited such elements as (1) the speed in which the investigation was commenced; (2) the opportunity granted to the complainant to "present her complaint, articulate her concerns, and express her view of preferred outcomes"; (3) the scope of the investigation in terms of the nature and number of witnesses; (4) the adequacy of efforts made to corroborate the complainant's and the alleged wrongdoer's versions of events; and (5) the promptness of the employer's response. Overall, the court ruled that, while an investigation need not be "perfect," it must be reasonable and effective in terms of the employer's ultimate remedial goals.

While an investigation need not be 'perfect,' it must be reasonable and effective in terms of the employer's ultimate remedial goal.

■ *Kohler v. Inter-Tel Technologies* (9th Cir. 2001) 244 F.3d 1167, 148 CPER 53. In *Kohler*, the court described the employer's investigation as "exemplary." It praised the company for (1) promptly hiring a neutral third-party to conduct the investigation when it was notified of the complaint; (2) immediately offering to allow the complainant to return to her position but with a new supervisor, and offering backpay from the time of her resignation; (3) seeking the complainant's participation in the investigation and, when the complainant declined to participate, proceeding with the investigation anyway; (4) interviewing an adequate number of witnesses; and (5) following the investigation, taking adequate remedial steps by both disciplining the employee wrongdoer and training the entire workforce.

■ *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 128 CPER 11. In *Cotran*, the court did not provide a detailed description of an "adequate investigation," but instead identified broad principles of fairness and due process which ensure that investigative results are "reasoned" and "supported by substantial evidence," and "not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual."

■ *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 131 CPER 70. In determining the sufficiency of the employer's investigation, the *Silva* court noted, among other factors, that the investigator (1) was skilled and objective; (2) promptly interviewed the complainant; (3) developed a sufficient evidentiary record; (4) asked "relevant, open-ended, non-leading questions" and "attempted to elicit facts as opposed to opinions or suppositions"; (5) maintained confidentiality and encouraged those he interviewed to contact him if they wanted to speak with him again; (6) gave the accused employee prompt notice of the allegations and an opportunity to respond; (7) gave critical witnesses an opportunity to clarify, correct, or challenge information provided by other witnesses; and (8) considered and evaluated contrary information.

Problematic investigations.

■ *Sarro v. City of Sacramento* (E.D. Cal. 1999) 78 F.Supp.2d 1057. In *Sarro*, the court held that the investigation fell far short of its goal of “detering future harassment” and instead appeared aimed at deterring the *reporting* of harassment. Among other deficiencies, the court noted (1) the investigator had not been trained in conducting sexual harassment investigations; (2) the investigation was not reasonably tailored to assess the merits of the complaint; (3) the investigation aimed to discredit and even to humiliate the complainant by focusing on irrelevant, personal, and private aspects of her life; (4) the investigation did not test the credibility of the alleged wrongdoer, an issue “clearly relevant” given the nature of the allegations; and (5) the investigation did not involve interviews with pertinent witnesses.

■ *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1529, 111 CPER 51. In holding that the city’s investigation of the plaintiff’s complaint was inadequate, the court noted that the investigator (1) failed to promptly interview the accused employee; (2) accepted the accused employee’s version of events without taking reasonable steps to corroborate that version; (3) failed to interview a percipient witness favorable to the plaintiff; and (4) failed to give sufficient weight to evidence that contradicted the accused employee’s version of events.

Lessons Learned

As these cases demonstrate, courts do not demand perfection from an investigation. After all, demanding that employers conduct investigations on par with the exhaustive discovery typically undertaken in the litigation setting would render most internal investigations impractical. Instead, courts have spoken in broad terms about the general, interrelated characteristics that an adequate, or reasonable, investigation will possess.

Courts have spoken in broad terms about the general interrelated characteristics that an adequate, or reasonable, investigation will possess.

Promptness. What is considered appropriate timing for an investigation to begin will vary from situation to situation. But, generally speaking, the investigation should be commenced and completed as promptly as reasonably possible.

Neutrality and objectivity. The investigation should be conducted by an investigator untainted by biases for or against any particular person or point of view. Throughout the process, the investigation should be marked by an open-minded, non-end-driven approach.

Fairness and due process. The investigation should be conducted with principles of fairness and due process squarely in mind. For instance, the investigator should give the complainant an adequate opportunity to communicate his or her complaint and to offer information relevant to it. Similarly, the investigator should give the accused employee an adequate opportunity to respond to the allegations and bring forth relevant information.

Effectiveness of investigative techniques. The investigator should employ investigative techniques designed to effectively uncover the facts. That is, the investigator should be skilled. For instance, investigative interviews should be conducted using

non-leading questions aimed at the relevant factual matters. Overall, the investigation should reflect a well-organized and thoughtful approach.

Rigor. The investigation should be adequately rigorous in certain key respects: (1) in the number of witnesses questioned and the factual matters examined; (2) in the steps taken to corroborate the complainant’s and the alleged wrongdoer’s versions of the central events; and (3) in the efforts made to account for conflicts in the information received.

Candor. A good investigator creates an environment that promotes witness candor. For instance, interviews should be conducted in a private setting, and witnesses should be informed of the employer’s policy against retaliation.

Evaluation of the evidentiary record. Finally, an adequate investigation will include the proper development and evaluation of the information gathered. The results of the investigation will demonstrate the investigator's discerning eye in sifting through the evidence and properly weighing witnesses' accounts in light of bias, supposition, and hearsay.

Conclusion

Conducted well, investigations are an indispensable employee relations and legal tool that serve multiple objectives. First, they provide management with a thorough and accurate understanding of whether misconduct has occurred, so that the organization can engage in effective problemsolving regarding matters of consequence both to individual employees and the organization. Second, they promote a work environment in which employees and managers alike can comfortably report issues of concern with a sense of confidence in the organization's ability to effectively examine and address problems. And, finally, they shore up certain legal defenses and help mitigate damages by demonstrating the organization's effectiveness in, and commitment to, responsibly addressing questions of possible misconduct. *

1 *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882, 88 CPER 48; *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 111 CPER 51; *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184.

2 Gov. Code Sec. 12940(k).

3 (9th Cir. 2001) 271 F.3d 1184.

4 *Ibid.*

5 *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 789, 131 CPER 14.

6 *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, and *Faragher v. City of Boca Raton, supra*, 524 U.S. 775, 131 CPER 14.

7 *State Department of Health Services v. Superior Court; Theresa v. McGinnis* (2003) 31 Cal.4th 1026.

8 Gov. Code Sec. 12940(j).

9 *Kolstad v. American Dental Assn.* (1999) 527 U.S. 526.

10 See, e.g., *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128 (law firm liable for punitive damages when it knew that partner was likely to sexually harass plaintiff but failed to take reasonable steps to prevent the misconduct).

11 (1998) 17 Cal.4th 93, 128 CPER 11.

12 *Id.* at 107-08.

Supreme Court Upholds Limits on Agency Fee Spending

Carol Vendrillo, CPER Editor

In June, the U.S. Supreme Court ruled that a state law can demand that a public sector union get non-members' consent before it uses 'fair share' fees for political purposes.

In a case that was closely watched by labor organizations and right-to-work groups, the U.S. Supreme Court in a unanimous ruling upheld a Washington state law that required public sector unions to obtain individual nonmembers' affirmative authorization to use their agency fees for election-related purposes. The justices found that the union had no constitutional right to agency fees and that the "modest limitation" imposed by the state law did not violate the First Amendment.

At the center of the high court ruling was a Washington state statute approved by voters in 1992 that imposed restrictions on the Washington Education Association's ability to spend the agency fees it collects from nonmembers. The provision in contention prohibited a union representing public sector employees from using agency shop fees to make political contributions "unless affirmatively authorized by the individual."

In two separate lawsuits that challenged the association's expenditure of agency fees for election-related purposes without obtaining nonmembers' approval, the Supreme Court of Washington held that the approval requirement violated the First Amendment and disrupted the balance which has been established by federal agency fee and constitutional case law. The court had in mind *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 34 CPER 2, which allowed public sector unions to collect and use agency fees for purposes that are germane to their collective bargaining duties, and *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292, 68X CPER 1, which imposed specific procedural requirements on unions to ensure that nonmembers can prevent the use of their fees for purposes deemed impermissible under *Abood*.

High Court's Opinion

In the opinion authored by Justice Antonin Scalia, the court began by describing a public sector union's right to "levy fees on governmental employees who do not wish to join the union" as "undeniably unusual," and characterized an agency shop agreement as "the power...to tax government employees." The statutory obligation "is simply a condition on the union's exercise of this extraordinary power," wrote Scalia, and "the notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive."

Contrary to the Washington Supreme Court, Justice Scalia did not read the agency fee cases as striking a constitutional balance because "unions have no constitutional entitlement to the fees of nonmember-employees." "We have never suggested that the First Amendment is implicated whenever governments place limitations on a union's entitlement to agency fees above and beyond what *Abood* and *Hudson* require." The court explained that *Hudson* sets out a minimum set of procedures with which a union must comply in order to satisfy *Abood*. "The mere fact that Washington required more than the *Hudson* minimum does not trigger First Amendment scrutiny," said the court. "The constitutional floor for unions' collection and spending of agency fees is not also a constitutional ceiling for state-imposed restrictions."

The court cautioned against reading too much into the cases that have invoked the proposition that an agency fee payer's dissent to an expenditure "is not to be presumed" and that it must affirmatively be made known to the union by the dissenting employee. By that admonition, Scalia explained, the justices meant only that it would be improper for a *court* to enjoin the expenditure of the agency fees of all employees, including those who had not objected, when the statutory or constitutional limitations established by case law could be

satisfied by a narrower remedy. This admonition on the *courts* "does not imply that legislatures (or voters) themselves cannot limit the scope of that entitlement," wrote Scalia.

The Supreme Court also took exception to the argument that the Washington statute improperly limits how the union can use "its" money. Agency fees are in the union's possession only because Washington and its union-contracting government agencies "have compelled their employees to pay those fees," said the court. As applied to public sector

unions, wrote Scalia, the Washington statute cannot fairly be described as a restriction on the way the union can spend its money; "it is a condition placed upon the union's extraordinary state entitlement to acquire and spend *other people's* money."

The union's contention that the statute amounted to unconstitutional content-based discrimination met with similar disapproval from Scalia. "We do not believe that the voters of Washington impermissibly distorted the marketplace of ideas when they placed a reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of government employees." The electorate "sought to protect the integrity of the election process," wrote

Scalia, "which the voters evidently thought was being impaired by the infusion of money extracted from nonmembers of unions without their consent." The voters did not have to enact an across-the-board limitation on the use of agency fees to vindicate their more narrow concerns. And, said Scalia, "no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission." Given the "unique context of public-sector agency-shop arrangements," the court concluded that the content-based nature of the Washington law did not violate the First Amendment.

'The constitutional floor for unions' collection and spending of agency fees is not also a constitutional ceiling for state imposed restrictions.'

Justice Scalia, along with Justices Stevens, Kennedy, Souter, Thomas, and Ginsburg, rejected the association's argument that the Washington statute conflicted with the Supreme Court's prior campaign finance decisions. Scalia and these five justices found that that precedent was "not on point." Justice Breyer, in a separate opinion with which Chief Justice Roberts and Justice Alito joined, asserted that the union's campaign finance argument should not be addressed because it was raised for the first time when the case reached the high court.

While the case was pending before the court, the Washington lawmakers amended the law to provide that a union "does not use agency shop fees when it uses its general treasury funds to make [political] contributions or expenditures if it has sufficient revenues from sources other than agency shop fees in its general treasury..." Despite this amendment, the court determined that the cases were not moot because the agency fee petitioners had sought monetary damages previously collected by the association and because "it still matters whether the Supreme Court of Washington was correct to hold that [the former] version [of the law] was inconsistent with the First Amendment." (*Davenport v. Washington Education Assn.* [6-14-07] ___ U.S. ___, 127 S.Ct. 2372.)

Varied Reactions

Predictably, reaction to the court's decision has been mixed. The National Right to Work Legal Defense Foundation and other anti-union groups heralded the opinion as "an important victory" for the First Amendment rights of workers. Some praised the ruling for rejecting the union's argument that it enjoys a constitutional right to use the agency fee funds it collects for political activities. But others were disappointed that the court did not go farther and, according to these right-to-work groups, strike down compulsory unionism altogether.

Indeed, some union leaders expressed relief that the high court rejected the argument that unions must obtain individual affirmative consent to have any of their agency fees used for nonrepresentational purposes. Other labor organizations noted that, in light of the statutory amendment, the court's decision will have no prospective impact.

In 1998 and 2005, California voters rejected ballot initiatives that would have imposed similar restrictions on unions' expenditures of dues and agency fees. *

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Recent Developments

Local Government

Action to Compel Arbitration Is Within PERB's Exclusive Jurisdiction

In a case that was closely watched by local government practitioners, the First District Court of Appeal announced that Sec. 3509 of the Meyers-Milias-Brown Act conveys to the Public Employment Relations Board exclusive jurisdiction to decide whether the exclusive representative of city employees is required to participate in arbitration under the city charter.

The union declined to select an arbitrator, the first step in the process.

The case arose when the City of San Francisco sought to compel arbitration with International Union of Operating Engineers, Local 39, after the union told the city that it would not participate in arbitration during negotiations for a new memorandum of understanding. The San Francisco charter obligates the city and the unions to engage in good faith negotiations for a new MOU. The charter also declares that any disputes between the parties

must be submitted to a three-member arbitration board which has the power to issue binding decisions regarding such quarrels.

The parties have used the arbitration procedure to resolve their labor disputes for several years, but in January 2006, when a dispute arose, the union declined to select an arbitrator, the first step in the process. In response, the city filed an action in superior court, alleging that the union was required by the terms of the city charter and the existing MOU to submit all unresolved labor disputes to arbitration.

Local 39 argued that the city had failed to exhaust its administrative remedies before proceeding with the lawsuit. The union urged that under Gov. Code Sec. 3509 of the MMBA, PERB has exclusive jurisdiction to determine whether the union is required by the city charter to submit its labor dispute to binding arbitration. The trial court found the union was not required by the terms of the MOU to do so, and the court did not have jurisdiction to adjudicate the city's claims, holding instead that PERB had exclusive jurisdiction over the dispute.

After the trial court's decision, the city filed a charge with PERB, alleging again that the union was required by

the terms of the city charter to submit all labor disputes to binding arbitration. The city sought an order requiring the union to participate in the charter-mandated impasse resolution procedures because negotiations with the city's unions had to be completed in time for the board of supervisors to authorize inclusion of any compensation change in the city's budget before the new fiscal year.

PERB denied the city's injunction request, but it did issue a complaint asserting the union was obligated by the terms of the city charter to arbitrate all outstanding labor disputes. An ALJ conducted an evidentiary hearing and issued a proposed decision ruling that the

The union was required by the terms of the city charter to submit its outstanding labor disputes to binding arbitration.

union was required by the terms of the city charter to submit its outstanding labor disputes to binding arbitration.

In the meantime, the city appealed the trial court decision to the First District Court of Appeal, reiterating its view that PERB did not have exclusive jurisdiction to determine whether Local 39 was required by the terms of the

city charter to arbitrate its outstanding labor disputes.

The Court of Appeal explained that the legislature granted PERB exclusive jurisdiction over alleged violations of the MMBA starting in July 2001, as codified in Sec. 3509. That section states, “A complaint alleging any violation of this chapter or any rules and regulations adopted by a public agency pursuant to Sec. 3507...shall be processed as an unfair practice charge by [PERB].” With the city con-

The legislature granted PERB exclusive jurisdiction over alleged violations of the MMBA.

ceding that the charter provision is a rule adopted by a public agency within the meaning of Sec. 3507, the appellate court found that the city’s petition to compel arbitration alleged the violation of a rule adopted by a public agency under Sec. 3507. Thus, under Sec. 3509(b), PERB has exclusive jurisdiction over the claim.

The city argued that PERB has no jurisdiction over complaints filed in superior court, but the court found no precedent to support that argument. In fact, it noted the California Supreme Court actually reached the opposite

conclusion in *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Board* (2005) 35 Cal.4th 1072, 173 CPER 18. In *Coachella*, the court stressed that Sec. 3509 grants PERB exclusive jurisdiction over alleged violations of the MMBA.

Because Sec. 3509(c) gives PERB the power to enforce rules concerning unit determinations, representation, recognition, and elections, the city next argued — relying on the rule that the expression of some things in a statute necessarily means the exclusion of other things not expressed — that the statute cannot be construed to grant the board the power to enforce a local rule that sets forth procedures for resolution of disputes. To that, the Court of Appeal noted that the board is given exclusive jurisdiction under Sec. 3509 (b), and therefore, subdivision (c) is not determinative.

The city further contended that the board has the power under Sec. 3509(b) to adjudicate unfair practice claims, but only when those claims concern unit determinations, representation, recognition, or elections as listed in Sec. 3509(c). The court rejected this argument, highlighting that Sec. 3509(a) grants the board powers described in both subdivisions (b) and (c); and nowhere does Sec. 3509 state the powers set forth in subdivision (b) are qualified by the powers granted in subdivision (c).

Next, the city argued that PERB does not have jurisdiction because its complaint only alleges a violation of the city charter, but contains no allegation of unfair practice under the MMBA.

The court conceded that the city’s complaint does not mention the MMBA, but what matters, it said, is whether the underlying conduct on which the suit is based, however described, falls within the board’s exclusive jurisdiction. The court held the city’s complaint alleges conduct that comes within the scope of Sec. 3509(b), and the city could not, through artful pleading, evade the board’s exclusive jurisdiction.

The city’s citation to case law failed to convince the court that the superior court, not PERB, had jurisdiction. In

The city could not, through artful pleading, evade the board’s exclusive jurisdiction.

Rojo v. Klinger (1990) 52 Cal.3d 65, 86 CPER 60, the California Supreme Court ruled that the Fair Employment and Housing Act provides the exclusive remedy for injuries that arise from sex discrimination in employment. Here, the Court of Appeal found *Rojo* not controlling because it involved a different statutory scheme.

In *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 49 CPER 45, the issue was whether the provisions of the Dills Act conflicted with the State Personnel Board’s constitutional jurisdiction to review disciplinary actions. In



Pocket Guide to Meyers-Milias- Brown Act

The Meyers-Milias-Brown Act governs labor-management relationships in California local government: cities, counties, and most special districts. This update from the last edition covers three years of Public Employment Relations Board and court rulings since jurisdiction over the MMBA was transferred to PERB; the Supreme Court ruling establishing a six-month limitations period for MMBA charges before PERB; changes in PERB doctrine including a return to the Board's pre-*Lake Elsinore* arbitration deferral standard and reinstatement of the doctrine of equitable tolling; new federal court developments in the constitutional rules governing agency fees, and more.

This booklet provides an easy-to-use, up-to-date resource for those who need the MMBA in a nutshell. It's a quick guide through the tangle of cases affecting local government employee relations and includes the full text of act, a glossary, table of cases, and index of terms.

By Bonnie Bogue, Carol Vendrillo, Marla Taylor and Eric Borgerson
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Pacific Legal, the Supreme Court ruled that the Dills Act provisions were not facially unconstitutional because no actual jurisdictional conflict existed between PERB and the SPB. The appellate court held that *Pacific Legal* did not assist the city's jurisdictional argument because it did not allege that there were conflicting statutory schemes, nor did it facially challenge the statute.

A third case cited by the city likewise failed to win the court over. *United Teachers of Ukiah v. Board of Education* (1988) 201 Cal.App.3d 632, held that parties may not divest the court of jurisdiction over alleged violations of the Education Code by framing their defenses in a fashion that arguably invokes PERB's jurisdiction. The appellate court explained that, unlike in *United Teachers*, San Francisco's claim had

nothing to do with the Education Code and did not invoke the board's jurisdiction via a defense.

The city contended that even if PERB has exclusive jurisdiction, it should be excused from initially pursuing that administrative procedure before resorting to the courts.

First, the city argued that it should be excused from pursuing its remedies with the board because such an action would be futile. The city noted that, as predicted in the lower court proceedings, PERB denied its request for an injunction. It is not sufficient to show what the board's ruling would be on a particular issue or defense, the court explained. Rather, the party must demonstrate what the board's ruling would be in the particular case before the court. Here, the city could not invoke

the futility exception simply by pointing to the fact that the board denied its request for an injunction. Rather, the city had to show how the board inevitably would rule on its claim that Local 39 was required to submit to binding arbitration under the charter's impasse provisions. The court found that the city did not even attempt to carry that burden.

Next, the city contended that it should be excused from pursuing its administrative remedies with the board because doing so would cause irreparable injury. It cited *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 94 CPER 8, which arose at a time when the state faced an unprecedented budgetary crisis. When DPA imposed certain fiscal policies, unions representing state em-

employees challenged the actions and a superior court ruled that DPA lacked the authority to impose those policies. Before the Court of Appeal, the question was whether the superior court had jurisdiction over the matter, or whether the dispute should have been submitted to PERB. The *Department of Personnel Administration* court assumed that PERB had jurisdiction, but ruled the employee unions were excused from pursuing their administrative remedy

PERB has the exclusive jurisdiction to determine whether the union was required by the terms of the city charter to arbitrate.

under the irreparable injury exception — because of the urgent need for a quick resolution to the issues and the great potential for irreparable harm in the nature of increased layoffs of state employees.

The appellate court found that San Francisco was not facing a crisis like the one presented in *Department of Personnel Administration*, and while the city wanted and needed to reach an agreement with Local 39 prior to the start of the new fiscal year, the record indicated the city achieved that goal. Because procedurally the court had to assume that

the terms of the new agreement were favorable to the city, the court held the irreparable injury exception did not apply.

Finally, the city contended it was excused from pursuing its administrative remedies with PERB by what it described as the “administrative jurisdiction exception” that was expressed in *Coachella*. The *Coachella* court ruled that a court may, in certain circumstances, entertain a claim that an agency lacks jurisdiction before the agency proceedings have run their course. The *Coachella* court announced that when deciding to exercise that power, a court should evaluate three factors: the injury or burden that exhaustion of administrative remedies will impose, the strength of the legal argument that the board lacks jurisdiction, and the extent to which the administrative expertise may aid in resolving the jurisdictional issue.

The Court of Appeal observed that the trial court addressed the jurisdictional issue even though the adminis-

trative proceedings had not run their course, and it ruled PERB did have exclusive jurisdiction over the dispute between Local 39 and the city. Under these circumstances, the court held, *Coachella* does not provide grounds for avoiding the otherwise applicable administrative remedies.

Lastly, the court rejected the city’s argument that the trial court should have granted its petition to compel arbitration because its contract with Local 39 incorporated the terms of the city charter, which requires the union to submit to arbitration. The court held that under Sec. 3509(b), PERB has the exclusive jurisdiction to determine whether the union was in fact required by the terms of the city charter to arbitrate, and thus the superior court could not issue the sought ruling. (*City and County of San Francisco v. International Union of Operating Engineers, Loc. 39* [5-31-07] 151 Cal.App.4th 938.) ♦

Sheriffs Association Wins Attorney’s Fees in Bill of Rights Case

In a case of first impression, the Fourth District Court of Appeal awarded attorney’s fees to the Riverside Sheriff’s Association in a lawsuit where the association was successful in enforcing its members’ rights to representation under the Public Safety Officers Procedural Bill of Rights Act. The appellate court announced that Sec. 3309.5(e)

of the Bill of Rights Act, which authorizes a civil penalty of up to \$25,000 and attorney’s fees for malicious violations of the act, does not foreclose an award of attorney’s fees under Code of Civil Procedure Sec. 1021.5 when a party has secured an important right of public interest.

The underlying case arose when several deputy sheriffs, working at a county jail, were denied access to RSA employee representatives during a criminal investigation into their alleged sexual improprieties with female inmates. In June 2004, when the association's lawyer sent a letter demanding compliance with the Bill of Rights Act, the county claimed that it need not adhere to PSOPBRA because it was conducting a criminal investigation, not a personnel matter.

The association reacted by filing a lawsuit alleging that the county violated the act by denying the deputy sheriffs their right to representation under Gov. Code Sec. 3303. In its defense, the county reiterated its view that there was no PSOPBRA violation because the act "does not apply to a strictly criminal investigation, but only to administrative investigations." The county also claimed that the case relied on by the association, *California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, 143 CPER 64, was distinguishable because it concerned an administrative investigation conducted under the guise of a criminal investigation.

The superior court found that the county's denial of representation to the sheriffs was a violation of Sec. 3303. However, it determined that this conduct was not based on malice but resulted from an erroneous interpretation of Sheriff's Department policy. The superior court granted an injunction prohibiting the county from violating PSOPBRA.

The superior court also awarded the association attorney's fees under Code of Civil Procedure Sec. 1021.5. It found that the representation right vindicated by the association was a matter of significant concern to present and future employees of the Sheriff's Department, relying on *Baggett v. Gates* (1982) 32 Cal.3d 128, 52 CPER 31.

On appeal, the county argued that Gov. Code Sec. 3309.5(e) authorizes the sole avenue for obtaining attorney's fees in a successful PSOPBRA action. Sec-

*Lawmakers did not
intend to limit
attorney's fees to
malicious
violations only.*

tion 3309.5(e) provides that if a public safety department maliciously violates any provision of the statute, the department is liable for a civil penalty not in excess of \$25,000, awarded to the public safety officer whose right was denied, and an award of reasonable attorney's fees as determined by the court. This provision of the Bill of Rights Act was amended in 2002, and, as the First District Court of Appeal found in *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, the "legislative history indicates the amendment was a response to an

unpublished case in which the court held that the public safety officer was not entitled to damages despite conduct which could be characterized as malicious by the public entity employer."

Here, the Fourth District Court of Appeal found no authority to support the county's contention that a public safety officer can obtain attorney's fees only for a malicious violation of PSOPBRA, and not under Sec. 1021.5. The county reasoned, based on ordinary principles of statutory interpretation, that because Sec. 3309.5(e) was more specific and more recent than Sec. 1021.5, the former replaced the latter. The court clarified that a more recent and specific statute will be read to replace an older statute on the same matter, but only when the two acts or statutes cannot be reconciled. In this case, the court found that Sec. 1021.5 and Sec. 3309.5(e) were reconcilable.

The court held that Sec. 3309.5(e) did not supplant Sec. 1021.5 because the two statutes were not mutually exclusive. Section 3309.5(e) permits an award of attorney's fees where there has been a malicious violation of PSOPBRA, the court explained, while Sec. 1021.5 permits an award of attorney's fees when a party has secured an important right affecting the public interest. Despite the county's assertion that the legislature considered Sec. 1021.5 when it amended Sec. 3309.5(e), it failed to produce any legislative history demonstrating the intent to make Sec. 1021.5 the sole basis for attorney's fees.

Citing *Lozada*, the court found that lawmakers did not intend to limit attorney's fees in PSOPBRA cases to malicious violations only. Rather than circumscribing the right to attorney's fees, Sec. 3309.5(e) extended the rights to attorney's fees to a party who otherwise might not qualify under Sec. 1021.5. Therefore, the court granted the association's motion for fees under Sec. 1021.5 and held that Sec. 3309.5(e) is not the exclusive basis for attorney's fees awards.

Next, the court faced the county's argument that the association was not entitled to attorney's fees under Sec.

The rights and protections afforded by PSOPBRA also benefit the public in general.

1021.5 because the association did not achieve a unique or expanded interpretation of an existing right and because the benefit of the litigation was more private than public. The court explained that attorney's fees are permitted under Sec. 1021.5 and the "private attorney general doctrine" in any action that results in the enforcement of an important right affecting the public interest. One component of that standard mandates that a significant benefit be conferred on the general public or a large class of persons. The county argued that

the condition was not satisfied because the only benefit of the successful lawsuit inured to the association and its members, including the deputy sheriffs who were targeted in the investigation.

Again citing *Lozada*, the court underscored that the rights and protections afforded by PSOPBRA benefit not only public safety officers but the public in general. By promoting stable employer-employee relations, the act fosters a solid and secure public safety workforce and encourages peace officer cooperation in investigations of possible wrongdoing. Alleged violations of the act, therefore, implicate duties that benefit the public at large, transcending the employer-employee relationship. The court held that despite the fact that the association was enforcing an existing right under PSOPBRA and Sec. 3033, the attorney's fee award was justified because association members had been denied representation and it had not sought financial recovery, leaving attorney's fees as the only available monetary damage.

Citing *Baggett*, the court explained that attorney's fees should be awarded

when the plaintiff secures the enforcement of basic procedural rights without accruing a pecuniary benefit, or when the burden of the lawsuit is disproportionate to the individual plaintiff's stake in the matter. The court noted that the association undertook this litigation solely to guarantee the representation rights of its members. Citing numerous cases in which officers have won enforcement of PSOPBRA rights and were awarded attorney's fees, the court rejected the county's argument that the decision to award the association attorney's fees would open floodgates of litigation on the issue.

The Court of Appeal rejected the county's argument that the trial court abused its discretion when it awarded the association the actual attorney's fees it incurred, nearly \$74,000, because the association succeeded in enforcing an important benefit to its members, the right of representation conveyed by Sec. 3303(i). (*Riverside Sheriff's Assn. v. County of Riverside* [6-21-07] E040921 [4th Dist.] ___ Cal. App.4th ___, 2007 DJDAR 9326.) ❁

No Appealable Demotion for Reduction of Employee Work Responsibilities

The Second District Court of Appeal found that the county's reduction of an employee's work-related job responsibilities did not amount to a demotion under the county civil service rules, and

therefore, the trial court did not err by denying a petition compelling the county Civil Service Commission to review the case.

The Peace Officers Bill of Rights Act specifies elements of procedural rights that must be accorded to public safety officers when they are subject to investigation or discipline.

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Margaret Berumen was hired by the County of Los Angeles Department of Health Services in 1979. In 1995, she was appointed to the civil service position of hospital administrator at the University of Southern California Medical Center. In 1998, the department hired Roberto Rodriguez as the new executive director of the medical center. In 2000, Rodriguez restructured the administration, and as a result, Berumen lost many of her assignments and responsibilities. However, Berumen retained the same job title and salary, and continued to report to the same person.

The civil service rules authorize managerial discretion.

Berumen filed a claim with the Los Angeles County Civil Service Commission, alleging that, with her loss of responsibilities, she had suffered a de facto demotion caused by the medical center's reorganization. The commission's hearing officer found that Berumen had not suffered a reduction in pay or rank, and thus, had not been demoted. The commission affirmed the hearing officer's decision, holding that in the absence of an employment discrimination violation under the civil services rules, it lacked jurisdiction to make a finding of a de facto demotion.

