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letter from the editor

Dear *CPER* Readers,

It's funny how an issue of *CPER* comes together. Attorney Bob Bezemek had a strong reaction to the retiree health care articles we ran in the June and August issues, and eagerly volunteered to write a rejoinder. The result is "Retiree Health Benefits: Still Misunderstood...Still Protected," where Bob takes issue with some of the assertions made in "Weathering the Gathering Storm," the piece by Jeff Sloan and his colleagues that appeared in *CPER* No. 184.

Law professor and arbitrator John LaRocco gave me a call to tell me about an interesting arbitration dispute he had recently faced, and followed up the conversation with his article, "Tension in the Public Safety Officers Bill of Rights." The factual circumstances in John's case presented a scenario that demands a challenging comparison between routine supervisor conversations and interrogations that trigger Bill of Rights Act protections.

If you've got something on your mind, contact me to discuss contributing to a future issue of *CPER*.

The Recent Developments sections of this issue are bursting with stories that cover the broad terrain of the public sector landscape in California. Health care benefits are among the topics reviewed in both the Public Schools and Local Government sections. The State section lays out the dramatic end to talks between DPA and CCPOA, and reports on the state attorneys' legal challenge to their salary levels. Developments in discrimination law garner attention along with reorganization news from PERB.

U.C. Hastings College of Law student Konstantin Savransky is *CPER*'s new legal intern. He's been with us since May and has contributed the summaries of PERB decisions and the arbitration awards we highlighted in this issue.

So, it has all come together again. And, according to Stefanie Kalmin, our managing editor, who has been with us for 15 years, this is one of the most lengthy issues of *CPER* ever!

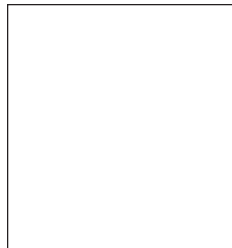
Get busy!



Carol Vendrillo
CPER Editor

Tension in the Public Safety Officers Bill of Rights: Interrogations Versus Routine Supervisor-Subordinate Communications

John B. LaRocco



John LaRocco is a professor of law at the College of Business Administration, California State University at Sacramento, as well as a labor arbitrator and mediator.

Section 3303 of the Public Safety Officers Procedural Bill of Rights Act¹ vests a peace officer with significant protections when the officer's employer potentially subjects the officer to disciplinary sanctions or criminal charges. The primary protections require that the interrogation be held at a reasonable time; that the officer be permitted to have representation at the interrogation; that the officer be provided notice of the nature of the charges; and, if possible criminal charges are forthcoming, that the officer be informed of his constitutional rights.² These subsections read:

(b) The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(h) If prior to or during the interrogation of a public safety officer it is deemed that he or she may be charged with a criminal offense, he or she shall be immediately informed of his or her constitutional rights.

(i) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for non-criminal matters.

The introductory portion of Gov. Code Sec. 3303, which sets forth the circumstances that trigger the protections, provides:

When any public safety officer is *under investigation and subjected to interrogation* by his or her commanding officer, or any other member of the employing public safety department, that *could lead to punitive action*, the interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. [Emphasis added.]

In essence, these rights are triggered when the peace officer is (1) under investigation; (2) subject to an interrogation; and, (3) the investigation could lead to punitive action.

Neither Gov. Code Sec. 3303 nor the remainder of the PSOPBRA defines an interrogation. However, one provision of the statute describes what is not an interrogation. The second paragraph of Gov. Code Sec. 3303(i) announces that not every question from a superior to a subordinate constitutes an interrogation for the purpose of extending the Bill of Rights Act protections. The second paragraph of Sec. 3303(i) reads:

This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.³

If the interaction between a supervisor and a subordinate falls within Sec. 3303(i), a peace officer is not subject to an interrogation, and consequently, the protective rights are inapplicable. However Sec. 3303(i) does not cover every

informal employee interview since a California appellate court has ruled that the PSOPBRA protection is not restricted to an internal affairs interrogation.⁴ The rights can be, and often are, triggered by an “interrogation” well before the advent of an investigation by internal affairs.

In a recent case, the police officer’s union and the law enforcement agency vigorously argued over the demarcation between a non-internal affairs supervisor-subordinate question-and-answer session, which triggers the PSOPBRA protection, and an interview, which does not. The central question is whether a supervisor’s questioning constitutes an interrogation that warrants extending the PSOPBRA protection to the subordinate.

The following hypothetical closely resembles an administrative appeal over which this author presided.⁵ A police department terminated a veteran peace officer for allegedly committing theft, lying to his supervisors, and lying to the internal affairs investigators. The facts have been altered slightly to illustrate the difficulty of defining a

PSOPBRA interrogation and to demonstrate the tension between Sec. 3303(i) and the remainder of Sec. 3303.

Hypothetical Scenario

While the appellant was on patrol duty, a citizen called the police department and spoke to the appellant’s supervisor, a sergeant. According to the citizen, six months before, the appellant arrested the citizen on an outstanding warrant. The citizen had been carrying \$500 in cash, which he had turned over to the appellant. Unable to make bail, the citizen spent about five months in jail. Upon his release, the jail property clerk returned the citizen’s possessions to him except for the cash. The clerk told the citizen that the property unit did not have any record of receiving \$500 when the citizen was booked. The citizen then contacted the appellant, who told the citizen that he vaguely remembered seeing the money and would try to retrieve it from the property unit. About one

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week later, the appellant called the citizen to inform him that he had obtained the \$500 from the property unit and would meet the citizen at a convenience store to give him his cash.

The citizen told the sergeant that he was calling the police department because he suddenly wondered if he should meet the appellant at the store in 10 minutes. The sergeant told the citizen, "OK — I'll get back to you."

The sergeant then radioed the appellant and told the officer that he had received an "incredible" call from the citizen. The sergeant asked the appellant to explain the situation. The appellant responded that, at that moment, he was at the store to meet with the citizen. The appellant informed the sergeant that the citizen had contacted him about the missing \$500. Thereafter, the appellant went to the property unit, which had misplaced the \$500; took possession of the \$500; and was now returning the money to the citizen for the citizen's convenience. The sergeant instructed the appellant to call him back as soon as he finished the meeting.

The sergeant testified in the administrative hearing that, when he received the call from the citizen, he did not believe the citizen's story. The sergeant further testified that when the appellant confirmed the story, the sergeant became bewildered about the situation. The sergeant asserted that he was mainly concerned about the officer's safety, but did not dispatch available backup to the meeting. The sergeant specifically denied that he was thinking about whether the officer violated department policy by either possessing the cash or by returning it to the citizen in the field.

At the convenience store, the officer tendered the citizen \$500 in cash and radioed the sergeant that the citizen had his money. The sergeant told the officer that he was "...concerned about what just occurred," and asked, "What's going on?" The officer responded that he wanted to "come clean" with his sergeant and stated that when he received the call from the citizen about the missing money, he contacted the property unit, which did not have any record of receiving cash when

the citizen was arrested. The officer stated that a few days later, he found the \$500 nestled behind some old patrol bulletins in the back of his locker. Because he was embarrassed, he did not tell the department or the property unit about the cash. He thought he could quickly return the money to the citizen without causing any harm.

Several minutes later, the sergeant reported the information about the citizen and the appellant's two stories to the watch commander, who instructed the sergeant to call the property unit, which he did. The sergeant told the commander that the property unit did not have any record of the citizen's cash, and the commander instructed the appellant to come to the station. When the appellant arrived, the commander instructed that the officer had jeopardized his own safety by meeting the citizen at the convenience store. The commander asked for an explanation.

The appellant replied that after the citizen contacted him and he learned that the property unit did not have the cash, he searched for the missing money.

Some days later, he found it buried at the bottom of a gym bag he keeps in the trunk of his private vehicle. The appellant told the commander he was so humiliated that he first told the sergeant he retrieved the money from the property unit. Within minutes, he realized that the property unit would not corroborate this story, so he told the sergeant that the cash had never left the police department because it was in his locker. The commander then referred the matter to internal affairs, which relied heavily on the sergeant's notes, the commander's notes, and the appellant's multiple confessions. At no time during the events did either the sergeant or the commander notify the appellant about any of his PSOPBRA protections.

During the internal affairs interview, the appellant denied that he ever possessed any of the citizen's cash.⁶ He told the internal affairs investigators that he coincidentally met the citizen at the store when he stopped for a soft drink while on patrol and that no property exchanged hands. The appellant

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said the citizen, a known criminal, was lying about getting the cash from the officer. The appellant also told the internal affairs investigators that the sergeant was confused about what occurred during the radio call and that he never told the commander anything about a gym bag. The appellant asserted to the investigators that he told the commander he did not have any knowledge of the citizen's cash.

At the administrative hearing, the union moved to exclude the appellant's statements made to the sergeant and the commander on the grounds that the communications were made during interrogations and the appellant was not afforded his PSOPBRA right to notice of the investigation, the nature of the charges brought against him, or his right to representation. What is the proper ruling on this motion?

Case Analysis: Labio and Steinert

The seminal case that attempted to define an interrogation for the purpose of triggering PSOPBRA rights is *City of Los Angeles v. Superior Court of Los Angeles County*⁷ (hereinafter "*Labio*").⁸ In *Labio*, a doughnut shop proprietor reported to a watch commander and a sergeant that a male Filipino peace officer in a marked patrol car drove by a fatal accident scene without rendering aid. According to the proprietor, the officer drove to another nearby doughnut shop. The commander checked the duty roster and determined that Labio had been the only officer of Filipino descent on duty.

At the commander's instruction, the sergeant visited the second doughnut shop and learned that an officer who appeared to be of Filipino descent had been in the shop at the time of the auto accident. The commander consulted with Labio's immediate supervisor and discovered that Labio had not received permission to use a city vehicle. The sergeant directed Labio to see the commander. When Labio arrived, the commander questioned him about his whereabouts at the time of the auto accident and his use of a city vehicle. The

commander did not advise Labio of any PSOPBRA rights or give him any notification about an investigation. While the evidence was not entirely clear, Labio apparently made some admissions in response to the commander's inquiries.

The court determined that Labio's statements to the commander, as well as all evidence flowing from the commander's questioning, must be suppressed because the commander had not advised Labio that he was under an investigation, the nature of the investigation, or his right to representation.⁹ The court specifically rejected the

The court specifically rejected the employer's argument that the 'Q and A' session between the commander and Labio had been a routine conversation.

employer's argument that the question-and-answer session between the commander and Labio had been a routine conversation. The court held that the exclusion in Gov. Code Sec. 3303(i) was intended to cover "innocent, preliminary or casual questions."¹⁰ The court concluded that an investigation had been underway because the commander had looked at the crew log and had sent the sergeant to the second doughnut shop. The court also inferred that the commander had punitive action on his mind when he called Labio to his office. Thus, when he questioned Labio, the commander had engaged in a PSOPBRA interrogation.¹¹

Following the *Labio* holding, yet distinguishing the case's underlying facts, the court in *Steinert v. City of Covina*¹² determined that a sergeant's question did not invoke PSOPBRA protections for a peace officer because the sergeant had not been considering or thinking about disciplinary sanctions at the time of his questions. In *Steinert*, the police department discovered that an officer had run a name through a criminal records database, designating the reason for the search as "training." Department policy precluded using actual criminal records and databases for training purposes.

The sergeant deduced that the peace officer had run the name through the records because the name had come up when the officer had taken a vandalism report, even though the person had not appeared in the officer's report. The

sergeant thus believed that the error simply had been mislabeling the search as training rather than for a crime report. When the sergeant asked the officer about the search, the officer confirmed that the victim had mentioned the name she used in the database. The sergeant told the officer that, next time, she should include the name in the crime report and use the case number (rather than training) when she performed such searches. Next, the sergeant asked the officer one more question: Had she disclosed to the victim any confidential information that she had learned from the search. The officer assured the sergeant that she had not done so.

The department had a practice of conducting routine audits of two crime reports a week, and the sergeant picked the vandalism report since he had already familiarized himself with the event. During the course of this audit, the victim reported to the sergeant that the officer, in fact, had disclosed confidential information about the person on which she ran the search. At this point, the sergeant launched an internal affairs investigation that ultimately led to the officer's dismissal. The court refused to suppress her denial of disclosing confidential information on the grounds that the sergeant's question had been related to the counseling of a subordinate and was not an interrogation.

The court determined that the sergeant had not intended to punish the officer for a coding error but had meant to use the opportunity for training. The court emphasized that at the time, the sergeant truly believed that the officer had accessed the information for a legitimate reason and that no serious breach of policy had occurred. The court believed the sergeant when he asserted that he thought the officer had committed a simple error as opposed to any intentional wrongdoing or dishonesty. The court concluded that in the sergeant's mind, the officer's mislabeling of the search had not been a substantial rule violation. Therefore, the sergeant had taken the opportunity to train the peace officer so she would perform better in the future.

In sum, the court held that neither the meeting nor the question was likely to result in any punitive action against the officer. The court opined that the question about disclosing information demonstrated the sergeant's need to be thorough. The court adjudged that it was the subsequent audit which had led to the internal affairs investigation, not the sergeant's question to the officer.

The court therefore distinguished *Labio* on the grounds that at the time of the discussion, the sergeant did not think misconduct had occurred or that discipline was imminent. The court concluded that the conversation, including the confidentiality question, was a "remedial interaction and not the attempt to tighten the metaphorical noose around an...officer's neck...."

Pursuant to *Labio*, an agency's preliminary inquiry into possible misconduct can constitute an investigation. Such an inquiry plus the superior's contemplation of punitive action renders the questioning of a peace officer a PSOPBRA interrogation. Before asking any questions, the superior must notify the peace officer of the nature of the investigation and the right to representation. Under *Steinert*, which followed *Labio* albeit with a different

result, what the sergeant is thinking at the time the superior poses the question to the subordinate is important. If discipline is not on the sergeant's mind, the questioning is within the Gov. Code Sec. Sec. 3303(i) exception.

Applying *Labio* to the hypothetical, the union had strong arguments that the commander's questioning of the appellant after the rendezvous was an interrogation because the commander had initiated an investigation by directing the sergeant to call the property unit. Unlike the facts in *Steinert*, the commander implicitly foresaw the potential for discipline since he had called the appellant in early from patrol, not a routine order. And, since he already had heard two inconsistent explanations, the appellant's conduct was patently suspect.