Subsequently, Berumen filed a petition for writ of mandate in superior court, insisting that she had been constructively demoted because she had been "stripped of the duties and responsibilities she previously performed" and was assigned to perform "an increasing number of marginal tasks." She alleged that the commission had the inherent authority to decide a claim of constructive or de facto demotion.

The trial court denied the petition, explaining that Berumen's claim had no merit because the civil service rules did not give her a right to challenge a change in duties in the absence of demotion, suspension, layoff, or reduction in compensation. Also, the trial court found that the civil service rules do not recognize a direct civil appeal for a de facto demotion.

On appeal, Berumen continued to assert that the commission had the authority to render a finding on her de facto demotion claim.

The Second District Court of Appeal first explained that the county charter authorizes the commission to review decisions about "discharges and reductions of permanent employees." Under the civil service rules adopted by the county, an employee may seek a hearing before the commission when he or she has been affected by a discriminatory action in violation of Rule 25, when an employee has been adversely affected by a decision of the commission, or when the employee is otherwise entitled to a hearing under the charter or the civil service rules.

The court next observed that "reduction" and "demotion" are synonyms under the civil service rules; each is defined as "a lowering in rank or grade," with grade meaning one's salary range, and rank referring to the level of difficulty or responsibility of a class. The court noted that the rules also permit a permanent employee who has been reduced in grade or compensation to appeal that decision to the commission. However, said the court, the civil service rules authorize managerial discretion in assigning employees to different positions within their class.

The civil service rules make a distinction between actual and constructive demotion.

Contrary to Berumen's argument, the court found that the civil service rules make a distinction between actual and constructive demotion. Because Berumen's grade and rank were not reduced within the meaning of the rules when she lost her job responsibilities, the court held that the commission had no jurisdiction to hear her appeal.

The court rejected Berumen's assertion that the commission should hear her case because past cases held that a reassignment which significantly

diminished job responsibilities can be an adverse employment action. The cases cited by Berumen dealt only with violations of the California Fair Employment and Housing Act.

Berumen also argued that civil service rules gave the commission the exclusive right to assign work performed by each department, including the right to direct the department to assign duties and responsibilities that correspond to her civil service classification. The

of personnel. The court also found that because Berumen never pursued that allegation at the administrative hearing, the required factual predicates of an alleged temporary-duty assignment to a lower rank were never raised, litigated, or established. Thus, the court concluded that this claim was forfeited.

Lastly, Berumen argued that if the commission lacked jurisdiction to adjudicate her claim, she would have no remedy. Citing *Hunter v. Los Angeles County Civil Service Commission* (2002) 102 Cal.App.4th 191, the court rejected

Berumen's argument, instead affirming that commission jurisdiction must be based on express authority in the charter, not on the absence of any other designated forum. Moreover, the court found that under the civil service rules Berumen had another remedy available, since she could appeal her assignment to the director of personnel. (*Berumen v. County of Los Angeles Department of Health Services* [6-21-07] B189886 [2d Dist.] ___ Cal.App.4th ___, 2007 DJDAR 9348.) *

An appeal should be made to the director of personnel.

court held that the rules do not grant the commission the power asserted by Berumen, and concluded that the county, through its departments, is empowered to make those decisions.

Civil Service Rule 2.17 permits an employee to be temporarily assigned the duties of a lower rank if the temporary assignment does not exceed one year. Berumen reasoned that because her duties and responsibilities were taken away more than a year prior to the suit, the department violated Rule 2.17. But the court held that a complaint about the duration of a temporary assignment is not properly the subject of an appeal to the commission; instead, under the civil service rules, the appeal should be made to the director

Supreme Court Depublishes Sacramento POA Decision

The Third District Court of Appeal's decision in *Sacramento Police Officers Assn. v. City of Sacramento* was ordered depublished by the California Supreme Court. The appellate court in the *Sacramento* case ruled that the decision of the city police department to hire retirees as temporary officers to address a staffing shortage was a fundamental policy decision designed to maintain the existing level of public safety in the community. As a result, the court concluded, the city was not required to meet and confer with the POA under the Meyers-Milias-Brown Act.

The Court of Appeal opinion had relied on the Supreme Court's ruling in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 180 CPER 21, which articulated the test to

determine when the impact of a managerial policy decision is sufficient to trigger a duty to bargain. In *Sacramento*, the court held that the city's interest in unfettered decisionmaking was not outweighed by the benefit to be gained in subjecting the matter to the bargaining process. (See CPER No. 183, pp. 28-31, for a complete summary of the Court of Appeal decision.)

The high court ordered the decision depublished at the time it denied the POA's petition for review. With very limited exceptions, Rule 8.1115(a) of the California Rules of Court instructs that a decision ordered depublished by the high court may not be cited or relied on by a court or a party in any other action. *

***Pitchess* Motion Denied in Search and Seizure Case**

Building on the Supreme Court's recent *Warrick* decision, the Fourth District Court of Appeal found that a minor's *Pitchess* motion seeking *in camera* review of arresting officers' confidential personnel records was properly denied by the trial court because the requested discovery was irrelevant to the minor's defense that he had been improperly detained and searched. The officers had an objectively reasonable basis to place the minor in custody, said the court, and the *Pitchess* motion fell short of articulating how the officers' veracity would undermine the validity of the search and seizure.

The case arose when Chula Vista police officers Trampus and Murgia arrived at the scene of a disorderly party

shortly after midnight, and observed Giovanni B. and two other youths riding bicycles away from the scene. The officers detained Giovanni because he appeared to be underage and because one of his companions fled when the officers arrived. Trampus' narrative report of the incident stated that Giovanni's companion had blood on his arm, his clothes were dirty, he was sweating, and there appeared to have been a fight. According to Trampus, Giovanni, who also was sweaty and dirty, told him there had been a fight at the party. In Giovanni's *Pitchess* motion, he denied the details of his conversation with Trampus, and challenged the accuracy of Trampus' observations as to his and his companion's physical dishevelment.

A pat-down search of Giovanni revealed he was carrying a screwdriver, and he was arrested for possession of a concealed weapon. Officer Murgia wrote in his report that he had asked Giovanni various questions about his gang affiliations and had received affirmative responses to these inquiries. Giovanni's *Pitchess* motion denied the accuracy of Murgai's description of their conversation concerning his gang affiliation.

Following the incident, the San Diego County District Attorney's Office charged Giovanni with possession of a concealed weapon in violation of Penal Code Sec. 12020(a)(4). Giovanni denied the charge and filed a *Pitchess* motion seeking to discover evidence that the arresting officers previously had made false statements in their reports or had committed other acts of dishonesty. Under *Pitchess v. Superior*

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**Pocket Guide to
Due Process
in Public
Employment**

The right to procedural due process is one of the most significant constitutional guarantees provided to citizens in general and to public employees in particular. Its entitlement has been created by statute, charter, ordinance, and other local laws or enactments. This pocket guide provides an overview of due process in public sector employment to assist employees and their employers in understanding their respective rights and obligations.

The guide explains who is protected, what actions are covered, what process is due, remedies for violations, and more. A section focuses on the due process rights afforded to several specific types of employees: state civil service, public officers, police officers, school district employees, and community college district employees. The Pocket Guide also includes a discussion of Skelly and other key cases on due process and the liberty interest.

By Emi Uyehara • 1st edition (2005) • \$12

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Court (1974) 11 Cal.3d 531, a criminal defendant has a limited right to discovery of a peace officer's personnel records in order to obtain information demonstrating an officer's past misconduct that may be used to support a defense to the criminal charges.

In this case, Giovanni argued that the information about any acts of dishonesty on the part of Trampus and Murgai would be relevant to a motion to suppress the weapon as the product of an unlawful search and seizure. He asserted that the arresting officers did not have reasonable suspicion to support his initial detention because his alleged physical appearance and admission of gang affiliation were falsehoods. Under *Pitchess*, Giovanni charged that the trial court was required to conduct an *in camera* review of the officers' personnel records and that any information concerning the officers' veracity would be material to support his motion to suppress. The prosecution argued that Giovanni was detained because he was underage and in a public place after 11 p.m. in violation of Chula Vista's curfew ordinance. Therefore, it asserted, any alleged falsehoods as to collateral matters were irrelevant to a possible motion to suppress evidence.

The trial court agreed with the prosecution and ruled that because Giovanni appeared to be, and was, underage, the initial detention and subsequent search were constitutionally permissible, and the lack of veracity of any of the officers' other claimed observations was immaterial to a motion to suppress.

On appeal, the Court of Appeal explained that a *Pitchess* motion seeking disclosure of an officer's personnel records must be accompanied by affidavits that show good cause for the discovery and set forth the materiality of the records involved in the pending litigation.

A showing of good cause requires the defendant to demonstrate a specific factual scenario that establishes a plau-

The Pitchess motion did not reveal information calling into question the officers' observations.

sible foundation for the allegation of officer misconduct and that the misconduct would be material to the defense. In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 173 CPER 21, the California Supreme Court recently clarified that the materiality element requires the defendant to establish a logical connection between the charge and the proposed defense. *Warrick* instructed that the defense counsel's supporting declaration must propose a defense and articulate how the requested discovery may be admissible as direct or impeachment evidence in support of the proposed defense, or how the requested discovery may lead to such evidence.

In light of Giovanni's motion to suppress, the court reviewed search and seizure standards under the Fourth

Amendment. Detention of an individual is reasonable when an officer can point to specific facts that provide some objective manifestation that the person detained may be involved in criminal activity. When an officer detains a suspect, the officer may pat-down the suspect's outer clothing if he or she reasonably believes the suspect may be armed or dangerous. When an officer determines the suspect is in violation of the law and places him or her in custody, a search is proper.

The court found that Trampus and Murgia had an objectively reasonable basis to detain Giovanni because he appeared underage and was out in public in violation of the city's curfew. Therefore, said the court, Giovanni cannot contest the validity of the stop or the search by asserting that the officers' other observations concerning suspected criminal activity were false. The court noted that Giovanni's *Pitchess* motion did not claim it might reveal information calling into question the accuracy of the officers' observation that Giovanni was a minor on the street in violation of the curfew, or any information suggesting the officers improperly relied on their observations of his youthful appearance to support the stop. Furthermore, the *Pitchess* motion did not articulate how the officers' veracity would be admissible as to whether, after Giovanni was properly stopped and placed in custody, the officers were permitted to conduct the pat-down that revealed the weapon.

The court held that because the officers had probable cause to detain and search Giovanni based on uncon-

The officers had probable cause to detain and search the suspect.

tested facts, independent of the alleged falsehoods as to his physical dishevel-

ment or statements of gang affiliation, the materials sought by Giovanni's *Pitchess* motion were irrelevant to his proposed defense. Therefore, the court concluded that the motion did not demonstrate good cause for an *in camera* review of the officers' confidential records. (*Giovanni v. Superior Court of San Diego County; City of Chula Vista Police Dept.*, RPI[5-30-07, certified for publication 6-21-07] D049778 [4th Dist.] ___Cal.App.4th___, 2007 DJDAR 9322.) *

tween the county and the alliance. The commission concluded that it lacked authority to hear all general employment-related appeals, and it refused to review the matter. Shortly thereafter, the county's Department of Employment Services and Risk Management determined that Tully's assignment was not a temporary appointment under the county rules because there was no vacancy. Instead, it viewed the appointment as a temporary out-of-class assignment consistent with the contract.

In July 2005, SCI Lori Babbage temporarily assigned employee Robert Waugh, who, like Tully, was not on the SCI classification eligibility list, to work as a SCI in her unit while she took a two-week vacation.

The alliance then filed a writ petition in the superior court, seeking a ruling that Spitze improperly had been denied temporary appointments to the SCI positions, and that those violations

Civil Service Commission Had Authority to Hear Appeal

The Sacramento County Civil Service Commission had authority to hear an administrative appeal contesting a temporary civil service appointment, the Third District Court of Appeal ruled. However, there was no merit to the claim that a civil service employee had been improperly passed over for two temporary work assignments.

Randy Spitze was employed as a criminal investigator in the welfare fraud unit of the county's Department of Human Assistance. In 2003, after passing an examination for promotion to the position of supervising criminal investigator, Spitze was placed on the eligibility list for that classification. In April and May 2005, county supervisor Mike Moody temporarily assigned employee Brian Tully, who was not on the eligibility list, to work as an SCI in Moody's unit.

Spitze and the employee organization that represented him, Sacramento County Alliance of Law Enforcement, appealed the assignment to the Sacramento County Civil Service Commission and alleged that Tully's appointment violated Sec. 7.7(a) of the county civil service rules. That rule section provides that "temporary appointments shall be made from appropriate eligible lists whenever possible."

The county argued that Tully's assignment was not a temporary appointment within the meaning of the civil service rules because there was no "vacant" position, a prerequisite for a "temporary appointment." Instead, the county contended the appointment was a temporary "out-of-class assignment," expressly permitted by the terms of the collective bargaining agreement be-

The county contended the appointment was a temporary 'out-of-class assignment.'

were appealable to the civil service commission. The trial court reasoned that because the positions assigned to Waugh and Tully both had existing incumbents, they were not "vacant" positions and had not been filled by "temporary appointments" within the mean-

ing of Sec 7.7. Also, the trial court agreed that the commission did not have the authority to hear the case because no existing rule permitted it to entertain appeals of short-term, out-of-class assignments.

The Third District Court of Appeal first noted that county rules define a vacant position as any “unfilled position in the civil service.” The court rejected the interpretation that “vacancy” is defined by the absence of an employee fulfilling the day-to-day job activities associated with the position, even on a temporary basis. Instead, the court found that an office or position is vacant only when there is no legally qualified incumbent who has a lawful right to continue working in that position.

Based on this reasoning, the court found that Moody’s position was not vacant while he was temporarily assigned to serve as the acting assistant chief investigator, and Babbage’s position was not vacant while she was on vacation. Despite their temporary absences, both positions continued to be occupied by legally qualified incumbents who had the lawful right to continue in their positions. Affirming the trial court, the Court of Appeal held that because there were no vacancies, Sec 7.7 did not apply, and Spitze was not entitled any preference to those temporary assignments simply because he was on the eligibility list for the SCI classification.

But the Third District Court of Appeal disagreed with the trial court when it came to the commission’s au-

thority to hear Spitze’s administrative appeal. The court noted that Sec. 71-B of the commission’s charter states that it “shall establish rules regarding the selection of employees for, and classification of, civil service positions.” The court found Sec. 7.7 to be such a rule. Because the charter instructs the commission to make final decisions involving alleged improper actions or denial of rights provided by the rules, and because Spitze’s appeal alleged the denial of such rights under Sec. 7.7, the court found the commission’s refusal to hear

*The commission has no
power to promulgate
a rule that divests
it of a duty.*

the case was inappropriate. The court reasoned the commission has the power to hear an appeal of an improper action or denial of rights claim that is merely alleged and not necessarily actual; a complaining party need not demonstrate the validity of its complaint in order to have the commission hear its appeal.

The county argued that under Sec 9.3, the commission has no authority to consider a matter unless the action is specifically made appealable to the commission by a provision of the rules. Since the rules did not expressly authorize an appeal from a decision to assign one employee over another, the

county asserted, the commission had no authority to hear the appeal. The court rejected the county’s argument, concluding that the commission has no power to promulgate a rule that divests it of a duty imposed by its charter. The commission’s charter explicitly directs that it “shall make final decisions on appeals” that fall within the scope of the charter. The court determined that Spitze’s appeal fell within the scope of charter Sec. 71-B(d) to make final decisions on appeals involving alleged improper action, and thus, Sec 9.3 could not, and did not, relieve the commission of the duty to hear his appeal.

Finally, the court emphasized that its conclusion that the commission had a duty to hear Spitze’s appeal did not mandate reversal of the trial court’s judgment because he had failed to make the commission a party to the writ proceeding. The court drew a distinction between the county as a corporate entity and the autonomy of various elements of a county’s government structure, like the county civil service commission. Because the commission has autonomous stature and was not named as a defendant, the court could not compel it to hear the appeal sought by Spitze. (*Sacramento County Alliance of Law Enforcement v. County Sacramento* [6-4-07] 151 Cal.App.4th 1012.) *

Public Schools

Four-Year Evidence Bar Not Absolute in Proceeding to Dismiss Teacher Accused of Sexual Misconduct

Education Code Sec. 44944(a) provides that credentialed teachers may be disciplined by a school district for certain behavior occurring less than four years prior to the filing of a notice of intent to discipline. The California

The four-year limitation period is subject to equitable principles.

Supreme Court, in *Atwater Elementary School Dist. v. California Department of General Services*, has determined that the four-year limitation period is subject to equitable principles and is, therefore, not absolute.

Factual Background

On July 17, 2002, the district served Albert Truitt, a credentialed teacher, with a notice of dismissal alleging that he had engaged in sexual misconduct with five students between 1992 and 1998. Truitt denied the allegations and, during the administrative proceedings, moved to dismiss all charges based on incidents occurring more than four

years prior to the date the notice was served on him, and to exclude all evidence relating to those events. He relied on Sec. 44944(a) which states:

No testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice.

The administrative law judge granted Truitt's motions, and the district sought a writ of mandate to vacate the ruling. The trial court granted the writ and directed the administrative law judge to enter new orders denying the motions. Truitt appealed. The Fifth District Court of Appeal reversed, finding that the time limit is "absolute and cannot be extended by the application of equitable doctrines such as delayed discovery, fraudulent concealment, equitable estoppel, and continuing course of conduct." The district appealed to the Supreme Court.

Between the time that the Supreme Court granted review and the issuance of its decision, Truitt had resigned his position, relinquished his teaching certificate, and died. Even though the case had become moot, the court retained it for decision, stating, "it is undisputed that this case involves a matter of state-wide importance."

Supreme Court Decision

Though the court found in favor of the district, it did not base its decision on the district's rationale. The dis-

Even though the case had become moot, the court retained it for decision.

trict argued that the Court of Appeal incorrectly characterized Sec. 44944(a) as an evidentiary bar or condition on a substantive right rather than on a statute of limitations. The Supreme Court found the distinction immaterial, noting, "The courts have applied equitable principles to conditions on substantive rights as well as to statutes of limitation."

The court also rejected the district's suggestion that it individually address several equitable doctrines, those being equitable tolling, equitable estoppel, fraudulent concealment, and delayed discovery, finding such an approach unnecessary. "A conclusion that

any one applies resolves whether the four-year time limitation is absolute,” it reasoned, deciding to focus on only one: equitable estoppel.

It turned to its decision in *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363 for guidance. Quoting from that case, the court explained:

Equitable estoppel...comes into play only after the limitations period has run and addresses...the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life...from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice....

The court reasoned that “because equitable estoppel is ‘wholly independent’ of section 44944(a)’s time limitation, it could be relied upon in some

circumstances to prevent a defendant from asserting the statutory bar,” and thus, “equitable estoppel *may* apply to section 44944(a)’s four-year time limitation.” The court declined to express an opinion as to whether the district could have successfully asserted the doctrine in this case or whether other equitable principles might apply. “We simply conclude that the four-year time limitation is not absolute,” it said.

*Equitable estoppel
may apply for reasons
‘wholly independent’
of the general rule of
Sec. 44944(a).*

The court disagreed with the Court of Appeal’s reasoning in reaching a contrary result. The appellate court pointed

to Sec. 44242.7, which expressly exempts allegations of sexual misconduct from the requirement that, in cases of teacher discipline by the Commission on Teacher Credentialing, allegations of wrongdoing be presented within four years. The Court of Appeal concluded that the legislature would have inserted a similar provision in Sec. 44944(a) if it had meant for the same exception to apply to that section. The Supreme Court found this reasoning faulty:

Indeed, the application of equity does not create an *exception* to the four-year time limit. Generally, as a matter of law, the limit still applies. Equitable estoppel may apply in a given case for particular reasons “wholly independent” of the general rule of section 44944(a). Thus, the Legislature’s decision to include or omit such an express legal exception does not signal an intent to bar the application of equitable estoppel. It simply reflects a legislative disinclination to write a sweeping exception into the statutory scheme as a matter of law.

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The court also concluded that the legislature could not have intended for a teacher accused of sexual misconduct to be prosecuted criminally and have his credential revoked by the CTC, but not be subject to discipline by his school district.

Justice Joyce Kennard dissented from the majority's opinion. She read the clear wording and plain meaning of the statutory scheme to provide that disciplinary action against a teacher for sexual misconduct occurring more than

Justice Kennard dissented that disciplinary action can be taken only by the CTC.

four years earlier can be taken only by the CTC, not by the local school district. "Whatever the applicability, scope, and efficacy of the doctrine of equitable estoppel may be in cases not involving allegations of teacher sexual misconduct more than four years old, in my view it may not be invoked to mollify a decision by the Legislature to vest authority over such cases more than four years old in the Commission and not in school districts," she said. (*Atwater Elementary School Dist. v. California Department of General Services* [6-4-07] 41 Cal.4th 227.)

Thomas J. Driscoll, Jr., of Driscoll & Associates, who argued on behalf of Truitt before the Court of Appeal, told *CPER* that he read the decision as one

of limited applicability. "*Atwater* blazes no new ground in equitable estoppel jurisprudence, and by citing *Lantzy* and *Benner*, emphasized the very limited bases for avoidance of the language of Section 44944," he said. He expressed concern about the court's reliance on *Lantzy*, "even though *Lantzy* held mere denial did not establish equitable estoppel" and in this case, "the district's only allegation against Truitt was his denial of asserted molest." Driscoll also noted that in *Lantzy*, the Supreme Court held that equitable tolling should not apply if it is inconsistent with the text of the relevant statute. In this case, Driscoll argued that the theory *is* inconsistent with the text of Sec. 44944(a)'s explicit time limitation. "*Atwater* simply does not square with statutory construction jurisprudence," he said, referring to *Lantzy* and other prior cases, "meaning the court de-

parted from precedent without explaining why." "Its intellectual gaff is atypical of the court, and a sad departure from its duty," he said.

Michael E. Smith, of Lozano Smith, argued for the district. In response to Driscoll's criticism of the decision, Smith said, "statutes of limitations, like the four-year rule applicable to teacher termination proceedings, are born into a world of equity. In this case, "the California Supreme Court adhered to centuries-old precedent by recognizing that equitable principles are inherently incorporated into such statutes," he said. "If the court had limited its analysis to strict principles of statutory construction, the result would be bad public policy; school districts might be liable for employee misconduct beyond their control through no fault of the district, and a big hole would be cut into the safety net." *

Legislature Puts Self-Representation Back Into EERA

The California Legislature recently amended Sec. 3543 of the Educational Employment Relations Act to reestablish the right of public school employees to represent themselves individually in their employment relations with the public school employer, except in situations where an exclusive representative has been recognized or certified. A.B. 1194, introduced by Assembly Member Betty Karnette (D-Long

Beach) and signed into law on June 28, was supported by the California Teachers Association, the American Federation of State, County and Municipal Employees, and the California School Employees Association. The amendment restores a portion of the statute that was deleted in 2000 by S.B. 1960. That bill, authored by Senator John Burton (D-San Francisco), required the implementation of a mandatory "fair

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By Bonnie Bogue, Carol Vendrillo, Dave Bowen, and Eric Borgerson
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share” or “agency shop” fee for all public school and community college employees who are represented by an exclusive bargaining agent.

The legislature determined that the change was needed because the Public Employment Relations Board has interpreted the section worded after the 2000 amendment as meaning that teachers and other school employees were prohibited from discussing problems with their immediate supervisors without the union being present. For example, in *Woodland Education Assn.* (2005) No. 1722, 173 CPER 73, PERB concluded that a teacher who represented herself at a meeting with her principal was not engaged in protected activity under EERA because the right to self-representation had been

deleted from the statute by the 2000 amendment. The *Woodland* decision was at odds with prior PERB case law, such as *Pleasant Valley School Dist.* (1988) No. 708, 79X CPER 12, where the board found that an individual’s complaint about an unsafe mower was deemed protected activity. Similarly, the board in *Livingston Union School Dist.* (1992) No. 965, 98 CPER 58, held that an individual employee’s complaint about class size was protected conduct under EERA. Following *Woodland*, these cases no longer supported the conclusion that self-representation was a protected right under the act.

The language restored by the 2007 amendment is identical to that which was deleted in 2000. According to the Senate Education Committee analysis

of the bill, “reinstatement of the exact language would be the clearest means to accomplish the reestablishment” of the right to self-representation recognized in past PERB cases that interpreted that same language prior to 2000.

EERA now provides:

Public school employees shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

West Contra Costa Teachers Vote to Strike

West Contra Costa Teachers, upset about what they see as a turnabout by the district on a tentative agreement, voted to strike by an overwhelming margin.

The teachers, represented by the United Teachers of Richmond, are in the middle of a three-year contract that expires in June 2008. But, the agreement allowed for salary negotiations to

The district refuted the 6 percent figure as an 'idea,' nothing more.

reopen in June 2006, and again in July 2007. The union and the district have been in negotiations for the last year, and have been meeting with a state mediator for months. The union has demanded a 7.94 percent pay raise. The last offer made public by the district was for 3 percent.

After an intense bargaining session at the end of May, the union emerged announcing that a tentative agreement for a 6 percent raise had been reached. The district refuted that characterization, calling the 6 percent figure an "idea," nothing more. On June 6, 2007, the union filed an unfair practice charge against the district with the Pub-

lic Employment Relations Board, accusing the district of renegeing on the salary deal. "What we know is, when we left that night, there was a tentative agreement," said union president Gail Mendes. Superintendent Bruce Harter explained the district's point of view, stating "there was a proposal that was going to be brought to the board and not a tentative agreement." He said that "there was never anything written up and nothing to sign."

District officials maintain that greatly increased health care and other costs prevent them from approving a significant raise for the teachers and that, after crunching the numbers, they determined that they could not afford the 6 percent boost. The last time West Contra Costa teachers received a raise was in January 2006, when their salaries increased by 3 percent. According

to the California Teachers Association, the teachers' pay schedules are near the bottom of area school districts.

The strike vote took place over two days, on June 11 and 12. About 82 percent of the union's 2,000 members participated in the vote, with more than 92 percent supporting a strike. Under state law, the teachers cannot strike until the conclusion of the factfinding process, authorized mid-June. Factfinding usually takes about two months, meaning that, if there is a strike, it would not take place until the fall.

In another move to bring pressure on the district, the union announced that it would not support a renewal of the parcel tax when it comes up for a vote this month, until the teachers get more money. If approved, the tax would raise about \$14 million a year for eight years starting in 2009. The district relies on this money to help pay for teaching materials, athletics, textbooks, library services, maintaining smaller class sizes, and other expenditures. *

Oakland Inches Back Toward Local Control

Oakland Unified School District's four-year-long period under total state control may be winding down, but the way in which the end-game will be played out is not at all clear. A bill pending in the state legislature would require the state to return local control to OUSD if the district meets certain cri-

teria. But opponents of the bill, including State Superintendent of Public Instruction Jack O'Connell, maintain the state should decide when the district is ready to take back the reins.

The state assumed control over the district in the summer of 2003, when it issued an emergency loan for \$100 mil-

lion. From that time until just recently, the district has been run by an administrator appointed by O'Connell, and the elected school board has acted as an unpaid advisory board. (For a complete discussion of the state's takeover of the district, see *CPER* No. 158, pp. 37-40, and *CPER* No. 160, p. 35.) Currently, O'Connell has sole discretion over who runs the school district.

A.B. 45 would require the state to return local control.

A.B. 45, introduced by Assembly Member Sandre Swanson (D-Oakland), already has been passed by the Assembly and was pending before the Senate Committee on Education at the time *CPER* went to press. The bill would require the County Office of Fiscal Crisis and Management Assistance Team to prepare an annual report on the district's assessment and recovery plan, starting March 1, 2008, and continuing until authority for all operational areas has been returned to the district's governing board. By July 1, the State Superintendent would be required to return to the district authority over each operational area for which FCMAT's annual progress report recommends resumption of control. The bill also provides that the school board shall begin to receive full compensation once au-

thority for one or more operational areas is restored.

In a move perhaps designed to derail the pending legislation, O'Connell restored control over the operational area of "community relations and governance" to the local school board in July. FCMAT gave the district a passing grade in this area in 2005, but O'Connell was not willing to restore this area of authority to the district at that time. Having regained this control, board members now can decide issues related to communication with parents and other members of the community. They also will be able to create policy to deal with problems like declining enrollment. Board members also will begin to receive their \$700-a-month stipend.

O'Connell will maintain control over pupil achievement, financial management, facilities, and personnel until he determines the district is ready to resume its authority over those areas as well, or until the legislature wrests control by passage of A.B. 45. *

Higher Education

CSU Academic Student Employees Battle for Fee Waivers

Student fees, not wages, may cause graduate student teachers, tutors, and graders to strike at the California State University this fall. The employees, represented by United Auto Workers Local 4123, believe they were entitled to waivers of student fees last year. The university, however, invoked a contract clause granting it the discretion to determine whether it had enough funding to give fee waivers to its 6,000 academic student employees. The union has filed an unfair practice charge claiming the university did not disclose available funding in a factfinding process that began after fee negotiations stalled last fall.

Contract Contingency

UAW entered its first contract with CSU in May 2005, about nine months after the university agreed on an appropriate unit of student employees. (See story in *CPER* No. 172, at pp. 69-70.) The union's first step toward obtaining a waiver of student fees was to secure an agreement in principle that waivers could be granted to student employees who teach, tutor, or grade papers at least 25 percent time, or 160 hours per semester, or 110 hours per quarter.

The contract did not guarantee fee waivers, however. Instead, CSU won a clause that made the implementation of fee waivers in 2006-07 "subject to the administration's determination that it has received funding sufficient to implement the cost of [the] benefit." If the university decided it could not grant fee waivers, UAW had no right to grieve the decision. The remedy was to "re-open bargaining on whether to provide fee waivers in fiscal year 2006-07."

*Academic student
employees had received
no across-the-board
wage increases from
1991 to 2005.*

To place pressure on the university when it made its decision, the union conducted a strike vote in May 2006, before it had any idea whether CSU would grant the benefit. An overwhelming 97 percent of the union members voted in favor of a strike if the university failed to relieve the fee obligation. Nevertheless, last July, the university

notified the union that it would not waive student fees for the employees.

The union was surprised because the state budget provided CSU with millions of dollars more than was anticipated in May 2005. In addition, the union pointed out, the university had publicly declared it was going to address the discrepancies between its salaries and those paid in the national market. Academic student employees had received no across-the-board wage increases from 1991 to 2005. In that time, undergraduate fees had increased more than 300 percent. Since 2001, graduate student fees had risen 95 percent. Providing a fee waiver, asserted the union, would help bring CSU's academic student employees up to the level of their unionized peers nationwide.

In late-September 2006, the parties reached impasse. Mediation was unsuccessful, and the parties proceeded to factfinding in April.

Factfinding Report

The factfinding panel recommended against implementation of a fee waiver in 2006-07. The neutral chair of the panel based the recommendation on the price tag for the waiver — \$14.6 million in lost fees to CSU. A benefit worth that amount would represent a 42 percent increase in compensation for the bargaining unit. No other unit at CSU had bargained such a large increase, explained the chair, and the other unions surely would demand similarly huge increases when bargaining the next contract.

Nor does any other bargaining unit at CSU receive a comparable fee waiver, the panel observed. In fact, employees in other units are eligible for fee waivers for two classes or six units, whichever is greater, each term.

The chair's opinion acknowledged that academic student employees must be students as a condition of their employment. Even though most unit members barely make a living wage af-

Employees in other units are eligible for waivers of some fees.

ter they pay fees, the chair found that this equitable consideration did not outweigh CSU's arguments that the benefit would amount to a much greater increase in compensation than other units receive.

UAW argued that other universities with unionized student teachers provide fee waivers. But the chair of the panel did not find the comparisons persuasive. There was evidence from only five other unionized student employee units nationwide, he said, and the University of California is not comparable since its academic student employees are doctoral students in a research environment.

In his dissent to the report, the factfinder selected by the union asserted

that the median salary for 97 percent of unit members is \$10,000 below the cost of attending CSU. Because the union has no control over the skyrocketing fees, there needs to be a full waiver of fees so that economic gains from collective bargaining are not swallowed up by fee hikes, he argued. The fact that other units do not have full fee-waiver benefits should not be persuasive, he countered, because no other employees are required to be students as a condition of their employment. Besides, he pointed out, academic student employees do not earn pensions like the other employees do.

The union-selected factfinder also took issue with the panel's dismissal of U.C. as a comparator institution. While U.C.'s academic student employees may be doctoral students in a research environment, the work that the university compensates them for is the same — teaching, tutoring, and grading, not research, he emphasized.

Unfair Practice Charged

After the report was issued to the parties, they began negotiations again. The union found "discrepancies" between the amount of funding that it asserts was budgeted for the UAW unit in 2005-06, and the actual compensation increase for the unit. In his dissent to the factfinding report, the union panelist charged that CSU had failed to disclose relevant financial information which would have changed the factfinder's view of the fee-waiver dispute. The \$4.3 million that CSU bud-

geted, but did not spend, on unit compensation increases, amounts to almost one-half of the cost of the fee waiver benefit it demanded for 2006-07, the union representative observed.

The university dismissed the union's contentions as false. CSU does not budget bargaining unit salaries, it contended, although its budget office calculates estimated compensation and compensation pool amounts "for the purpose of internal guidance to its col-

Cost estimates are not promises, university representative Gail Brooks pointed out.

lective bargaining representatives." The cost estimates are not promises, university representative Gail Brooks pointed out in her response to the union-selected factfinder.

In addition, she asserted, the estimate of compensation for 2005-06 has "nothing to do with" the fee-waiver benefit in 2006-07. The neutral factfinder's recommendation was not based on funding, but on the "unacceptably large percentage increase" to the compensation base for the unit, she pointed out.

In early May, UAW filed a charge with the Public Employment Relations Board, asserting that the university participated in bad faith in impasse procedures.

Although UAW local president James Banks emphasized that the issue needs to be resolved before academic student employees pay fees for the fall term, the parties are no longer in nego-

tiations on the issue. If a settlement is not reached, there could be a job action once school starts. Fees are rising 10 percent in the fall, but wages for the unit are increasing only 4 percent. *

Scrutiny of U.C. Retirement System Continues

It may be “innuendo, old newspaper clippings and unproved allegations by disgruntled former employees” to the University of California Office of the President, but a recent article about outsourcing investment management of the U.C. Retirement System has fanned the anger of university employees. U.C. is planning to resume retirement contributions to the system while salaries are still below market rates, and employees are outraged that a change in the investment philosophy of the U.C. regents in 2000 may have contributed to the U.C. Retirement Plan’s dwindling health. Union calls for joint governance of the UCRP and concerns about unreliable evaluations of the system have caught the attention of state legislators.

Questions Raised

Lingering questions concerning the regents’ decisions in 1999 through 2002 to involve outside consultants in the management of the UCRP portfolio resurfaced in a weekly San Francisco Bay Area newspaper, the *East Bay Express*, this spring. At the center of the May 9 article is Regent Gerald Parsky,

who also sits on the governor’s Public Employee Post-Employment Benefits Commission. He is also a major fundraiser for the Republican Party. Parsky was head of the Regents’ Investments Committee in 1999, when the committee decided to contract with Wilshire Associates to analyze the retirement fund’s performance. At the time, the fund had far outperformed one of its benchmarks, the Capital Resource Advisors Balanced Fund Median, but had underperformed the Standard and Poor’s 500 index since 1994. The total funded ratio of the plan had climbed to 144 percent.

The *East Bay Express* article repeated allegations of suspicious timing between Wilshire Associates’ contributions to the Republican Party and contracts it had received in 1999 and 2000 to analyze the U.C. pension fund and then handle part of its portfolio. At the same time, the article noted, the regents were taking actions that eventually forced out the U.C. treasurer, who had 29 years’ tenure. At the time she left, the UCRP fund had an annual return of 12.8 percent while the S&P 500 return had dwindled to 7.3 percent. The

funded ratio was 153 percent. Two years later, the regents moved management of its entire portfolio to external fund managers. Since then, the *Express* charged, the UCRP has underperformed other pension portfolios and paid millions — \$32 million last year — to private fund managers.

Immediately the next day, Michael Reese, associate vice president at the U.C. Office of the President, wrote a letter to the editor denying it had farmed out control of the pension fund to consultants. “Like a majority of large institutional funds, U.C. uses manage-

He complained about the newspaper’s ‘character assassination’ of Parsky.

ment firms with greater expertise in specific investment areas than could be employed in-house,” he asserted, but the university maintains control of the investment decisions. He complained about the newspaper’s “character assassination” of Parsky. And he claimed that the regents’ decision to change its investment policies had led to \$2.7 billion more in UCRP assets than if the assets had been invested in “a traditional 60/40 S&P 500/Lehman Aggregate mix.” It is not clear from his letter, or from the university’s fact sheet of corrections to the *Express* article, that the

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The Guide provides an up-to-date and easy-to-use description of the rights and obligations conferred by the act that governs collective bargaining at the University of California and the California State University systems.

Included is the full text of the act, plus an easy-to-read explanation of how the law works, its history, and how it fits in with other labor relations laws. The Guide explains the enforcement procedures of the Public Employment Relations Board (PERB), analyzes all important PERB decisions and court cases (arranged by topic) that interpret and apply the law, and contains a useful index, glossary of terms, and table of cases.

Portable, readable, and affordable, the guide is valuable as both a current source of information and a training tool — for administrators, human resource and labor relations personnel, faculty, and union representatives and their members.

By Carol Vendrillo, Ritu Ahuja and Carolyn Leary
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traditional mix is what the UCRP fund had in the 1990s. The Lehman Aggregate index is a fixed income benchmark. The U.C. fund's holdings of fixed income investments actually was less than 35 percent, and as low as 22 percent in the late 1990s.

The university's Office of Strategic Communications issued a fact sheet denying political considerations when the decisions to hire outside consultants were made. It claimed the decisions conformed to "the national industry norm of institutional external equity management." Wilshire Associates never was hired to implement its own recommendations, U.C. countered, and \$32 million in fees, once "offset by income from securities lending and commission recapture," really consti-

tutes less than 1 percent of the total \$71 billion portfolio under external management.

Legislators Concerned

For several years, communications from the unions that represent many of U.C.'s employees have grumbled about the regents' change in investment policy. That sentiment is based in part on the analyses of a retired U.C. Berkeley physics professor, Charles Schwartz, who claims that the pension fund has not performed as well as other institutional funds and has not met its benchmarks since the decisions in the early 2000s. Since 1990, neither the university nor its employees have contributed to the retirement fund because of a large surplus of assets over liabilities, but

U.C. notified employees that contributions would be necessary again soon. (See story in *CPER* No. 181, pp. 42-45.) On June 30, 2006, the total funded ratio was only 104 percent. Now that the university is demanding employee contributions that may reach 5 to 8 percent of pay, employees are suspicious that the downturn in the fund's health is due to mismanagement rather than demographics of employees and performance of the stock market.

In December, the U.C. Union Coalition, which is negotiating over the resumption of employee pension contributions, demanded joint governance of the UCRP. It argued that the presence of employees on the board of the California Public Employees Retirement System had led to higher rates of

return in the CalPERS fund than in the U.C. system. CalPERS' annual rates of return between 2001-02 and 2005-06 add up to 39.7 percent, whereas UCRP returns over the same period sum to 28.1 percent. In addition, the unions charged that they had uncovered potential conflicts of interest concerning the regents' UCRP Advisory Board. Two members have connections to the plan's outside investment managers.

SCR 52 puts pressure on U.C. to include faculty and staff representatives as fund 'trustees.'

The unions' concerns moved Senator Leland Yee (D-San Francisco) to propose Senate Concurrent Resolution 52, which would urge U.C. to implement shared governance of the UCRP. Clauses of the resolution recite how jointly governed funds generally have been better managed than unilaterally managed pension funds and how U.C. is determined to restart contributions even while employee salaries lag behind market rates. SCR 52 also claims that U.C. has been making decisions without appropriate actuarial studies and has refused to provide data so that independent actuaries could evaluate the plan. The measure puts pressure on

U.C. to include faculty and staff representatives as "trustees," similar to CalPERS.

The Senate analysis of the measure notes, however, that the CalPERS board is separate from the state employer, whereas the U.C. regents fill roles as both the employer and the retirement system board. Although the regents have a nine-member UCRP Advisory Board that includes two faculty members and two staff members, the regents themselves make final decisions. Because the California Constitution does not provide for staff representatives on the Board of Regents, Senate staff are recommending greater employee representation and power for the UCRP Advisory Board, or at least a requirement that U.C. come up with its own plan for better employee representation.

Investments Defended

In mid-July, the university published a pamphlet proclaiming the health and integrity of the UCRP. Its

annual return as of May 31 — using unaudited numbers — is 19.7 percent, and its ratio of assets to obligations is 104 percent, compared to CalPERS ratio of 87 percent, it announced. The regents have ethical guidelines that prevent advisory board members from participating in discussions when a decision might affect their personal interests, U.C. assured the public. The plan's obligations have grown because the number of retirees has increased nearly tenfold while the number of employees has only doubled, it explains. The university asserted it is assessing the governance structures of other public pension funds nationwide, and is looking at the levels of employee representation and how employees participate in fund governance. And, since it received no funding from the state for retirement contributions and has not reached agreement with any unions to restart employee contributions, no contributions were begun July 1, as planned. *

U.C. Increases Wages for Custodians and Other Low-Paid Employees

Agreements reached by the University of California with two more unions will bring pay increases for low-wage workers. Originally, the increases were partially tied to the university's demand that three unions agree to reinstate employee contributions to the U.C. Retirement System. But, in early February, the university separated negotia-

tions on those two issues. The unions were concerned that new contributions along with general increases in the cost of living would be equivalent to a pay cut if raises were not given to counteract these burdens. Also, the unions argued that U.C.'s wages were lower than salaries available for comparable jobs in the labor market.

Last year, the Coalition of University Employees became the first of the three unions to settle with the university. The bargaining resulted in sliding scale-salary increases, ranging from .75 to 1.5 percent, for 11,800 clerical employees who earned less than \$40,000 a year. (See story in *CPER* No.

The university did not budge from its stance, and the union accepted its offer in late June.

184, pp. 70-73). Soon after reaching the agreement with CUE, U.C. declared that it would provide 4,000 unrepresented employees at the university and its medical centers with a similar wage increase program.

The other two unions engaged in the bargaining, University Professional and Technical Employees and American Federation of State, County and Municipal Employees, refused to settle. They accused the university of making unacceptably low offers and alleged that the state had provided more funding for employee raises than the university was offering.

Agreement with UPTE

UPTE asserted that the university had received a 4 percent increase in its base budget, instead of the expected 3

percent, but that it has refused to pass along the extra money to fund employee raises. The union argued that \$2.9 million should be used to finance a 4 percent salary increase for UPTE-represented unit members, as opposed to \$1.2 million to fund a 3 percent boost. 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, and that increases for non-represented employees and CUE will come from a redirect of existing sources.

The university did not budge from its stance, and the union accepted its offer in late June. The total cost to U.C. will be roughly \$1.2 million. The agreement assures raises for approximately 5,000 university research support and technical employees who work in classifications that pay on average less than \$40,000 a year. Retroactive to April 1, 2007, employees represented by UPTE who work in job titles that are paid less than \$40,000 a year on average will receive salary increases of .5 percent for those earning between \$35,001 and \$40,000, and a .95 percent increase for those earning between \$34,501 and \$35,500. Employees earning less than \$34,500 will get a 1.95 percent hike.

Agreement with AFSCME

AFSCME, which has been trying to boost custodial salaries for two years, expressed concern that an extra \$8.9 million provided by the legislature was not passed along for its intended pur-

pose. The union argued that the additional money was meant for only two purposes: hiring contract groundskeepers at U.C. Irvine, and raises for custodians at U.C. Santa Cruz, Santa Barbara, and Berkeley, whose wages all were allegedly 25 percent below those of nearby community college custodians.

Custodians at U.C. Berkeley, Santa Barbara, and Santa Cruz will get an initial wage hike of \$1.25 an hour.

Last year, the custodian wage issue caused a disruption at graduation ceremonies at the U.C. Berkeley campus. (See story in *CPER* No. 178, pp. 54-55.) Hoping to avoid similar disturbances this year, the university proposed that former State Senator John Burton mediate the dispute. Burton was unable to broker a deal, but he issued a mediator's proposal that suggested terms nearly identical to those eventually accepted by the parties. Right before settlement, the wage dispute gained media attention because actor Danny Glover, in support of the union's demand for equal pay, canceled his keynote address at U.C. Berkeley's commencement.

In May, AFSMCE and the university agreed on a settlement based on the recommendations made by Burton. Custodians at U.C. Berkeley, Santa Barbara, and Santa Cruz will get an initial wage hike of \$1.25 an hour. This raise is retroactive to April and will be additionally increased by \$.50 an hour in October. The agreement further stipulates that at U.C. Irvine, outsourced groundskeepers will be brought on as full U.C. employees effective July 1, 2007, and custodians at other U.C. campuses will receive a \$.50 an hour raise.

Finally, every low-wage worker represented by AFSCME Local 3299 will receive a wage increase of 2 percent for those making under \$30,000 a year, a 1 percent increase for those making between \$30,000 and \$35,000 a year, and a .5 percent increase for those making between \$35,000 and \$40,000 a year. The agreement affects approximately 14,300 U.C. service and patient-care employees, and will cost the university roughly \$8.9 million. *

State Employment

Arbitrator Cannot Reform Contract That Has Been Approved by Legislature

Although an arbitrator had evidence that the memorandum of understanding between the Department of Personnel Administration and the California Correctional Peace Officers Association did not reflect the intent of the parties, she exceeded her powers under the Dills Act when she rewrote the contract to match the parties' intent, the Court of Appeal has held in a case of first impression. The court explained that since the act requires legislative approval of any terms requiring expenditure of funds, and the arbitrator's reformation of the contract had significant fiscal consequences, her award violated "the important public policy of legislative oversight of employee contracts." But the arbitrator did not exceed her powers under the collective bargaining agreement, the court found in an unpublished section of the opinion.

Union Leave Disputed

The CCPOA contract permits employees to donate hours of paid leave to a released time bank that other employees may use to conduct union business. Prior contracts had capped the released time bank at 10,000 hours. A 10,000-hour cap was mentioned in Section 10.13 of the contract in subparts A

and B. Section 10.13(A) limited the timing of donations, capped donations and use of released time to 10,000 hours "during the contract year," and prescribed the proportion of time to be used for Department of Corrections unit members and for California Youth Authority members. In negotiations in 2001, CCPOA proposed changes to subpart A that removed reference to the 10,000-hour cap, but did not propose a change to subpart B. Still in the MOU was subpart B, which read, "In no case shall CCPOA accumulate or use more than ten thousand (10,000) CTO and/or vacation hours from the bank during the term of this MOU." The duration of the contract was July 2001, through July 2, 2006.

The MOU was submitted to the legislature for approval as required by the Dills Act. The enrolled bill report stated that the contract would provide a "mutually agreed upon amount of employee released time annually," and did not mention elimination of the 10,000 cap.

In May 2005, DPA notified the union that it had used 122,387 hours from the released time bank. DPA announced that any further request for donations or paid released time would

be denied. Any employee on union leave would be required to return to state employment by June 6, 2005. CCPOA demanded arbitration.

Mutual Mistake Found

CCPOA asserted that the language of subpart B remained in the MOU due to scrivener's error. The union's chief negotiator testified that DPA had agreed with CCPOA in a sideletter in 1997, when no contract was in effect, that it would "not enforce the caps of 10,000, 5,800 (CDC) and 4,200, (CYA)." The sideletter reflected DPA's practice at that time, which was to per-

The enrolled bill report did not mention elimination of the 10,000-hour cap.

mit accumulation of more than 10,000 hours in the leave bank. The chief negotiator showed the sideletter to DPA negotiators and made a written proposal to delete the limits on donations and the use of leave in subpart A. He testified the parties intended to incorporate the terms of the sideletter into the MOU, and that after an off-the-record discussion, they signed a tentative agreement. He did not realize that the cap appeared twice in the contract, and failed to propose the deletion from subpart B.

DPA argued at the arbitration that the sideletter had been superseded and that it had agreed only to eliminate the limits on how the hours could be divided between CYA and CDC. However, DPA's chief negotiator testified that the parties discussed removing the cap and that she agreed to the demand. The discussion was not reflected in the bargaining notes, but she asserted that removal of the cap reflected the parties' agreement.

The arbitrator concluded that the parties agreed, off the record but at the bargaining table, to remove the cap. She pointed out that the chief negotiators from both sides had testified to their intent to remove the cap and that removal of the cap was consistent with their sideletter agreement and prior practice. She found that the agreement was inaccurately written due to mutual mistake or inadvertence.

The award deleted the language about the 10,000-hour cap from the contract. The arbitrator ordered the parties to return to the conditions existing before DPA issued the May 2005 letter curtailing use of further released time. She also required DPA to reimburse the union for out-of-pocket costs associated with the limits on released time.

DPA petitioned the trial court to vacate the award. It argued that the arbitrator had exceeded her authority by changing the MOU based on an off-the-record discussion. The department also argued that the decision violated public policy because it enforced an agreement that was never submitted to the legislature as required by the Dills Act.

The union's contention that the arbitrator had properly exercised her authority failed. The trial court found that the MOU stated it expressed the entire agreement and prohibited the arbitra-

tor from altering the agreement. By considering parol evidence — evidence of oral agreements or evidence other than the contract itself — the arbitrator had exceeded her powers under the MOU, it said. The court also declined to return the parties to the status agreed to in the 1997 sideletter because the legislature had approved the later MOU. The court vacated the award, and CCPOA appealed.

Dills Act Violated

The appellate court emphasized its understanding that courts can overturn an arbitration award only in narrow circumstances. Even though a court cannot review an award for errors of fact or law, courts "must vacate an arbitrator's award when it violates a party's statutory rights or otherwise violates a well-defined public policy."

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**Pocket Guide to the
Ralph C. Dills
Act**

Last published in 1996, the new edition 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 new section on PERB procedures, including recent reversals in pre-arbitration deferral law.

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

By Fred D'Orazio, Kristin Rosi, and Howard Schwartz
2nd edition (2006) • \$12 • <http://cper.berkeley.edu>

The appellate court agreed with the trial court's ruling, although not its reasoning, and affirmed the judgment vacating the arbitration award. The court noted that CCPOA addressed the trial court's basis for decision (lack of contractual authority), but provided no "reasoned response" to the alternate theory that the award contravened the Dills Act. Therefore, the court said, CCPOA forfeited any claim that the Dills Act was not violated.

The court presumed that lawmakers were aware of the terms of the prior MOU.

Despite the union's forfeiture of the claim, the court explained why DPA's Dills Act argument was correct. The act requires legislative approval of MOU provisions that entail expenditure of funds before the provisions become effective. Prior case law already has established that the legislature intended to retain "ultimate authority over state employees' wages, hours, and working conditions," the court said, quoting *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155.

As many contracts do, the MOU stated that the arbitrator had "no authority to add to, delete, or alter any provisions of this MOU." That section of the

contract not only protects the parties, observed the court, but also assures the legislature that the MOU is the parties' contract, that there are no unknown agreements, and that the MOU will not be changed afterward.

What the legislature approved was the determining factor for the court, and predictably, CCPOA and DPA argued that the legislature was aware of different things when it approved the MOU. DPA contended that the legislature approved the entire MOU containing the 10,000-hour cap. The union asserted that the legislature reviewed only the alterations to the prior MOU, and that those alterations showed the cap was eliminated.

The court commented that it is "bad practice" for the parties to submit only part of an agreement for legislative approval, especially since courts presume that the legislature has performed its duties correctly and reviewed all the provisions it is responsible for approving. Even though the court said that it appeared the legislature did not review the entire MOU, it rejected CCPOA's argument that the legislature approved elimination of the cap on union leave.

The court presumed that lawmakers were aware of the terms of the prior MOU, and if so, could have understood that the cap was eliminated from subpart A because it duplicated the cap in subpart B. It could have had this understanding of the contract even if it did not review the new MOU in its entirety, the court reasoned.

The court also rejected CCPOA's argument that the presence or absence of a cap had little fiscal importance. Whether there is a cap on leave usage has significant fiscal consequences, the court countered. Costs for paid leave are predictable when there is a cap.

The court held that the arbitrator's reformation of the written MOU violated the Dills Act and the public policy of ensuring that the legislature oversees employee contracts. Although that was

The arbitrator's alteration of the MOU did not exceed contractual limits on her authority.

a sufficient basis to vacate the award, the court also addressed CCPOA's argument that the trial court's reason for ruling in favor of DPA was erroneous.

Parol Evidence Appropriate

In an unpublished section of the opinion, the court found that the arbitrator's alteration of the MOU did not exceed contractual limits on her authority. The court recognized that the parties have the right to agree to restrict an arbitrator's authority, and that the MOU prohibited arbitrators from deleting any of its provisions. Because the arbitrator found a mutual mistake in the

contract, however, the arbitrator did not violate the contract's limit on her power, the court concluded.

DPA argued that deletion of the cap in subpart B resulted when the arbitrator ignored a rule which prohibits consideration of parole evidence when the terms of a written contract are clear and unambiguous. The rule applies when the contract states that it contains all of the parties' agreements on the subjects of the contract and that all prior agreements are superseded.

The parole evidence rule does not apply when the writing contains a mistake.

The court explained that the parole evidence rule does not apply when a party claims that the writing contains a mistake. Relying on *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, the court instructed that when the written contract does not express the intent of the parties due to a mutual mistake, the erroneous parts of the writing are to be disregarded and the wording of the written contract reformed to express the parties' intent at the time they entered into the agreement.

DPA argued that reformation of the contract was prohibited by the language preventing alteration of the MOU. The

court found that numerous court opinions which DPA relied on were not similar. Instead, it agreed with arbitral precedent that reformation of a contract to reflect the parties' true intent is not an alteration of the contract since the result is to give effect to the parties' original agreement.

The court's decision that the arbitrator did not exceed the contractual

limitations on her powers did not save the award from violating the Dills Act. Therefore, the Court of Appeal affirmed the trial court's judgment vacating the award. *Department of Personnel Administration v. California Correctional Peace Officers Assn.* [6-29-07] C051636 [3d Dist.] ___ Cal.App.4th ___, 2007 DJDAR 9959. *

State Forced to Raise Pay in Mental Hospitals

Court orders to hike pay in the prisons again have led to raises for employees in the Department of Mental Health. After District Court Judge Lawrence Karlton ordered a December raise for mental health workers in the prisons, the state's mental hospitals suffered an exodus of staff to the prisons. Since some mentally ill prisoners are housed in mental hospitals, the judge ordered the state to present a plan to raise wages of DMH employees who treat inmates. DMH responded with a proposal to raise the salaries of all its employees in seven mental health occupations.

Staffing Crisis

Judge Karlton presides over *Coleman v. Schwarzenegger*, a case from the mid-1990s that challenged the adequacy of care for mentally ill inmates in California prisons. In 1995, the court ruled that the state prison system's treatment of the mentally ill was so inadequate that it was unconstitutional. To

oversee remedial efforts, the court appointed a special master, who identified understaffing as one of the major deficiencies in the system.

Last December, the special master reported that the number of vacant psychiatrist positions in the prisons had been climbing since 2005, despite temporary recruitment and retention bonuses which had been ordered in some prisons to attract employees. To combat high vacancy rates in psychiatrist and other mental health positions, the court ordered huge boosts in their pay ranges. (See story in *CPER* No. 182, pp. 58-59.) The pay hikes went to psychiatrists, psychologists, social workers, and other mental health employees in the California Department of Corrections and Rehabilitation and to some DMH staff working in programs run by DMH in two prisons — the California Medical Facility and the Salinas Valley State Prison.

The pressure to raise salaries for the same mental health classifications

in the state hospitals began immediately. The California Association of Psychiatric Technicians was not happy to have its members in the prisons paid more than ones working in the hospitals and developmental centers. Its first priority in reopener bargaining, which began in February, was to achieve the same raises for psych techs in DMH and the Department of Developmental Services. And the union's prediction that, without raises, mental health workers would transfer in droves to the prisons was borne out.

At Atascadero State Hospital, only 15 out of 46 psychiatrist positions were filled.

By early February, the Prison Law Office had informed the court that inmates who were being treated at the state's mental hospitals were now suffering from staffing shortages caused in part by the exodus of mental health employees to higher-paying correctional positions. Atascadero State Hospital capped its population and refused to admit more patients because only 15 out of 46 psychiatrist positions were filled. Karlton gave the state 60 days to present a plan to increase staffing at the four hospitals that treated inmates for mental illness — Napa, Atascadero, Patton, and Coalinga, a new hospital

that is not operating at full capacity because of the dearth of clinical employees.

Before the plan was due, the governor announced that the state temporarily would increase pay on April 1 for DMH psychiatrists and other psychiatrists in non-corrections positions. But the Union of American Physicians and Dentists opposed the governor's plan because the new pay scales would have been 5 percent less than CDCR psychiatrists' pay ranges.

Other unions representing mental health workers outside the prisons also were battling the administration in negotiations to garner the same salaries for all state employees in the classifications, whether or not they worked at prisons. Senior psychologists' salaries also would have been boosted to an amount 5 percent less than pay of psychologists at the prisons, but the Department of Personnel Administration told the American Federation of State, County and Municipal Employees it would raise pay for other psychologists, social workers, and recreational therapists only to an amount 18 percent less than the pay of their counterparts in the prisons. CAPT heard the same proposal for psychiatric technicians. CAPT organized pickets at some mental hospitals. Signs read, "DMH v. CDCR: Same Patients, Same Danger, Same Duties, Same Psychiatric Technicians. Why Not the Same Pay?"

At the April hearing on staffing at the mental hospitals that house prisoners, one of the state's proposals involved

pay raises for existing staff but did not address pay for new hires. Judge Karlton was not satisfied. He extended the deadline for the state to present a better plan. In May, he ordered pay parity for psychiatrists, psychologists, so-

'Isolating clinicians that treat only CDCR inmates at DMH facilities is not possible.'

cial workers, and psychiatric technicians who work at the four mental hospitals with prison inmates, but he gave the state another 30 days to draft a detailed implementation plan and report how it could lift the cap on patient admissions to the Atascadero hospital.

DMH Plan

Rather than agree to full parity for the psychiatrists, psychologists, social workers, and psychiatric technicians at the four mental hospitals that house prisoners, DMH proposed salaries that were 5 percent below prison pay for all DMH employees in seven occupations, whether or not they work with *Coleman* class members or at hospitals that had no prisoners. The medical directors, rehabilitation therapists, and unit supervisors would receive the same salary treatment as psychiatrists, social

workers, psychologists, and psych techs. "Isolating clinicians that treat only CDCR inmates at DMH facilities is not possible," the state asserted. Not only are patients in 50-bed dormitories, the department explained, hospitals need to be able to move clinicians from one unit to another, without regard to whether they are treating prisoners under the court's watch. There-

The state will contract with a recruitment firm to fill DMH's 1,860 vacant positions.

fore, it wanted to raise the pay of all the clinicians, but pay a little less than at the prisons. The 5 percent differential would prevent a "bidding war," DMH spokesperson Kirsten Deichert told *CPER*, and it would not be enough to cause employees to leave one institution for another.

The state told the court that DPA would need 30 to 60 days to implement the plan, since meet-and-confer sessions with the unions would be required. The state expressed its dissatisfaction with the court order because it would impede the effectiveness of labor negotiations. It protested:

The imposition of an order that includes higher salary levels that ignores and supersedes a salary package already agreed to by the state

and employee organization negotiators distorts the negotiation process.

The state also told the court that it would contract with a recruitment firm to help fill the department's 1,860 vacant positions. DMH would ask the State Personnel Board to compress the six existing hiring ranks to three ranks to speed up the hiring process. The state currently may consider only those in the top three ranks when hiring. The department would apply to participate in the federal loan repayment program so it could offer applicants school loan repayments while they work at the three most understaffed hospitals. DMH also

told the court it would use contractual mental health workers to meet staff shortages in the short term and employ interns as a recruitment tool.

The court accepted the state's proposal to raise the pay in the seven occupations to an amount 5 percent less than the pay in CDCR facilities. In a footnote, however, Judge Karlton explained his mandate extended only to those employees treating *Coleman* class members. Focusing his attention on the needs of the mentally ill inmates, he ordered the state to submit a plan to increase dramatically the number of beds available at the Atascadero facility. *

First Steps Taken to Modernize State Civil Service Hiring

The aging state workforce is facing a crisis, but the Schwarzenegger administration has a plan. A task force thinks modernization can reduce the hiring and selection process to about 60 days, and make the state an attractive employer. The California Association of Professional Scientists and other unions are cautiously supportive of the modernization project.