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It is less clear whether the union could successfully assert that the two radio communications between the sergeant and the appellant were interrogations. With regard to the second, the correct ruling is uncertain. One could easily infer the sergeant had been thinking that the appellant committed misconduct which could result in punitive action even though the sergeant had not expressed to the appellant that he might be subject to discipline for violating any policy.

Pursuant to *Steinert*, the sergeant's credibility becomes critical. If one believes he truly had been confused and concerned only about the appellant's safety, and had not been thinking about potential discipline, *Steinert* might place the second radio conversation within the Gov. Code Sec. 3303(i) exception. Even if the sergeant had been befuddled, it also is reasonable to infer that he could have foreseen possible discipline, especially since he had expressed his "concern" to the appellant before asking "What's going on?" The *Steinert* court believed the sergeant's assertion that discipline was not a potentiality despite irregularities. In the hypothetical, it is not as easy to accept the notion that the sergeant had not been thinking about discipline or, perhaps, criminal penalties.

A second issue is whether the sergeant had engaged in an investigation by having heard the citizen's information and by asking the appellant how the rendezvous went. The union vigorously argued that the sergeant knew that, at the very least, the appellant had violated policies and procedures by returning cash to the citizen in the field. Otherwise, the union asserted, the sergeant would not have previously instructed the appellant to radio him immediately after meeting with the citizen.

The police department argued that the sergeant and the commander had engaged in a routine conversation with the appellant by simply asking him what he was doing, which is a frequent, if not daily, request from a superior to a subordinate. Also, the police department contended that instead of considering potential discipline, the commander,

and especially the sergeant, had been solely concerned about the appellant's safety. Under *Labio*, this can be construed as having started a preliminary inquiry, which is tantamount to an investigation. *Steinert* would suggest that the sergeant's questions had been routine.

Even if all of the appellant's inconsistent statements to the sergeant and the commander are suppressed, the police department probably could marshal evidence completely independent of the inconsistent statements to show that the appellant had unlawful possession of the citizen's money. The police department also may be able to prove that he had

been dishonest to internal affairs investigators, but the charge that he had been dishonest to his superiors would fail. If the two inconsistent statements the appellant made to the sergeant, coupled with the third statement to the commander, were admitted into evidence, the appellant obviously would be found guilty of all charges.

Conclusion

The hypothetical and *Labio* demonstrate that even an innocuous question to a subordinate from a superior, such as, "What are you doing out there?" could be an interrogation within the meaning of the PSOPBRA.

As a result, the prudent advice to law enforcement agencies is that, whenever there is even a hint of misconduct, superiors must advise peace officers that they are under investigation, the nature of the investigation, and their right to representation. The employer cannot rely on the "routine and unplanned" exception established by Gov. Code Sec. 3303(i). Prudent advice to law enforcement labor organizations is to challenge statements made by their members in any type of question-and-answer session if the union can show that the agency made some inquiry into an incident prior to the questioning. The *Labio* and *Steinert* decisions demonstrate that tension within Gov. Code Sec. 3033 must be reconciled on a case-by-case basis. *

Even an innocuous question to a subordinate from a supervisor could be an interrogation within the meaning of the PSOPBRA.

1 Gov. Code Secs. 3300 et seq.
2 Gov. Code Secs. 3303(b), (c), (h), and paragraph 1 of subsection
(i). Other rights are: notice of the identity of the officer in charge
at an interrogation; limiting the length of the interrogation to a
reasonable time; and, restricting the number of interrogators to
two. Gov. Code Secs. 3303(a), (b), (c), (d), (e), (g), (h), and (i).
3 The exclusion expressed in the second paragraph of Sec.
3303(i) applies not just to the right of representation described in
the first paragraph of that section but to all of the rights in Sec.
3303.
4 *Upland Police Officers Assn. v. City of Upland* (2003) 11
Cal.App.4th 1294, 1302, 162 CPER 30.
5 The author opts to use a hypothetical to guarantee the
anonymity of the parties.

6 The appellant had his full panoply of PSOPBRA protection
at this interview.
7 (1997) 57 Cal.App.4th 1506, 127 CPER 24.
8 Officer Labio was the real party in interest.
9 *Id.* at 1515.
10 *Id.* at 1514.
11 *Id.* at 1514-1515. Although the court excluded all evidence
from the administrative hearing of Labio's admissions to the
commander as well as evidence the department gathered as a
result of those statements, it held that the evidence could be used
to impeach Labio. *Id.* at 1517-1518.
12 (2006) 146 Cal.App.4th 458, 182 CPER 47.

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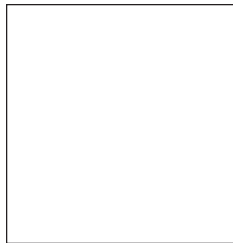
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Retiree Health Benefits: Still Misunderstood...Still Protected

Robert J. Bezemek



Robert Bezemek has represented California public sector unions since 1976. His Oakland, California, firm represents numerous public and private sector unions, and has represented several retiree groups and unions in vested rights cases.

“[M]en do not labor for chances on a roulette wheel and employers do not...pay wages with lottery tickets.”¹

Retiree health benefits may be as hot a topic as Texas Hold-Em, but they are nothing to gamble with. Most retirees promised employer-paid, lifetime retiree health benefits never imagined that after retirement, they would suddenly face overwhelming charges for these benefits. And current employees, who have labored for years with the expectation of lifetime health insurance security, are equally shocked when they learn their employer is attempting to negotiate “cost-sharing” with their union representatives. Cost-sharing is more than disheartening to an older retiree on a fixed income. It is a breach of an important promise. Did retirees remain loyal employees on the *chance* that their employer might fulfill this promise?

Several *CPER* articles recently have addressed retiree health benefits.² My earlier “Short Primer on Retiree Health Benefits” discussed the law governing impairment of vested retiree health benefits.³ It focused on the nature of vested rights, their special protection under California law, and the extremely limited circumstance under which an employer could *unilaterally* impair such benefits. However, I reserved for another day the issues presented when benefits are conferred through collective bargaining agreements. That day has arrived.

This article addresses whether and under what circumstances retiree health benefits created through collective bargaining under the Educational Employment Relations Act can be modified or extinguished through subsequent collective bargaining agreements for existing employees or retirees. However, much of this analysis applies to other public sector employees, unions, and employers. In general, changes for those who have already retired are presumptively suspect and

frequently prohibited. Changes for existing employees are more complex, sometimes allowable, frequently not, depending on several factors. Changes for future employees are often, but now always, allowable.⁴

This article was prompted by serious misstatements of law in the recent *CPER* article “Weathering the Gathering Storm Over Post-Retirement Health Care Benefits — Vested or Not.” Among other things, that article incorrectly suggests that retiree health benefits cannot “vest” under collective bargaining agreements, and that retirees cannot challenge changes to their retirement health benefits. Both notions are dead wrong.

Before collective bargaining began for public schools and community colleges in 1976 with the adoption of EERA,⁵ many California public employers offered retiree health benefits. The reasons were fairly simple. Public employers typically could not afford wages that were competitive with the private sector, but benefits were a different matter. A good health plan and the opportunity to receive such benefits after retirement, at no cost, induced people to come to work for less pay. Indeed, in 1963 it became the official policy of California to encourage this benefit.⁶ So it is hardly surprising that these plans spread throughout the state.

By the time collective bargaining arrived, it was already settled under the National Labor Relations Act that retiree health benefits are a mandatory subject of bargaining.⁷ The Public Employment Relations Board followed suit.⁸ Many of the pre-bargaining plans were replicated in collective bargaining agreements. In districts where no pre-bargaining policies existed, they were negotiated. The language of the plans sometimes changed, thanks to the bargaining process.

In “Gathering Storm,” the authors argue that retiree health benefits for active employees can be modified through valid collective bargaining agreements with labor unions. The authors intimate that such benefits also can be modified for current retirees. Neither proposition can stand as a general principle. The reality is far more nuanced.

The *San Bernardino* case, the sole authority relied on for the startling position that employees cannot challenge changes to negotiated retiree health benefits, did not even decide the issue for which it is cited.⁹ Indeed, there is no judicial authority for this astounding proposition. In fact, the California Supreme Court has held that benefits conferred in collective bargaining agreements are subject to vesting and constitutional protections, and are subject to legal challenges to protect vested rights. Scores of analogous private sector cases have held that retiree health benefits created by collective bargaining agreements are protected from governmental impairment.¹⁰

Indeed, it is well settled that private sector retirees have standing to file suit under Section 301 of the Labor Management Relations Act to enforce retiree benefit provisions in expired collective bargaining agreements.¹¹ California law allows enforcement of actions for vested rights through mandamus.¹²

In addition, the central holding of *Thorning v. Hollister*, that retiree health benefits conferred by a public employer are subject to vesting under the Contract Clause, remains good law.¹³ Contrary to the “Gathering Storm,” the decision in *Sappington v. Orange Unified School Dist.* did not limit the “reach” of *Thorning*.¹⁴ Rather, *Sappington* involved an unexceptional interpretation, based

on a measly evidentiary record, of a cryptic promise to “underwrite” a retiree health benefit plan, made in a unilaterally adopted city policy. *Sappington* actually illustrates the importance of applying settled tests of contract interpretation and reviewing extrinsic evidence to determine the meanings of words and phrases concerning these benefits.

The right to enforce contractual promises has a rich history. The Founding Father’s enshrined the sanctity of contracts in the U.S. Constitution. Article 1, Section 10, provides that “no state shall pass any law impairing obligations of Contracts.” James Madison, writing in the *Federalist Papers*, explained that the Contracts Clause was the “constitutional bulwark in favor of personal security and private

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rights,” explaining that impairment of a contract was “contrary to the first principles of the social compact...”¹⁵ The California Constitution parallels this rule in Article I, Section 9.

California law has identified and protected the vested rights of public employees for almost a century.¹⁶ This precedent is worth summarizing. The contractual basis of the right is an exchange of the employee’s services for the benefits offered in a contract.¹⁷ This entitlement can be implied,¹⁸ or it can be explicit.¹⁹ “Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation.”²⁰ When a public entity creates a post-retirement benefit plan, an employee’s right to that plan vests when the employee accepts employment, or when the promise is made or improved upon while employed.²¹ This is so “even though the right to immediate payment of [the benefits] may not mature until certain conditions are satisfied.”²² Requiring increased employee contributions to pension systems has been held to unconstitutionally impair contract obligations.²³

Pension laws, which were first afforded the protection of vested rights, are to be liberally construed to protect pensioners and their dependents from economic insecurity.²⁴ California favors this liberal construction of retirement benefit provisions to accomplish their “beneficent purpose” to “protect the reasonable expectations of those whose reliance is induced.”²⁵ The first cases to apply these principles in situations involving public employers and employees were pension cases (cited in the preceding footnotes). California courts understood that public employers could not lightly impair promised retiree compensation. It was equally clear that policies providing such benefits were contracts, protected by the constitution. Thus, even unilaterally created employer policies manifested themselves as contracts.²⁶ Like pensions, retiree health benefits are simply another form of retirement-based deferred compensation, entitled to similar protection.²⁷

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When referring to retiree health benefits, we usually mean several discrete benefits: (1) retiree health plans provided without premiums or similar fees to retirees and sometimes their spouses and dependents, which may or may not parallel the plans available to active employees; (2) the copays and deductibles that accompany the plans; and (3) the scope of the plan, that is, whether there is an HMO and/or a PPO option available, and whether the plan is portable. Add in Medicare-eligible employees, Medicare Supplement plans, and Medicare Part B, and the topic becomes even more confusing. This article focuses on changes, regardless of the particular benefit at issue.

It is worth mentioning a few facts often overlooked in the current debate. First, retiree health benefits are widespread in California public jurisdictions. According to a study by the California State Teachers’ Retirement System, between 62 percent and 100 percent of public schools and community colleges provide some form of employer-paid retirement health benefits.²⁸

Second, the health benefits “crisis” is not new. Hundreds of court decisions from across the nation have addressed retiree health benefits in the private sector, and occasionally in the public sector. Private sector litigation has been especially intense in the last 20 years.²⁹

Although many of these cases arise under a specific federal law inapplicable to the public sector, they often address benefits codified in the terms of collective bargaining agreements, thus offering a rich, though at times conflicting, source of interpretative guidance. Moreover, these cases analyze crucial concepts, such as the survival of benefits following contract expiration and reservation of rights clauses, in addition to theories that might arise in a California public sector case, such as breach or impairment of a promise or contract, equitable estoppel, promissory estoppel, and breach of fiduciary duty.³⁰

Third, the accounting requirements of the Government Accounting Standards Board do not mandate elimination or curtailment of retiree health benefits. Nor does GASB re-

quire the pre-funding of such benefits. GASB merely addresses the reporting of these benefits on an employer's financial statement. As anyone who has worked on a PERB factfinding case involving these benefits can attest, estimates of future costs are about as predictable as the stock market.

My experience with retiree health benefits dates to 1985, when I represented retirees from the San Leandro Unified School District. The district had promised that, upon retirement and qualification for Medicare, the district would reimburse them for their Medicare Part B premiums. The promise had been made in pre-collective bargaining district policies, and in a series of collective bargaining agreements. But after several years, the district reneged on the Part B reimbursement promise. The retirees were understandably upset. A petition for writ of mandate was filed, seeking to enforce the district's promise. The case eventually settled with the restoration of the reimbursement program, and a make-whole remedy.³¹

Since then, I have handled several similar cases for groups of retirees who have had their expectations of employer-paid benefits dashed. Some cases involved promises of paid health plans (paid premiums), while others included pledges of very small copayments and deductibles.³² In the course of handling these cases, and representing scores of labor unions in negotiations that addressed retiree health benefits, I came to understand that although employer-paid retiree health benefits are a crucial component of compensation for both private and public sector employees, there is uncertainty about the nature of the protections afforded these benefits.

Vested Rights Created in Collective Bargaining Agreements

There is nothing exceptional about the notion that vested rights for retirees may be created in a collective bargaining agreement. Collective bargaining agreements are bilateral

contracts between contracting parties. In California, their enforceability under the Contracts Clause was settled in *Sonoma County Organization of Public Employees*. There, several cities and counties, suffering from a collective governmental panic following passage of Proposition 13, impaired employees' vested rights by abrogating wage increases required by collective bargaining agreements. The Supreme Court struck down the employers' actions, finding the strict scrutiny standards for the impairment of contracts had not been met.³³ Other states have confronted cases involving impaired vested rights, and reached similar results.³⁴

Interpreting a Collective Bargaining Agreement

Whether a collective bargaining agreement conveys vested rights depends on the "intention of the parties as expressed in the contract."³⁵ In determining those rights, the task of the court is to "ascertain and give effect to this intention by determining what the parties meant by the words they used."³⁶

The case of *Sappington v. Orange Unified School Dist.*, mentioned earlier, did not deal with either a union bargaining agreement or with an explicit promise. Instead, administrative retirees claimed they were promised a particular PPO plan, at district expense, rather than the cheaper HMO plan the district provided, based on an ambiguous policy statement that "the District shall *underwrite* the cost of the District's medical and hospital insurance program for all employees who retire...."³⁷ At the center of the case was the meaning of "underwrite." The retirees offered no evidence regarding the intended meaning of this word. The trial court *agreed the retirees had vested rights to a premium-free plan*, but "construed the policy as a promise to offer [only] at least one health plan for which retirees pay no monthly premium."³⁸ The appeals court emphasized the *absence of any evidence* that retirees, "individually or as a group, had a reasonable expectation the District would always pro-

Although employer-paid retiree health benefits are a crucial component of compensation, the nature of their protections is uncertain.

vide free PPO coverage as part of the medical insurance program.”³⁹

Sappington thus illustrates what are the pivotal issues in cases where retiree health benefits are created by a union collective bargaining agreement: (1) Did the contract language intend to confer a vested right? And, (2) If so, what was actually promised? The answer to these questions lies in the traditional rules of contract interpretation.⁴⁰

Do Retiree Health Benefits Survive the Duration of the Agreement?

A corollary to these questions is whether the employer promised retiree benefits that survive the duration of the contract. This also involves interpretation of the agreement to elucidate the parties’ intent.⁴¹

Some employers have argued that the limited duration of a CBA defeats the claims for lifetime retirement health benefits.⁴² These arguments are unconvincing. If the mere existence of a contract duration clause defeats claims for lifetime retiree benefits, then deferred compensation of any kind would be disallowed. In fact, nearly every contract has a limited duration, yet many provide for deferred compensation.

According to benefits attorney William T. Payne, most unionized employees who have sued to enforce promises in collective bargaining agreements have prevailed, and most courts have reasoned that general “durational” clauses do not limit promised deferred compensation. For instance, in *Bidlack v. Wheelabrator Corp.*, a series of contracts provided that “...those employees who have retired since September 22, 1959, will have the full cost of their Blue Cross-Blue Shield coverage paid by the Company after they attain 65 years of age.”⁴³ In addition, these benefits “shall be continued for the spouse after the death of the retiree.”⁴⁴ Concluding that courts “do not sit to relieve contract parties of their improvident commitments,” the court found the duration of the CBAs

did not defeat the retirees’ claims and that extrinsic evidence had to be considered. “We reject the extreme position...that all contractual obligations cease on the expiration date stated in the contract,” said the court.⁴⁵

Mauer v. Joy Technologies, Inc., likewise held that the duration of the CBAs did not limit retirees’ right to benefits. If the benefits could be terminated after just three years, when the contracts expired, then the promise would be meaningless and illusory, the court reasoned.⁴⁶ That the promised benefits were reduced to a Medicare supplement when an employee became eligible for Medicare further supported the conclusion that the benefits vested. The court found that the employer had unambiguously conferred employer-paid health benefits for the *duration of the retirees life*, despite the general duration clause in the CBA. It added that the Medicare supplement would have no value if benefits could be discontinued.⁴⁷

Similarly, in *UAW v. American Pad*, the court rejected the employer’s argument that the contract durational clause limited the right to retirees’ benefits. The court held that the benefits vested when the requisite service was fully performed.⁴⁸ And, in *UAW v. Yard-Man, Inc.*, considered to be the seminal private sector retiree health benefits case, the court concluded that retirees’ benefits were lifetime and vested, ruling that a nonspecific general clause (such as a general duration clause of a labor contract) cannot “take precedence” over a more specific clause (such as one promising benefits during retirement).⁴⁹

More recently in *Yolton v. El Paso Tennessee Pipeline Co.*,⁵⁰ the court concluded

that the benefits vested despite general durational language. It relied on those decisions holding that absent specific durational language *referring to the benefits themselves*, general durational language “says nothing about those benefits.”

Employer representatives often explain to retirees and prospective retirees the nature of their future pension and insurance benefits. If these representatives fail to delineate the duration of these benefits, and this leads retirees to be-

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lieve they will be “for life,” this is strong evidence favoring the plaintiff-retirees and has proved relevant in decisions rejecting duration of contract defenses.⁵¹

In addition, evidence that an employer informed employees that, upon retirement, they would receive benefits for life, has been found particularly relevant in interpreting collective bargaining agreements.

The Thorning Decision

The leading California case discussing retirement health benefits as a vested right is *Thorning v. Hollister School Dist.*⁵² There, two retired school board members claimed they had been granted vested health benefits that extended beyond their terms of office. The Court of Appeal agreed and relied heavily on California cases protecting vested pension benefits.

It is incorrect that *Thorning* was qualified by *San Bernardino Public Employees Assn. v. City of Fontana*. *San Bernardino* did not decide any issue regarding retiree health benefits. Following a negotiation impasse under the Meyers-Milias-Brown Act, the City of San Bernardino unilaterally imposed reductions in the *future* accrual rate for personal leave and the method of determining longevity pay for active employees. The city did not attempt to eliminate benefits already earned. It also imposed a clause requiring that “[r]etirement insurance benefits were to be renegotiated” for *active* employees who had not yet retired.⁵³ The employees’ union argued that the rights at issue had vested, and could not be unilaterally changed without violating the Contract Clause.

The court found that neither future *vacation leave accrual rates* or *longevity pay* qualification rules for current employees were vested rights, ruling that the existing rates continued only as long as they were renegotiated in periodic CBAs, and that employees had “no legitimate expectation that the longevity-based benefits would continue.”⁵⁴ This was so

“because the benefits were earned on a year-for-year basis under previous MOUs that expired under their own terms.”⁵⁵

Notably, the court did not extend⁵⁶ this analysis to retiree health benefits because a “court may not issue rulings on matters that are not ripe for review.”⁵⁷ The court appropriately declined to reach the issue because there had been no impairment. The authors of “Gathering Storm” have entirely missed the fact that the court *declined to rule* on whether it was illegal to impose the clause requiring future negotiations over the future benefits of existing employees, and that the case did not address benefit rights of those already retired.

The authors of “Gathering Storm” argue that because both *Sappington* and *San Bernardino* rejected the *Palos Verdes* decision, *Thorning* is now questionable authority due to its reliance on *Palos Verdes*.⁵⁸ This shaky house of cards falls when these cases are carefully examined.

First, *Palos Verdes* did not involve the enforcement of a collective bargaining agreement under the Contract Clause. Instead, it asserted that certain benefits were “fundamental rights” worthy of constitutional protection, and could not be unilaterally withdrawn after a collective bargaining impasse. Second, *Thorning* cited *Palos Verdes* mainly for the proposition that benefits other than pensions were subject to vesting. Several cases have identified vari-

ous benefits that have contractually vested including health benefits, wage increases, and disability benefits. Third, *Palos Verdes* did not address whether contractually vested post-retirement health benefits were subject to impairment. As is evident, such deferred compensation is of a character considerably different than vacation and other transitory benefits.

In *Olson v. Cory*, the Supreme Court held that promised *salary increases* for judges were vested rights protected by the Contract Clause that could not be abridged by placing a limit on cost-of-living increases for judicial salaries.⁵⁹ The *Olson* court clearly held that promised compensation for future years is protected by the Contract Clause: “[T]he ele-

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ments of compensation for [judicial] office become contractually vested upon acceptance of employment.”⁶⁰ Similarly, in *Sonoma County Organization of Public Employees v. County of Sonoma*, future *cost-of-living salary increases* for the 1978-79 fiscal year were deemed vested so that passage of a June 1978 initiative measure could not impair such contracts, even though the salary for that following year had not yet been completely earned.⁶¹ In *Frank v. Board of Administration of PERS*, the Court of Appeal held that a disability pension vested at the time of employment even though there was no service requirement for receiving disability benefits; the court rejected the argument that the benefits were not earned and did not vest until the employee was disabled.⁶²

Reservation of Rights Clauses

Employers sometimes argue that a “reservation of rights clause” allows post-retirement changes in promised health benefits. These arguments depend greatly on the specific language used in the collective bargaining agreement. For instance, in *Anderson v. Alpha Portland Industries, Inc.*,⁶³ the court found that the benefits did not survive contract expiration because “[f]rom 1946 through 1955 Alpha ‘reserve[d] the right to change, modify, or discontinue [the group insurance plan] if future conditions made such action necessary...The 1956, 1957, and 1958 CBAs expressly limited benefits to the duration of the agreement....”⁶⁴

Generally, however, the courts have been suspicious of these clauses, and unlikely to apply them unless the reservation of rights is clear and unambiguous. For instance, *Barker v. Ceridian*⁶⁵ found no valid reservation of rights to allow impairment of benefits because of ambiguity; it was unclear whether the clause preserved the rights only for those who would be entitled to the benefits in the future, or for those already receiving benefits. The court concluded that too broad a reading would make the promised lifetime benefits “illusory.”

Some employers have relied on documents that contain a reservation of rights clause given to retirees at the time of

retirement. These efforts to restrict vested rights have been struck down by the courts. The City of Santa Barbara learned this when it gave a future retiree a form that dissuaded him from applying for vested retirement benefits. Later, when he sought benefits, the city argued he had waived his rights. In *Hittle v. Santa Barbara County Employees Retirement Assn.*, the Supreme Court found the purported waivers of rights to be ineffective because no consideration was supplied for them, and they essentially were adhesion contracts.⁶⁶ *Hittle* holds that an employee cannot waive entitlement to future retirement benefits by signing such a form at the time of retirement, absent

clear notice of what he was waiving.⁶⁷

Thus, *adhesive* documents presented to retirees at the *time of retirement*, containing recitals eliminating previously vested rights, have no legal effect and cannot divest retirees of previously acquired vested rights.

Furthermore, in a collective bargaining system, the presentation of an employer-created reservation of rights document, external to the collective bargaining agreement, amounts to an act of direct dealing and hence is of no independent validity. Direct dealing with employees at any time is an unfair labor practice.⁶⁸

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No Need to Use the Term ‘Vest’

It is unnecessary for an agreement to use the word “vest” in order for the benefits to become vested. Courts may imply contractual obligations “from the particular words” at issue, and implied contracts are “of equal dignity with an express contract for purposes of the prohibition against impairment.”⁶⁹ An intent to grant contractual rights can be implied from an unambiguous exchange of consideration between a private party and the state.⁷⁰ Federal cases also hold that the use of the words such as “vested” “are not prerequisites to finding the parties intended the benefits to vest.”⁷¹

Second, Medicare offset language also has been considered strong evidence that retirement health benefits were intended to survive the expiration of the contract. The rea-

soning is that, if the promise was not intended to survive contract expiration, there would be no need to reference qualification for Medicare, an event generally years away for most employees.⁷²

Use of Extrinsic Evidence to Prove the Meaning of Contract Language

If a contract clause is subject to more than one interpretation, it is “ambiguous” under governing case law.⁷³

Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, extrinsic evidence nonetheless may play a significant role in interpreting a written contract the terms of which are not entirely clearly. As explained in *Wolf v. Superior Court*.⁷⁴

Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court’s own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible.⁷⁵

Thus, the trial court follows a two-step process. First, it provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions in order to determine ambiguity. If, in light of the extrinsic evidence, the court decides the language is reasonably susceptible to the interpretation urged, extrinsic evidence is then admitted to aid in the second step, interpreting the contract.⁷⁶

The trial court’s determination of whether an ambiguity exists is a question of law. The trial court’s resolution of an ambiguity is also a question of law if no parol evidence is

admitted, or if the parol evidence is not in conflict. Where the evidence is in conflict, the trial court’s interpretation of that evidence is a question of fact.⁷⁷

Unions and Employers Cannot Negotiate to Eliminate Vested Benefits

Although collective bargaining rests on the principle that a bargaining unit member is bound by a labor agreement even though he or she may not have personally consented to its provisions, the policy of overriding individual interests for the good of the whole is not absolute.⁷⁸ Con-

gress did not authorize a “tyranny of the majority over minority interests.”⁷⁹ A union may not bargain away *individual* rights in vested retirement benefits.

Federal courts have expressly held that vested pension rights cannot be bargained away by unions in negotiations with employers. As articulated in *Allied Chemical and Alkali Workers of America, Loc. Union No. 1 v. Pittsburgh Plate Glass Co.*,⁸⁰ “Under established contract principles, vested retirement rights may not be altered without the pensioner’s consent.” *Allied Chemical* held that retirees

were not “employees” under the federal labor laws, and that unions may, but are not required to, negotiate concerning benefits of retired employees. The court explained that even though unions could bargain for retirees, *they could not bargain away vested rights without individual retiree consent*. This principle of the decision was grounded on the recognition that active employees had no duty to represent the interests of those who retired; and, even if it chose to do so, the union was under no duty to fairly represent the interest of retirees.⁸¹ Thus, the court explained the obvious, that active employees are “free to decide...that current income is more preferable to greater certainty in their own retirement benefits” or those of retirees. Therefore, while a union may bargain for future benefits for active employees, it is constrained in bargaining away those benefits for those who have retired.

If a contract clause is subject to more than one interpretation, it is ‘ambiguous’ under governing case law.

Although *Allied Chemical* focused on the relationship between unions and retired employees, the principle that unions cannot bargain away vested retirement rights has been extended to vested rights of employees *still represented* by the union. These rulings recognize that benefits may vest before the right to their receipt has accrued. This is crucial in California, which has long held that retirement benefits vest for public employees when they are conferred.