Budget Request

Over one-fifth of the state's managers and supervisors are old enough to retire immediately, and another 20 to 25 percent will be eligible to retire within the next five years. Even more dramatic, 35 percent of senior-execu-

tive employees holding career-executive assignments could retire now, and another 30 percent will be retirement age within the next five years. The state will need to hire and promote tens of thousands of employees over the next few years to replace retiring managers. The California Performance Review warned in July 2004 that the state needed a workforce plan. It suggested the establishment of a statewide recruiting program that would spend significant efforts on attracting college students. It also recommended improvements in hiring methods, and automation of applications and examinations.

In his January budget summary, the governor described the current civil

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**Pocket Guide to
Workplace
Rights of
Public
Employees**

In concise and understandable language, this compact edition explains the many rights afforded public employees in California — state, local government, and school employees — and in the federal workforce. It provides an overview of the rights that have been granted to individual employees by the United States and California Constitutions and by a variety of statutes, including the Americans With Disabilities Act and the Family and Medical Leave Act of 1993, and anti-discrimination laws, such as Title VII of the federal civil rights act and the state Fair Employment and Housing Act.

Part I covers personal rights that public employees enjoy, such as free speech, equal protection, due process, privacy, and protections against wrongful termination. Part II explains the rights of individual employees who work where there is a union, such as the right to participate (or not to participate) in a union and the union's duty to fairly represent all employees, regardless of union membership or political activity.

By Bonnie Bogue, Carol Vendrillo and Liz Joffe • 2nd edition (2005) • \$12

<http://cper.berkeley.edu>

service system as “cumbersome and difficult to administer.” Vowing to reform the hiring process and employee compensation, he promised a plan and budget proposal by this spring. State employee unions generally were welcoming of the idea that the 4,200 classifications might be consolidated and employees could enjoy greater career growth. But they also were wary of the potential for outsourcing and cronyism if civil service protections were reduced. And they were concerned about the governor's assertion that “the salary and benefits that attracted the baby boomers may not be as attractive to a [different] generation,” which they read as code for another attack on defined benefit pensions.

A task force of 10 representatives from the Department of Personnel Administration, the State Personnel Board, the Department of Water Resources, and the Department of Social Services examined the weaknesses of the current process. The representatives came up with a recommendation to change the focus from a duties-based system to a competency-based system, and a strategy to reduce hiring timelines and improve hiring and performance outcomes. So far, the task force is looking at changing how jobs are viewed and incorporating technology into the human resources process, not outsourcing or altering retirement benefits.

In May, the legislature approved DPA's request for five new permanent positions, over \$2 million, and redirec-

tion of 70 current employees from other departments to work on the Human Resources Modernization Project. DPA is requesting another \$2.58 million for 2008-09 to continue the development and design of the new system.

Hiring Obstacles

The task force found that, for a job applicant, the current system requires a wait of six weeks to three years for a position. A prospective employee has difficulty identifying all the classifications for which he or she is qualified. There are over 200 scientist classifications and 30 attorney classifications, for example, based on the types of duties the employee in the position performs. A scientist looking for biologist positions could miss Agricultural Biologist

opportunities, for example. Most state jobs require the applicant to take an exam, which may not be offered for six months. Waiting for test results takes at least two weeks, and then the applicant must apply for a specific job, which usually requires an interview. The interviewing process may take another month. Many prospective employees will have found another job outside of state service long before they receive a job offer. State employees seeking promotions are sometimes ineligible to apply for vacancies because they have to wait for the appropriate examination to be given.

The database would accept applications on a continuous basis.

The task force envisions a largely automated process based on competencies, which would reduce the time an applicant waits to between 3 and 60 days. In a competency-based system, classifications would be based on skills, knowledge, and abilities needed for the job rather than the duties to be performed. Job searches would be simpler. Prospective hires would file online applications that outline competencies such as education, certifications, and experience. The database would accept applications on a continuous basis. A department with a vacancy could enter

the database to find candidates with the required skills and knowledge. If the department needed to test for specific competencies, such as writing ability or vocabulary, the examination could be taken online. Other competencies would be measured at an interview, where an applicant might be asked to complete an “in-basket” assignment. The most time-consuming aspect of the process would be scheduling interviews and conducting background checks.

This system also would improve the promotional process. A performance evaluation system based on levels of skills and other competencies, such as behaviors that indicate specific personal traits, could be used to make promotion decisions without repeating the examination process. Compensation would be based on employee contributions to the agency’s goals, self-development, and the marketplace, as well as length of job tenure. The system would encourage employee training.

Implementation Timeline

The first goal of the project is workforce planning. A newly hired executive project director and staff member will work with employees loaned from several other departments to analyze the workforce and determine where state government has the most labor needs. All departments will draft workforce plans.

Designing a new classification scheme will begin this fall and continue into next fall for a pilot occupational group. The task force will decide soon

whether the initial group should be scientists, attorneys, excluded employees, or information technology workers. By next summer, project participants will be formulating selection criteria and testing for the pilot occupational group, and will begin developing a compensation scheme that determines how an employee can gain a higher salary on a compensation grid.

In early 2009, the state will begin training its human relations staff and supervisors and managers on how to implement the competencies-based system. Meanwhile, application, testing, selection, evaluation, and market

DPA envisions hiring the first employees under the new system by July 2009.

compensation elements of the system will be automated. Debbie Endsley, chief deputy director of DPA, told *CPER* that the department envisions hiring the first employees under the new system by July 2009.

Union Involvement

CAPS Staff Director Chris Voight told *CPER* that the union supported DPA’s budget request for the modernization project. “The current system does not result in competitive hiring.

It does not allow for movement between departments or salary advancement.” The task force already has met with CAPS several times. The association agreed that the large number of classifications needs to be reduced, and it advocated for deep classifications so that employees could be promoted without taking examinations.

CAPS also voiced concerns about compensation of state employees. The state is unattractive as an employer, especially in fields like information technology, medicine, and science. “Cost

of living raises will not attract the next generation of scientists,” he emphasized. State scientists now either take supervisory jobs to increase their pay or they go elsewhere. “Scientists need a longer rank-and-file career path with high-enough salaries to keep them doing science,” says Voight.

The modernization task force is planning to meet with all the employee organizations this summer. Endsley told *CPER* the department will need the assistance of the unions to implement this program. *

well as managers and supervisors who are excluded from bargaining units, did not receive the 5 percent increase until July 2004. Pay was not boosted again for most non-law enforcement employees until 2006-07, when they received a 3.5 percent raise and a \$1,000 bonus. Under contracts that SEIU Local 1000 and other unions negotiated, most non-public safety employees received a 3.4 percent increase this July.

Like the raise for rank-and-file employees, the pay increase for appointed officials was 4 percent in 2000-01. But the 5 percent raise was delayed until December 2006, for those whose salaries were set by statute. While managers and supervisors were compensated with ex-

Elected and Appointed Officials’ Salaries Jump

After years of salary increases tethered to raises of rank-and-file state employees, officials in many high-level state positions are enjoying hefty pay boosts that dwarf the raises received by the state’s lower-level managers and supervisors. And the California Citizens Compensation Committee decided in June that elected officials should receive a small pay increase this winter, which will follow an 18 percent hike in December 2006. Excluded employees are hoping that the higher executive pay will make room for their salaries to rise.

Market Lags

Salaries for some appointed officials are set by statute, while others are determined by the Department of Personnel Administration. Since the early 1980s, raises for salaries set by statute

have been linked to the general salary increases that rank-and-file employees received. DPA generally granted to the other appointed employees increases that matched managers’ raises, which usually mirrored the increases bargained by unions representing civil service employees.

With the exception of law enforcement and public safety employees, most state employees received a 4 percent raise in 2000-01, and no further increases until a 5 percent raise that was scheduled for July 1, 2003. Because of the budget crisis at the time, the Davis administration negotiated a 12-month delay in that raise with some bargaining units, in return for extra personal leave days and other benefits. The employees in those bargaining units, as

The 5 percent raise was delayed until December 2006 for those whose salaries were set by statute.

tra personal-leave days, personal leave is meaningless to appointed officials who do not accrue paid leave.

Meanwhile, salaries of their peers in local and federal public entities were rising much faster. In June 2005, the state’s Little Hoover Commission reported that the \$131,412 annual salary of the director of the state’s Department of Finance, which oversaw a budget of

\$117.5 billion, lagged the salaries of some of his peers at the county level by as much as 40 percent. The comparable position at the County of Sacramento, which oversaw a budget of \$4.2 billion, paid \$163,728, and the County of Alameda, with an even smaller budget, paid \$218,982 annually. Senior managers in career executive assignments could earn no more than \$117,960, while senior executives in the federal service could be paid up to \$162,100.

Over the course of two years, the Little Hoover Commission, the California Performance Review, and the Excluded and Exempt Salary Setting Task Force recommended that DPA incorporate compensation surveys of other public entities into the process for determining excluded and exempt employees' salaries. (See story in *CPEP* No. 175, pp. 47-50.) They all suggested pay-for-performance plans, and the California Performance Review recommended lifting a statutory restriction that limited executive salaries to pay no higher than the governor's salary.

Legislation Lifts Ceiling

Last year, when the governor was looking for a new secretary for the Department of Corrections and Rehabilitation, he found that the \$131,000 annual salary for the position was an obstacle. The Department of Personnel Administration asked the legislature to pass a bill allowing the state to pay a higher salary for the corrections secretary, department spokesperson Lynelle Jolley told *CPEP*. Lawmakers went fur-

ther. In A.B. 2936 (Assembly Member Ridley-Thomas, D-Los Angeles), DPA gained the authority to raise salaries of those appointees whose salaries previously had been set by statute. The new law lists several factors that DPA is required to consider, such as the size and scope of the agency or department and the compensation paid to comparable positions in other public jurisdictions. And the legislation raised the salary

The new law raised the salary ceiling to 125 percent of the governor's salary.

ceiling to 125 percent of the governor's salary, which then was \$175,000.

DPA immediately used the new powers to raise the salary of the new corrections secretary, James Tilton, to \$225,000 last fall. The salary is comparable to that of the police chief of the City of Oakland, but lower than the pay of the chief law enforcement officers in the city and the county of Los Angeles, who are paid over \$250,000. And it is higher than the governor's salary, which Governor Schwarzenegger has declined. In December, the salary for his position rose to \$206,500, as a result of the deliberations of the California Citizens Compensation Commission. That commission, which was established by

initiative in 1990, meets annually to determine the compensation of the state's elected officials.

In 2000-01, the salaries of all elected officials rose 6 percent. But the commission did not vote to raise their salaries again until 2005-06, when it increased legislators' pay 12 percent. Last December, legislators received a 2 percent raise while elected officials' pay was boosted 18 percent. In June, the commission announced that all elected officials' pay will go up another 2.75 percent in December 2007, except for the salaries of the Attorney General and the Superintendent of Public Instruction, which will increase 5 percent to \$184,301. The governor's salary will be boosted to \$212,179.

In March, the department announced that the salaries of 49 appointees would be raised based on comparisons to the \$175,544 average maximum salary of comparable executive management positions in other California government agencies. The state's 10 agency secretaries other than Tilton are now paid \$175,000 annually, up from \$142,582, which was 81 percent of the average maximum salary of comparable positions. Directors of larger departments were placed on the bottom of a salary range that extends from \$142,965 to \$150,112. Other directors had their salaries raised from \$118,000 to \$136,156, but could earn as high as \$142,964. In those positions where there are salary ranges, an incumbent's salary can go up only 10 percent a year. Those in public health and safety agen-

cies enjoyed boosts to at least \$165,000. No new funds are authorized for the raises, which will come from departments' existing budgets.

ACSS Optimistic

"They finally raised our glass ceilings," responded Tim Behrens, president of the Association of California State Supervisors. Behrens was on the

Supervisors in many departments are earning only 5 percent more than those they supervise.

The boost would widen the spread between the salaries of supervisors and the highest pay of those they supervise. Before state employees began collective bargaining in 1982, state compensation schedules had maintained at least a 10 percent differential between rank-and-file employees and their supervisors. The Task Force found that 85 percent of the public entities it surveyed attempted to maintain at least a 10 percent gap, and DPA officials publicly have stated that they believe the minimum differential is desirable. Behrens is hoping that the boosts in salaries of appointed executives will enable the administration to establish a real difference between the wages of the rank-and-file and the pay of their supervisors. *

Task Force and the Little Hoover Commission when the compensation reports of the two study groups were issued. He told *CPER* that DPA has not signaled yet that major boosts in compensation are coming to the state's managers and supervisors, although the new DPA head, David Gilb, is willing to recognize the problems with excluded employees' compensation. Supervisors in many departments are earning only 5 percent more than those they supervise, and may earn less when the subordinates get overtime or other collectively bargained benefits.

ACSS is asking for a 5 percent raise in addition to any across-the board increases that the rank and file receive.

Discrimination

Supreme Court Interprets Time Limit Narrowly in Pay Discrimination Case

In *Ledbetter v. Goodyear Tire & Rubber*, the Supreme Court held, by a vote of five to four, that administrative complaints alleging pay discrimination must be filed within the charging period — 180 days after the last pay decision that demonstrated discriminatory intent, or within 300 days in states with agencies authorized to accept Title VII charges — not within 180 or 300 days of the issuance of the last paycheck that reflects the discriminatory activity. In doing so, the majority rejected the theory, adopted by the Equal Employment Opportunity Commission, that each paycheck reflected the adverse effects of past discrimination and thus constituted a new violation. It explicitly refused to extend to claims of pay discrimination the rationale applied to hostile work environment claims in *National Railroad Passenger Corp. v. Morgan* (2002) 536 U.S. 101, 155 CPER 70.

Justice Ruth Bader Ginsburg, in a powerful dissent, argued that the majority decision ignores its own precedent and stands in opposition to decisions of the lower courts that have overwhelmingly held otherwise. Justice Ginsburg openly called on Congress to enact legislation that would reverse the court's ruling, and it has responded.

Factual Background

Lily Ledbetter was a supervisor at Goodyear from 1979 until her retirement in 1998. She worked as an area manager, a position held primarily by men. At first, her pay was in line with that of men performing similar work. Over time, however, it declined in comparison to male area managers with equal or less seniority. By the end of 1997, Ledbetter was paid \$3,727 a month, while the lowest-paid male area manager received \$4,286 and the highest-paid received \$5,236.

Ledbetter filed a charge of discrimination with the EEOC in March 1998. She claimed that Goodyear had violated Title VII of the Civil Rights Act, which makes it unlawful for an employer to discriminate against any individual “with respect to her compensation...because of such individual's...sex.” At trial, Ledbetter introduced evidence that, during her employment, several supervisors had given her poor evaluations because of her sex and that her compensation was not increased as much as it would have been had she been evaluated fairly. These past pay decisions continued to affect the amount of her pay throughout her employment. The jury found

for Ledbetter, and awarded her backpay and other damages.

The Eleventh District Court of Appeals reversed, holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred more than 180 days, or 300 days, before the EEOC charge was filed. The Court of Appeals concluded that there was insufficient evidence to prove that Goodyear acted with discriminatory intent in making the only two pay decisions that occurred within that time span.

Ginsburg argued that the majority decision ignores its own precedent.

Ledbetter filed a petition with the Supreme Court, asking review of the following question: “Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.” The Supreme Court agreed to review the case because of what it determined to be disagreement among the Courts of Appeals as to the proper application of the limitations period in Title VII disparate pay cases.

Supreme Court Decision

Justice Samuel Alito, writing for the majority, rejected Ledbetter's argument that each paycheck issued to her during the charging period was a separate act of discrimination or, alternatively, that the 1998 decision denying her a raise was unlawful because it carried forward intentionally discriminatory disparities from prior years. "In essence," wrote Alito, "she suggests that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period." "This argument is squarely foreclosed by our precedents," he said.

The majority rejected that each paycheck was a separate act of discrimination.

Alito pointed to *United Airlines v. Evans* (1977) 431 U.S. 553, as one such case. There, a flight attendant, forced to resign because she was married, did not file a charge of discrimination. When rehired, she was not credited with seniority for her prior service. She then sued, claiming that the airline's refusal to give her credit gave "present effect to its past illegal act and thereby perpetuated the consequences of forbidden discrimination." The Supreme Court in *Evans* concluded "that the continuing effects of the precharging period

discrimination did not make out a present violation," according to Alito.

Alito also relied on *Delaware State College v. Ricks* (1980) 449 U.S. 250. In that case, the court found against a college librarian denied tenure prior to the charging period, but terminated within the period because of the tenure denial, holding that the charging period ran from "the time the tenure decision was made and communicated" to her.

The majority also found support for its view in *Lorence v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, in which a change in the method of calculating seniority resulted in layoffs of women testers because of their low seniority. In *Lorence*, the court concluded that the charging period ran from the date the seniority rule was changed, not from the date of the layoffs.

Alito cited *Morgan* as the most recent decision confirming the court's interpretation. "In *Morgan*, we explained that the statutory term 'employment practice' generally refers to 'a discrete act or single occurrence' that takes place at a particular point in time," he said. "We pointed to 'termination, failure to promote, denial of transfer, and refusal to hire' as examples of such 'discrete' acts, and we held that a Title VII plaintiff 'can only file a charge to cover discrete acts that 'occurred' within the appropriate time period," he continued.

These cases provide a clear instruction, concluded Alito:

The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.

Alito reasoned that Ledbetter's arguments "cannot be reconciled" with the foregoing cases because she did not claim that intentionally discriminatory conduct occurred during the charging

Alito: 'Current effects alone cannot breathe life into prior, uncharged discrimination.'

period but rather that Goodyear's conduct during the charging period gave present effect to prior discriminatory conduct. "But current effects alone cannot breathe life into prior, uncharged discrimination; as we held in *Evans*, such effects in themselves have 'no present legal consequences,'" he said.

Ledbetter's argument, if adopted, would distort the public policy underlying Title VII's enforcement procedure, the majority concluded. "Statutes

of limitations serve a policy of repose," wrote Alito. "The EEOC filing deadline protects employers from the burden of defending claims arising from employment decisions that are long past," he continued. By adopting the short, 180-day filing deadline, "Congress clearly intended to encourage the prompt processing of all charges of employment discrimination" and its "strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation," he reasoned.

The majority was not persuaded by Ledbetter's argument that the holding in *Bazemore v. Friday* (1986) 478 U.S. 385, requires a different treatment of pay claims. *Bazemore* involved disparate pay claims based on race where a group of state employees were originally segregated into "white" and "Ne-

gro" branches, with the latter receiving less pay. The two branches were merged in 1965 and, after Title VII was extended to public employees in 1972, black employees sued claiming that pay disparities attributable to the old, dual pay scale persisted. The Supreme Court found in favor of the plaintiffs, stating "each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."

Alito found that *Bazemore* did not support Ledbetter's argument but rather was consistent with the earlier *Evans* decision. He interpreted *Bazemore* as holding that "when an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees." And, "an

employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure is used." Thus, said Alito, the *Bazemore* court found the defendants had engaged in "fresh discrimination." Therefore, *Bazemore* does not stand "for the proposition that an action not comprising an employment practice and alleged discriminatory intent is separately chargeable, just because it is related to some past act of discrimination," he concluded. "Because Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus, *Bazemore* is of no help to her."

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The majority also rejected Ledbetter's reliance on analogies to other statutory constructs. Ledbetter argued that the court should look to the Equal Pay Act, enacted at the same time as Title VII, for interpretation of the limitations period. Under the EPA, the lower courts have considered cases involving pay disparities that first arose outside the limitations period. She also cited the Fair Labor Standards Act under which the statute of limitations runs anew with each paycheck. The majority distin-

Ginsburg commented that pay disparities often occur in small increments.

guished both acts from Title VII because neither requires proof of intentional discrimination. Ledbetter's reliance on the National Labor Relations Act was on firmer ground, said the court, because it was used as a model for Title VII. However, Ledbetter's argument that the NLRA's statute of limitations starts anew with each paycheck was not supported by the court's precedents, wrote Alito.

Ledbetter's policy arguments met a similar fate. She claimed that a longer limitations period was reasonable here because pay discrimination is harder to detect than other forms of discrimination. The majority responded that it

was "not in a position to evaluate Ledbetter's policy arguments" and that "it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the prompt processing" of discrimination charges and "the interest in repose."

The Dissent

Justice Ginsburg, with whom Justices John Paul Stevens, David Souter, and Stephen Breyer joined dissenting, fully embraced Ledbetter's policy argument regarding the unique character of pay discrimination, stating:

The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meat for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.

Pay disparities are thus significantly different from adverse actions "such as termination, failure to promote, or refusal to hire," all involving fully communicated discrete acts, "easy to identify" as discriminatory. It is only when the disparity becomes apparent and sizeable, e.g., through future raises calculated as a percentage of current salaries, that an employee in

Ledbetter's situation is likely to comprehend her plight and, therefore, to complain. Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.

Ginsburg formulated the question presented by Ledbetter's petition as, "What activity qualifies as an unlawful employment practice in cases of discrimination with respect to compensation?" One answer, she noted, identifies the pay-setting decision alone as

Ginsburg : 'Paychecks perpetuating past discrimination... discriminate anew each time they issue....'

the unlawful practice; another counts both the pay-setting decision and the actual payment of a discriminatory salary as unlawful practices. Ginsburg argued that although the majority adopted the first view, "the second is more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose."

Ginsburg's interpretation of the holding in *Bazemore* differed from that of the majority. According to Ginsburg, the court rejected the Court of Appeals' conclusion that the pay discrepancies "were simply a continuing effect of a

decision lawfully made prior to the effective date of Title VII,” instead finding that each paycheck “that delivers less to a black than to a similarly situated white” is separately actionable. “Paychecks perpetuating past discrimination, we thus recognized, are actionable not simply because they are ‘related’ to a decision made outside the charge-filing period, but because they discriminate anew each time they issue....”

In *Morgan*, said Ginsburg, the court made clear that “claims...based on the cumulative effect of individual

*Compensation
disparities are often
hidden from sight,
said Ginsburg.*

acts” are different in kind from discrete acts. It placed hostile work environment claims in this category because “their very nature involves repeated conduct,” and thus “it does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory period,” the court wrote in that case. “Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.”

The dissenters would treat pay discrimination claims in the same way. “Pay

discrepancies, of the kind Ledbetter experienced, have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination,” wrote Ginsburg. “Ledbetter’s claim, resembling *Morgan*’s, rested not on one particular paycheck, but on the ‘cumulative effect of individual acts.’”

The minority’s reasoning underlying this conclusion demonstrates an understanding of the obstacles faced by victims of pay discrimination:

The realities of the workplace reveal why the discrimination with respect to compensation that Ledbetter suffered does not fit within the category of singular discrete acts “easy to identify.” A worker knows immediately if she is denied a promotion or transfer, if she is fired or refused employment. And promotions, transfers, hirings, and firings are generally public events, known to co-workers. When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext. Compensation disparities, in contrast, are often hidden from sight. It is not unusual, decisions in point illustrate, for management to decline to publish employee pay levels, or for employees to keep private their own salaries....

The problem of concealed pay discrimination is particularly acute where the disparity arises not because the female employee is flatly denied a raise but because male counterparts are given larger raises. Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision. She may have

little reason even to suspect discrimination until a pattern develops incrementally and she ultimately becomes aware of the disparity. Even if an employee suspects that the reason for a comparatively low raise is not performance but sex (or another protected ground), the amount involved may seem too small, or the employer’s intent too ambiguous, to make the issue immediately actionable — or winnable.

Pay claims also differ from discrete employment actions because “an employer gains from sex-based pay disparities in a way it does not from a discriminatory denial of promotion, hiring, or transfer,” Ginsburg continued. “When a male employee is selected over a female for a higher level position, someone still gets the promotion and is paid a higher salary; the employer is not enriched,” she explained. “But when a woman is paid less than a similarly situated man, the employer reduces its costs each time the pay differential is implemented.” Another distinction is that promotion decisions often affect other employees’ rights, whereas disparate pay can be remedied solely at the expense of the employer.

Because of these differences, the cases relied on by the majority, i.e., *Evans*, *Ricks*, and *Lorance*, “hold no sway,” concluded Ginsburg. She also noted that *Lorance* is no longer effective because it was superseded by the 1991 Civil Rights Act. The Supreme Court has not once relied on *Lorance* in the 15 years since Title VII was amended, and it was mistaken to do so now, said Ginsburg. In amending the act in 1991, Congress’

intent was to generalize the ruling in *Bazemore*, she explained, citing references from the congressional record. She found further proof of congressional intent in Title VII's provision which expressly provides that backpay may be awarded for up to two years prior to the filing of an EEOC charge.

Ginsburg also noted that "the Courts of Appeals have overwhelmingly judged as a present violation the payment of wages infected by discrimination," and that the EEOC "has interpreted the act to permit employees to challenge disparate pay each time it is received."

Congressional Democrats responded quickly to Ginsburg's plea to introduce legislation.

The minority also was not persuaded by the majority's concern that employers should be protected from having to defend employment decisions that are long past. First of all, instructed Ginsburg, "the discrimination of which *Ledbetter* complained is *not* long past," but rather continued to occur with each pay period. Secondly, as the court explained in *Morgan*, employers disadvantaged by delay may raise various defenses such as waiver, estoppel, and equitable tolling.

At the conclusion of her dissenting opinion, Ginsburg explicitly urged Congress to protect future victims by enacting legislation to nullify the majority's decision.

"This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose," she noted, referring to a number of decisions in the late 1980s. The demands for legislative change in reaction to those decisions resulted in the 1991 Civil Rights Act. "Once again, the ball is in Congress' court," she wrote. "As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII." (*Ledbetter v. Goodyear Tire & Rubber Co.* [5-29-07] Supreme Ct. No. 05-1074, ___U.S.___, 2007 DJDAR 7573.)

Legislative Action

Congressional Democrats responded quickly to Ginsburg's plea, announcing the day after the decision was issued that they would introduce legislation "to ensure that workers are able to enforce their legal right to equal pay." On June 11, Representative C.A. "Dutch" Ruppertsberger (D-Maryland) introduced H.R. 2660, known as the "2007 Civil Rights Pay Fairness Act," which would amend Title VII to extend the period for filing charges with the EEOC from 180 and 300 days to 360 and 480 days, respectively, and would provide that "an unlawful employment practice occurs with respect to compensation when a person ag-

grieved is injured as a result of a compensation calculation attributable in whole or in part to the application or continuation of a compensation decision that was made" at any time before a charge relating to such calculation is filed and for an intentionally discriminatory purpose.

On June 22, Representative George Miller (D-California) introduced H.R. 2831 which would amend Title VII, the Age Discrimination in Employment Act of 1967, the Americans With Disabilities Act of 1990, and the Rehabilitation Act of 1973 "to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, or for other purposes."

Also in reaction to the decision, California Assembly Member Dave Jones (D-Sacramento) introduced A.B. 437 in the California legislature. The bill is designed to ensure that California courts do not place the same restrictions on discrimination claims made under the state's Fair Employment and Housing Act. All of the bills were pending at the time *CPER* went to press. *

Employee Should Have Been Notified of Right to CFRA Leave

An employee who provided sufficient information to advise his employer of his need for leave under the California Family Rights Act should have been given notice of his right to take such leave prior to being terminated, ruled the Second District Court of Appeal in *Faust v. California Portland Cement Co.*

Michael Faust worked as a lube-specialist for Portland in a garage supervised by Hank Schrader. In February 2003, Faust sent an email to plant manager Bruce Shafer stating that vari-

*Fearing for his safety,
Faust requested
time off.*

ous unnamed employees had engaged in theft and other misconduct. Shafer discussed the matter with Schrader and Schrader's supervisor on February 26, 2003.

The following day, Faust's coworker, Bill Buchanan, did not pick up Faust to take him to the worksite as he was supposed to do. When Faust asked him why, Buchanan said that Schrader had told the employees at the garage about Faust's email and that "everyone should watch their back." Faust was disturbed by this news and began to experi-

ence shortness of breath, confusion, panic attacks, and feelings of despair.

Later that day, Faust's coworkers gave him "the cold shoulder." Fearing for his safety, Faust requested time off. Schrader denied his request. Faust believed he might be in danger if his coworkers would not respond to requests for help, and he experienced extreme anxiety. He called Ron Bergloff, a supervisor, who agreed that Faust would leave the premises.

Five days later, Faust began a 30-day psychiatric program at Kaiser Permanente. He filed for workers' compensation, and his attorney notified Portland of the claim. Faust provided Portland with documentation of a medical impairment showing he suffered from anxiety and stress.

Faust began to experience back pain, and on April 1, 2003, he provided the company with a medical certification from his chiropractor stating that he was unable to perform his regular job duties. Ms. Andersen, Portland's human resources manager, called Faust's home and left a message that she had problems with the certification form and wanted to speak to him right away. Faust's wife left two messages for Andersen stating that she could talk to her, the chiropractor, or Faust's workers' compensation attorney, but that Faust was "too stressed out" to talk to Andersen. Andersen never contacted

any of the designated individuals. Instead, she called Faust's home again and left a message saying that she needed to talk to Faust directly.

A week later, Andersen informed Faust that the chiropractor's slip was unacceptable because it was not from a medical doctor.

On April 15, 2003, Andersen sent another letter to Faust, notifying him that he had been terminated because the paperwork he submitted "was insufficient to sustain an approved absence from work." Andersen never informed Faust of the availability of medical leave under the CFRA or the federal Family and Medical leave Act of 1993.

*The trial court erred
when it applied the
McDonnell Douglas
burden-shifting
analysis.*

Faust sued Portland, claiming that it had violated the CFRA and had discriminated against him on the basis of disability in violation of California's Fair Employment and Housing Act. The trial court dismissed the complaint, and Faust appealed.

The Court of Appeal reversed the trial court's ruling as to the CFRA claims and the claim of disability discrimination.

The court noted that the CFRA, which is part of the FEHA, makes it an unlawful employment practice for an employer of 50 or more persons to refuse to grant an employee's request to take medical leave for up to 12 work-weeks in any 12-month period. The court agreed with Faust that the trial court erred when it applied the *McDonnell Douglas* burden-shifting analysis to his interference claim under the CFRA. A violation of the CFRA simply requires that the employer deny the employee the CFRA leave to which he or she is entitled, the court instructed.

Regarding the notice requirements for an employee seeking leave, the court looked to Sec. 7297.4(a) of the California Code of Regulations enacted to implement the CFRA. That provision requires an employee to provide verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. But, the regulations state, "The employee need not expressly assert rights under the CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice requirement." The employee must state the reason the leave is needed. The regulation instructs the employer to ask for additional information about whether CFRA leave is being sought by the employee and to obtain the necessary details of the leave to be taken.