For example, in *Terpinas v. Seafarer's International Union of North America*, the court held that once an employee became vested in a disability plan after 10 years of service, the union's agreement to amend the disability plan could not retroactively destroy or alter the employee's vested rights.⁸²

It is true that unlike retirement health benefits, virtually all other provisions of a collective bargaining agreement are subject to change. A prime example is seniority. Retiree rights are very different than seniority system rights,⁸³ which the federal courts have held can be changed by collective bargaining.⁸⁴ Seniority rights are *collective* rights and a union's authority to negotiate over seniority is derived from its right to act for "mutual aid or protection."⁸⁵ Retiree health benefits, in contrast, are a special form of deferred compensation guaranteed to an individual, which generally is earned only after years of loyal service.

In *Alexander v. Gardner-Denver*, the Supreme Court similarly distinguished between certain rights related to collective activity, such as the right to strike, and *individual* rights, such as the right to equal employment opportunities. It held that an employee's individual rights to be free from discriminatory employment practices could not be waived by a collective bargaining agreement.⁸⁶

Despite the general rule in California that individual employees are bound by the collective agreement, important individual constitutional and statutory rights cannot be waived by unions when enforcement of a collectively bargained provision would contravene an explicit state policy. For example, in *Phillips v. California State Personnel Board*,

the court held that unions cannot bargain away fundamental due process rights to pre- and post-termination hearings for permanent public employees. They may, however, supplant existing procedures with those that meet the minimal requirements of due process.⁸⁷ The *Phillips* court relied on this distinction between collective and individual rights in holding that unions may not waive minimum due process rights in termination procedures.⁸⁸ A union contract that contains residency requirements in violation of the state constitution is void and unenforceable. Again, the court was protecting individual rights.⁸⁹

Statutory rights that spring from a strong and explicit state policy cannot be waived in collective bargaining agreements. In *Wright v. City of Santa Clara*, the court held that a collective bargaining agreement could not require reserve officers in the armed forces to relinquish their military paycheck before receiving compensation under the Military and Veterans Code. The court reasoned that the legislature manifested a different intent by not explicitly allowing such a waiver by city employee unions.⁹⁰

A few cases have identified rights that are subject to waiver in collective bargaining. For instance, in *Porter v. Quillin*, the court held that the unions could waive the statutory right where

the public policy supporting the right — protection from employer coercion to purchase the employer's products or services — was adequately served by union representation and collective bargaining.⁹¹ In *McMillen v. Civil Service Commission*, the court upheld the union's agreement to differentiate obesity from other medical or physical employee problems because the disciplinary procedural rules still included a due process hearing.⁹² In these cases, the employees' rights subject to waiver by the unions were not individual rights to deferred compensation that had been earned by the employee.

Courts have addressed negotiated impairments of retirement health benefits. In *Hauser v. Farwell, Ozmun, Kirk & Co.*, the court rejected the purported analogy to *seniority benefits* and held that "without explicit authority or a power of

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attorney from the individual members,” the union could not bargain away the vested pension rights of employees.⁹³ The distinction between seniority system rights and retirement benefits rights is founded on the fact that seniority is not a guaranteed benefit but merely a status. It is a rank based primarily on an employee’s length of service relative to others that leads to preferential treatment.⁹⁴ Retirement health benefits and other benefits such as vacation pay, unlike seniority, are earned wages, the payment of which is merely deferred.⁹⁵

In *Bokunewicz v. Purolator Products, Inc.*, the court held that disability pension benefits vested prior to application for the benefits and a collective bargaining agreement that modified the plan between the date of injury and the date of application for benefits could not waive the employee’s vested rights.⁹⁶ Thus, in the private sector, vested retirement rights cannot be amended through collective bargaining without individual consent.

Some employers dismiss the relevance of *Terpinas*, *Bokunewicz*, and *Hauser* because they are pension cases. But there is no reason why the vested rights to retirement health benefits should not similarly be immune to impairment through collective bargaining. Retirement health benefits are as important to retirees as pensions, especially in light of current health care costs. Indeed, many retirees identify retirement health benefits as a crucial reason to continue working for their employer.

State policy favoring collective bargaining, some argue, should prevent retirement health benefits from vesting at the time of employment. Yet, as evidenced by *Hauser* and other cited cases, corresponding federal policy in favor of collective bargaining does not override vested contractual rights of union represented employees. In *Hauser*, the pension plan originated as a company plan that subsequently was amended through collective bargaining conditional on receipt of *individual waivers* of the rights conveyed by the original plan.⁹⁷

Some employers insist that collective bargaining and exclusive representation precludes individual consent to

these benefits because the right to enter into contracts is affected. In fact, the Supreme Court has left open the possibility that individual contracts “may add to [collective contracts] in matters covered by the collective bargain,” while declaring that in individual contracts the employer “may not...obtain any diminution of his own obligation or any increase of those of employees in the matter covered by collective agreement.”⁹⁸ In addition, the contractual right of public employees under the Contract Clause does not apply

to private sector employees’ vested contract rights. Surely, this constitutionally protected right should be held as secure as private sector employees’ rights.

The public policy argument advanced in “Gathering Storm” is not supported by any precedent in this constitutional context. No “paralysis” of labor-management relations will occur by vesting these at the time of employment. Only promised future compensation is vested and protected by the Contract Clause. Although aspects of vacation pay, such as accrual rules, are promised future compensation, most subjects of bargaining do not become

vested rights of employees. Workload, class size, safety conditions, procedures for discipline, and layoff procedures and criteria are not subject to vesting.

Guiding Principles

So, what principles can be derived from this state of affairs? First, promises can be made that do not allow for post-retirement modification through negotiations. Whether such a promise exists turns on the intent of the parties. And that, in turn, depends on the language used and application of the traditional tools of contract interpretation.

Second, in any given plan, some aspects may be protected vested rights, such as the right to a premium-free plan, while other aspects (i.e. the scope and ancillary costs) may be tied to the benefits offered active employees. While the right to *receive* a plan may be vested, specific copays and deductibles may not. Again, it depends on the language employed.

Unions and retirees are advised to investigate the origins of their contract language and to keep good records.

What is a union to do if an employer insists on negotiating to eliminate or encumber vested rights? They have various courses. Unions can refuse to negotiate rights they believe are vested, asserting that they do not represent retirees. They can demand broad hold harmless and indemnification language. The correct approach depends on the situation. Unions and retirees are advised to investigate the origin of their contract language and maintain good records, for when a dispute arises, those who negotiated the language may no longer be available.

The parties at all times should be cognizant of the principle that a union cannot be forced to agree to waive individually vested rights. *

1 *Roxbury Carpet Co.* 73-2 Lab. Awards, CCH par. 8521, at p. 4938-4939 (Summers 1973).

2 See “Weathering the Gathering Storm Over Post-Retirement Health Care Benefits — Vested or Not,” by Jeff Sloan, Genevieve Ng, and Merlyn Goeschl, *CPER* No. 184, June 2007 (“Gathering Storm”); and “Further Storm Warnings in the Territory of Retiree Health Care Benefits,” by Richard Whitmore and Cepideh Roufougar, *CPER* No. 185, August 2007 (“Further Storm”).

3 “A Short Primer on Retirees’ Vested Health Benefits,” by Robert J. Bezemek, *CPER* No. 163, December 2003.

4 *Legislature v. Eu* (1992) 54 Cal. 3d 492, 534; *Claypool v. Wilson* (1992) 4 Cal.App. 4th 646, 662, 670; but see *Valdes v. Cory* (1983) 139 Cal. App. 3d 772, and *California Teachers Assn. v. Cory* (1984) 155 Cal. App. 3d 494, 506 (courts found an assurance concerning the rights of future employees to the permanency of government funding of STRS and PERS).

5 Gov. Code Secs. 3540 et seq.

6 Gov. Code Secs. 53201 et seq., especially Sec. 53205 (Stats. 1963, Chap. 1773, Sec. 2).

7 *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157, 159-160, 92 S. Ct. 383.

8 *County of San Joaquin* (2003) PERB Dec. No. 1570, 28 PERC par. 37, p. 158, 164 CPER 119; *Temple City Unified School Dist.* (1989) PERB Dec. No. 782, 14 PERC par. 21027, p. 68, 83X CPER 15.

9 See *San Bernardino Public Employees Assn v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1223, 133 CPER 9.

10 See cases discussed in “Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits: A Plaintiff’s Perspective,” William T. Payne, 10 *The Labor Lawyer* 91 (1994).

11 *Pittsburgh Plate Glass* (1962) 404 U.S. , 181, n. 20; *Smith v. News Assn.* (1962) 371 U.S. 195, 200-201; *United Auto Workers v. Yard-Man, Inc.* (6th Cir. 1983) 716 F. 2d 1476, 1484-1486, cert den. (1985) 485 U.S. 1007; *Turner v. Local Union No. 302, Int. Brotherhood of Teamsters* (9th Cir. 1979) 604 F. 1219. 1224 n. 5.

12 This flows directly from California Code of Civil Procedure Sec. 1085, which defines the writ as one that may be issued “to compel the performance of an act which the law specially enjoins as a duty resulting from an office” See also *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296; *Santa Clara County Counsels Assn. v. Woodside* (1994) 7 Cal. 4th 525, 540 (*reh. den.* 1994), upholding the right of employees to sue in mandamus to enforce a local salary ordinance.

13 *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598 (*rev. den.* 1993).

14 *Sappington v. Orange Unified School Dist.* (2004) 119 Cal.App.4th 949.

15 *The Federalist*, No. 44, at 282, c. Rositer ed. 1961.

16 *O’Dea v. Cook* (1917) 176 Cal. 659; *Aitken v. Roche* (1920) 48 Cal.App. 753.

17 *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 505-506.

18 *Id.* at 504-505.

19 *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 130.

20 *Olson v. Cory* (1980) 27 Cal.3d 532, 538.

21 *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853, 856; *Legislature v. Eu, supra*, 54 Cal.3d at 534; *Association of Blue Collar Workers v. Wills* (1986) 187 Cal.App.3d 780, 786-787. In *Kern*, the court held a city could not deny a pension to a firefighter by repealing the pension system 23 days before his required 20 years of service. Similarly, in *Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183, the court held that an amendment prior to the plaintiff’s required 25 years of service which disallowed pensions to convicted felons could not make the plaintiff ineligible for his pension upon conviction.

22 *Miller v. State of California* (1977) 18 Cal.3d 808, 815.

23 *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 133.

24 *O’Dea v. Cook, supra*, 176 Cal. 659; *United Firefighters of Los Angeles v. City of Los Angeles* (1989) 210 Cal.App.3d 1101, 1102 (*rev. den., cert. den.*).

25 *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 340, 348-350.

26 *Goddard v. South Bay Union High School Dist.* (1978) 79 Cal.App.3d 98, 105; *American Federation of Teachers v. Oakland Unified School Dist.* (1967) 251 Cal.App.3d 91, 97; *Frates v. Burnett* (1970) 9 Cal.App.3d 63.

27 *Thorning, supra*, 11 Cal.App.4th at 1607.

28 “A Review of Potential Health Care Benefit Programs Provided by the California State Teachers’ Retirement System,” May, 2001, p. 40.

29 See “Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits: A Plaintiff’s Perspective, William T. Payne, 10 *The Labor Lawyer* 91 (1994)

30 See Payne, *supra*.

31 See *San Leandro School Retirees Action Assn. v. San Leandro Unified School Dist.* (1985) Ala.Co.Sup.Ct. H104212-0.

32 See, e.g., *CRTA Protect v. West Contra Costa Unified School Dist.* (2000) A086837 (1st Dist.), not certified for publication; *Contra Costa Colleges Retirees Assn. v. Contra Costa Community College Dist.* (1996) A064817 (1st Dist.), not certified for publication; *AGREE v. San Ramon Valley Unified School Dist.*, Co.Co.Co. C 95 05063.

33 *Sonoma County Organization of Public Employees v. County of Sonoma, supra*, 23 Cal.3d 296, at 304, 321.

34 Connecticut (see *Poole v. City of Waterbury* [2003] 266 Conn. 68, 831 A.2d 211, holding that retired firefighters had a vested right to medical benefits established in collective bargaining agreement); Hawaii (*University of Hawaii Professional Assembly v. Cayetano* [9th Cir. 1999] 183 F.3d 1096, 1102-1104, holding that the state impaired obligations set forth in collective bargaining agreements regarding date employees were entitled to be paid); Maryland (*Baltimore Teachers Union et al. v. Mayor and City of Baltimore* [4th Cir. 1993] 6 F.3d 1012, holding that pay increases in collective bargaining agreement were vested, but allowing impairment); and Massachusetts (*Massachusetts Community College Council v. Commonwealth of Massachusetts* [1995] 420 Mass. 126, 649 N.E. 2d 708, holding that collective bargaining agreements established vested rights).

35 *Pacific Gas and Electric Company v. G. W. Thomas Drayage and R. Co.* (1968) 69 Cal.2d 33, 36-37, at 38; *SEIU v. City of Los Angeles* (1994) 24 Cal.App.4th 136, 143-144 (A court must interpret a contract so as to execute the mutual intent and purposes of the parties).

36 *Ibid.*

37 *Sappington, supra*, 119 Cal.App.4th at 954, emphasis added

38 *Id.* at 955.

39 *Ibid.*

40 In *How Arbitration Works*, BNA, 6th ed., 2003, these rules are discussed in detail.

41 *Armistead v. Vernitron Corp.* (6th Cir. 1991) 944 F. 2d 1287; *International Union, UAW v. BVR Liquidating, Inc.* (6th Cir. 1999) 190 F.3d 768, cert den. (2000) 529 U.S. 1067; *International Union, UAW v. Yard-Man, Inc.* (6th Cir. 1983) 716 F. 2d 1476.

42 See, e.g., *Anderson v. Alpha Portland Industries, Inc.* (8th Cir. 1988) 836 F.2d 1512.

43 (7th Cir. 1992) 993 F.2d 603 at 605-607.

44 *Id.* at 605.

45 *Id.* at 607.

46 (6th Cir. 2000) 212 F.3d 907, 915, 918; accord, *Policy v. Powell Pressed Steel Co.* (6th Cir. 1985) 770 F. 2d 609.

47 *Id.* at 615-616

48 (6th Cir. 1967) 372 F.2d 427.

49 *International Union, UAW v. Yard-Man, Inc. supra*, 716 F. 2d 1476, cert den. (1984) 465 U.S. 1007.

50 *Yolton v. El Paso Tennessee Pipeline Co.* (6th Cir. 2006) 435 F.3d 571, 578-579.

51 *UAW v. BVR Liquidating, Inc., supra*, 190 F.3d 768, 772-776 (durational clause not a defense; evidence that employer’s agents informed retirees that their health care benefits would be lifetime benefits); *Smith v. ABS Industries, Inc.* (1989) 890 F.2d 841, 846-47; *Armistead v. Vernitron Corp, supra*, 944 F.2d at 1294-1297 (retiree rights survive expiration of CBA; meaning of contract depends on construction of CBA and intent of the parties; context justifies inference they survive; rejecting approach of *Alpha Portland Industries, supra*); *Keffer v. Conners Steel, supra*, 872 F.2d at 64; *United Steelworkers v. Textron, Inc.* (1st Cir. 1987) 836 F.2d 6, 9; *United Steelworkers v. Newman-Crosby Steel* (D. R.I. 1993) 822 F. Supp. 862, 866.

52 *Thorning v. Hollister School Dist., supra*, 11 Cal.App.4th 1598.

53 The clause said, “During the period...both the City and the PBA agree to meet and confer regarding the additional incremental costs of future benefits...” *Supra*, 67 Cal.App.4th 1215 at 1226.

54 *Supra*, 67 Cal.App.4th 1215 at 1223-1224.

55 The court analogized this to the judges discussed in *Olson v. Cory, supra*, who entered into new terms and “impliedly agreed to be bound by salary benefits then offered by the state for a different term.” *Id.* at 1225-1226. By analogy, most retirees contemplating lawsuits over changes in their plans invariably have retired *before* the changes at issue. Although this ruling would not apply to employees who are already vested, its citation illustrates the factual distinction between the typical case and *Fontana, supra*, 67 Cal.App.4th 1215.

56 *Supra*, 67 Cal.App.4th 1215 at 1226-1227.

57 *Id.* at 1226.

58 The court in *California League of City Employee Assns. v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135, held that an employer at impasse in collective bargaining over vested rights could not unilaterally modify those rights even though unilateral modification of terms of employment is normally allowed when the parties are at impasse. In 1966, before collective bargaining, three forms of deferred compensation were created (a longevity pay award after nine years of service, extra vacation after ten years,

and sabbaticals after six years). In subsequent collective bargaining under the MMBA (Gov. Code Secs. 3500 et seq. added by Stats. 1968), a negotiations impasse occurred and the employer unilaterally implemented its last, best offer. But the court would not allow the bargaining process and *impasse* to supersede these previously vested rights as to those employees “who had been working toward them prior to” the change. *Id.* 137-138. *Palos Verdes* did not involve vested post-retirement benefits.

59 The Supreme Court in *Olson* also cited *Palos Verdes* in part for the proposition that obligations of a public employment contract are protected by the Contract Clause of the constitution. 27 Cal.3d at 538.

60 *Id.* at 538-539, n. 3, citing *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863.

61 (1979) 23 Cal.3d 296, 304.

62 (1976) 56 Cal.App.3d 236.

63 (8th Cir. 1988) 836 F.2d 1512.

64 *Id.* at 1518.

65 (8th Cir. 1997) 122 F. 3d 628, cert den. (1998) 529 U.S. 1109.

66 (1985) 39 Cal.3d 374.

67 *Hittle* ruled that the retirement system was bound to its original promise, that a purported waiver is not legally effective unless the party executing it has been “fully informed” of the existence of the right being waived, its meaning, the effect of the waiver presented to him, and has full understanding of the explanation. *Id.* at 389. The burden is on the party claiming waiver to prove it by “clear and convincing evidence” and “doubtful cases will be decided against a waiver.” *Id.* at 390. The court also relied on the principle that California favors pension benefits and construes them liberally to assure that they are given full effect in order to protect the retiree against economic insecurity.

68 The root case holding direct dealing to be unlawful is *J.I. Case Co. v. NLRB* (1944) 321 U.S. 332.

69 *California Teachers Assn. v. Cory, supra*, 155 Cal.App.3d at 505.

70 *Ibid.*

71 *Mauer v. Joy Technologies, Inc.* (6th Cir. 2000) 212 F.3d 907, 915; *Bidlack v. Wheelabrator Corp.* (7th Cir. 1992) 993 F.2d 603.

72 *Mauer v. Joy Technologies, Inc., supra*, 212 F.3d at 918; *Policy v. Powell Pressed Steel Co., supra*, 770 F.2d at 615-616.

73 *Pacific Gas and Electric Co. v. G. W. Thomas Drayage and Rigging Co.* (1968) 69 Cal.2d 33, 36-37; *Alexander v. Primerica Holdings, Inc.* (3d Cir. 1992) 967 F.2d 90, 95 and n. 1 (“If a reasonable alternative is suggested, even though it may be alien to the judge’s linguistic experience, objective evidence in support of that interpretation should be considered by the fact finder. See Corbin, *Contracts*, Sec. 542.”

74 (2004) 114 Cal.App.4th 1343.

75 *Ibid.*

76 *Id.* at 1350-1351

77 *Ibid.*

78 *NLRB v. Allis-Chalmers Mfg. Co.* (1967) 388 U.S. 175, 180; *San Lorenzo Education Assn. v. Wilson* (1982) 32 Cal.3d 841, 846.

79 *Emporium Capwell Co. v. Western Addition Community Org.* (1975) 420 U.S. 50, 64, 95 S.Ct. 977, 43 L.Ed. 12.

80 *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157, 181, 92 S.Ct. 383.

81 *Id.* at 181-182, and n. 20.

82 *Terpinas v. Seafarer’s International Union of North America* (9th Cir. 1984) 722 F.2d 1445, 1447-1448.

83 Reference to seniority as a “vested” right in *International Longshoremen and Warehousemen Union v. Kuntz* (9th Cir. 1964) 334 F.2d 165 was the result of the plaintiffs’ characterization, *Ibid.* at 167, a view not shared by the court. *Ibid.* at 171.

84 *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed 1048; *International Longshoremen’s and Warehousemen’s Union v. Kuntz, supra*, 334 F.2d 165.

85 *Ford Motor Co. v. Huffman, supra*, 345 U.S. at 337.

86 *Alexander v. Gardner-Denver* (1974) 415 U.S. 36, 51-52, 94 S. Ct. 1011, 1021-22

87 *Phillips v. California State Personnel Bd.* (1986) 184 Cal.App.3d 651, 658-659.

88 *Ibid.*, 184 Cal.App.3d at 659.

89 *International Assn. of Fire Fighters v. City of San Leandro* (1986) 181 Cal.App.3d 179, 183

90 *Wright v. City of Santa Clara* (1989) 213 Cal.App.3d 1503, 1506.

91 *Porter v. Quillin* (1981) 123 Cal.App.3d 869, 876.

92 *McMillen v. Civil Service Comm.* (1981) 6 Cal.App.4th 125, 132. (D. Minn. 1969) 299 F.Supp. 387.

94 *California Brewers Assn. v. Bryant* (1980) 444 U.S. 598, 605-606, 100 S.Ct. 814, 63 L.Ed.2d 55.

95 One author has noted that pension benefits, vacation pay, and even severance pay are distinguishable from seniority as deferred compensation and in a sense “property,” unlike seniority, which is merely a status that is lost when the employment relationship terminates or the contract which defines it expires. Aaron, “Reflections on the Legal Nature and Enforceability of Seniority Rights,” 75 Harv. L. Rev. 1532, 1536, 1537, 1538, 1540-1541 (1962). See, *Smith v. Kingsport Press, Inc.* (6th Cir. 1966) 355 F.2d 416, 420.

96 (3d Cir. 1990) 907 F.2d 1396, at 1401-1402.

97 *Supra*, 299 F.Supp. at 394.

98 *J.I. Case Co. v. NLRB, supra*, 321 U.S. 332, 339, 64 S.Ct. 576, 88 L.Ed. 762.

Recent Developments

Public Schools

Parents Sue Department of Education Over Definition of 'Highly Qualified' Teachers

A group of students and parents from the Hayward, Contra Costa, and Los Angeles school districts has filed a lawsuit in the United States District Court in San Francisco against the United States Department of Education, alleging that the department has failed to provide a quality teacher in each classroom as required by the federal No Child Left Behind Act.

More than 10,700 interns taught in California classrooms last year.

To be considered "highly qualified," the NCLB requires that teachers be credentialed and teach in a subject in which they have received proper training. It also provides that districts must notify parents each fall if their child's teacher does not meet those requirements. In addition, the act requires schools that receive federal poverty funding to notify parents when their child is taught for more than four weeks by a teacher who is not "highly qualified."

However, the department has allowed an exception to these require-

ments in the case of teacher interns. It permits states to count interns as credentialed even though they are in the process of earning certification. This means that recent college graduates, with, in some cases, little or no training, are being given their own classrooms. They call in a substitute on days when they attend credentialing classes.

According to the California Department of Education, more than 10,700 interns taught in California classrooms last year. A higher percentage of interns show up in poor and minority districts because they are used to fill empty slots in schools that have a hard time getting and keeping teachers. For example, although on average, districts throughout the state filled only 3 percent of classroom teaching positions with interns, the percentage in the Oakland district was 11 percent; in the affluent Piedmont district it was only 1 percent. And, in some schools, the percentages were even higher than in Oakland. Last year, nearly one quarter of the teachers at Pittsburg's Central Junior High were interns, as were more than a third of the teachers at Oakland's Edna Brewer Middle School.

"Congress did not intend that an individual with no proper training in

how to teach would be labeled 'highly qualified' on her first day in the classroom merely because she is 'participating' in an alternative route to certification," the lawsuit states.

John Affeldt, managing attorney of Public Advocates, the San Francisco law firm that represents the plaintiffs in the lawsuit, said that, "If successful, this suit will prohibit states and districts from continuing the all-too-frequent practice of concentrating interns at low-income and high-minority schools."

If the lawsuit is successful, however, it will only heighten the nationwide current teacher crisis. Thousands of baby-boomer teachers are retiring,

A higher percentage of interns show up in poor and minority districts.

and new educators are leaving the profession at a record rate. California is projecting that it will need 100,000 new teachers within the next 10 years because of retirements alone. The National Commission on Teaching and America's Future, an independent non-profit group, has calculated that nearly one-third of all new teachers leave the profession after three years, with almost half leaving after five years. (For a full story on the teacher shortage, see *CPER* No. 178, at pp. 28-31.) *

Changes to No Child Left Behind Act Under Consideration

Since its passage in 2002, the federal No Child Left Behind Act has been the target of criticism from many different quarters. Now the act is up for reauthorization, and one of its original architects has proposed several changes, each of which also has come under fire.

Representative George Miller, (D-CA 7th), chairman of the Committee of Education and Labor of the U.S. House of Representatives, was one of the main proponents of the NCLB. His committee issued a draft proposal for changes to the law in late summer, unleashing a storm of criticism from all sides. The proposed changes include expanding the number and types of tests for grading a school's progress and considering student test scores in granting teacher pay bonuses. Other adjustments would make a distinction between those schools that are failing across the board and those in which just some groups have not met annual testing goals. Allowing students not fluent in English to be tested in their native language for five years, instead of three, is another item being considered.

The proposed changes have been criticized by Education Secretary Margaret Spellings, who believes that these alterations would weaken efforts to raise achievement among poor and minority students, and "could be a significant retreat from accountability."

The proposals would not change the overall strategic goal of the act, which is to bring every student to proficiency in reading and math by 2014 as measured by standardized tests administered by the states, and to punish schools where scores do not rise. Under the act, schools are required to report annual test scores in reading and math for all children in grades three through eight; scores are broken down by race, ethnicity, and other factors.

The proposed changes have been criticized by Education Secretary Margaret Spellings.

The draft legislation proposes a pilot program that would allow districts to devise their own measures of student progress, rather than rely on statewide tests. Tests in history, science, and civics could be employed, and attendance, graduation rates, and performance on advanced placement tests could be used as other measures. This proposal drew heated criticism at a hearing of the House Education Committee held on September 10. Diane Piché, executive director of the Citizens' Commission

on Civil Rights, said that this plan, if it became law, had "the potential to set back accountability by years, if not decades," and would lead to lower standards for children in high poverty schools. Miller responded that, under the proposal, district tests would have to be approved by the federal Education Department.

Another proposed change to the act would impose less rigorous punishments on schools where only one or two groups of students fail to meet annual testing goals. The potential amendment is popular with reputable suburban schools that have been threatened with federal sanctions because of one or two low-performing groups. It is opposed by the tutoring industry and the Bush administration.

The proposal to allow states to test students with limited English in their native language for five years instead of three, is supported by states with large immigrant populations. However, Spellings opposed the plan in a letter to congressional leaders. "That's simply too long," she wrote. "This would allow a third-grade student to reach the tenth grade before ever being tested in English."

The proposal includes provisions for school districts to give exemplary teachers raises of up to \$12,500 a year, and exemplary principals raises of up to \$15,000 annually. Leaders of the National Education Association and the American Federation of Teachers told the committee that they would not support the bill in its current form and spe-

cifically objected to the proposal to base the bonuses on student test scores. Mary Bergan, a vice president of the American Federation of Teachers, wrote, "The AFT has a position on 'pay for performance,' the short version of which is that it must be negotiated based on local needs, and it must augment a basic salary schedule that is good enough to attract and retain the best teachers at every level."

Reg Weaver, president of the NEA, urged Congress to slow down the legislative process.

During his testimony before the committee, Reg Weaver, president of the National Education Association, urged Congress to slow down the legislative process in order to make meaningful changes. "The draft language is still too focused on high stakes testing, punishments, labeling children, and unfunded federal mandates," he said. "It fails to adequately address issues that parents and teachers know best provide a positive impact on students such as reducing class size, increasing the training and retention of highly qualified teachers, expanding access to early childhood education, and providing adequate funding for school facilities and materials."

The California Teachers Association is calling for a "No" vote on the Miller reauthorization proposal. CTA claims that the proposed changes will actually make NCLB *worse*. It argues that the plan to pay and evaluate teachers based on student test scores would encourage teachers to "teach to the test" even more than they already do to meet the NCLB mandates. "Test scores don't fairly measure student achievement and cannot accurately evaluate and pay teachers," it states on its website, <http://www.cta.org>. Further, "research shows that merit pay schemes tied to student test scores have not improved student achievement and have been abandoned in many states where they were tried, because they were not working." CTA asserts that this proposal will make it harder to find quality teachers to re-

place the 100,000 educators who will be leaving the profession in the next 10 years and will drive teachers away from lower-performing schools. It also will undermine teachers' rights to bargain issues such as pay and working conditions. "California teachers work for local school districts, not the federal government," it points out. "This proposal's attempt to mandate a particular evaluation or compensation process is an unprecedented federal infringement on teacher rights. It's offensive and disrespectful to educators," it adds.