The court found that Faust provided Portland with sufficient notice of a CFRA-qualifying leave and that, in

fact, Portland had admitted in discovery that he had done so. The court rejected Portland's argument that Faust had unreasonably refused to respond to Portland's questions seeking necessary information which would have assisted it in determining if Faust was seeking a CFRA-qualifying leave. Faust presented evidence that he was unable to personally respond to Andersen because he felt "too stressed out" and that he had designated three other people to whom Andersen could direct her questions, noted the court.

*A physician is not the
only health care
provider who can
certify a serious
health condition.*

The court also was not persuaded by Portland's argument that Faust's chiropractor was not a qualified health care provider within the meaning of the CFRA.

First, Portland never informed Faust of the CFRA notice and certification requirements it had adopted, said the court. In addition, when it received the note from the chiropractor, Portland did nothing to inquire further to determine whether Faust qualified for CFRA leave, though it was required

to do so. And, instructed the court, "Contrary to the view expressed by Andersen, a physician is not the only health care provider who can certify a serious health condition under the CFRA."

The court also reversed the lower court's dismissal of Faust's claim of retaliation for exercise of his CFRA rights. It found that Faust had established a prima facie case of retaliation by showing that Portland was covered by the CFRA, that he was an employee eligible to take CFRA leave, that he properly exercised that right, and that he suffered an adverse employment action because of his exercise of that right. The burden then shifted to Portland to offer a legitimate, non-retaliatory reason for the adverse employment action. Portland's claim that it terminated Faust because of insubordination was not credible, found the court. "Portland's refusal to communicate with any of Faust's representatives, particularly his workers' compensation attorney, undermines Portland's contention that, as a matter of law, it legitimately fired Faust for ignoring Andersen's inquiries," it explained.

Similarly, the court found that the dismissal of Faust's cause of action for wrongful termination in violation of public policy must be reversed. "The public policy embodied in the CFRA satisfies all the requirements identified in *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083 [93 CPER 42] and *Stevenson v. Superior Court* (1997) 16 Cal.4th 880 [126 CPER 7]."

The court also resurrected Faust's claim of disability discrimination in violation of the FEHA. Portland argued that Faust did not have a disability or that it did not know of his disability as of the date of his termination. The evidence pointed to the contrary,

said the court, noting that the chiropractor's work-status report stated that Faust was "unable to perform regular job duties." (*Faust v. California Portland Cement Co.* [5-10-07] 150 Cal.App.4th 864.) *

an unlawful employment practice." An employer cannot go forward with a claim of failure to accommodate unless it can show that reasonable accommodation was offered and refused, there was no vacant position within the company for which the employee is qualified and which he can perform with or without accommodation, and the employer did everything in its power to find a reasonable accommodation, instructed the court, citing *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 1376.

Disabled Employee Must Make Specific Request for Accommodations

In *King v. United Parcel Service, Inc.*, the Third District Court of Appeal upheld the trial court's dismissal of a discharged employee's complaint of disability discrimination and failure to provide reasonable accommodation in violation of California's Fair Employment and Housing Act. The court concluded that the employee had failed to provide sufficient evidence that he was terminated because of his disability and that the employer had shown that it had a legitimate, nondiscriminatory reason for terminating him. The more difficult question in this case, according to the court, was whether the employer had failed to meet its duty to provide reasonable accommodation.

Richard King was a long-time supervisory employee who was fired for falsifying time cards two months after returning from a four-month disability leave. King filed a lawsuit, claiming that the employer's given reason for firing him was pretextual and that the real reason underlying the termination was his disability, a blood disorder. He also

claimed that the employer failed to provide him with reasonable accommodation.

The trial court granted the employer's motion for summary judgment and dismissed King's complaint, finding no triable issue of material fact. King appealed.

The Court of Appeal affirmed the lower court's ruling. It concluded that King had not presented specific and substantial evidence that he was fired because he was disabled. The employer did present sufficient evidence to conclude that it honestly believed that King had violated its integrity policy by falsifying a subordinate's time card and that it fired him for that legitimate reason.

However, the court found the issue of whether the employer failed to provide King with reasonable accommodation "a much closer one to resolve." Under the FEHA, noted the court, "an employer's failure to provide reasonable accommodation to enable an employee with a disability to perform the essential functions of his job constitutes

The employer presented evidence that it honestly believed King had violated its integrity policy.

Prior to leaving on disability, King had been performing double duty, serving as both a "feeder" supervisor and a supervisor of the "local sort." King's doctor released him back to work to perform "his regular duties and regular hours," and did not list any restrictions. To the employer, this meant that King could do the assignments that he had been performing prior to being released. King argued that his doctor's note meant that he could return to his normal feeder supervisory position, not to the additional duties of the local sort. His supervisor, Nunes, understood that

and did not require him to take on the local sort duties when he returned to work. However, after Nunes was fired, King's new supervisor, Zakoor, did require him to take on the local sort work. King complained to another supervisor and was told to talk to Zakoor about it.

The trial court found that King did not make a specific request for necessary accommodations or a "concise" list of restrictions. Nor did he ever inform his supervisor or human resources of his need to work fewer hours.

The Court of Appeal found that King's evidence did not create a triable issue of fact. "While he describes in painful detail how poorly he felt, he simply does not establish that he communicated his distress to his supervisors or made the kind of specific request for a modified work schedule required to trigger an employer's duty to provide

accommodation," said the court. "An employee cannot demand clairvoyance of his employer," it said. The court concluded:

We recognize that the interactive process compelled by FEHA requires flexibility by both the employer and employee, and that no magic words are required to necessitate accommodation. But plaintiff has presented far less than what FEHA demands. We agree with the trial court that plaintiff has not sustained his burden of demonstrating a genuine issue of material fact given his failure to get additional clarification from his doctor to specifically restrict his hours and to communicate his limitations to his supervisors.

(*King v. United Parcel Service, Inc.* [6-22-07] No. C051657 [3d Dist.] ___ Cal.App.4th ___, 2007 DJDAR 9360.) *

been filed within one year from the date the alleged unlawful practices occurred, as required by Government Code Sec. 12960(d). The plaintiffs appealed.

The Court of Appeal reversed the trial court's decision as to McDonald and Brown, and upheld it as to Stryker. It found that McDonald had alleged an act of retaliation occurring on December 17, 2002, which was within one year of the filing of the administrative complaint on December 20, 2002 and, therefore, his complaint should not have been dismissed.

The time for filing a claim can, in the proper circumstance, stop running.

Equitable Tolling Applicable to Time Limit for FEHA Claims

The Second District Court of Appeal has ruled that the doctrine of equitable tolling applies to the one-year statutory time limit for the filing of administrative complaints of discrimination under California's Fair Employment and Housing Act. In *McDonald v. Antelope Valley Community College District*, the court determined that the time for filing a claim with the Department of Fair Employment and Housing can, in the proper circumstance, stop running

while the complainant pursues internal remedies with her employer.

Three community college district employees, John McDonald, Sylvia Brown, and Sallie Stryker, filed complaints with the DFEH, alleging discrimination and retaliation in violation of the FEHA. After receiving right to sue letters from the agency, the three brought a lawsuit against the district. The trial court dismissed the case, finding that the DFEH complaints had not

In the case of Brown, the court found there were no allegations and no evidence to establish any actionable conduct by the district within one year of the October 11, 2002, filing date of her DFEH administrative complaint. However, Brown did file an internal complaint with the district on October 8, 2001, which was within one year of the last alleged act of discrimination. Community college districts are required to adopt written policies providing for investigation of discrimination complaints under California Code of Regulations, Title 5, Sec. 59322. Brown argued that the one-year limit

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California
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Get a comprehensive look at the unfair practices created by state laws covering public school, state, higher education, and local government employees. The 4th edition details important developments in California's public sector labor law, including the Board's new arbitration deferral standards, restoration of the doctrine of equitable tolling, and the addition of three new statutes to PERB's jurisdiction: Trial Court Employment Protection and Governance Act, Trial Court Interpreter Employment and Labor Relations Act, and the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act.

Along with extensive new statutory and regulatory text, the guide includes the unfair practice sections of EERA, the Dills Act, HEERA, the MMBA, TCEPGA, TCIELRA, and TEERA. A guide to cases further elaborates what conduct is unlawful, and a glossary defines labor relations terms.

By Carol Vendrillo and Eric Borgerson • 4th edition (2006) • \$15

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for filing her DFEH complaint was equitably tolled during the time that she was pursuing her internal complaint remedies with the district.

The Court of Appeal agreed that the principle of equitable tolling could apply to Brown's case. It noted that the California Supreme Court "has applied equitable tolling in carefully considered situations to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice." Citing several Court of Appeal cases, the court instructed that three factors determine whether the statute of limitations is equitably tolled in a particular case: timely notice to defendants in filing the first claim; lack of prejudice to defendants in gathering evidence to defend against the second claim; and, good faith and reasonable conduct by plaintiffs in filing the sec-

ond claim. The court also remarked that equitable tolling principles apply to the filing of an administrative complaint with the federal Equal Employment Opportunity Commission and, "under California law, a claimant's resort to one administrative remedy can equitably toll the time to pursue another," citing *Barth v. Board of Pension Commissioners* (1983) 145 Cal.App.3d 826.

The district argued that the case of *Lantzy v. Centrex Homes* (2003) 31 Cal.4th 363, controlled the situation before the court and mandated that equitable tolling could not apply to the Sec. 12960(d) one-year statute of limitations. Section 12960(d) expressly states that "no complaint may be filed after the expiration of one year" from the unlawful practice, but that the limitations period may be extended in four specified instances. The statute consid-

ered in *Lantzy* involved a 10-year statute of limitations that also sets forth several exceptions to its application. The court in *Lantzy* determined that equitable tolling did not apply to that statute.

The court rejected the district's argument, finding that "*Lantzy* is materially distinguishable and not controlling" for six different reasons. First, Sec. 12960(d) contains no express language stating that no tolling is to occur except under the four specified circumstances. Second, nothing in the legislative history of the section indicates that the legislature intended to prevent equitable tolling from applying. Third, "it bears emphasis that *Lantzy* involved a lengthy 10-year statute of limitations," while Sec. 12960(d) is a one-year statute. Fourth, "equitable tolling is a firmly established judicially developed

principle and was so when section 12960, subdivision (d) was enacted.”

For its fifth reason, the court declined to apply the principle of statutory construction, urging that “where exceptions to the general rule are specified by statute, other exceptions are not to be implied or presumed.” Application of the doctrine, said the court, would contravene well-established principles of law, such as equitable tolling rules. In explaining its sixth basis for its position, the court recognized that “even with the foregoing five considerations, this is a close question.” “What clinches the issue for us,” it said, “is the requirement that the Fair Employment and Housing Act statutes of limitation be liberally construed to promote the resolution of potentially meritorious claims on their merits.”

“For these combined reasons, *all of them*, we conclude this case is materially different from *Lantzy* and equitable tolling is potentially available to a discrimination plaintiff who files an administrative complaint more than one year after an act of unlawful discrimination,” held the court.

The court was similarly not persuaded by the district’s argument that its holding was inconsistent with language appearing in *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 164 CPER 44, in which the California Supreme Court held that a city employee is not required to exhaust an internal remedy required by a city charter prior to filing a DFEH complaint. The Court of Appeal noted that the issue

before it was different than that presented in *Schifando*, and said that case “is not controlling authority for the proposition before us.”

The court ruled that Stryker’s DFEH complaint was filed more than one year after the last alleged discriminatory act. It did not address whether the principle of equitable tolling could

apply to her case because she never filed a DFEH claim identifying any of the discriminatory acts alleged in her court complaint and, therefore, did not exhaust her administrative remedies. (*McDonald v. Antelope Valley Community College Dist.* [6-25-07] 151 Cal.App.4th 961.) *

State Senate Passes Bill to Ban ‘Family Status’ Discrimination

The California State Senate has passed a bill that would add “familial status” to the categories of discrimination banned by the state’s Fair Employment and Housing Act. S.B. 836, authored by Senator Sheila Kuehl (D-Santa Monica), passed by a vote of 25 to 14, with Democrats voting in favor of the bill. The legislation is now pending in the Assembly, where it is opposed by the California Chamber of Commerce, which contends that there are enough protections in federal and state laws for workers who need to take extended leaves to deal with family issues. “S.B. 836 appears to open the door to new mandates on employers to provide modified schedules or leave to accommodate baby-sitting or driving children to soccer practice,” said a spokesperson for the chamber.

If the statute is passed, California would join a handful of other jurisdictions that protect workers from discrimination because of family respon-

sibilities. Alaska and several cities, including Atlanta, Chicago, and Washington, D.C., already have similar laws in place. New York and Pennsylvania are in the process of considering similar measures. *

General

Employee's Reports of Physical Threats State Public Policy for Wrongful Discharge Claim

In a unanimous decision, the Second District Court of Appeal reversed a trial court decision that had dismissed an employee's wrongful discharge action. The appellate court found public policy precluded the employer from terminating the employee in retaliation for reporting physical threats against himself and other employees in the workplace. The court emphasized that public policy demands the workplace be a crime-free and safe environment and that employees should be able to report threats of violence voiced by coworkers without fear of losing their jobs.

The plaintiff, Calvin Franklin, was hired as a metallurgical heat-treater at the Monadnock Company. In his first amended complaint, Franklin alleged that his coworker, Richard Ventura, threatened to physically harm or kill him and three other employees. Franklin complained about the threats to the company's Human Resources Department. A week later, Ventura allegedly attempted to stab Franklin with a metal screwdriver. In response, Franklin notified the police department. The company subsequently terminated him.

Franklin alleged that he was discharged in retaliation for complaining about Ventura to the company and the police. His amended complaint stated that, notwithstanding the company's knowledge of Franklin's concern for the safety of individuals at the facility, the company refused to keep Franklin

Public policy demands the workplace be a crime-free and safe environment.

or his fellow coworkers safe from Ventura; failed to counsel, warn, or segregate Ventura; and failed to prevent Ventura from assaulting Franklin or his coworkers. Instead, the company allegedly "maintained an unsafe place of employment by allowing the threats of violence and attempted violence to continue unheeded in the workplace."

The trial court dismissed Franklin's complaint because of inconsistent factual allegations between the original and amended complaints.

Tort of Wrongful Discharge in Violation of Public Policy

The Court of Appeal first explained that the vast majority of states, including California, recognize that an at-will employee may bring a tort cause of action for wrongful discharge when he or she is discharged for performing an act that public policy would encourage. "The difficulty," said the court quoting *Garntt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 93 CPER 42, "lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee. This determination depends in large part on whether the public policy alleged is sufficiently clear to provide the basis for such a potent remedy."

In *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 126 CPER 7, the California Supreme Court identified four requirements to support a public policy wrongful discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be public in the sense that it inures to the benefit of the public and does not merely serve the interests of the individual. Third, the policy must have been articulated at the time of the discharge, and it must be fundamental and substantial.

Public Policy Requirement

The company argued that Franklin could not state a cause of action for

wrongful termination because his complaint about Ventura's threats and his report of the assault to the police did not involve a fundamental public policy contained in any constitutional or statutory provision.

The Court of Appeal looked first to *City of Palo Alto v. Service Employees International Union* (1999) 77 Cal.App. 4th 327, where the Sixth District Court of Appeal considered the city's contention that an arbitrator's award reinstating a terminated employee violated a fundamental public policy requiring employers to provide a safe workplace by terminating employees who threaten the lives of coworkers. Like the court in *Palo Alto*, the court here found that Labor Code Sec. 6400 and Code of Civil Procedure Sec. 527.8, taken together, "establish an explicit public policy requiring employers to provide

a safe and secure workplace, including a requirement that an employer take reasonable steps to address credible threats of violence in the workplace."

Admittedly, Sec. 6400 focuses on occupational injury and illness and contains no specific mention of workplace violence or threats of violence. But the court found the provision makes it an employer's legal responsibility to provide a safe place of employment. Section 527.8, added by the Workplace Violence Safety Act, specifically addresses potential workplace violence, providing employers with an injunctive remedy to address "unlawful violence or credible threat of violence" by an employee against a co-worker.

Citing *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, the Court of Appeal affirmed that it is California policy

to protect an employee who complains in good faith about working conditions or practices which he reasonably believes to be unsafe.

The company, citing *Muller v. Automobile Club of South California* (1998) 61 Cal.App.4th 431, argued that there is no fundamental public policy requiring employers to take reasonable steps to address mere *threats* of violence in the workplace, even if the prevention of foreseeable actual violence in the workplace is demanded by statutory provisions. In *Muller*, a claims adjustor threatened by the son of an insured client, allegedly was terminated after she expressed concerns about her safety to her employer. The *Muller* court ruled against the employee, explaining that there is a certain risk of crime in any workplace to which the general public has access, and that voicing a fear about

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

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one's safety does not necessarily constitute a complaint about unsafe working conditions under the Labor Code.

The Court of Appeal asserted that, even if *Muller* was correctly decided, it is distinguishable from the facts of Franklin's case. First, the court noted, because of the different procedural postures of the two cases, different standards of review are required. In this case, the court had to assume that Ventura threatened Franklin and his

Franklin's complaint protected the interests of a significant number of innocent coworkers.

coworkers, and assaulted Franklin with a weapon. Considering these properly pleaded allegations as true, the court found that the record demonstrated the workplace actually was unsafe. Also, the court explained, *Muller* did not involve a threat by one employee against another, so the workplace in *Muller* was not continuously and foreseeably dangerous, as it was with Ventura's looming threat.

The court also relied on *Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, where the Fourth District Court of Appeal cited the plaintiff's reasonable belief that extended driving hours were a health and safety hazard in violation

of public policy. The *Cabesuela* court found that employees must be protected against discharge for voicing a good faith complaint about unsafe working conditions. Unlike the *Muller* court, the court in *Cabesuela* referenced the Supreme Court's decision in *Hentzel* to support the notion that honest subjective foreseeability of danger is enough to protect against discharge.

As in *Cabesuela*, the court concluded that Franklin's allegations were sufficient to state a violation of public policy which protects an employee against discharge for making a good faith complaint about working conditions he reasonably believes to be unsafe.

Public Benefit

The company argued that the public policy on which Franklin relied would not benefit the public at large, as required by *Stevenson*, and Franklin's complaint to the company and his report to the police only benefited himself and the three other threatened coworkers. The court was not persuaded. It found that Franklin's complaint about Ventura's threats and the report to the police served the public interest by promoting workplace safety, deterring workplace crime, and protecting the interests of a significant number of innocent coworkers who could have been injured.

To support its holding, the court also cited *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, where the Court of Appeal found that an employee who is terminated in retaliation for report-

ing criminal conduct by other employees has a cause of action for wrongful discharge because the public interest is furthered by deterring crime. Similarly in *Hentzel*, where an employee protested what he considered to be hazardous working conditions caused by other employees smoking in the workplace, the court held that the employee had a viable cause of action for wrongful termination because discharge in retaliation for his report implicated the public policy interest in a safe and healthy working environment for employees.

In *Rojo v. Kliger* (1990) 52 Cal.3d 65, 86 CPER 60, the court said that the public policy against sex discrimination and sexual harassment in employment is one that inures to the benefit of the public at large rather than to a particular employer or employee. Based on *Rojo*, the Court of Appeal rejected Monadnock's contention that public policy based wrongful discharge claims should be limited to situations where, as a condition of employment, the employer coerces an employee to commit an act that violates public policy, or restrains an employee from exercising a fundamental right.

The court emphasized that the public has a vital interest in ensuring workplaces are free from credible threats of violence. The court noted that this is at least as compelling as the public's interest in a healthy, smoke-free workplace at issue in *Hentzel*, or the public's interest in the prevention of financial crimes at issue in *Collier*. The court explained that, as in those cases,

it is important that an employee be able to report illegal conduct to the employer or to the police without fear of retaliation and termination. Thus, the Court of Appeal held that Franklin's

complaint satisfied the public benefit requirement that is the basis for his wrongful discharge claim. (*Franklin v. The Monadnock Co.* [5-24-07] 151 Cal.App.4th 252.) *

of his early withdrawal of retirement benefits. The trial court ruled in favor of the commission, and Davis appealed.

The Court of Appeal affirmed the trial court's decision. It gave short shrift to Davis' argument that the commission had to reinstate him immediately even though he was not able to work. "Davis never sought to go back to work, nor did he provide a date when he might do so," said the court. "This argument is without merit because reinstatement is synonymous with returning to work," it explained. "The Commission had the authority to condition Davis' reinstatement on a release from his physician," it held, citing Education Code Sec.

Wrongfully Terminated Disabled Employee Not Entitled to Backpay

The Second District Court of Appeal, in *Davis v. Los Angeles Unified School Dist.*, has determined that a wrongfully demoted school district employee who was on disability leave for reasons unrelated to his employment is not entitled to full backpay or immediate reinstatement.

Ennis Davis had been employed by the district since 1976. At the time of his demotion in December 2001, he had been the director of the information systems branch for at least two years. In July 2001, Davis was accused of "generalized wrongdoing" in an anonymous interoffice memo directed to his supervisor. The charges were that he had falsified time cards, allowed a subordinate to work two jobs, and failed to pay for personal calls made on his LAUSD cell phone.

Davis was placed on disability leave for non-work-related injuries in November 2001. He was demoted to software engineer effective December 12, 2001. Davis filed an appeal of his demotion with the LAUSD Personnel Commission. The hearing officer concluded that the evidence did not sup-

port the charges and that Davis was not afforded progressive discipline. The commission rescinded the demotion, restored David to his prior position effective as of the date of the demotion, and awarded him full backpay from the date of the demotion. This meant that he remained eligible for reinstatement to his prior position if he demonstrated at any time before May 9, 2006, that he was fit for duty.

Davis did not provide the district with a doctor's statement releasing him to work, and he was not reinstated.

Davis filed two petitions for pre-emptory writ of mandate alleging that the district had not reinstated him or paid him the full salary he would have received if he had continued to work in his prior position. The commission responded that Davis had not presented medical clearance from his treating physician allowing him to return to work. It denied that Davis should be reimbursed his attorneys' fees and costs, damages for emotional distress, repayment of medical costs, restoration of benefit time, and reimbursement for taxes and penalties incurred as a result

This argument is without merit because reinstatement is synonymous with returning to work.

45307, which states that when the commission sustains an employee's appeal, "it shall order his reinstatement upon such terms and conditions as it may deem appropriate."

"The intended effect of reinstatement is to reduce or eliminate an employer's liability for money damages by returning the employee to the workplace and compensating him or her for actual work," the court instructed. "Reinstatement should only be ordered

where the plaintiff, *returning to work*, successfully performs all the required duties of her position [with or without accommodation,] notwithstanding any disability she might have,” said the court, quoting *Criado v. IBM Corp.* (DPR 1997) 962 F.Supp 262, *affd.* (1st Cir. 1998) 145 F.3d 437. “Reinstatement is not merely to take advantage opportunistically of company benefits,” it continued.

The court found Davis’ reliance on Government Code Sec. 31725 misplaced. Section 31725 provides that where a county discharges an employee because it has determined that he is permanently disabled, but the county retirement board concludes that he is not disabled for retirement purposes, the county must reinstate the employee to “paid status” if he cannot return to active duty. Davis was not discharged and elected to take medical leave, noted the court. “Accordingly, the Government Code is of no help to Davis,” it said.

Nor was Davis entitled to full backpay, determined the court. “Back pay serves to make an employee whole for the employer’s wrongdoing,” it instructed. The remedy should return the employee to the financial position he would have been in but for the unlawful conduct. The employer is responsible only for losses suffered by the employee as a result of its wrongdoing, explained the court. “To hold otherwise renders the back pay obligation punitive, and abuses the intent of the remedy,” it said. “It is manifest that back pay is compensatory and remedial in

purpose, not punitive,” the court noted, quoting *Brady v. Thurston Motors Lines, Inc.* (4th Cir. 1985) 753 F.2d 1269.

The court undertook a lengthy review of other cases and statutes to underscore its analysis. It noted that “virtually all non-California courts have acknowledged” that, while an employee is entitled to be made whole for damages suffered as a result of a wrongful termination, “as a general rule, he will not be allowed back pay during any periods of *disability*.” However, where the disability is a result of the employer’s conduct, the employee may recover full backpay, explained the court, citing a number of cases decided by the National Labor Relations Board.

Backpay is compensatory and remedial in purpose, not punitive.

The court also examined three California cases relied on by Davis: *Ahlstedt v. Board of Education* (1947) 79 Cal.App.2d 845, *Carroll v. Civil Service Com.* (1973) 31 Cal.App.3d 561, and *Mayer v. Multistate Legal Studies, Inc.* (1997) 52 Cal.App.4th 1428. In *Ahlstedt*, also decided by the Second District Court of Appeal, a high school district employee was fired. The trial court ordered her reinstated with full backpay. The district appealed, arguing that full backpay was not warranted

because the employee had been ill part of the time. The Court of Appeal sustained the trial court’s ruling because the discharge had caused the employee’s illness and she had remained ready, willing, and able to work while ill. In *Carroll*, the Fifth District Court of Appeal, relying on *Ahlstedt*, affirmed an award of full backpay for a wrongfully discharged county employee, even though the employee had been in jail for public drunkenness for 147 days of the covered period. The Second District Court of Appeal in this case clarified that the Fifth District had misinterpreted its holding in *Ahlstedt*, explaining that because the employee’s incarceration was not related to his discharge, he should not have received a windfall based on the court’s failure to note the circumstances that exist between discharge and reinstatement. “To the extent *Carroll* is inconsistent with *Ahlstedt*, we decline to follow it,” said the court.

Mayer concerned a wrongfully discharged employee who was treated for cancer during the period between discharge and reinstatement. The employer argued that he should not receive backpay for the period of time that he received disability benefits. The trial court found for the employer on that issue. The Court of Appeal reversed, finding that, “to accept the trial court’s ruling would force future employees” in similar situations “to make an unacceptable election, i.e., accept benefits needed for survival in the present or pursue a more lucrative claim against the employer that may or may not come

to fruition for several years.” Further, the employee may have been able to work during the time that he was receiving treatment, but his wrongful termination deprived him of the opportunity to even attempt to do so, said the court. “We have previously stated that the mere receipt of disability benefits, as well as the representations made by an employee in obtaining them, do not necessarily mean the employee is unable to perform his or her job,” said that court, citing *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171.

*The district met its
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his demotion
and employment.*

In this case, the court did not rely on Davis’ receipt of any benefits or statements he made to obtain them in concluding that he was unable to work. Rather, it relied on other evidence, such as his failure to provide a medical release. Also, reasoned the court, this situation is “more straightforward” than that in *Ahlstedt* and *Mayer* because Davis was demoted, not terminated. Therefore, he had the option to continue working but did not do so. “Given these facts, the cause of Davis’ unavail-

ability is not open for debate,” said the court. “His illness — not his demotion or employment — was the sole cause of his inability to work.”

The court determined that the district had met its burden of showing that Davis would not have received a salary because of an illness unrelated to his demotion and employment and, therefore, was not entitled to backpay. It also ruled that because Davis did not cite any pertinent authority to support his claim of the other remedies he sought, “the point is therefore waived.” (*Davis v. Los Angeles Unified School District Personnel Commission* [6-28-07] No. B188435 [2d Dist.] ___ Cal.App.4th ___, 2007 DJDAR 9866.) *

Public Sector Arbitration

Grievant Reinstated After Termination for Sexual Harassment

The Ventura County Department of Airports determined that an airport officer had engaged in sexual harassment, neglect of duty, and bad behavior, and thus it discharged the officer. But arbitrator Philip Tamoush disagreed. He found that the termination was inappropriate and ordered that the grievant be reinstated.

The grievant had worked as an operations officer and provided security at the airport for two years. The grievant's job entailed stopping at tenant company offices to assure security of the building's employees and parking areas. One business employed several female customer service representatives who worked in the company's reception and lounge area. The grievant developed a routine of visiting the area for one-half to two hours, reading, drinking coffee, and eating cookies placed in the lounge for customers.

During his visits, he engaged two of the female employees in conversations that had a sexual overtone causing the women to become uncomfortable. They testified that they usually tried to ignore the grievant, as the conversations often were offensive.

The conversations were reported to county management by a male employee who overheard some of the lewd

discourse after being made aware of the grievant's misconduct by one of the female parties. As a result of the report, management met with both female employees and asked them to write down their experiences with the grievant. One of the women reported that in at least two conversations held within a two week period, the grievant detailed his sexual exploits and brazenly inquired about her sexual history. The other female employee reported at least one similar conversation and an incident in which she believed the grievant, while performing his security rounds in a small truck, had blocked her egress from her parking place until she gestured for him to move. Both employees found their contacts with the grievant to be very uncomfortable and offensive.

The county hired an outside investigator, who in the arbitrator's mind, conducted a fairly complete and intensive investigation, resulting in a written report supporting the female employees' allegations. The grievant generally admitted to all of the conversations but denied ever having blocked an employee from leaving the parking lot.

Also, during the investigation, management discovered that the felony admitted by the grievant on his job application pertained to his having sexual

relations with a 14-year old girl, whom he described as his girlfriend. For that conviction, the grievant had been sentenced to 100 days in jail and had been required to register under Megan's Law.

Considering the grievant's misconduct and role as a quasi-police officer, the department believed termination was warranted. The county argued that the conversations with the two female employees constituted sexual harass-

The grievant had previously attended sexual harassment and discrimination prevention classes.

ment. The county emphasized that because the grievant had previously attended sexual harassment and discrimination prevention classes, he should have been aware that his conduct was inappropriate. Furthermore, the county stressed that the grievant admitted the sexual nature of the exchanges, and other employees corroborated the parking lot incident.

The grievant argued that the conversations were not inappropriate and essentially constituted banter in line with his role of attempting to determine the security context of the tenant company's operations. He admitted that the sexual dialogues may have gone too

far, but they were not sufficient to justify termination. The grievant also argued that had he known the women were feeling uncomfortable, he would have ceased the sexual discussions, adding that the women themselves seemed to willingly participate in the conversations. The grievant contended that he should have been given the benefit of the doubt, and he promised not to engage in such conversations in the future.

The grievant argued that the women seemed to willingly participate in the conversations.

The arbitrator noted that the case was especially difficult because of a possible bias against the grievant due to the discovery of his felony conviction. The county maintained that it was not influenced by the criminal record and that it had known about the conviction when hiring the grievant. The arbitrator asserted that the prior conviction should not bear on the facts of the ongoing arbitration.