The House education committee's proposed changes can be found on its website, <http://edlabor.house.gov>. The Senate, too, is expected to release proposed legislation modifying the NCLB. *

Teachers Union's Use of School Mailboxes Restricted

In *San Leandro Teachers Assn. v. Governing Board of the San Leandro USD*, the First District Court of Appeal ruled that Education Code Sec. 7054 prohibits teachers unions from distributing materials with political endorsements to school mailboxes. In doing so, the appellate court overruled the trial court's decision and rehabilitated the Public Employment Relations Board's interpretation of the statute.

Factual Background

The San Leandro Teachers Association is the exclusive bargaining representative of the district's certificated employees. Each school in the district maintains a permanent on-site mailbox for each certificated employee. The district paid for construction of the mailboxes and pays the cost of maintaining them, although the boxes do not require any specialized maintenance or servicing.

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The district uses the mailboxes to distribute written communications to employees. SLTA is allowed to use them pursuant to the access provisions of the Educational Employment Relations Act and the terms of its collective bargaining agreement. The contract provides that SLTA has the right to “use teacher mailboxes...for lawful communications to teachers.”

Two newsletters placed in the mailboxes by SLTA contained information about the union's representation activities, including contract negotiations and activities of its political action committee. Members were asked to help in SLTA's campaign to elect certain school board candidates it had endorsed. SLTA paid for production of the documents, and they were placed in

the mailboxes by teachers during non-duty time.

Shortly thereafter, the district instructed SLTA to stop using the mailboxes to distribute material containing “impermissible political endorsements” in violation of Ed. Code Sec. 7054. That statute provides: “No school district...funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district.”

SLTA filed an unfair practice charge with PERB, alleging that the district's directive violated EERA by denying the access rights conveyed in Government Code Secs. 3543.5(a) and (b). PERB refused to issue a complaint

and dismissed the charge. (See discussion of PERB's ruling in *CPER* No. 175, pp. 5-9.) SLTA then filed a lawsuit in superior court.

The superior court judge overruled PERB and held that school districts cannot prohibit teachers unions from distributing newsletters with political content to members' school mailboxes because such a restriction would violate the state Constitution's free speech protections. The judge found that the use of public funds in this case was nominal at best and that “this is simply not the type of political campaigning activity to which Section 7054 is directed.” (See discussion of the superior court's decision in *CPER* No. 179, pp. 47-50.)

The district appealed.

Court of Appeal Decision

The appellate court made short shrift of the trial court's rationale. Relying on a basic rule of statutory construction, "we presume the Legislature meant what it said and the plain meaning of the statute governs," it instructed. Applying this principle, the court said:

In our view, section 7054 unambiguously decrees that school district resources may not be used in furtherance of political activities, regardless of the identity of the actor or the cost to the district. The statute's use of the passive voice ("[n]o school district...funds, services, supplies, or equipment shall be used") appears to us to be deliberate. If the Legislature had desired to limit the application of this provision to school districts only, it could easily have crafted the language to so state. We also observe that this section does not contain an exception for "nominal" uses, and we decline to interpret the statute to include such an exception.

The court was not swayed by any of the arguments to the contrary. It dismissed the claim that use of the mailboxes does not constitute use of district "equipment" because equipment refers to something that can be handled. The mailboxes are equipment, said the court, because they are tangible, specially constructed receptacles. And, it rejected the union's assertion the mailbox does not involve a "service" because it does not require any action on the part of the district. By facilitating communication, the mailboxes provide a service, it reasoned.

The court refused to consider the argument that a technical reading of Sec. 7054 would bar permissible political activity, such as discussions among teachers on school grounds or political bumper stickers on cars in the school parking lot. Those were not facts presented in this case, said the court. It similarly discredited an attorney general opinion cited by the union in support of its argument that Sec. 7054 applies to districts only. "Opinions of the Attorney General are not binding on this court," it said. "In any event, we do not believe that the circumstances addressed in the opinion are analogous to the present case."

In contrast to arguments put forward by the union, the court found no inconsistency between Sec. 7054 and other Education Code sections. Section 7052 states: "Except as otherwise provided in this article...no restrictions shall be placed on the political activities of any officer or employee" of a school district. The court rejected the union's "expansive reading" of the section, noting that the first clause "clearly takes into account the fact that other sections within the article may operate to impinge on the political activities of school district employees," including Sec. 7054 and Sec. 7055(b), which specifically allows districts to regulate political activities on their premises.

Section 7056, which permits union agents to solicit campaign contributions on school property during non-working time, also does not conflict with Sec. 7054, said the court. "We do

not believe that 'the mailboxes stand in the same relation to the literature as does the chair the union agent may sit on while soliciting campaign funds,'" it said, because, "in contrast to a chair, a school mailbox is specifically provided and designed to convey school-related information and material between teachers and staff." It similarly distinguished a table in the teachers' lounge on which the union, with the district's agreement, may leave its newsletters. "Mailboxes function as a conduit to deliver material to a specific

The court refused to consider the argument that a technical reading of Sec. 7054 would bar permissible political activity.

reader, whereas tables are not primarily...used as a means of communication."

The court also reconciled its interpretation of Sec. 7054 with EERA Sec. 3543.1(b). It provides:

Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation,

and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

Section 7054 is a “reasonable regulation” within the meaning of the statute, said the court. “In the context of public education, it is proper for a school district to seek to disassociate itself with any position other than neutrality on matters of political controversy,” it reasoned.

Supporters of the union’s position argued that there is no violation of Sec. 7054 where the primary purpose behind the expenditure of public funds is unrelated to partisan campaigning and the partisan political message is only incidentally or indirectly aided by the expenditure, citing *League of Women Voters v. Countrywide Criminal Justice Coordination Com.* (1988) 203 Cal.App.3d 529, and *Choice-in-Education League v. LAUSD* (1993) 17 Cal.App.4th 415. The court distinguished these cases,

finding that “the use at issue here is not unrelated to the public resource that SLTA desires to use.” Because the primary purpose of the mailbox system is to deliver messages to teachers, such a use of this “public resource” cannot be deemed “indirect” or “incidental,” said the court.

*The court agreed
with the district that
the mailboxes are a
non-public forum.*

In its analysis of the union’s freedom of speech claim, the court declined to limit its consideration to cases interpreting the California Constitution, as the union had. While the court acknowledged the broader reach of the state’s free speech guaranty, it found no reason to depart from “federal fo-

rum analysis” in deciding this case. And, said the court, citing *California Teachers Assn. v. Governing Board* (1996) 45 Cal.App.4th 1383, 119 CPER 44, federal cases are “particularly relevant in the context of educational institutions.”

Under the forum analysis approach, the first step is to determine the nature of the forum involved. A forum can be the traditional public forum, such as a street or park. It can be a designated public forum, meaning property the state has opened for expressive activity by all or part of the public. Or, it can be a non-public forum, or public property that is not by tradition or designation a forum for public communication.

The court rejected the union’s argument that the mailboxes are a designated public forum. Instead, it agreed with the district that they are a non-public forum. In doing so, it relied on *Perry Education Assn. v. Perry Local Educators Assn.* (1983) 460 U.S. 37, 57 CPER 53, in

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which the Supreme Court held that teacher mailboxes in a school district's interschool mail system were not a public forum, and that the district could prevent unions other than the teachers' exclusive bargaining representative from using it. Here, the court found, although the district did allow other organizations to use the mailboxes, that use was limited to non-political matters benefiting teachers. "Thus, the mailboxes have not been converted from a non-public forum to a designated or limited public forum," it concluded.

The court rebuffed the union's argument that under EERA, mailboxes are open to employee organizations without limitation as to topic. In doing so, the court cited with approval PERB's decision in *American Federation of Teachers Guild v. San Diego Community College Dist.* (2001) No. 1467, 152 CPER 86, in which PERB ruled that the district did not violate EERA when it refused to allow the union to use its mail system to distribute political flyers.

"Regulations restricting speech in a non-public forum survive constitutional scrutiny if they are reasonable and viewpoint neutral," instructed the court, citing *Cornelius v. NAACP Legal Defense and Education Fund* (1985) 473 U.S. 788. Applying that test to the district's policy, the court found it reasonable to limit a school district's involvement in partisan politics. And, because the policy "restricts all political campaigning, regardless of whether the speech favors or disfavors any par-

ticular candidate or ballot measure, it is clearly viewpoint neutral," said the court. It also added that the district's policy leaves "ample alternative channels for communication by which SLTA may engage in political activities." "The existence of alternative channels is further evidence of the reasonableness of a speech restriction."

Though the court could not find any California cases directly on point, it cited two cases with similar facts, one

from Minnesota and another from Washington, in which the courts came to the same conclusion. (*San Leandro Teachers Assn. v. Governing Board of the San Leandro Unified School Dist.* [8-28-07] 154 Cal.App.4th 866.)

Priscilla Winslow, attorney for the union, told CPER that it would be filing a petition with the California Supreme Court for review of the Court of Appeal decision. *

Demoted High School Principal Has Right to Attend Board Meeting

The California Attorney General has issued an opinion stating that, under the Ralph M. Brown Act, a school superintendent may not prohibit an administrative employee of the district from attending or speaking at a public school board meeting.

According to the facts presented to the Attorney General, a high school district employee was notified by the district superintendent that he was being demoted from his position as an assistant high school principal to a teaching position and that the personnel decision would be brought before the district's board of trustees for ratification at their next meeting. The county district attorney requested an opinion from the Attorney General as to whether the superintendent could prohibit the employee from attending

and/or speaking about his demotion during the public comment period.

The Attorney General determined that, under the Brown Act, Government Code Secs. 54950-54963, the superintendent could not prohibit the employee from either attending the board meeting or speaking on the agenda item. The Attorney General explained that the act "is designed to encourage public participation in government by requiring public agencies to conduct their business and deliberate in meetings open to the public," citing *Shapiro v. Board of Directors* (2005) 134 Cal.App.4th 170, and *Chafee v. San Francisco Library Comm.* (2004) 115 Cal.App. 4th 461.

Section 54953(a) of the act states: "All meetings of the legislative body of a local agency shall be open and pub-

lic, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.”

A high school district's board of trustees is a “legislative body of a local agency” for purposes of the act, instructed the Attorney General. “In addition, Education Code section 35145 specifies that all school board meetings shall be public and conducted in accordance with the Brown Act,” he continued. Further, Sec. 54953.3 of the act provides that all persons are permitted to attend any open session of a legislative body without preconditions placed on that attendance, he noted, and the statutes make no exception for the local agency's own employee.

While the local governing agency may conduct certain deliberations and votes in closed session, including the kind of agenda item involved here, the facts as stated specified that the item would not be designated as a closed session agenda item, said the Attorney General.

He concluded that “although the Superintendent exercises supervisory authority over the employee with respect to his work-related duties, we find that such authority does not extend to prohibiting the employee from attending, on his own time, a public meeting of the Board.”

Regarding the issue of whether the employee can be prohibited from addressing the board, the Attorney General pointed again to Sec. 54954.3, which allows the public to participate

in the board's decisionmaking process by presenting testimony on any item of interest to the public. In addition, he noted, Ed. Code Sec. 35145.5 provides that “every agenda for regular meetings shall provide an opportunity for members of the public to directly address the governing board on any item of interest to the public, before or during the governing board's consideration of the item, that is within the subject matter jurisdiction of the governing board.” The superintendent's proposed

demotion of an assistant principal clearly falls within the scope of both sections, he concluded, finding that the matter is within the board's subject matter jurisdiction. “Moreover, the staffing of key administrative positions within a school district is of significant public interest,” he said, citing *BVR, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 181 CPER 30. (*Opinion of Edmond G. Brown, Jr.*, Ops. Cal. Atty. Gen. No. 07-106 [7-20-07] 2007 DJDAR 11439.) *

LAUSD Extends Health Benefits to Part-Time Cafeteria Workers

Los Angeles Unified School District's school board has agreed to pay health benefits for approximately 2,352 part-time cafeteria workers. The new policy bumped these workers from three hours to four each workday starting September 1, making them full-time workers eligible for full health care benefits under existing labor agreements. Benefits will go into effect November 1.

It is estimated that the decision, implemented by a five-to-two vote, will cost the district in the neighborhood of \$90 million to \$100 million over the next three years. The district estimates the cost at \$35.5 million annually, while the union, Service Employees International Union, Local 99, puts it at \$28 million. The district maintains that health care costs are \$600 a month for each employee.

The two members who opposed the plan, Marlene Canter and newly elected Tamar Galatzan, believed it to be fiscally irresponsible. “It sets the precedent that collective bargaining can happen through board motions,” said Canter. She also was critical that the board passed the measure without identifying the funding source for the enhanced benefits. “It's just irresponsible to pass motions we cannot afford. I don't know where this board thinks they are going to get that money.”

In a subsequent vote, the board approved more than \$30 million in cost savings suggested by Superintendent David Brewer to finance the increased health care price tag. These belt-tightening measures include a hiring freeze in the district's administrative offices and a reduction in the number of teach-

ers who can be hired to fill unexpected vacancies. More than half the money will come from funds that remained on the books due to an overestimate of some of last year's costs. These savings will not be available in future years.

Critics of the plan warn that other unions now will make demands for full-time benefits for their part-time workers and that it could cost the district an additional \$250 million annually if the remaining 18,700 part-time district employees were to receive health care benefits.

Local 99 had waged a two-year campaign to win health benefits for its part-time food service workers. It claimed that the change would increase staffing for longer hours, giving students more time to eat lunch. This, in turn, would increase the number of students buying lunch at school. "The district has a multi-billion dollar budget," said Bill Lloyd, interim executive director of the union. "I know it's hard, but sometimes the kids and the workers have to come first."