The arbitrator found it clear that the grievant “did engage in conversation/banter which [went] beyond the bounds of normal informal conversation,” but he found insufficient evidence to establish the grievant’s involvement

in the parking lot incident. The arbitrator noted that the two women involved in the incident had, since the filing of the grievance, moved on in their employment and that the only remaining conversation participant was a female supervisor. The supervisor testified that only 2 out of about 100 conversations with the grievant were sexual in nature.

The arbitrator found that the grievant’s strong background in aeronautics and administration deemed him worthy of a last chance at rehabilitation, and the problem could be “nipped in the bud by discussion, counseling, and preventative punishment.” The arbitrator suggested that the department

structure the grievant’s assignments better, allowing for more scrutiny of his security operations. Finding the termination unreasonable, the arbitrator ordered the grievant’s reinstatement. However, he denied the grievant backpay, asserting that the grievant’s time off work would be treated as a disciplinary suspension. (*County of Ventura Department of Airports and Ventura County Professional Peace Officers Assn.* [5-22-07; 9 pp.]. *Representatives:* Brian P. Keirghorn [Law Offices of Alan E. Wisotsky] for the county; Peter J. Horton [Adams, Ferron & Ferron] for the association; *Arbitrator:* Philip Tamoush [CSMCS Case No. ARB-06-0326]. *

Law Firm’s Mandatory Arbitration Clause Found Unconscionable

In a unanimous decision, the Ninth Circuit Court of Appeals found an arbitration agreement between a paralegal and her former employer, O’Melveny & Myers, both procedurally and substantively unconscionable. Reversing the district court decision that had sent the action to arbitration, the federal appeals court relied on California case law, *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 93, and Ninth Circuit precedent to find the contract void.

In 2002, the law firm adopted and distributed to its employees a new dispute resolution program that required

most employment-related claims by and against its employees be subject to final and binding arbitration. At the time the new program was announced, the plaintiff, Jacquelin Davis, was working as a paralegal for the law firm.

Davis filed suit against the firm in 2004, under the federal Fair Labor Standards Act and various other state and federal labor statutes. The lawsuit alleged that the firm failed to pay overtime wages for work performed during lunchtime and rest periods, and for hours worked beyond her 40-hour workweek. Also, Davis alleged that the firm had denied her rest and meal peri-

ods, and violated the Unfair Business Practices Act. Finding for the firm, the district court upheld the policy and deferred the case to arbitration.

On appeal, the court first observed that Davis' FLSA and related claims regarding overtime pay clearly were covered by the scope of the dispute resolution policy. Therefore, the only issue before the court was whether the policy was enforceable.

The policy was distributed to employees on a 'take it or leave it' basis.

In assessing whether an arbitration agreement is enforceable, the court must apply contract formation principles from state law. In California, under *Armendariz*, an arbitration contract is unenforceable if it is both sub-

stantively and procedurally unconscionable. Strong evidence of one form of unconscionability diminishes the need for decisive establishment of the other. Still, both forms must be present.

Procedural Unconscionability

Citing *Soltani v. W. & S. Life Ins. Co.* (9th Cir. 2001) 258 F.3d 1038, the court explained that procedural unconscionability exists when the contract is one of adhesion, when the employees to the contract have no chance to negotiate its terms, or when there is evidence of oppression or surprise. The court noted that the terms of the dispute resolution program were not hidden; they appeared in bold, uppercase text, and the firm's human resources personnel were made available to answer questions regarding the policy.

However, the court found that the policy was distributed to the employees on a "take it or leave it" basis, which establishes procedural unconscionability under *Armendariz*. The policy took effect three months after it was an-

nounced, whether an employee liked it or not. The court explained that the absence of the opportunity to opt out of the arbitration policy, and the fact that the defendant was an international law firm with overwhelming bargaining power, demonstrated procedural unconscionability.

Relying on *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, O'Melveny argued that by giving three months notice to employees about the impending adoption of the policy, it defeated any oppression or unconscionability. In *Dean Witter*, which addressed mandatory arbitration in a financial services contract, the court reasoned that if a consumer did not like the mandatory arbitration provision in an investment account contract, he or she could obtain an account with another company. O'Melveny hoped to extend the *Dean Witter* reasoning to the employment context, arguing that if Davis did not want to work at the law firm because of the arbitration policy, she could seek employment elsewhere.

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By Bonnie Bogue and Frank Silver • 3rd edition (2004) • \$12

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Citing *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, the Ninth Circuit affirmed that a “take it or leave it” arbitration provision was not procedurally saved by providing employees time to consider a policy change or find alternative employment. And, although the employees in *Ingle* were given only three days notice before the policy took effect, the court determined that the length of time an employee has to consider the contract

*Few employees would
forfeit a job solely
to avoid forced
arbitration terms.*

change is irrelevant when no choice to opt out exists. The court explained that few employees would forfeit a job and accrued benefits solely to avoid forced arbitration terms. Thus, the court held the policy oppressive and procedurally unconscionable.

Substantive Unconscionability

Although the court found the policy to be procedurally unconscionable under *Armendariz*, it still had to address whether there also was substantive unconscionability. That analysis, the court explained, focuses on the effect of the contract or provision, the degree of mutuality, and whether the terms are unduly harsh, oppressive, or so one-

sided as to “shock the conscience.” Davis argued that four provisions of the program were substantively unconscionable.

Notice provision. Davis argued that the notice provision of the policy was substantively unconscionable because it shortened the statute of limitations provisions of the statutes and required that a claim be filed within one year of the discovery of a violation. The Ninth Circuit previously held that forcing employees to comply with a strict one-year limitations period for employment-related statutory claims was oppressive and substantively unconscionable in a mandatory arbitration context; for example, the court struck down a virtually identical provision in *Ingle*. The court rejected the argument that the provision was saved because the firm was bound to make its claims within a year of discovery, just like an employee.

The court also stressed that historically it has barred provisions that prevent claims which rely on a “continuing violation” theory. That theory allows employees to file suit after the statutory deadline when the employer engages in a “systematic policy of discrimination” consisting of related acts.

Relying on *Soltani*, where the court found that a shortened, six-month limitations period in an arbitration policy was not substantively unconscionable, O’Melveny contended that its program’s comparatively longer one-year notice provision also was not unconscionable. But, the court distin-

guished *Soltani*, explaining that there, the contract required a claim to be filed within six months after the employee left the employer; the time to file was not dependant on when the claim should have been discovered. Therefore, in *Soltani*, the provision did not nullify the continuing violations theory because the employee still could attach his claim to the start of the violation.

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theory.*

Confidentiality provision. The O’Melveny confidentiality policy precludes mention to anyone not directly involved in the arbitration of its pleadings, papers, orders, hearings, trials, awards, or even of the existence of the controversy. In *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, the Ninth Circuit found a similar confidentiality clause in an arbitration agreement substantively unconscionable, reasoning that employers continually arbitrate the same claims, obtaining the legal research and knowledge inherent in being a repeat player. Imposing a “gag order” on plaintiff-employees diminishes their ability to similar benefit.

Here, the court found that, while Davis' suit did not involve the kind of repeatable claim that could be made by millions of potential plaintiffs as in *Ting*, allegations like Davis' could be brought by thousands of firm employees. The court emphasized that even facially mutual confidentiality provisions can effectively lack mutuality and be unconscionable regardless of the number of potential claimants.

The court found the policy's confidentiality clause substantively unconscionable because it was overly broad under *Ting*, prevented employees from contacting other employees to assist in litigation, stifled the employees' discovery process. And, it put O'Melveny in a far "superior legal posture" by preventing plaintiffs from accessing precedent while allowing the firm to learn how to negotiate and litigate its contracts.

Exemption for attorney-client privilege defeats provision. The O'Melveny policy allowed the firm to bypass the arbitration forum and bring a lawsuit for violations of the attorney-client privilege or work product doctrine, or where an employee shares confidential information. The firm cited its contractual and ethical obligation to protect its clients' information as justification for the exemption.

Citing *Armendariz*, the court explained that California law allows an employer to preserve a judicial remedy if it is based on a legitimate commercial need or business reality. The court agreed that the firm might need to procure a quick court order to prohibit an

employee from releasing privileged information, thus justifying a narrow exception to the arbitration policy due to a legitimate business reality. The court also acknowledged that the attorney-client privilege and work product doctrine primarily are for the benefit of clients and cannot be made subject to arbitration under California law.

However, the court concluded,

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posture.'*

protection against breaches of confidentiality alone does not justify an exemption from arbitration. To constitute a reasonable business justification, something more than the employer's desire to maximize its advantage is necessary. The court held the O'Melveny's provision was one-sided, overly broad, and substantively unconscionable because it allowed the firm to obtain judicial relief for the disclosure of any confidential information, not just attorney-client privileged or work product documents.

Availability of statutory rights.

Davis also argued that the program's provision prohibiting most administrative actions for employment-related

claims covered by its scope conflicts with public policy. The challenged clause states that neither party can "pursue any lawsuit or administrative action in any way related to, or arising from, any claim covered by the program," except when filings are made with the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, the New York Human Rights Commission, or any similar fair employment practices agency.

Citing *Gilmer v. Interstate Johnson Lane Corp.* (1991) 500 U.S. 20, the court explained that although arbitration is favored as a matter of policy over both a judicial or administrative forum, an arbitration agreement may not require employees to waive potential recovery for substantive statutory rights established for a public purpose. Under *Armendariz*, while such rights are arbitrable, pursuit of legal rights and remedies provided by statute must be allowed.

Davis' employment rights derived from the FLSA and the California Labor Code are protected public statutory rights, like those covered by the protected Age Discrimination in Employment Act and the California Fair Employment and Housing Act noted in *Gilmer*, and the EEOC rights preserved by the firm's policy. Thus, the policy illegally prohibited employees from seeking judicial actions and injunctive relief based on public interest.

The court further emphasized that

complaints related to the FLSA and the Department of Labor may not be waived by an arbitration clause because the statutory scheme is premised on an employee's willingness to come forward in support of the public good. Consequently, the court found that even if the policy did not preclude the Department of Labor or California Labor Commissioner from instituting independent actions against the employer, it is illegal for the policy to preclude an

O'Melveny & Myers [9th Cir. 3-7-06] 485 F.3d 1066.) *

*The four
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individual such as Davis from notifying the agencies of any potential violations. Therefore, the court held the policy's clause prohibiting administrative claims was void under *Gilmer* and *Armendariz*.

Severability. Finally, the court determined that the four unconscionable provisions could not be stricken without "gutting the agreement," and thus, the entire policy was substantively and procedurally unconscionable and void under *Armendariz*. (*Davis v.*

Arbitration Log

• Discipline — Just Cause

Hayward Police Officers Assn. and City of Hayward (1-22-05; 51 pp.). *Representatives:* Daniel S. Connolly (city attorney's office) for the employer; Terry Bowman (Rains, Lucia & Wilkinson) for the union. *Arbitrator:* William E. Riker.

Issue: Did the City of Hayward police department have just cause to terminate the grievant?

Employer's position: (1) The grievant used excessive force to subdue a suspect at a crime scene and thereafter untruthfully reported the incident. By this conduct, the grievant relinquished the trust and confidence of the police department and the community he is charged to serve, and potentially brought discredit on the department.

(2) When the grievant arrived as the fifth officer at the crime scene, he confronted the suspect after he was prone, handcuffed, and compliant. The grievant admitted he "lost his cool" and attacked the suspect with punches, knee strikes, and kicks. Also, the grievant used excessive force when he pushed the suspect against a door and then threw him down after the suspect was passive and compliant.

(3) The grievant used more force than was necessary to affect an arrest, quell a disturbance, or preserve the public peace. The other arresting officers confirmed that the grievant used

excessive force, as the suspect had been stunned with a Taser gun, was lying on the floor, and posed no threat.

(4) The grievant admitted to one of the other arresting officers that he used more force than necessary and, under cross-examination, agreed that his three kicks were unreasonable and inappropriate uses of force.

(5) The grievant obscured the truth from his supervisor by not fully and honestly conveying the circumstances surrounding the arrest and omitting details from his written report, including references to his kicks. Additionally, he used words intended to mask the severity of his actions.

(6) The grievant's supervisor accepted the deceptive and incomplete report as a complete and factual description of the incident. Had other officers not voiced their concerns, the report would not have been questioned.

(7) Traditional elements of "just cause" justify the department's decision to terminate the grievant. As an expe-

rienced officer, the grievant had notice of his obligation to use reasonable force and write truthful reports. The excessive force and truthful reporting policies are reasonable rules. The department conducted a fair and objective investigation of the grievant's conduct before rendering a decision. The testimony of various witnesses during the internal affairs investigation was sufficient to justify termination. There is no evidence that the grievant's fellow arresting officers received favorable treatment for not reporting the grievant's use of force since the police chief did not initiate a criminal investigation, and thus there was no requirement to submit a report. The penalty of termination is not disproportionate to the grievant's conduct because he admitted to using excessive force, lied in his report, and numerous witnesses testified to the misconduct.

(8) The department did not violate the grievant's rights under the Public Safety Officers Procedural Bill of Rights Act. It was the grievant's responsibility to request representation under the act. And at the time he reported the incident to his supervisor, there was no ongoing investigation.

Attention Attorneys and Union Reps

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Union's position: (1) The grievant, while working an overtime shift, engaged in a foot pursuit of a parolee who was on methamphetamines, hid from the police, refused to comply with orders, was hit with a Taser gun, and then resisted being handcuffed. After being handcuffed, the suspect continued to move his feet and body dangerously in a confined space. Thus, the grievant used necessary force to place the suspect under control. The suspect was not injured.

(2) The grievant was not afforded his rights under the PSOPBRA. The grievant's supervisor, while aware of a pending internal affairs investigation and the severity of the accusations, directed the grievant to write a report without informing him that he should exercise his rights under the act. Afterwards, the supervisor approved the report without checking its accuracy or completeness. Thus, any discrepancies with later-written reports or oral testimony were interpreted as dishonest.

(3) The grievant's statement to his supervisor and the supplemental police report were obtained in violation of the Bill of Rights Act. The department knew that punitive action would be taken after the grievant's superior asked the other arresting officers about the incident within an hour of the arrest. Because the department failed to inform the grievant of his rights, neither his statements nor his police report can be considered to support the termination.

(4) In *City of Los Angeles v. Superior Court (Labio)* (1997) 57 Cal.App.4th

1506, 127 CPER 24, a police officer was interrogated by his superior without being provided his *Miranda* warnings or being informed of his rights under the PSOPBRA after an alleged offense occurred. The reviewing court found that the improper procedures violated the officer's PSOPBRA rights and the incriminating statement provided to the supervisor was excluded from the case.

(5) The city failed to establish the elements of just cause by clear and convincing evidence. When considering the totality of circumstances, there is insufficient evidence to support a finding that the grievant intentionally was dishonest in his police report. The grievant had a reputation as a hardworking officer and was told by his supervisor that he included the appropriate amount of detail in the report. The report was approved by two superiors who had knowledge of the incident. Also, the grievant knew that there would be an internal affairs investigation and that he would be required to provide a detailed account of the incident. Thus, he was not purposefully misleading in his report.

(6) The investigation into the incident failed to reconcile inconsistent versions of what occurred, resulting in a condemning interpretation of the events. Not every individual in the chain of command objectively reviewed the circumstances before rendering a decision.

(7) The investigating officer unfairly denied the grievant the opportunity to explain his report in the internal

affairs interview. The grievant was questioned only once, while the other officers were questioned multiple times. Also, the investigating officer did not inform the grievant of his PSOPBRA rights.

(8) Use of force cases should not be judged with 20/20 vision on hindsight. Reasonable allowance must be given to the fact that police officers often are forced to make split-second judgments in circumstances that are uncertain and rapidly evolving. Termination is a disproportionate penalty given the grievant's need to subdue the non-compliant suspect.

(9) Mitigating factors demonstrate that termination was not a just punishment. The day of the arrest, the grievant was distracted by the anniversary of the death of his grandfather and learned that his girlfriend was seriously ill. Also, the grievant's excellent service record, free from any proven excessive force incidents, does not support termination.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) Consideration must be given to the impact that this assessment will have on officers' confidence and ability to make the right choice in a high-stress situation.

(2) Whether force used in an arrest is excessive is best decided by the grievant's fellow arresting officers, who also are required to use reasonable force and report abuses. The other arresting officers testified that the grievant kicked and struck the suspect's back and head after the suspect was on the ground

and handcuffed. One of the grievant's fellow officers told the grievant to stop hitting the suspect during the series of punches. Another witness testified that the suspect begged the grievant to stop hitting him.

(3) The testimony and the investigation reveal that the other officers did not feel threatened by the suspect and felt they had other means of control.

(4) While there was no major injury to the suspect, the grievant's conduct did inflict redness and abrasions.

(5) The grievant understood that he contravened the limits of proper use of force, based on his training and a prior excessive force charge, for which he was exonerated. While some use of force may have been necessary to further gain control of the suspect, the grievant's blows were excessive.

(6) The grievant's error in judgment and the goal of deterring such future behavior justified the unanimous multi-tier decision to terminate employment.

(7) The grievant's description of events in his initial police report roughly corresponds to the other arresting officers' reports. However, the grievant failed to report that he punched

and struck the suspect twice with his knee. To his credit, during the internal affairs investigation, the grievant did admit to the previously unacknowledged strikes.

(8) In his initial report, the grievant was evasive and deliberately omitted details. He should have known a more-detailed report was warranted. Thus, the charge of untruthfulness is sustained.

(9) The grievant admitted, and the arbitrator agrees, that the personal problems distracting the grievant on the day of the misconduct are not an excuse for his excessive use of force. These factors do not warrant a decrease in the penalty.

(10) Although the duty to file a truthful supplemental report was principally the grievant's, termination might have been prevented if his supervisors had been more proactive in ensuring that he fully documented the incident. In the future, supervisors should receive additional training to ensure that they verify the thoroughness of officers' reports involving high-profile incidents.

(Binding Grievance Arbitration)

• Discipline — Just Cause

Alameda County Medical Center and Healthcare Workers Union, Loc. 250, SEIU (12-8-05; 15 pp.). *Representatives:* Rosemarie Kwiatkowski (interim assistant general counsel) for the employer; Bruce Harland (Weinberg Roger & Rosenfeld) for the employee organization. *Arbitrator:* Katherine J. Thomson.

Issue: Did the medical center discharge the grievant for good cause?

Employer's position: (1) The grievant failed to provide authorized medical documentation for his work absence from January to early April. The grievant repeatedly acknowledged that he was required to provide medical verification for his absence.

(2) The grievant flagrantly disregarded the employer's sick leave policies. On one occasion, when his supervisor requested that he provide the required medical documentation, he promised to retrieve the documents from his car but failed to return to the office.

(3) During the Step 3 grievance meeting, the grievant falsely stated that he had submitted the requested documentation to his supervisor in January.

(4) The medical documents provided at the grievance meeting were unauthenticated, and there is no reliable testimony that the grievant ever gave them to his supervisor.

(5) Even if the grievant belatedly provided the required documentation, the employer is not obligated to rescind the termination because there was just cause to terminate the grievant at the time he was discharged.

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(6) A public employer has broad discretion to take appropriate disciplinary action for just cause, and the penalty should not be disturbed unless there has been an abuse of discretion.

(7) The grievant's absence caused harm to the public service because managers could not plan staffing since they did not know if, or when, the grievant might return to work. Additionally, condoning the grievant's actions will encourage undesirable conduct as other employees will perceive that policies are not enforced.

Union's position: (1) The grievant did not receive the January 2004 letter directing him to submit further medical documentation proving his inability to return to work or face being placed on unauthorized leave without pay with the possibility of disciplinary action and termination. This letter asked the grievant to provide documentation for November 2003, which he already had supplied.

(2) The March 2004 notice of proposed termination incorrectly identified the date of the grievant's last medical documentation and failed to charge that the grievant did not provide required documentation in January or later. The employer must be held to the contentions outlined in the notice because the grievant was not properly informed of his obligations to provide further documentation.

(3) Testimony that the grievant told a medical center employee he was a rap music producer is not relevant. Moreover, the employee's testimony is not credible because she did not give her notes to the grievant's supervisor on the

day she allegedly learned the information.

(4) The grievant's failure to notify his employer of his change in address does not diminish his employer's obligation to provide proper notice of termination. Alternate means of contacting the grievant were available since his supervisor had access to the grievant's phone number and knew that the grievant's relative worked at the center.

(5) The grievant's supervisor did not tell the grievant about the intent letter when she saw him the day after the letter was drafted, never checked to make sure the grievant signed for the certified letters, failed to follow up on the intent notice and letter, and failed to document any phone calls made to the grievant regarding his potential termination.

(6) The supervisor's testimony alleging that the grievant refused to give her medical documentation is not credible because it was not mentioned in the notice of proposed termination.

(7) The employer failed to conduct a full and fair investigation before termination, as evidenced by its failure to detect and fix the incorrect factual assertions in the letter and notice regarding the date of the last medical documents.

(8) Because the employer failed to verify the contents of the documents presented at the grievance meeting, it did not discover that the grievant had visited the doctor, who determined that the grievant could not return to work. Also, the employer failed to discover that it had received these documents.

(9) The labor relations manager who drafted the intent letter and notice of termination did not talk to the grievant's supervisor until after the grievance meeting. Moreover, the labor relations manager's testimony stating that she did not receive medical documentation is not credible in light of notes to the contrary.

(10) The labor relations manager admitted that if she had received the documentation, there would be no just cause for termination. Consequently, it is the employer who is at fault for failing to keep accurate records of the medical documents the grievant provided.

Arbitrator's holding: Grievance sustained in part.

Arbitrator's reasoning: (1) The threshold issue is whether the intent letter and the notice of proposed termination sufficiently notified the grievant he was being charged with failure to provide documentation for his leave in and after January.

(2) The grievant might have been confused about the nature of the charges because the notice misstated the date of his last medical documentation and the date of the January request for current medical documentation. However, the employer attached pertinent documents that should have put the grievant on notice.

(3) The proposed termination notice accurately stated that, at least by late February, the workers' compensation administrator had not received timely medical documentation. While not ideal, the notice adequately advised

the grievant that he was charged with failure to provide medical documentation.

(4) The grievant was aware that he was required to submit medical documentation for his leave. He admitted this in a discussion with his supervisor in early January.

(5) The grievant's allegation that his supervisor refused to look at the medical documentation he provided in January is not credible. The grievant did not complain about this to anyone and there is no evidence that he attempted to deliver or mail the required documentation.

(6) Based on the record, it is likely that the grievant did not return for his checks after January because he knew he would be asked for the required medical documentation, which he did not possess.

(7) The grievant did not submit the required documentation to his supervisor or to the workers' compensation administrator prior to receipt of the notice of proposed termination. Therefore, at the time the notice was sent, there was just cause to discipline the grievant.

(8) The employer did not adequately investigate the facts before terminating the grievant. The labor relations manager did not examine the documents attached to the notice of proposed termination with sufficient care to realize that the notice contained factual mistakes. Nor did the manager note the absence of a receipt for the intent letter. Because of this, the grievant might not have known about his impending termination or his right to a *Skelly* hearing.

(9) Further attempts to notify the grievant might have been successful and likely would have prodded the grievant to provide the required documentation. In fact, once the grievant was aware of his termination, he provided the medical documentation at the grievance meeting. Even if unsuccessful, further attempts to notify the grievant would have ensured that the employer had made good faith efforts to afford procedural rights prior to termination.

(10) The medical documents the employer now claims are unauthenticated were accepted without question at the grievance meeting. The employer had ample opportunity to verify the documents' authenticity. Thus, the evidence shows that the grievant produced the required medical documents for the relevant time period at the grievance meeting.

(11) The employer had just cause to discipline the grievant because he failed to timely provide medical documentation. However, the penalty of termination is inappropriate because the grievant did provide the medical documentation after he received proper notice.

(12) Because the record does not indicate whether or when the grievant can again return to work or be placed on unpaid disability leave, and because the grievant failed to provide his correct address and discontinued communication with the employer, the grievant is not awarded backpay; he will be entitled to benefits as though he were on a work-related disability leave of absence. Also, the employer will not recover any workers' compensation

benefits received after February.

(Binding Grievance Arbitration)

• Contract Interpretation

California State University and California Faculty Assn. (7-24-06; 17 pp.). *Representatives:* Paul G. Verellen (labor relations manager) for the university; Kathryn Sheffield (association representative) for the employee association. *Arbitrator:* Bonnie G. Bogue.

Issue: Are the three consolidated grievances arbitrable under Sec. 10.2 of the collective bargaining agreement if the grievance is based on issuance of administrative policy statements or directives?

Pertinent contract language: Section 10.2(b) defines a "grievant" to be "... an employee or group of employees alleg[ing] that they have been directly wronged by a violation, misapplication, or misinterpretation of a term or provision in this Agreement that confers rights upon them individually or as a group. The term 'grievant' shall also mean the CFA when alleging a grievance on behalf of itself, or on behalf of a unit member or a group of unit members."

Association's position: (1) The association has the contractual right to file a grievance protesting an employer's announcement of policy in order to prevent wrongs that would result if such policies that violate the collective bargaining agreement were implemented and applied to unit employees.

(2) The advice conveyed by the university through the Office of the Assistant Vice Chancellor in charge of

labor relations informed the campuses that they could ignore indirect instructional credits in the assignment of work to employees in the Faculty Early Retirement Program. If followed, this administrative directive would contravene various provisions of the bargaining agreement.

(3) Requiring that an employee first must actually be harmed before a grievance becomes arbitrable would allow the university to publish and impose policies that conflict with the bargaining agreement. This interpretation would allow the university to impose a policy in violation of the contract and later claim that it is a binding past practice.

(4) The question whether employees suffered any damage must await an evidentiary hearing. The lack of an allegation of any specific harm does not render the grievance non-arbitrable.

(5) The Dominguez Hills grievance asserts that FERP-covered employees were not notified they would be assigned an excess workload when the employer announced an increase in the upcoming year's teaching assignment. A hearing on the merits is needed to establish the harm done as a result.

(6) The San Luis Obispo grievance challenged an email sent by the dean of the College of Science and Mathematics advising employees who were considering the early retirement program to meet with the employer in anticipation of possible workload increases. The grievance is arbitrable for the same reasons as the systemwide grievance, and is not premature due to a lack of actual harm.

University's position: (1) The three grievances are premature and not arbitrable under the contract because no bargaining unit member has been "directly wronged" or "harmed." The employer's directives regarding retirement program workload had not been implemented at the time the grievances were filed.

(2) The contract uses the past tense when stating that employees must "have been directly wronged." This means a grievance cannot be filed until an actual employee has been wronged by implementation of the directive. Therefore, this grievance is not arbitrable.

(3) The "or" in the last sentence of Sec. 10.2(b) means that the association cannot file a grievance both on its own behalf and on behalf of unit members. Since this grievance was filed on the association's behalf, there can be no liability accruing to individual members of the bargaining unit.

(4) Section 10.2(b) requires that the grievant be an employee or a group of employees who have been directly wronged; therefore, when the named grievant is the association, the grievance must allege how the association has been directly wronged by the alleged contract violation. Because the association's grievance fails to allege how the association itself has been directly wronged by the vice chancellor's advice, it is not arbitrable.

(5) The Dominguez Hills grievance is moot because the actual teaching assignments of the three grievants did not include a fifth class; no other evidence of an increase in teaching assignment was presented.

(6) The San Luis Obispo grievance is not arbitrable because it is premature and a violation of the contract is only speculative. At the time the grievance was filed, the dean only had proposed implementation of the new policy and no employee had yet been assigned an increased workload.

Arbitrator's holding: Grievance sustained in part.

Arbitrator's reasoning: (1) The contractual grievance procedure provides the means for association-represented employees to ensure that the terms of the collective bargaining agreement are not misinterpreted, misapplied, or violated.

(2) If the employer issues a policy statement, contract interpretation, or directive that allegedly misinterprets or misapplies the agreement, or authorizes an action that would violate the contract if implemented, that action in and of itself can be grieved under the contract. To interpret the contract otherwise would defeat the purpose of the grievance procedure and prevent early resolution of differences in contract interpretation as mandated by Sec. 10.4.

(3) Contrary to the university's contention, the plain meaning of the contract allows the association to file a grievance on its own behalf as well as on behalf of bargaining unit members for violations of employee rights.

(4) In a grievance in which the association is named as the grievant, Sec. 10.2(b) of the contract allows the association to file a grievance in which it is the named grievant on behalf of employees, and the contract does not re-

quire the association to allege how it has been directly wronged.

(5) Although the grievance did not include a specific proposed remedy as required under the grievance procedure, it need not be dismissed because the clear remedy for a statement of policy that violates the bargaining agreement is rescission of the policy. Additionally, the failure to specify the remedy did not prejudice the university's ability to understand the nature or scope of the particular grievance, or impede its ability to respond to it.

(6) The Dominquez Hills grievance is moot and not arbitrable because the school reversed its position on the announced policy and did not increase the grievants' workloads, and nothing in the record suggests that future violations of the contract would occur.

(7) The San Luis Obispo grievance is arbitrable because the dean's statement is alleged to be a misinterpretation of the contract, creating a "wrong" that is subject to arbitration under the contract.

(Binding Grievance Arbitration)

- **Contract Interpretation**

- **Bargaining History**

Santa Ana Unified School Dist. and Santa Ana Educators Assn. (12-28-06; 24 pp.). *Representatives:* Keith V. Breon (Breon & Shaeffer) for the district; Bill Ribblett (regional staff consultant for CTA/NEA) for the association. *Arbitrator:* Walter N. Kaufman (CSMCS No. ARB-05-0430).

Issue: Did the district violate the collective bargaining agreement by

transferring the grievant to teach at another school?

Pertinent contract language: "[Section] 11.7.11: District-initiated transfers caused by curricular modifications and/or other educationally-related needs of the district and/or affected schools may be recommended at any time. Such transfers shall not be arbitrary or capricious, and in making such transfers, the district shall refer to the criteria in [section] 11.7.3."

Association's position: (1) The involuntary transfer of the grievant was arbitrary and capricious despite the fact that the agreement allows for "district-initiated transfers caused by curricular modifications and/or other educationally related needs." Section 11.7.3 was specifically amended to read that only "[p]osted educationally-related needs" could be the basis for involuntary transfer, and the district did not present any evidence of an educationally related need for the grievant's transfer.

(2) Section 11.8.2 of the agreement, which states that "[a]ll transfers and re-assignments shall occur in accordance with the provisions of this Article," was added at the district's suggestion, to assuage the association's concern that an involuntary transfer not be arbitrary and capricious. The intent of this section is to insure that all Section 11.7.3 criteria be met to validate a transfer.