The decision was made by the newly constituted school board, to which four members supported by Los Angeles Mayor Antonio Villaraigosa were recently elected. *

Local Government

County Can Force Use of Vacation Leave

To avoid paying a year-end cash-out payment, the County of Los Angeles can force peace officers to use excess deferred vacation time, the Court of Appeal announced in *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*. Relying primarily on provisions of the county code that address deferral of vacation hours, the court reasoned that the officers did not enjoy an unconditional right to a cash payout because the county retained the right to order them to use the deferred hours by the end of the deferral year.

The case involved two lawsuits filed on behalf of sworn peace officers employed by the county as deputy sheriffs or district attorney investigators. Prior to 1979, county employees could accumulate up to 40 days, or 320 hours, of vacation time. Any time earned in excess of the maximum was forfeited. That year, a coalition of unions, including ALADS, which represents deputy sheriffs, and the Los Angeles County Professional Peace Officers Association, which represents the district attorney investigators, negotiated a new benefit for their members.

Under the new MOU provisions, officers gained the right to defer vacation time in excess of the prior one-year limit and to be paid in cash for the excess deferred vacation time not used by

the end of the deferral year. The maximum yearly amount of vacation hours an employee accrued under the MOU was 160, so the most an employee could defer was 320 hours plus 160 hours, for a total of 480 hours.

The new benefit set out in their MOUs provided the right to “allow employees whose current and deferred vacation total more than 40 days [320 hours] to have deferred the excess vacation time over 40 days for no more than one additional year. After that year, if such excess vacation time over 40 days has not been used, the employee will be paid for such excess.” This language was carried over to the 1994 MOUs, with addition of the following statement: “Nothing in this Article diminishes the department head’s authority to grant, schedule, and defer vacation time.”

A management rights provision was added to the 1999 MOUs, affirming that the county retained the exclusive right “to direct its employees, relieve its employees from duty, effect work furloughs or any other alternatives because of lack of work or for other legitimate reasons, and determine the methods, means and personnel by which the County’s operations are to be conducted.”

The new deferral benefit also was set forth in the Los Angeles County Code. It read: “Effective on December 31, 1993 and at the end of each calendar year thereafter, the sum of an employee’s Current and Deferred Vacation may be deferred to the following calendar years. If that sum exceeds 320 hours, those hours in excess of 320 hours must be used by the end of the calendar year to which they were deferred. If, at the end of that year, an

The code does not give officers an unconditional right to cash payment.

employee still has Current and Deferred Vacation in excess of 320 hours, the employee’s balance of available vacation hours shall be reduced by the number of hours in excess of 320 hours that were deferred, and the employee shall be compensated for the reduction on an hour-for-hour basis at the employee’s workday rate of pay in effect on the last day of the year of deferral.”

Because an employee’s termination pay upon retirement includes payments for the vacation hours earned during his or her last year of service, the increased cash payments available under the county’s deferral policy are included in an employee’s final compensation

based on which pension benefits are calculated.

The parties stipulated that in January 2000, in order to avoid a cash payment for the excess hours at the end of the deferral year, the Office of the District Attorney and the sheriff's department required their officers to use vacation hours in excess of 320 that were carried over from the previous calendar year. At the end of 2002, each of the individual officers named in the lawsuit were ordered to use, by the end of the year, vacation hours in excess of 320 that they had carried over from the previous year.

The trial court found that the county had the right to force employees to use excess deferred vacation time, but also that the employees were entitled to cash payment for current and

deferred vacation hours in excess of 320, which resulted in an order for payment to each claimant for an additional 160 hours.

On appeal, the court first established that the code does not give officers an unconditional right to cash payment. It referred to the language which mandates that "those hours in excess of 320 hours *must be used* by the end of the calendar year to which they were deferred." To adopt the employees' interpretation, said the court, would render this directive to use the hours within the deferral year "a nullity."

The language of the code can be harmonized with an interpretation that an employee has the right to defer excess vacation time, but must use the time as vacation by the end of the deferral year, and in the event that the excess

vacation time is not used, the employee is entitled to payment. Nothing in the code "curtails the County's management right to set the terms and conditions of employment, including the right to force the use of excess deferred vacation." And, the court found its interpretation of the code reflected in the parties' MOUs, which expressly reserved the authority of the district attorney and the sheriff "to grant, schedule, and defer vacation."

Cases relied on by the employee organizations did not convince the court that the county lacked the right to force vacations. Both cited cases — *Bonn v. California State University, Chico* (1979) 88 Cal.App.3d 985, and *Kistler v. Redwoods Community College Dist.* (1993) 15 Cal.App.4th 1326 — concerned the forced divestiture of already vested

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By Bonnie Bogue, Carol Vendrillo, Marla Taylor and Eric Borgerson
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vacation benefits. Neither case can be read to prohibit an employer from forcing an employee to use vacation benefits, especially where the code directs that excess deferred hours must be used by the end of the deferral year, said the court.

The court looked to *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal.App.4th 1595, a private sector case on which *Kistler* relied. In that case, the court explained that a “use it or lose it” policy that demands forfeiture of vested vacation pay if it is not used within a specified time frame is impermissible. But, a “no additional accrual” vacation policy that prevents an employee from earning vacation benefits above a specified limit is not an illegal forfeiture of vested vacation time and is permissible. Relying on the *Boothby* analysis, the Court of Appeal viewed the county’s policy as “a species of ‘no further accrual’ rather than a ‘use it or lose it’ provision” because it did not cause the forfeiture of any vested vacation time; it simply was an attempt to limit the amount of vacation time that could be accrued.

Based on this reasoning and its interpretation of the county code provision, the court concluded that the award of cash payments for the additional 160 hours was in error. In agreement with the county, the court found that the code requires payment only for deferred hours in excess of 320 hours, not, as the unions argued, for current and deferred hours beyond the 320 hour limit.

The county conceded that both the sheriff’s written policy and that of the district attorney were at odds with the code provision by calling for cash payments for the employee’s entire balance of available vacation hours. The court declared, however, that to the extent the department policies did not accurately reflect the code, “they were invalid and the employees were entitled only to that compensation set forth in the ordinance.”

The court concluded that the code plainly states an employee will be compensated only for a reduction in the

number of hours in excess of 320 hours “that were deferred,” not for his or her total balance of vacation hours. The code does not provide for payment for any portion of the 320 deferred hours or the 160 current hours that are earned by the end of the deferral year, said the court, even if that is the employee’s year of retirement. (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* [9-11-07] B188886 [2d Dist.] ___ Cal.App.4th___, 2007 DJDAR 14181.) *

Sacramento’s Elimination of Retiree Medical Subsidy Faces Challenges

The County of Sacramento’s decision to eliminate its medical subsidy for retirees has drawn challenges from several employee organizations. Five unions have filed unfair practice charges with the Public Employment Relations Board and are set to go to hearing in January. The Sacramento County Deputy Sheriffs Association filed a lawsuit claiming that the county is required to negotiate over the subsidy and, if impasse is reached, submit the dispute to binding interest arbitration.

Discord first surfaced back in January, when the board of supervisors was scheduled to vote on a staff proposal to eliminate the subsidy that has been conveyed to retirees each year for 27 years. The subsidy is intended to offset retirees’ out-of-pocket costs for health in-

urance. Most recently, the subsidy entitled retirees to \$244 a month for medical insurance and \$25 a month for dental benefits.

The plan put forth by county staff in January was to eliminate the subsidy for those who had retired from county employment after June 29, 2003. That date was selected because retiree benefits were greatly enhanced that year, when the average retiree’s pension rose between 25 to 50 percent.

County lawmakers were advised to eliminate the subsidy because of increases in the cost of the program and because of the new reporting requirements of the Governmental Accounting Standards Board Statement 45, which mandates local governments to declare their long-term retiree health

care liabilities. By continuing the program into the future, the financial analysts argued, the county would have to begin pre-funding the subsidy, similar to its pension obligations.

During the most recent round of negotiations, the county addressed the health benefit funding issue by setting up a retiree health savings program. To address the health benefit needs of current employees when they retire, the

By continuing the program, the county would have to begin pre-funding the subsidy.

county now makes monthly deposits into a health savings investment fund. Critics of the county's targeting of the subsidy argue that this funding scheme will benefit current employees who are just joining county employment, but will do little to fund health benefits of workers who have been with the county for several years and will be retiring within the next few years.

The January vote of the board was delayed, but county officials continued to maintain that the board was free to eliminate the subsidy because no county employee or retiree ever had been promised the subsidy except on a year-to-year basis. Subsidies had been voted on by the board of supervisors every year for 26 years. During prior

years, the subsidy was paid out of "excess earnings" in the retirement funds. However, when the subsidy was moved from the pension fund account to the county's general operating fund, it received more scrutiny and financial advisors claimed that the county would be unable to continue to offer the subsidy without cutting other services. They tabulated the unfunded liability associated with this retiree benefit as ranging from \$300 million to \$500 million.

In May, the staff came back to the board with the same recommendation it had made in January. The plan included a pledge from the county that retirees still would have access to the county's insurance plans and could buy into those programs at the county's negotiated rate. By a 3 to 2 vote, the board elected to discontinue offering the subsidy to employees retiring after May 31, 2007. Some called the decision a victory for the county's 6,000 current retirees, but a defeat for the county's 12,800 current employees.

Unions representing the county workforce were not pleased with the board's vote. United Public Employees, Local 1, decried the action, calling it "wrong legally and morally." But county officials asserted that the subsidy was never "guaranteed" and the subsidy was never a vested retiree health benefit.

In July, the deputy sheriffs association filed a lawsuit to overturn the board's decision. The association asserts that the county is required to ne-

gotiate the subsidy that, like salaries and other terms and conditions of employment, is a matter within the scope of representation. And, under the county charter, the parties must proceed to binding arbitration should they reach impasse on the subsidy question.

Five other unions filed charges with PERB, asserting that the subsidy is a matter over which the county must bargain under the MMBA because it affects current employees. These unions

Some called the decision a victory for current retirees, but a defeat for current employees.

are UPE, AFSCME, Sacramento County Attorneys Association, Sacramento County Professional Accountants Association, and International Brotherhood of Teamsters, Local 150. PERB has issued complaints in these cases, and they are likely to be consolidated and will go to hearing before Chief Administrative Law Judge Bernie McMonigle.

For its part, the county takes the position that the subsidy is a benefit afforded to retirees, not employees, and is therefore a permissive subject of bargaining. Moreover, it alleges, the subsidy is not a vested right, but a benefit enacted each year by the board at its discretion. *

Discharge Rejected for Misconduct That Occurred Two Years Prior to Administrative Complaint

A Los Angeles police officer was improperly fired for misusing his department computer, the Second District Court of Appeal held, because the board of rights based its decision on misconduct that occurred outside the two-year statute of limitations period prescribed by the city charter. The board erroneously determined that the officer's actions were criminal in nature, and therefore subject to a three-year limitations period.

The court also found that, while the officer's computer inquiries were not initiated for any legitimate job-related purpose, he still was acting within the scope of his employment and, therefore, subject to the two-year limitations period.

The factual backdrop in this case involved allegations that a Los Angeles police officer had physically assaulted a woman he was dating. During an internal affairs investigation into those charges, the department discovered that the officer had used his computer to search the records of celebrities and his ex-girlfriend while on duty. Most of the evidence in support of these allegations dated back to 1994, but other examples were more current.

On March 28, 2001, the department served a 52-count administrative complaint on the officer. The majority of the accusations that concerned domestic violence charges were later with-

drawn, but the department added three counts targeting the officer's misuse of the department's computers. The gist of these charges was that the officer had conducted searches using department computers and that he had no legitimate work reason to do so.

Following a board of rights hearing, the department found the officer guilty of these three charges and recommended termination. The department accepted that recommendation and fired the officer in October 2003.

The officer's improper computer inquiries were misconduct, not hacking.

The officer unsuccessfully challenged the dismissal and then appealed.

The court first determined that the officer's misconduct was not criminal activity covered by the three-year statute of limitations. The court rejected the department's contention that the officer had violated Penal Code Sec. 502(c)(7), which describes as a criminal offense unauthorized "access" to a computer system or network. The court determined that "access" refers to "hacking," and is defined in the statute

as entry gained to "instruct, or communicate with the logical, arithmetical, or memory function resources of a computer." This is different than using a computer without permission, which is misconduct addressed in Sec. 502(c)(3). Relying on rules of statutory construction, the court felt compelled to give different meanings to the words "use" and "access," and concluded that the officer's improper computer inquiries about celebrities and friends were misconduct because he had no legitimate purpose for securing that information, but it was not hacking.

Next, the court considered Penal Code Sec. 502(h), which prohibits criminal prosecution for acts committed by a person within the scope of his lawful employment. Even if the computer misuse was seen as criminal under subdivision (c), said the court, subdivision (h) removed the officer's conduct from threat of criminal prosecution. It is undisputed, said the court, that the officer was on duty when he misused the department's computers. But that fact does not mean he was acting outside the scope of his employment. "Showing that an employee violated an employer's rules does not determine whether the employee acted within the scope of employment," said the court. Citing *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, the court commented, "Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment."

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The court concluded:

[A]n employer's disapproval of an employee's conduct does not cast the conduct outside the scope of employment. If the employer's disapproval were the measure, then virtually any misstep, mistake, or misconduct by an employee involving an employer's computer would, by respondents' reasoning, be criminal. For example, if an employer prohibited employees from logging onto the internet to check their personal email, respondents' definition of scope of employment would make reading one's email on company time a crime even where the employee read the email on a computer regularly assigned to that employee. Surely, that was not the Legislature's intent in enacting subdivision (c)(7).

The court also examined a city charter provision which prohibited consideration of the officer's conduct that predated the department's administrative complaint by more than two years when setting the appropriate punishment. In one of the three counts of misconduct, half of the exhibits referred to computer inquiries that were more than two years old. All of the evidence in support of the second count was outside the two-year limitations period. Evidence in support of the third count referred to events that were within the statutory period.

In justifying the officer's termination, the board found that these three counts "individually and/or collectively" would have resulted in the board's recommendation of removal. Because nothing in the record indicated that the department tried to separate

misconduct less than two years old from older misconduct, the court could not discern what the board would have recommended had it known that the officer's punishable misconduct was substantially less than it believed. On this basis, the Court of Appeal sent the case back to the department to determine the appropriate penalty for those acts of computer misconduct that the officer committed within two years of the department's filing of the administrative complaint.