(3) The district had never previously bargained for or stated the proposition that program improvement, the stated basis for the grievant's transfer, can by itself be an educationally related need within the meaning of Sec. 11.7.3

to validate transfer. Consequentially, the district is attempting to gain a program-improvement-based right to transfer through arbitration instead of through bargaining.

(4) Program improvement is a product of the No Child Left Behind legislation. In a training guide issued by the California Department of Education, local educational agencies were advised that, in complying with NCLB, replacing school staff first requires consultation with the local bargaining organization.

District's position: (1) The district has the right, under the language of the collective bargaining agreement, to make transfers based on curricular modifications and/or other educationally related needs. Program improvement is a form of those needs and thus, a valid basis for transferring the grievant.

(2) Section 11.7.11 states only that the district "shall refer to" Section 11.7.3, but it does not mandate that each criterion in Section 11.7.3 be applied when initiating an involuntary transfer. Furthermore, the district considered "legal requirements" and the grievant's performance evaluations, as listed in Section 11.7.3, when it made its decision to transfer the grievant.

(3) The parties intended that the agreement permit educationally related needs, without specifically listing which ones, to be the basis for district-initiated transfers.

(4) At the time the charge was filed, the parties were engaged in bargaining regarding program improvement, how-

ever, program improvement as a basis for transfer was not an issue raised during negotiations. Until a position is reached on program-improvement-based transfers, such transfers cannot be relied on to support a grievance, as the district has a right to transfer based on the clear language of the bargaining agreement.

Arbitrator's holding: Grievance sustained.

Arbitrator's reasoning: (1) The bargaining history reveals that there were recent bargaining changes which clearly restricted the district's ability to transfer teachers.

(2) Educationally related needs must be "posted," meaning expressed in specificity for the particular case as to create expectations standards, before they can be a basis for involuntary transfer.

(2) In the wake of this proceeding, it is likely that the impact of program improvement on involuntary transfers will be part of future negotiations, and it is not the arbitrator's role to reach a decision on this issue.

(3) Without deciding if program improvement constitutes curricular modification or other educationally related needs as required to be a valid basis for transfer, the involuntary transfer of the grievant was arbitrary and capricious, and therefore, in violation of the bargaining agreement.

(4) Although a district witness testified that the decision to transfer the grievant was based on information from the school principal, the principal testified that her opinion regarding the grievant was not sought for consideration in the transfer decision.

(5) The principal's evaluations of the grievant's performance were above average, and thus, inconsistent with the principal's adverse and largely anecdotal testimony used by the district in making its decision to transfer the grievant.

(6) The transfer decision was arbitrary and capricious because the grievant's students did not under-perform on standardized tests.

(7) The record does not demonstrate that the grievant was non-cooperative or refused to implement the contemplated remedial instructional plan. Rather, the transfer was in retaliation for the grievant's outspoken protest of the selected instructional approach.

(Binding Grievance Arbitration)

- **Contract Interpretation**
- **Past Practice**
- **Timekeeping**

Service Employees International Union, Loc. 790, and San Francisco Bay Area Rapid Transit Dist. (4-07; 18 pp.). *Representatives:* Vincent Harrington (Weinberg, Roger & Rosenfeld) for the union; Matthew Burrows (district counsel's office) for the district. *Arbitrator:* Christopher D. Burdick.

Issue: Did the district violate the parties' contract by changing the method of recording work hours?

Pertinent contract language: Section 1.5 states, "Rules or regulations or practices affecting employees beneficially will not be changed without mutual agreement."

Union's position: (1) The newly implemented PeopleSoft timekeeping

software is less beneficial to employees than the traditional methods of recording work hours used by the union's professional unit. Thus, the district violated Sec. 1.5 of the contract by unilaterally adopting the PeopleSoft system.

(2) The new method substitutes a "real time" reporting system for the prior "elapsed time" system. Under the old system, employees entered a regular shift schedule of 8 or 10 hours and only noted exceptions to that time; workers were not required to "punch in" or "punch out" when, for example, taking lunch. The PeopleSoft system requires employees to take actions they were not previously required to do. They must enter their work time into the "web clock" on their computer and swipe an employee identification card when they arrive at or leave work.

(3) The PeopleSoft system has a material impact on working conditions because it "docks" paid work hours based on an employee's failure to observe a programmed start time; docking can be reversed only by the manual intervention of a supervisor.

(4) Before the adoption of the PeopleSoft system, it was presumed that employees worked the "core hours" of their shifts unless an employee specifically asked for special hours for a particular day. With the PeopleSoft system, manual intervention in the program with express approval of the supervisor is required to establish a scheduling variation. The more arduous, new system will make supervisors more reluctant to be flexible in granting work-time variation requests.

(5) A clear and detrimental change in existing practice and working conditions has occurred, and the old time-keeping system should be restored.

District's position: (1) The union objects to having its members use modern technology that would more accurately record its members' time at work.

(2) District employees always have been required to record their time to ensure that they are paid for all hours worked. The new technology is simply a change in the "method of operation" or tools by which time is kept, and thus, can be adopted unilaterally by the district.

(3) There is no protectable beneficial past practice, since employees have recorded their time on timesheets or by using a mechanical time clock. The new system improves the accuracy of recorded hours and ensures the district's financial accountability to the public.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) The preliminary task is to identify and describe the claimed beneficial past practice. Based on the record, there have been at least three different timekeeping practices before implementation of the new system; one recorded elapsed time, while the other focused on the employee's actual start and stop time. The varied old timekeeping systems are not a form of past practice entitled to protection under the contract.

(2) The past practice allowed employees to self-report their time, enabling them to misstate and falsify their work times with little or no supervisory

oversight. The employer understandably desires more uniformity, certainty for verification of reported hours, and transparency to appease the public.

(3) Absent a contractual waiver, the employer retains the right to manage its workforce and workplace, and can unilaterally change the method of operations if doing so does not violate protected contractual rights. The district changed only the method by which employees record their time and did not violate the contract.

(4) This conclusion is consistent with *Rust Craft Broadcasting* (1976) 225 NLRB 327, where the National Labor Relations Board held that the employer's unilateral installation of time clocks did not violate the NLRA. There, the method of timekeeping also changed from elapsed time to real time. The board found the new method a more dependable means of calculating and enforcing employees' time at work.

(5) If the new system causes employees to be improperly docked pay due to computer-generated absences or a supervisor's refusal to correct the error, workers have a remedy under the grievance procedure. Similarly, an employee can contest the denial of a request to vary work hours if such a variance is guaranteed by the contract.

(Binding Grievance Arbitration)

Public Employment Relations Board

Orders & Decisions

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

Dills Act Cases

Unfair Practice Rulings

Requirement that employee relinquish union membership to obtain religious objector status is permissible: SEIU.

(Dinkins v. SEIU Loc. 1000, CSEA, No. 1901-S, 5-7-07; 2 pp. + 6 pp. R.A. dec. By Member Shek, with Members Neuwald and McKeag.)

Holding: The union's insistence that an employee resign as a union member in order to attain religious objector status does not violate the Dills Act.

Case summary: The charging party alleged that the union violated the Dills Act by refusing to provide her with the documents necessary to become a religious objector and have her agency fees directed to a charitable organization. The charging party maintained that her religious tenets prohibited her from supporting employee organizations. However, she was informed by the State Controller's Office that union membership dues would continue to be deducted from her paycheck until the controller received the requisite forms from the union affirming her religious objector status.

The R.A.'s investigation revealed that the charging party was a member of SEIU Local 1000. Union policy permits an employee with religious objector status to have a sum equal to the fair share fee paid to a charitable organization,

however, that employee first must resign his or her membership in the union.

The R.A. concluded that the union's argument is consistent with the definition of a religious objector set out in Sec. 3515.7(c) of the act. Accordingly, the union did not violate the act by insisting that the charging party relinquish her union membership before acquiring religious objector status or by refusing to give her the needed paperwork to become a religious objector.

The board adopted the R.A.'s dismissal of the charge as a decision of the board itself.

EERA Cases

Unfair Practice Rulings

Absent protected activity, insufficient facts to support discrimination charge: Oakland USD.

(Benton v. Oakland Unified School Dist., No. 1902, 5-7-07; 2 pp. + 7 pp. R.A. dec. By Member Shek, with Members McKeag and Neuwald.)

Holding: Because the charging party alleged only that his hours were reduced and that he was reprimanded for his involvement in heated verbal confrontations with other em-

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ployees, the charge was dismissed for failure to state a prima facie case.

Case summary: The charging party, an outreach consultant in the Oakland Unified School District, alleged that the district violated EERA by reprimanding him and reducing his position from full-time employment to an 80 percent position. According to the factual allegations, the charging party was involved in a series of heated incidents with several different employees regarding available grant money and his reduction in hours. As a result of these incidents, the school principal issued a letter of concern which emphasized that the charging party had taken an “overly aggressive and verbally abusive” tone. In a subsequent letter of reprimand, the principal expressed alarm over the charging party’s continued unprofessional conduct and poor attendance.

Based on these facts, the R.A. concluded that the charging party failed to state a prima facie case because the charging party did not allege any facts indicating that he had engaged in protected activity as required to support an unlawful discrimination charge under EERA. The R.A. also dismissed the charging party’s claim that the district had unilaterally reduced his hours, explaining that as an individual employee, the charging party lacked standing to allege unilateral change violations. The R.A. further noted that an individual employee cannot allege violations of sections that protect the collective bargaining rights of employee organizations.

The board adopted the R.A.’s dismissal as a decision of the board itself.

Change in contributions to health care benefits not unfair practice: Madera USD.

(*California School Employers Assn. and its Chap. 169 v. Madera Unified School Dist.*, No. 1907, 5-24-07; 7 pp. + 8 pp. R.A. dec. By Member Shek, with Chairman Duncan and Member Neuwald.)

Holding: The district’s change in contribution levels toward current and retired employees’ health care benefits was not an unfair practice because the new levels were consistent with the terms of the collective bargaining agreement and past practice.

Case summary: The association filed an unfair practice charge alleging that the district violated EERA by unilaterally changing its contribution level toward health benefit premiums for current and retired employees. Section 7.1.2 of the collective bargaining agreement between the parties reads, “The district agrees to pay ninety percent of the total insurance premiums for the [health and welfare package, and] employees’ contributions shall be based upon the health plan selected.” Additionally, Sec. 7.4.3 provides, “The district’s contribution toward retirees’ medical insurance will be in the same amount as that for the current classified employees’ coverage.” Finally, Sec. 7.4.4.1 states, “The retirees shall be responsible for the same amount of cost for maintaining medical insurance coverage as other classified District employees.”

In 2005, while the parties were engaged in contract negotiations, the employer’s health care provider announced that it would charge school districts higher premiums for current and retired employees, with a disproportionately higher increase in retired employees’ rates. In response, the district proposed to change its contribution levels. The association opposed the proposal, and the district withdrew it. Subsequently, the parties agreed to modify health benefits by expanding the number of health plan choices from three to six. Other modifications also were agreed on, but none related to contributions.

According to the allegations, after negotiations, the district unilaterally issued lower employer health plan contributions for retirees than for current employees; despite this change, the overall costs of retiree plan premiums were higher than those for current employees. The charge alleged unilateral changes to the contribution level of premiums for both current and retired employees.

The R.A. found that the charge did not demonstrate a change in policy involving current employees. Thus, there was no unlawful unilateral change in policy for that group.

The R.A. also held that although the district contribution level for retirees may have been unilaterally changed, retirees are not covered by EERA. Thus, PERB does not have authority to resolve the complaints of former school employees under the act.

Citing *Temple City Unified School Dist.* (1989) No. 782, 83X CPER 15, the R.A. explained that while retirement benefits for current employees are a mandatory subject of bargaining, benefits for retirees are only a permissive subject of bargaining. Accordingly, the R.A. held that because retiree benefits are not a subject within the scope of representation, the district did not violate its duty to bargain in good faith when it unilaterally modified retiree benefits. Also, the R.A. found that there was no evidence to support the allegation that the district interfered, or attempted to interfere, with the internal activities of the union. Therefore, the R.A. dismissed the charge.

The board upheld the R.A.'s dismissal of the unfair practice charge but on alternative grounds. Citing *Temple City*, the board affirmed that retirees are not protected under EERA. However, unlike the R.A., the board held that future retirement benefits for current employees are within the scope of bargaining because they are part of an employee's compensation package. PERB, like the National Labor Relations Board, relied on the U.S. Supreme Court case *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157, which held that retirement, health, and life insurance benefits for current employees are within the scope of bargaining. Thus, like the NLRB, PERB held that future retirement benefits of current employees are a mandatory bargaining subject.

The board clarified that according to the association's allegation, the district was required to pay more for retirees after the healthcare provider began charging higher premiums for retirees than for active employees. On the other hand, the district alleged that its past practice under Sec. 7.4.3 of the agreement was to pay retirees a fixed amount of money equal to 90 percent of the premiums for active employees, so that its contribution to retirees would be the same monetary amount as that paid to active employees.

The board asserted that the ultimate issue in the case was whether the term "same amount" as stated in Sec. 7.4.3 refers to a fixed monetary sum, as the district alleged, or to 90 percent of the retiree rate independent of the current employee rate, as the association alleged. Adopting the former

interpretation, the board found that the language of Sec. 7.4.3 makes it clear that the district's contribution provision and formula under 7.1.2 applies to both employees and retirees. Thus, the amount of the district's contribution to the retirees' health insurance benefits is computed based on 90 percent of the total insurance premiums for the health plan package for current employees. Also, the board emphasized that Sec. 7.4.4.1 must be read in conjunction with, and in reference to, Sec. 7.1.2 since the second sentence in the latter sets forth the employees' contribution.

Finally, the board stressed that the interpretation of contractual health and welfare benefits for the purpose of determining the issue of unilateral change depends on the terms of the memorandum of understanding and the parties' past practice. The board concluded that the charging party did not meet its burden of establishing a change in policy, and thus affirmed the dismissal.

Unilateral change in policy allegations deferred to arbitration: Delano Union Elementary School Dist.

(*Delano Elementary Teachers Assn. v. Delano Union Elementary School Dist.*, No. 1908, 6-6-07; 17 pp. + 18 pp. R.A. dec. By Member Neuwald, with Members McKeag and Shek.)

Holding: Because the association failed to establish an unstable collective bargaining relationship, four allegations asserting unilateral policy changes were deferred to arbitration.

Case summary: In April, when two dead bats were discovered in an abandoned air duct attached to a classroom, the association president filed a formal report of a potentially hazardous classroom conditions. The district declined to review the report because it was not submitted by the affected teacher in whose classroom the bats were found. The association president filed a grievance regarding the matter, and the affected teacher filed a notice of unsafe conditions.

At the end of that month, the California Teachers Association informed the district that the association president and another teacher should be granted released time to attend a one-week training event on May 2. The district de-

nied the request, stating that because students were taking special exams that week, the teachers' presence was vital. Also, the district complained that the association failed to provide the required 48-hour notice. The district claimed it had the discretion to deny released time requests and interpreted the two-day notice requirement as a 48-hour notice requirement.

In May, the association president filed a transfer request seeking reassignment to a different middle school. The district denied the transfer and hired another qualified teacher, but one who had less seniority. The association alleged that the president satisfied all necessary requirements, and thus his request should have been granted.

In September, the association president met with a district representative to discuss working conditions impacting seventh- and eighth-grade language teachers. Shortly thereafter, the president received a poor performance evaluation covering the last three years of his employment. He filed a notice disputing the evaluation, urging that his grievance against the principal of the middle school where he taught prevented the district from giving an unbiased evaluation. The notice also stated that after the association president filed his grievance against the principal, the district began to assign students of mixed ability to his classes, thereby creating a more difficult teaching environment.

In October, the association president received a written reprimand for his conduct during a meeting where he allegedly made a district representative feel "embarrassed, intimidated, and degraded."

The association's unfair practice charge alleged, first, that the district had unilaterally changed the policy concerning reporting of unsafe classroom conditions by adding a requirement that only the teacher whose classroom was affected could file a report. Second, the charge alleged that the district changed the released time request policy by asserting it has discretion to deny released time requests and by changing the required leave request time from two days to 48 hours. And, finally, the unfair practice charge claimed that the district unilaterally changed the voluntary transfer request policy by claiming discretion in making transfer decisions.

The R.A. found that only the first two allegations established a failure to bargain in good faith. He explained that it was unclear from the charge, what the association viewed as the difference between a two-day and a 48-hour notice requirement. Also, the R.A. was unpersuaded by the association's assertion that the five contractually outlined criteria for transfer requests constitute a threshold, that, if met, guarantees a teacher's requested transfer. The R.A. concluded that the contract allows the district to transfer employees based on educational needs.

The R.A. held that all four unilateral change allegations were subject to deferral to arbitration under the collective bargaining agreement, and thus dismissed the charge under PERB Reg. 3260(b)(5). Citing *Collyer Insulated Wire* (1971) 192 NLRB 827, the R.A. held deferral to arbitration was appropriate because (1) the dispute arose within a stable collective bargaining relationship where there was no enmity; (2) the employer was ready and willing to proceed to arbitration and waived contractual procedural defenses; and (3) the contract and its meaning were at the center of the dispute.

The R.A. also dismissed the association's allegation that the district violated EERA by discriminating against the association president based on his protected activity, such as participating in the meeting to discuss the employment conditions of language teachers and filing the notice of dispute regarding his evaluation. The R.A. found that each of the alleged unilateral policy changes occurred several months before the alleged protected activity, and thus, were not retaliatory. Furthermore, the R.A. highlighted that the association president's transfer request was one of six that were denied, and the district rightfully contended that it had discretion to reject the request. Also, the R.A. found that there was no evidence that the president was treated disparately when he was denied released time, noting the district simultaneously denied another teacher's identical request.

Other than the temporal proximity between the letter of reprimand and the president's protected activity, the R.A. found insufficient facts to establish a nexus between the protected acts and the adverse action. The R.A. further found

that the district did not discriminate against the association president by denying his request to defer his performance evaluation, because the district legitimately determined that the president was a high-profile employee whose evaluation was important to the school.

The R.A. determined that the district did not have intent to subvert negotiations and did not bargain in bad faith; PERB's denial of the district's petition for an impasse determination did not indicate bad faith. Also, the R.A. maintained that the district did not violate employees' representation rights, as there were insufficient facts to determine whether the association's visits fell under reasonable access rights or whether the district was justified in prohibiting the visits.

The association argued that the R.A. erred in deferring the four unilateral change allegations to arbitration because the dispute did not arise out of a stable collective bargaining relationship as demonstrated by the extraordinary number of grievances filed. The association also asserted that enmity between the parties is established by *Delano Union Elementary School Dist. (Delano)* (2006) No. HO-U-889, a recent decision where the ALJ found that the district retaliated against the association president based on his exercise of protected rights.

The association also argued that the factual allegations support its discrimination charge, contending that the district representative allegedly admitted he took action against the association president because of the president's position, his high-profile union activities, and his alleged attempt to usurp and/or undermine the authority of the district principals. The association added that unlawful motive is evidenced by the board's own findings of discrimination and retaliation in *Delano*.

The district asserted that the deferral of the charge was appropriate, and the grievance procedure would not be futile.

Because the board has never considered the deferral requirement demanding a stable collective bargaining environment, it looked for guidance to decisions of the National Labor Relations Board.

The NLRB will not defer to arbitration where there is an unstable collective bargaining relationship, or where the respondent's conduct indicates a rejection of collective bargaining and the organizational rights of employees. The NLRB considers the length of an amicable bargaining relationship between the parties and whether the respondent's conduct interferes with contract rights. Deferral is less likely if there is an absence of a lengthy, successful bargaining relationship or if the allegations in the unfair practice charges strike at the foundation of the grievance arbitration mechanism.

The board found that the association failed to demonstrate that there was an unstable collective bargaining environment. It found a history of amicable negotiations and noted that the district allowed the association president representation even though he was not being disciplined. Also, the board noted that the association president had not been terminated and that effective dispute resolution machinery was available. The board concluded that the district's conduct did not interfere with collective bargaining rights as the district continued to engage in negotiations and numerous grievances had been settled. Thus, the board found deferral of the four unilateral change allegations was appropriate, and it dismissed them.

The board held that the association failed to establish unlawful retaliation against the president, but that it did establish a case of interference with regard to the principal's verbal and written admonishments of the association president. The board emphasized that unlike a retaliation allegation, where unlawful motive must be demonstrated, establishing interference requires only slight harm to employee rights. The board found that telling the president not to conduct an investigation into a grievance during his off-duty time interfered with the association's rights.

The board reversed and remanded the R.A.'s dismissal of the interference allegation but affirmed dismissal of all other claims.

Duty of Fair Representation Rulings

Charge filed beyond six-month limitation period dismissed as untimely: SEIU.

(*Gutierrez v. SEIU Loc. 99*, No. 1899, 4-16-07; 2 pp. + 8 pp. R.A. dec. By Chairman Duncan, with Members Shek and Neuwald.)

Holding: PERB is prohibited from issuing an unfair practice complaint with respect to any charge based on an alleged unfair practice occurring more than six months prior to the filing of the charge.

Case summary: The charging party, a school bus driver employed by the Los Angeles Unified School District and represented by SEIU Local 99, alleged that the union violated EERA by breaching its duty of fair representation and failing to meet and negotiate in good faith.

Three years before the charge was filed, the district unilaterally reduced total bus driver hours per pay period and allegedly developed a practice of hiring contractors to do the work that remained after the bargaining unit's drivers' hours were capped. The charging party claims that the union was not given notice or an opportunity to bargain, and the reduction in hours was not made in accordance with seniority rules. The union allegedly failed to adequately respond to unit members' complaints about this conduct. Also, the charging party alleged that the union violated the duty of fair representation because it did not address grievances, neglected to respond to certified mailing, and failed to retain strong union advocates. Additionally, the charging party protested a new higher dues structure.

The R.A.'s warning letter stated that apart from the charging party's allegation that the union failed to respond to certified mailing, the charges were legal conclusions, lacking the specific facts required to demonstrate a breach of the duty of fair representation.

The R.A. dismissed the charge because the events described in the allegation occurred more than six months prior to the filing of the charge. PERB is prohibited from issuing a complaint with respect to any charge based on an alleged unfair practice occurring more than six months prior to the

filing of the charge. Also, the R.A. expressed that the charging party's protest against higher dues was not specific enough to form the basis of a prima facie case.

Additionally, the charging party alleged that the union failed to meet and confer in good faith. Citing *Oxnard Educators Assn. (Gorcey)* (1988) No. 664, 75 CPER 86, the R.A. noted that the charging party, as an individual employee, lacked standing to allege that an employee organization has failed to bargain in good faith.

The board found the R.A.'s dismissal free of prejudicial error and adopted it as the decision of the board itself.

Untimely filing of grievance did not breach DFR: CSEA.

(*Wyman v. California School Employees Assn. and its Chap.* 374, No. 1903, 5-7-07; 2 pp. + 9 pp. R.A. dec. By Chairman Duncan, with Members McKeag and Neuwald.)

Holding: The association's failure to obtain the charging party's signature and approval of a grievance, the untimely filing of a grievance, and the failure to schedule an informal conference did not breach the duty of fair representation.

Case summary: The charging party is a classified employee of the Silver Lake Unified School District. She applied for a position as a food services account technician, however, the district elected to hire an outside candidate. The collective bargaining agreement between the union and the district requires the district to provide a justification when an outside candidate is selected over an internal candidate. The charging party requested justification from the district, however, she received a memorandum displaying her interview and test scores but lacking any justification. The union filed a grievance on the charging party's behalf.

The district denied the grievance on the grounds that the union had failed to attempt informal resolution of the matter with the charging party's immediate supervisor before filing the grievance, as required by the negotiated agreement.

The union filed a second-level grievance. Despite the fact that this was filed late, the district conducted a second meeting at which it discussed with the CSEA representative

its failure to hire the charging party. Following this meeting, the union informed the charging party that it would not pursue the grievance to arbitration.

The charging party filed an unfair practice charge alleging that the union breached its duty of fair representation by failing to arrange an informal conference with the charging party's supervisor before filing the grievance, by the untimely pursuit of levels one and two of the grievance, and by failing to obtain the charging party's signature or approval of the language of the grievance and the remedy sought by CSEA.

The R.A. explained that in order to establish a breach of the duty of fair representation under EERA, the charging party must show that the union's conduct was arbitrary, discriminatory, or in bad faith, or that the union's failure to perform a ministerial act completely extinguished the employee's right to pursue the claim.

Because the grievance proceeded to the second level, the R.A. held that the charging party's right to pursue her claim was not adversely affected by the union's failure to partake of informal settlement discussions. Also, the R.A. found that the union's failure to engage in the informal conference was not arbitrary, discriminatory, or in bad faith, but was due to scheduling difficulties.

The R.A. noted that the level-one grievance had been timely. Citing *San Francisco Classroom Teachers Assn. (Bramell)* (1984) No. 430, 64 CPER 56, the R.A. added that the board has held that the duty of fair representation is not breached even if a union negligently fails to file a timely grievance.

The R.A. further found that the union did not breach its duty by failing to obtain the charging party's signature and approval for the grievance, citing *Hart District Teachers Assn. (Merchado/Bloch)* (2001) No. 1456, 150 CPER 97, where the board held that this factor alone does not amount to arbitrary conduct.

The charging party also argued that the union violated the collective bargaining agreement by seeking as a remedy for the grievance, that the contract be amended to require the district to provide "clear and unambiguous" justification when an outside job candidate is hired over an internal candi-

date. The R.A. held that this requested relief was not arbitrary, discriminatory, or in bad faith, nor did it interfere with the charging party's right to pursue her claim.

Lastly, the charging party asserted that she had been poorly represented by her assigned union steward. However, citing *Castro Valley Unified School Dist. (McElwain)* (1980) No. 149, 48 CPER 65, the R.A. explained that the duty of fair representation does not contemplate the complete satisfaction for all represented; a wide range of reasonableness must be afforded the representative, subject to good faith and honesty of purpose. The R.A. found that the charging party's representative had acted in good faith.

The board found the R.A.'s dismissal free of prejudicial error and adopted it as the decision of the board itself.

MMBA Cases

Unfair Practice Rulings

Effects of background check policy linked to public safety are outside scope of bargaining: Sutter County In-Home Supportive Services Public Authority.

(*Health Care Workers Union Loc. 250 v. Sutter County In-Home Supportive Services Public Authority*, No. 1900-M, 4-25-07; 18 pp. By Member Shek, with Chairman Duncan and Member Neuwald.)

Holding: The decision to implement a criminal background check is a fundamental managerial policy outside the scope of bargaining, as are the effects of that decision, which are integral to the policy and primarily related to public safety. Effects that relate to traditional terms and conditions of employment are subject to the duty to bargain.

Case summary: State law authorizes each county to establish an authority to provide in-home supportive services to aged, blind, and disabled persons. IHSS is such an authority. Local 250 is the exclusive representative of some in-home supportive service providers in Sutter County.

In 2003, IHSS unilaterally adopted a policy requiring all in-home health care providers who elect to be included in the provider registry to undergo a mandatory criminal back-

ground check. According to the policy, a prior conviction for certain listed offenses excludes a provider from the registry. State law authorizes IHSS to investigate the backgrounds of providers and entitles in-home health care recipients to receive a copy of their provider's criminal record.

The union alleged that IHSS violated the MMBA by adopting the policy without affording it an opportunity to meet and confer over the decision and certain enumerated effects of the policy. IHSS argued that the provider registry and the background check policy were established simultaneously, and thus, there was no unilateral change to a past practice. IHSS further argued that the decision to implement the policy is exempt from bargaining as a management prerogative.

PERB found that because providers would use the registry to obtain future clients, IHSS's creation of the registry and its unilateral implementation of the background check policy constituted a change in past practice, regardless of whether or not a preexisting registry existed.

To determine whether the policy was within the scope of bargaining under the MMBA, the board applied the balancing test announced by the Supreme Court in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 180 CPER 21. The board found that because the registry would be used as a means of obtaining future clients, the policy would have a significant and adverse impact on the terms and conditions of employment within the meaning of the first prong of the *Claremont* test.

However, the board found that under the second prong of the test, significant and adverse effects arose from the implementation of a fundamental managerial or policy decision. The board explained that fundamental managerial decisions are those that directly affect the quality and nature of public services. Hence, the board declared that the effects of the policy that primarily relate to public safety and to the quality and nature of public services are outside the scope of bargaining, based on managerial prerogative. Also, the board found that under the third prong of the *Claremont* test, the employer's need for unencumbered decisionmaking in managing its operations outweighed the benefit of bargaining to the employer-employee relations.

Accordingly, the board determined that the following issues would not be subject to bargaining: (1) the categories of reportable offenses; (2) the categories of offenses that will result in exclusion from the registry; (3) to whom the background checks will apply; and (4) disclosure of the providers' disqualification for and/or exclusion from the registry to care recipients.

Nevertheless, the board held that the effects of the policy that were primarily related to wages, hours, and terms and conditions of employment were within the scope of bargaining. As under *Claremont*, the benefits to the employer-employee relationship of bargaining over these matters outweighed the employer's need for unencumbered decisionmaking. Accordingly, the board found the following issues to be within the scope of bargaining: (1) how a person's criminal record will be handled, aside from the non-bargainable issue of disclosure to care recipients; (2) whether applicants will be required to pay a fee; and (3) the procedures for providers to appeal any decisions excluding them from the registry. While holding that appeal procedures can be a subject of bargaining, the board stressed that the ultimate decision as to whom to include in the registry is a managerial prerogative. Thus, the board concluded that IHSS violated the MMBA by not giving the union an opportunity to bargain prior to implementation of the three specified effects of the policy.

The board emphasized that its decision is to be construed narrowly, noting that the negotiability of criminal background check policies is dependent on the facts and circumstances of each situation. The board added that the vulnerability of in-home supportive services recipients made this an extraordinary case in which it "would apply the managerial prerogative to exclude certain details of the policy from the scope of bargaining."

Statute of limitations runs from date of actual termination: State Bar of California.

(*Vorgias v. State Bar of California*, No. 1904-M, 5-8-07; 4 pp. By Member Shek, with Chairman Duncan and Member McKeag.)

Holding: The unfair practice charge alleging wrongful termination was filed more than six months after the date of the charging party's termination and was not tolled while her action was pending in federal court.

Case summary: The charging party's employment as deputy trial counsel with the State Bar was terminated because she failed to timely file a document in a pending attorney disciplinary action and allegedly misrepresented to the State Bar Court the reasons for the untimely filing. The charging party challenged her termination through the contractual grievance procedure. After the State Bar denied the charging party's grievance and sustained the termination, the union informed the charging party that it would not pursue arbitration.

The charging party filed an unfair practice charge under the MMBA, alleging that the State Bar delayed the grievance proceedings and held off providing relevant documents to her and her union.

The unfair practice charge further alleged that the charging party filed a complaint in a federal district court alleging unfair practices and seeking relief under the Labor Management Relations Act of 1947. According to the charge, the federal district court dismissed the complaint without leave to amend on grounds of governmental immunity.

The board held that the charge was barred by the six-month statute of limitations applicable to the MMBA. Citing *Regents of the University of California (Sarka)* (2004) No. 1585-H, 165 CPER 77, and *Los Angeles Unified School Dist. (Dorfman)* (2005) No. 1754, 173 CPER 82, the board affirmed that the statute of limitations for an unfair practice charge begins to run on the date of actual termination.

Based on this precedent, the board rejected the charging party's assertion that the statute of limitations did not begin to run until arbitration of her grievance was denied. Second, the charging party alleged that the statute of limitations was tolled while her action was pending in the federal district court under Gov. Code Sec. 3514.5(a)(2), a provision of the Dills Act that tolls the statute during exhaustion of a negotiated grievance machinery. The board asserted that a federal lawsuit does not fall within the provisions of Sec.

3514.5(a)(2) and stressed that the federal action was filed after the statute of limitations had elapsed.

Third, the charging party argued that the statute of limitations was further tolled for a period of 30 days after the federal claim was dismissed under federal procedural rules. The board found that even if the rule applied to PERB cases, it would be insufficient to render the charge timely because the federal district court action was filed after the statute of limitations had run. Fourth, the charging party alleged that the State Bar came to the PERB proceeding with "unclean hands" as the bar allegedly caused the delay in the processing of the grievance. However, the board found no precedent to suggest that this would impact application of the statute of limitations.

Based on the above reasoning, the board affirmed the R.A.'s dismissal.

No unlawful interference where union representative failed to get permission to access workplace: City of Porterville.

(*Operating Engineers Loc. 3 v. City of Porterville*, No. 1905-M, 5-10-07; 13 pp. By Member Shek, with Members McKeag and Neuwald.)

Holding: The city did not unlawfully interfere with the union's right to access employees because the union representative never obtained the consent of the department head to enter the employees' work location, as is required by the city access policy.

Case summary: The charging party alleged that the city violated the MMBA by refusing to grant the union representative access to city property, refusing to provide the union with a copy of an employee's "criminal offender record information," and adopting a rule prohibiting city employees' access to their union representative without the consent of the appropriate department head.

According to the union, the city violated an agreed-on access policy by denying a Local 3 union representative access to meet with, and introduce himself to, bargaining unit members on his first visit to the city's corporation yard. The representative arrived 10 minutes before 1 p.m. After briefly

talking to an employee who was on his lunch break, the representative followed the employee into an office and/or shop area. There, the employee introduced the representative to his supervisor. The supervisor was not designated as a department head for purposes of obtaining consent for site access under the city policy. The supervisor asked the representative to leave the property, warning him that his presence prevented the employee from working. The representative left a few minutes after 1 p.m., at the end of the employee's lunch break.

During the administrative hearing, the union introduced evidence of another incident not included in the complaint. This incident occurred when the same union representative used an employee break room, without obtaining the department head's consent, to meet with an affiliated employee association's president and an employee who was subject to termination. Several minutes into the meeting, a deputy city manager arrived, told the representative that he could not be on city property, and asked him to leave.

At the administrative hearing, the representative testified that he disfavored the rule requiring him to obtain permission prior to meeting with employees because it sometimes is important to meet with an employee immediately after the occurrence of an incident, it occasionally is difficult to reach a supervisor in a timely matter, and an employee might be adversely affected by a supervisor's knowledge that an employee is meeting with a union representative. The representative testified that Local 3 has never encountered access problems in exercising its role as the exclusive representative of the city police officers.

The ALJ held that the city's enforcement of its access rule interfered with employee rights under the MMBA and denied the union its rights under Secs. 3503 and 3506 of the act, as well as PERB Reg. 32603. The city's exceptions challenged the ALJ's conclusion that it violated the act by denying the representative access to city property to meet with employees. Also, the city excepted to the legal standard the ALJ applied, asserting that the charging party failed to meet its burden because the representative never sought consent under the terms of the access policy.

Furthermore, the city contended that PERB lacked jurisdiction to consider the second incident because it had been the subject of a separate unfair practice charge that was dismissed. The basis for dismissal was that the union had not attempted to obtain the consent of the department head as required by the access policy.

The board explained that interference with the rights of employees and employee organizations under the MMBA does not require that an unlawful motive be established; only slight harm to protected rights must result from the employer's conduct. Citing *Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797, 65 CPER 32, the board further stated that "all a charging party must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities; and (3) that the employer's conduct was not justified by legitimate business reasons."

The board found that the representative did engage in a protected activity when he attempted to visit city property and meet with unit members; and that by denying the representative access, the city "engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities," within the meaning of *Public Employees Assn.* Thus, the board reasoned that the case turned on the third prong of the test, whether the city's conduct was justified by legitimate business reasons.

The ALJ relied on EERA decisions where the board has held that a policy requiring an employer's permission for access to non-work areas is an impermissible restriction. The city argued that unlike EERA, the MMBA does not contain a provision expressly guaranteeing a union's access to employers' facilities, and that the MMBA specifically gives local agencies the discretion to devise their own union access rules. The board agreed with the city and found that the MMBA authorized the city to adopt its own reasonable access rules, as embodied by the city's access policy.

Because the representative never sought to obtain consent of the department head, as required by the city's access

policy, the board found no unlawful interference under the MMBA. Additionally, the board distinguished the facts of *San Ramon Valley Unified School Dist.* (1982) No. 230, 55 CPER 66, the EERA case on which the ALJ relied. The EERA decision held that it is unlawful for an employer to require prior consent for a union representative to access non-working areas. Here, in contrast, the charging party's representative met with the supervisor in a work area, in the "shop or the office of the shop," an area "with tools and equipment." Also, the representative was expelled after the lunch break ended. Therefore, the board found that the city's conduct was justified by legitimate business reasons under the *Public Employees Assn.* test.

Also, the board found that doctrines of res judicata and collateral estoppel barred reliance on the second denial of access incident, which was the same incident that formed the basis for the previously dismissed unfair practice charge. That dismissal, based on the soundness of the city's access policy requiring department head consent, became final when the union failed to file an appeal. Thus, the board found it lacked jurisdiction over an access claim based on that incident.

Finally, since no exceptions were filed to two other findings of the ALJ, the board affirmed the conclusion that the city's adoption of the access policy was not a unilateral change; nor had the union proved that the city denied it access to criminal offender information. However, the board emphasized that it did not affirm the rationale supporting the ALJ's decision's on those issues, thus rendering those determinations non-binding on future cases.

Administrative appeal moot since PERB already dismissed underlying charge: State Bar of California.

(*Vorgias v. State Bar of California*, No. Ad-362-M, 5-10-07; 1 pp. By Member Shek, with Chairman Duncan and Member McKeag.)

Holding: The State Bar's administrative appeal challenging the determination that its opposition to the charging party's appeal was untimely is moot because the board already had affirmed the dismissal of the charge.

Case summary: The State Bar of California appealed a board agent's denial of its opposition to the charging party's appeal of the dismissal of her unfair practice charge because the opposition was untimely filed. In *State Bar of California (Vorgias)* (2007) No. 1904-M, 185 CPER 102, the board affirmed the board agent's dismissal of the charge. There, the board found that the unfair practice charge alleging wrongful termination was filed more than six months after the date of the charging party's termination, and thus, was barred by statute of limitations.

The board held that the State Bar's administrative appeal was now moot because the board already had issued a final decision regarding the charging party's appeal.

Denial of request for on-call policy information is unfair practice: Town of Paradise.

(*Operating Engineers Loc. 3 v. Town of Paradise*, No. 1906-M, 5-24-07; 3 pp. + 9 pp. ALJ proposed dec. By Member Shek, with Members McKeag and Neuwald.)

Holding: The town violated its memorandum of understanding and duty to bargain in good faith with the union by refusing to provide information regarding its on-call employee policy.

Case summary: On behalf of an employee of the public works department, Local 3 filed a grievance alleging the town violated its memorandum of understanding with the union by directing a worker from outside the bargaining unit to repair a broken stop sign. Allegedly, the grievant was the designated on-call employee who should have been assigned the repair job.

In its response, the town argued that there was no violation of the agreement since a police officer at the site temporarily repaired the sign and determined it unnecessary to notify the on-call employee. The union representative requested information regarding the on-call policy and the manner in which the dispatcher is to handle emergency repair situations. The union representative was concerned as to why the on-call grievant was not assigned to immediately repair the sign and why the police were asked to make temporary repairs.

The town refused to provide the requested information, asserting that the union had failed to timely appeal the denial of the grievance. The union representative urged that the denial of the requested information was improper and that the town had not yet denied the grievance because the representative was still in negotiations regarding the grievance at the time she requested the information.

Citing *Stockton Unified School Dist. (Stockton Teachers Assn.)* (1980) No. 143, 48 CPER 61, the ALJ affirmed that an exclusive representative is entitled to all information that is “necessary and relevant” to the discharge of its duty of representation unless the employer can supply adequate reasons why it cannot provide the information. Additionally, the ALJ noted that failure to provide such information is a per se violation of the duty to bargain in good faith.

The ALJ explained that the collective bargaining agreement provided for wages and minimum paid hours for mandatory on-call employees. Citing *Stockton USD*, the ALJ emphasized that information immediately pertaining to a mandatory subject of bargaining is presumptively relevant. The ALJ found the information requested by the union was relevant to its ability to administer the contract and resolve disputes because the information detailed the circumstances in which an on-call employee is called on to perform work duties and paid pursuant to the agreement. Additionally, the ALJ held the town did not establish that the information was too burdensome to produce or that it could not be disclosed. Also, the ALJ asserted that even assuming an appeal of the grievance was untimely, the town still had an obligation to provide the requested information.

Citing *Trustees of the California State University (California Faculty Assn.)* (1986) No. 613-H, 72 CPER 61, the ALJ affirmed that the union representative is entitled to information needed to “understand and intelligently discuss the issues raised in bargaining.” The ALJ found that the parties were engaged in collective bargaining for a new memorandum of understating at the time the grievance was filed. One of the topics being negotiated was the on-call policy. Thus, the ALJ determined, the union requested the information for bargaining purposes, and the employer’s refusal to sup-

ply the information was a violation of the town’s duty to bargain.

The ALJ stressed that even if the parties had not been engaged in bargaining, the town’s refusal to provide the information would be an unfair practice because, during the term of a collective bargaining agreement, a union has the right to apprise employees regarding benefits and terms of the agreement, and to effectively administer it. Finally, the ALJ emphasized that requested information, relevant and necessary to the administration of the agreement, must be provided even in the absence of a specific grievance dispute so that the union can evaluate the merits and worthiness of future claims.

The ALJ’s proposed decision required the town to provide the requested information to the union. The board adopted the ALJ’s decision as its own.

Untimely appeal excused due to mailing error: City of Beverly Hills.

(*Tesfasion v. City of Beverly Hills Transportation Dept.*, No. Ad-363-M, 5-24-07; 6 pp. dec. By Member Shek, with Members McKeag and Neuwald.)

Holding: The charging party’s untimely filing of his appeal of the dismissal of his unfair practice charge was excused because there was good cause for the late filing.

Case summary: The charging party appealed the appeals assistant’s rejection of his appeal of the dismissal of his unfair practice charge as untimely filed. The appeal of the dismissal was due on December 11, but was not received and filed until December 14. The charging party alleged that he mailed his appeal on November 3, presenting evidence he served proof of service on the city representative on that date. The board explained that the mail was delayed at the post office for insufficient postage and was not returned to the charging party until December 9, at which point the charging party promptly re-mailed the appeal.

The board noted that it may excuse a late filing for good cause only. The board listed numerous cases where it has excused inadvertent mailing errors that resulted in a brief delay. Also, the board emphasized that it must decide if the

reason for the untimely filing is “reasonable and credible,” and whether the opposing party suffers any prejudice as a result of the excused late filing.

The board held that the charging party demonstrated a good faith effort in filing his appeal in a timely fashion because he mailed the insufficiently posted appeal letter well before the deadline, remailed the letter promptly after it was returned, and the appeal was filed only three days past the due date without causing prejudice to the opposing party. The board accepted the charging party’s appeal, finding that the reason for the untimely filing was “reasonable and credible,” and good cause existed to excuse the late filing.

Administrative appeal moot since PERB already dismissed underlying charge: Town of Paradise.

(*Operating Engineers Loc. 3 v. Town of Paradise*, No. Ad-364-M, 6-05-07; 1 pp. By Member Shek, with Members McKeag and Neuwald.)

Holding: The union’s administrative appeal challenging the determination that its opposition to the charging party’s exceptions was untimely is moot because the board has already affirmed the ALJ’s proposed decision regarding the underlying charge.

Case summary: The charging party appealed an administrative decision denying, as untimely filed, its opposition to the exceptions filed by the town to an ALJ’s proposed decision. In *Town of Paradise (Operating Engineers Loc. 3)* (2007) No. 1906-M, 185 CPER 105, the board affirmed the ALJ’s decision ordering the town to disclose requested on-call employee policy information to the union. Therefore, the board held that the union’s administrative appeal was now moot.

Representation Rulings

Severance petition for separate craft unit denied: IBEW.

(*City of Glendale v. International Brotherhood of Electrical Workers, Loc. 18*, No. Ad-361-M, 4-13-07; 7 pp. By Member Neuwald, with Chairman Duncan and Member Shek.)

Holding: The union’s petition seeking severance of craft employees was dismissed because the union failed to prove that the city’s unit determination decision was unreasonable.

Case summary: In 2004, pursuant to the city’s employee relations ordinance, IBEW filed a petition to sever a unit of employees in electrical services and power plant classifications in the Department of Water and Power from a larger unit represented by the Glendale City Employees Association. After performing a unit appropriateness determination, the city manager dismissed the union’s petition. The city addressed all six factors set forth in the local ordinance and concluded that the existing unit, which included the requested job classifications, was appropriate. The union filed a petition for board review, and a board agent dismissed the petition.

On appeal, the union argued that the board agent did not specifically analyze each of the union’s arguments in support of the proposed unit and that the city misapplied its unit determination criteria. The union provided the board with the same arguments previously offered to the city manager on each of the six unit appropriateness factors. The city argued that the union did not offer any legal argument that demonstrated the board agent erred in her decision to dismiss.

The board explained that the MMBA authorizes public agencies to adopt rules for the administration of employer-employee relations, including the determination of an appropriate unit. Also, under PERB regulations, a petition for review of a public agency unit determination can be dismissed if the determination was rendered in accordance with the MMBA, the local rules of the public agency, and applicable precedent. The board, relying on precedent, further explained that the public agency’s determination must be reasonable; however, the board emphasized that the local government employer need not determine the most appropriate unit. The board added that the party challenging a unit determination carries the burden of demonstrating that the decision was not reasonable.

The union argued that the city erred in its unit determination decision by failing to recognize a unit consisting solely of skilled crafts workers. However, the board held that the city was not required to recognize a separate unit of skilled crafts workers because, unlike the Dills Act and HEERA, which both provide a right to a separate unit of skilled crafts employees, the MMBA does not mandate recognition of such a unit. The board also noted that the unit sought by the union includes unskilled and semi-skilled craft workers.

The board found that the criteria set forth in the city's ordinance to determine appropriate representation units were consistent with applicable legal precedent. Applying those factors, the city found no evidence of any bargaining disparity; a community of interest shared with classifications in the existing unit in terms of uniform benefits and operational goals; and a positive 70-year history of employer-employee relations, evidencing a stable and productive relationship between the city and the classifications within the existing units. The city also found that creation of a new unit would require additional time to meet bargaining requirements and that friction could result if similar classifications were placed in different units, thereby negatively impacting operations. The city concluded that the proposed unit could result in a fragmented workforce and adversely affect the classification structure and the city's efficiency of operations. Finally, the fact that some skilled crafts employees sought to be represented by the union was insufficient to support creation of a new unit.

Furthermore, the board held that the union did not provide evidence showing a lack of a community of interest with other classifications in the unit. Rather, the union simply asserted that similar craft units in other cities have been effectively represented by the union. Also, the board noted that a wage comparison study requested by power plant personnel did not demonstrate that the exclusive representative was unable to adequately represent the interests of those employees.

Accordingly, the board dismissed the union's severance petition, concluding that the union had not met its burden of demonstrating that the city's determination was un-

reasonable, or that it violated the MMBA, local rules, or applicable precedent.

Activity Reports

ALJ Proposed Decisions

Los Angeles Regional Office — Final Decision

California Federation of Interpreters-The Newspaper Guild/Communication Workers of America v. Region 1 Trial Court, Case LA-CE-15-I. ALJ Thomas J. Allen. (Issued 3-21-07; final 4-17-07; HO-U-916-I.) No violation was found. The Trial Court Interpreter Employment and Labor Relations Act Sec. 71802(c)(3) states that a trial court may employ independent contractors only if it “does not provide independent contractors appointed pursuant to this subdivision with lesser duties or more favorable working conditions than those to which a court interpreter pro tempore by that trial court would be subject for the purpose of discouraging interpreters from applying for pro tempore employment with the trial court.” Here, the courts pay contractors premium pay for working two locations in one day. The MOU between the parties does not contain the premium. However, the union did not show working conditions as a whole were more favorable for a contractor or that premium pay was not for a legitimate purpose.

Sacramento Regional Office — Decisions Not Final

AFSCME Loc. 146 v. Carmichael Recreation and Park Dist., Cases SA-CE-370-M; SA-CE-379-M. ALJ Christine A. Bologna. (Issued 5-10-07; exceptions filed 6-4-07.) No violation was found. The district did not interfere with employee rights as a cartoon shown by the supervisor to employees was not reasonably considered threatening or retaliatory. No retaliation was shown against an employee who was required to submit to a fitness-for-duty exam and suspended for five days for making a threat. The district did not improperly refuse to provide information requested solely for a *Skelly* hearing, an extra-contractual forum; the information was not necessary and relevant to representational duties.

McKnight v. Fresno City Employees Assn., Case SA-CO-42-M. ALJ Christine A. Bologna. (Issued 6-12-07; time running for appeal.) A violation occurred when the union collected agency fees prior to sending a *Hudson* notice as required under *Chicago Teachers Union, Loc. No. 1 v. Hudson*

(1986) 475 U.S. 29, and PERB regulations. The failure to send a notice prior to collection interfered with employee rights. The union’s claim of later compliance with the notice requirements did not make this case moot.

Deglow v. Los Rios College Federation of Teachers, Loc. 2279, Cases SA-CO-424-E; SA-CO-426-E. ALJ Bernard McMonigle. (Issued 6-19-07; exceptions filed 6-4-07.) The complaints and charges were dismissed for lack of prosecution where the charging party contended that a July 1999 settlement conference continued indefinitely and was told by a board agent that there were no timelines for proceeding to a formal hearing. The charging party sought to proceed to a formal hearing in December 2005. A delay of six years is not due diligence, and good cause for the time lag was not established.

Fresno County Office Schools Educators Assn. v. Fresno County Office of Education, Case SA-CE-2004-E. ALJ Bernard McMonigle. (Issued 6-19-07; time running for appeal.) The remedial provision of a prior board decision finding that the involuntary transfer of an employee was discrimination for protected activity included reimbursement for monetary losses. The Office of Education applied an MOU provision that limited reimbursement for mileage and time to negotiated amounts when an employee is “necessarily assigned” to distant locations. The board held that the MOU provision was inapplicable to reimburse the discriminatee. An earlier board decision rejected the education office’s argument of business justification, therefore, the discriminatee was not “necessarily assigned.” The remedy requires mileage reimbursement at the IRS rate and compensation for actual time traveled.

SEIU Loc. 1000, CSEA v. State of California (Department of Corrections and Rehabilitation), Case SA-CE-1578-S. ALJ Bernard McMonigle. (Issued 6-21-07; time running for appeal.) The complaint was dismissed as an unfair practice charge filed outside the statutory limitations period. Dills Act Sec. 3514.5(a)(1) requires the charging party to file an unfair practice charge on the date it knows or should have known of the conduct underlying the alleged violation. The charging party contended that it learned of a change when the written policy was discovered in a personnel file. The

board found that the charging party should have known months earlier when that party (a union steward) and a union labor relations representative were aware of two management documents stating the policy.

San Francisco Regional Office — Decisions Not Final

City and County of San Francisco v. Stationary Engineers Loc. 39, Case SF-CO-129-M. ALJ Donn Ginoza. (Issued 4-11-07; exceptions filed 4-26-07.) The city charter provides for collective bargaining followed by mediation/arbitration. The charter requires that each side select a representative to a three-person panel by January 20 of the year in which bargaining is to occur. After an unfavorable 2004 decision, the union vowed not to participate in interest arbitration again. In February 2006, the parties commenced negotiations. The union did not name a panel member and took the position that interest arbitration was not mandatory. In April, the City and County of San Francisco declared impasse. The union continued to refuse to proceed to interest arbitration. Eventually, the parties reached agreement. A violation was found for failure to participate in the impasse resolution procedures. The employer declared impasse in good faith; the charter requirement for interest arbitration is not an unreasonable rule under the MMBA, and participation is mandatory. The union's 2004 vow not to participate in future interest arbitrations did not make the unfair practice charge filing untimely as failure to participate is a continuing violation. The issue was addressed despite technical mootness as an issue likely to recur in the future.

AFSCME Loc. 2620 v. State of California (Department of Personnel Administration), Case SF-CE-230-S. ALJ Bernard McMonigle. (Issued 4-11-07; exceptions filed 5-15-07.) An unfair practice charge was timely filed because notice of proposed legislation does not start the statutory limitations period. No violation was found with respect to the alleged unilateral change in pension. The MOU contains a provision for the eligibility of new employees to be enrolled in CalPERS' First Tier pension plan and to change to Second Tier within 180 days. Senate Bill 1105, enacted on August 11, 2004, mandates that all employees hired after that date be enrolled in the Alternate Retirement Program under which

they do not accrue credit within CalPERS for the first 24 months and contribute to an alternate retirement account. In *California Assn. of Professional Scientists v. Schwarzenegger* (2006) 137 Cal. App.4th 371, the court reviewed a nearly identical MOU provision in an action challenging S.B. 1105 as an unconstitutional impairment of the obligations of contracts. The court determined that under the MOU provision, the state had retained the power to make pension changes for prospective employees; there was no change in the contractual status quo. That interpretation and determination is binding precedent. Because there was no change in the status quo, the union did not establish a unilateral change.

Owens v. American Federation of State, County and Municipal Employees, Case SF-CO-162-H. ALJ Donn Ginoza. (Issued 6-28-07; time running for appeal.) No violation was found. The unfair practice charge was not timely filed eight months after the union informed an employee that her grievance would not be pursued past step one because it lacked merit. Even if had been timely, there was no breach of the duty of fair representation as representation ceased after a good faith assessment that the grievance lacked merit.

Los Angeles Regional Office — Decisions Not Final

Kettenring v. Los Angeles Unified School Dist., Case LA-CE-4878-E. ALJ Thomas J. Allen. (Issued 3-19-07; exceptions filed 4-13-07.) No violation was found. A teacher active in the union was accused by another employee of harassment. The principal issued a conference memo directing him to cease harassment. The teacher then filed an unfair practice charge, circulated a memo that identified his accuser, refused to cease his behavior, and accused the principal of unprofessional conduct. The principal issued a memo ordering the teacher to stop circulating the charge. The teacher also told students that, although he was required to hold class the last week of school, they need not attend as he would be busy preparing grades and they could read the newspaper at home. The principal issued a conference memo, notices of unsatisfactory acts, and a three-day suspension. It was found that the district would have taken the same action even in the absence of protected activity.

Alhambra Firefighters Assn. Loc. 1578 v. City of Alhambra, Case LA-CE-263-M. ALJ Thomas J. Allen. (Issued 5-8-07; exceptions filed 5-25-07.) Violations were found when the city unilaterally changed a fire captain class specification to allow more employees to compete. The change was found to be within the scope of representation.

Baker Valley Teachers Assn. v. Baker Valley Unified School Dist., Case LA-CE-4941-E. ALJ Ann L. Weinman. (Issued 6-26-07; time running for appeal.) Violations were found when the district discharged one probationary teacher/union activist and constructively discharged another tenured teacher/union activist. After years of inactivity in a “necessary small school” district (15-16 teachers), union officers began an aggressive membership campaign and bargaining. Two union leaders with excellent evaluations were terminated with cursory explanations. The district did not show legitimate reasons for its decisions and had deviated from the requirements of a written statement of reasons and the right of appeal.

Saenz v. County of San Diego (Health & Human Services), Case LA-CE-314-M. ALJ Thomas J. Allen. (Issued 6-29-07; time running for appeal.) The unfair practice charge and complaint were dismissed as untimely where the alleged acts of retaliation occurred more than six months before the charge was filed.

Report of the Office of the General Counsel

Injunctive Relief Cases

There were nine requests for injunctive relief filed between March 1 and June 30, 2007. Of these, one was granted by the board (but not sought due to resolution of the matter by the parties), four were denied, and four were withdrawn.

Alliance of Orange County Workers v. County of Orange, IR No. 516, Case LA-CE-366-M. On April 3, the union filed a request for injunctive relief against the county, alleging it unlawfully recognized SEIU Local 721 as the exclusive representative of the county’s operations services and maintenance workers. On April 11, the request was denied by the board.

Municipal Employees of Beverly Hills v. City of Beverly Hills, IR No. 517, Case LA-CE-367-M. On April 3, the union filed a request for injunctive relief against the city, alleging it unlawfully contracted out for services previously performed by bargaining unit members. On April 13, the union withdrew the request.

Society of Professional Scientists & Engineers v. Regents of the University of California (Lawrence Livermore National Lab), IR No. 518, Case SF-CE-837-H. On April 6, the union filed a request for injunctive relief against U.C., alleging it interfered with the union’s organizing rights. On April 18, the request was granted by the board, however, the relief was not sought in court by PERB due to resolution of the matter by the parties.

Hayward Unified School Dist. v. Hayward Education Assn., IR No. 519, Case SF-CO-700-E. On April 20, the district filed a request for injunctive relief against the union to stop teachers from allegedly striking unlawfully. On April 21, the request was withdrawn by the district.

Hayward Unified School Dist. v. Hayward Education Assn., IR No. 520, Case SF-CO-700-E. On April 24, the district again filed a request for injunctive relief against the union to stop teachers from allegedly striking unlawfully. On April 26, the request was withdrawn by the district.

Eisenberg v. State of California (Employment Development Dept.), IR. No. 521, Case SA-CE-1602-S. On May 3, Eisenberg filed a request for injunctive relief against EDD, alleging the department ordered him not to use the state’s email system to distribute decertification petitions and fair share fee rescission material. On May 10, the request was denied by the board.

Fairfield-Suisun Unified Teachers Assn. v. Hayward Unified School Dist., IR No. 522, Case SF-CE-2594-E. On May 11, the union filed a request for injunctive relief against the district, alleging it unlawfully reconstituted the schools. On May 17, the request was withdrawn by the union.

Amalgamated Transit Union Loc. 1704 v. Omnitrans, IR No. 523, Case LA-CE-358-M. On May 22, the union filed a request for injunctive relief against Omnitrans, alleging retaliation against the union president for protected activity. On May 29, the request was denied by the board.

County of Riverside v. SEIU Loc. 721, IR No. 524, Case LA-CO-57-M. On June 13, the county filed a request for injunctive relief against the union, alleging it unlawfully accessed certain areas within a county medical facility. On June 15, the request was withdrawn by the county.

Litigation Activity

One new case opened between March 1 and June 30, 2007.

Board of Trustees of the Los Angeles Unified School Dist. v. Public Employment Relations Board, California Court of Appeal, Second Appellate District, Case No. B197043. (No. 1884.) On March 1, LAUSD filed a petition for writ of review of (1) the board's January 2007 decision that LAUSD refused to bargain in good faith (No. 1884) and (2) the board's underlying unit-determination finding in July 2004 (No. 1665). In May, PERB filed the administrative record. In June, the parties stipulated to, and the court granted, an extension of time for the filing of LAUSD's opening brief, now due August 13.

Regulation Adoption and Modification

On December 1, 2006, the board published a Notice of Proposed Rulemaking concerning agency fee regulations (PERB Regs. 32990 through 32997). A public hearing on the proposed changes was held on February 8. Based on written and oral comments received, the board issued a Notice of Proposed Modifications to interested parties on February 26, and a Second Notice of Proposed Modifications issued on April 23. On May 24, at a special public meeting of the board, the board adopted the proposed changes as modified. The rulemaking package was submitted to the Office of Administrative Law for final approval on June 18.

On February 16, the board issued a Notice of Proposed Rulemaking concerning proof of support, revocation of proof of support, and various technical changes to other regulations. A public hearing on these proposed changes was held on April 12. Based on written and oral comments received, the board issued a Notice of Proposed Modifications to interested parties on June 12, and will consider the revised rulemaking package at the August 16 public meeting.

Personnel Changes

On July 2, Governor Schwarzenegger appointed Robin Wesley to the Public Employment Relations Board. Wesley is well-acquainted with the workings of the board. During the last 16 years, she has served in a variety of posts within the agency. At the time of her appointment, she was an administrative law judge. Before that, Wesley was called into service as the acting general counsel with the retirement of Bob Thompson. She also worked as a senior regional attorney and a legal advisor to PERB. Before coming to the board, Wesley served from 1983 to 1991 as deputy director for the Governor's Office of Planning and Research. With Wesley's appointment, the board is now fully staffed with five members.

Wendi Ross joined PERB, filling the Staff Counsel IV position in the General Counsel's Office in April 2007, as PERB's deputy general counsel. Since 1997, Ross worked for the Department of Personnel Administration, representing state agencies and departments in administrative hearings, arbitration proceedings, and civil litigation relative to any array of labor law and personnel issues. From 1991 to 1997, Ross worked for Pinnell & Kingsley, representing school districts and fire departments. Prior to that, she worked for Thierman, Cook, Brown & Prager, representing private sector employers in labor and employment law matters. While in law school, Ross worked for PERB researching issues for board counsel; she also performed legal work for the Agricultural Labor Relations Board.