The officer argued that he had been deprived of adequate notice of the charges because the first accusation of misconduct was accompanied by a "seven-foot stack" of computer printouts. The department waited until the hearing to sift through those documents and select a one-inch stack on which to examine the officer, the court observed. The officer argued that this approach impeded his ability to prepare his defense and that providing notice as the hearing unfolded was inadequate for purposes of due process.

The court dismissed this claim, citing a 19-page letter the officer received prior to the hearing that described the charges against him and the officer's failure to identify any prejudice he suffered from failure to receive earlier, more detailed notice.

The court dismissed the officer's conflict of interest claims because he did not raise those concerns at an earlier stage of the process. And, the court rejected the assertion that the department had failed to notify him of the proposed punishment within one year of

learning of the misconduct, as mandated by the Public Safety Officers Procedural Bill of Rights Act. The department's administrative complaint filed one day before the deadline imposed by Sec. 3304(d) of the Bill of Rights Act was entitled, "Complaint and relief from duty, suspension, or demotion." It did not mention termination. In support of his argument, the officer

The officer argued that notice of the charges was accompanied by a seven-foot stack of computer printouts.

cited *Sanchez v. City of Los Angeles* (2006) 140 Cal.App.4th 1069, 179 CPER 37, which announced that a police department must tell an officer of the actual discipline it may eventually impose within one year of learning about the officer's misconduct.

The court pointed out that the officer failed to raise this issue prior to his board of rights hearing and, while *Sanchez* was published after his board hearing, the one-year limitations defense dates from the enactment of Gov. Code Sec. 3304 in 1997, predating *Sanchez* by nine years and the board of rights hearing by four. (*Chrisman v. City of Los Angeles* [9-12-07] B184689 [2d Dist.] ___ Cal.App.4th ___, 2007 DJDAR 14264.) *

Governor Vetoes POST Membership Bill

Governor Schwarzenegger vetoed a bill that would have restricted his authority to make appointments to the Commission on Peace Officer Standards and Training by requiring that four of those members have served in a leadership position in the union that represents them.

POST is a commission in the Department of Justice that, as the name implies, sets minimum standards and training requirements for California peace officers. The 14 members of the commission are appointed by the governor, after consultation with and the advice of the Attorney General, and with the advice and consent of the Senate.

Penal Code Sec. 13500 sets out the required qualifications for these positions. For example, two must be members of the public and not peace officers. Four must be either deputy sheriffs, city police officers, marshals, or state-employed peace officers in the rank of sergeant or below, and have a minimum of five years' experience.

In addition, Sec. 13500(3) further provides that these four members must have "demonstrated leadership in their local or state peace officer association or union." Senate Bill 566 would have required of these four members "demonstrated leadership in the recognized employee organization having the right to represent

the member" under the Meyers-Milias-Brown Act or the Dills Act.

In his veto message, the governor said that POST members "need to be selected from a pool of high-caliber individuals." "Given the incredibly important nature of their work," Governor Schwarzenegger wrote, "we should strive to have a broad pool of candidates so this Commission has the best membership possible." As a result, he said, he could not support a bill that would limit his ability to appoint the most qualified individuals. *

State Employment

Dramatic Power Plays End CCPOA Talks; State Imposes Offer

The California Correctional Peace Officers Association walked out of mediation and took its plea to the legislature, but did not prevail. CCPOA, which represents about 30,000 correctional officers, lost in arbitration a grievance that claimed unit members were entitled to a raise. Then, when the association could not convince the legislature to enact the pay increase for them, the Department of Personnel Administration made an historic move. On September 18, the administration implemented its last, best, and final offer.

Legislature Concerned

In May, talks between CCPOA and DPA stalled during negotiations for a successor to the contract that expired July 2, 2006. The union was not happy the Public Employment Relations Board certified that the parties were at impasse. "This means that we will mediate with the threat of the State imposing a last, best and final offer hanging like a black cloud over the mediation," CCPOA President Mike Jimenez advised unit members in a statement on the union's website.

The union enlisted the support of influential legislators in its call for continued negotiations on employees'

safety and employee retention issues. Senators Don Perata and Dick Ackerman, and Assembly leaders Fabian Nunez and Mike Villines, wrote Governor Schwarzenegger to warn him against invoking "formal impasse." They reminded the governor of the prospect that the court receiver for the prison medical system could take control of correctional officer hiring. "The only way to get a resolution that will avoid court intervention is for there to be face-to-face negotiations between the two parties," the lawmakers advised in a May 29 letter.

Mediation Failed

Face-to-face negotiations did not occur during the mediation sessions over the summer, complained Jimenez when he explained in his letter to members why the union walked out of mediation in late August. The parties had been in the same room for only 10 minutes all summer — while the mediator was going over groundrules. DPA spokesperson Lynelle Jolley told *CPER* that the mediator set up the process. Referring to negotiations over the past year, she asserted, "Face-to-face negotiations would have been futile." The union counters, however, that the par-

ties met only about two hours a month in the year prior to impasse.

These negotiations have not gone smoothly. Spats over videotaping and recording of sessions peppered the initial negotiations. (See story in *CPER* No. 184, pp. 57-59.) Days before the mediation began, CCPOA unsuccessfully opposed the legislative confirmation of David Gilb as director of the Department of Personnel Administration. On the first day of mediation, CCPOA brought along a negotiator for the correctional supervisors, despite a

*The parties had been
in the same room for
only 10 minutes
all summer.*

long-running legal dispute about whether supervisors can sit in on negotiations for rank-and-file employees. For its part, the union was irked that DPA representatives did not sign in at mediation sessions, so union leaders did not know whether anyone had authority to negotiate a deal.

The major areas of disagreement include, but go far beyond, compensation. A major gain in the 2001-06 contract garnered unit members over 30 percent in pay raises in the last four years based on a formula that tied correctional officer salaries to the compensation of highway patrol officers, which

is itself tied to pay in local law enforcement agencies. After an arbitrator found that new CHP benefits had not been passed along to the CCPOA unit, and the correctional peace officers were awarded a 3.125 percent raise in early 2007, the Legislative Analyst's Office

DPA also has pushed to allow corrective action based on the amount or frequency of sick leave use.

advised against automatic pay raises, which tie the fiscal hands of the legislature. (See story in *CPER* No. 184, pp. 57-59.) DPA has demanded that the formulaic salary approach be scuttled, while the union insists that it be maintained. In April, the administration signaled its willingness to continue using the formula to calculate pay increases, but the union found other parts of DPA's proposal unacceptable.

DPA has insisted that the sick leave taken by an employee should not count as hours worked when determining whether premium overtime rates are due. In 2002, the Bureau of State Audits criticized an overtime provision in the parties' 2001-06 contract that counted sick leave hours toward the weekly maximum of 40 hours before overtime pay rates were used. The au-

ditor calculated the corrections department spent nearly \$10 million annually on this provision. (See story in *CPER* No. 156, pp. 54-57.) Over the past four years, the Schwarzenegger administration has bargained with other unions to exclude leave from the definition of hours worked.

DPA also has pushed to reintroduce provisions in the CCPOA contract that allow corrective action based on the amount or frequency of sick leave use. The 2002 BSA audit cautioned that the provisions of the contract, which forbid scrutiny of employees based solely on their use of sick leave, had resulted in a 20 percent increase in the use of such leave. This provision also was criticized in the report of the corrections panel of the California Performance Review. (See story in *CPER* No. 167, pp. 57-60.)

A huge sticking point for the union has been the administration's proposal to eliminate the use of seniority and post-and-bid procedures in assigning employees to their positions, another provision of the 2001-06 contract that came under fire from BSA and the California Performance Review. In April, DPA proposed reducing the number of posts that would be opened for bid. It also proposed changing contract provisions to allow the corrections department to place a freeze on transfers when officer vacancy rates are too high.

The union also has derided DPA's demand to streamline the prior grievance-arbitration procedure, which consists of four kinds of arbitration, de-

pending on the nature and complexity of the grievance. With a backlog of 550 grievances, the union believes several avenues are appropriate.

On August 22, hours after the union walked out of mediation, DPA presented a package proposal. This time DPA pro-

DPA proposed reducing the number of posts that would be opened for bid.

posed three 5 percent increases, on July 1 in 2007, 2008, and 2009, rather than the pay formula. The department persisted in its demands on overtime hours calculation, sick leave, and transfer freezes, but it reinstated some of the positions that it had tried to remove from post-and-bid procedures.

Arbitration Loss

In both the April and August offers, DPA proposed terms that would have settled a grievance that was proceeding to arbitration. In that grievance, CCPOA contended that the compensation formula survived the expiration of the 2001-06 MOU. Since the highway patrol officers had received several economic benefits in a tentative agreement reached on July 3, 2006, the day after the CCPOA MOU expired, CCPOA believed it was entitled to the same economic benefits. DPA proposed

a 1 percent salary increase to settle claims over pay rates for pre- and post-shift activities. DPA also offered increased shift differential rates, uniform allowances, and health benefit contributions, and proposed bonuses to officers who recruited new coworkers.

Before CCPOA rejected the state's August offer, the union lost the arbitration. The expired contract did not provide for continuing increases every time the highway patrol officers gained pay and benefits, said the arbitrator. The contract made raises effective on specific dates, and the last date a raise came due was July 1, 2006. The terms of the 2001-06 MOU also did not require employer health benefit contributions for 2007 to equal 85 percent of premiums for employee coverage and 80 percent of premiums for dependent coverage, the arbitrator decided.

Legislative 'End-Run'

The union rejected the August offer. It had another plan. On September 12, the last day of the legislative session, Assembly Member Bonnie Garcia (R-Cathedral City) amended an elections bill into an urgency measure that would have provided a 3.5 percent raise retroactive to April and a 6.1 percent raise effective July 1, 2007. The bill declared its purpose was to provide "a short-term solution to the lack of a current agreement...while the parties engage in good faith negotiations." Urgency was justified as an attempt to enable effective implementation of recent prison reform legislation by bringing labor peace to the correctional system. Garcia agreed to sponsor the bill because recruitment difficulties and the loss of 100 officers a month have led to 2,300 vacancies, many in the four pris-

ons in her district, her chief of staff, Dylan Gibbons, told *CPER*.

Media reports characterized the move as an end-run around the bargaining process. Appealing to fiscal prudence and concepts of fair play, Governor Schwarzenegger issued a statement referring to the \$700 million he had cut from the budget that he did not want spent on a "backroom deal." Although the bill dealt only with pay, he asserted it would reinstate the prior agreement, "the same contract that Republicans and Democrats derided as the biggest sweetheart deal in California history."

According to Garcia, A.B. 1662 had bipartisan support — due in part to the high number of officer vacancies — but it lost. In a letter in the *Sacramento Bee*, Garcia blamed the defeat on "[s]lick maneuvering, arm-twisting, flat-out lies and perhaps secret deals." When the bill came up for a vote, Garcia

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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>.

found it had been surreptitiously amended to provide only a 6.1 percent raise and to strip all coauthors' names. CCPOA no longer supported the bill, so Garcia withdrew it.

Last, Best, and Final Implemented

That same day, DPA sent the officers union a last, best, and final offer. It was nearly identical to the package proposal presented in August, except for the elimination of language relating to the contingency of the pay raise arbitration decision. The offer maintained the in-

DPA notified employees that no grievances can be filed on provisions in the expired contract.

creases in recruitment bonuses, shift differentials, and uniform allowance.

When the union rejected the offer, the state took no time to implement its terms. Through June 2010, the state's costs will increase \$609 million for rank-and-file officers and another \$123 million for correctional supervisors and managers. Over the three years, officers' total compensation will increase over 18 percent, and those who earn shift differentials, recruitment and retention stipends, and bonuses for recruiting new employees will gain nearly 20 percent. The compensation includes

raising the state's contribution to 85 percent of the employee's health care premium and 80 percent of the dependents' premium.

The California Department of Corrections and Rehabilitation and the Department of Mental Health, which employ officers, will be amending procedures to implement new policies allowing corrective action for frequent sick leave use, freezes on employee transfers out of institutions with high numbers of vacancies, and the reduction in the number of positions open for bidding.

DPA notified employees that no grievances can be filed on provisions in the expired contract. Grievances can be filed on non-contractual policies and health and safety matters, but those

grievances will not be subject to arbitration.

As *CPER* went to press, CCPOA announced that it had filed an unfair practice charge with PERB. Several imposed terms violate the law, the union claims, and many sections of the contract have been simply eliminated. The economic items are not effective until the legislature approves them, and since lawmakers will not return to a regular legislative session until January, the change in calculating hours worked for overtime purposes will not occur until then. The administration's September 18 letter to employees expressed the hope that the impasse in negotiations will resolve and the parties will return to good faith negotiations. *

State Attorneys Go to Court Over Low Salaries

Entry-level attorneys for the state earn about 60 percent of the average minimum salary of new attorneys in private firms and 62 percent of the pay of attorneys with similar experience in other governmental, educational, and non-profit organizations, says the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment. CASE, which represents 3,400 legal professionals, charges that the low pay is an unconstitutional application of the Dills Act since it undermines the civil service system, interferes with the law enforcement man-

date of the Attorney General, and violates the merit principle of "like pay for like work." Rather than defending against CASE's lawsuit on behalf of the state, the A.G., who employs nearly 1,000 unit members, is filing a friend-of-the-court brief in support of the union.

On the bargaining front, CASE has filed an unfair practice charge that claims the Department of Personnel Administration engaged in surface bargaining. Anticipating a potential impasse in negotiations, the union also has filed a separate action in court for a

declaration that its members can strike without violating ethical obligations. (See box on p. 48.)

'Employer of Last Resort'

The union's petition to the court relies in large part on observations of the state Supreme Court in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, CPER SRS No. 16. *Brown* arose in 1978 after the Dills Act authorized a collective bargaining process that gave authority to the governor to bargain with state employee organizations and effectively transferred salary-setting authority away from the State Personnel Board. In *Brown*, the Pacific Legal Foundation challenged the law on the basis that collective bargaining conflicted with the state constitutional merit principle and the powers that the state constitution conferred on the State Personnel Board. The Supreme Court held that the Dills Act was not unconstitutional. But it advised that parties to collective bargaining agreements "are not free to adopt salary measures that interfere with any fundamental 'merit principle' element that the [SPB's] classification system serves." The court recognized the possibility that the Dills Act could produce an agreement that violated the merit principle of state employment in the California Constitution. CASE argues that DPA is applying the Dills Act to unit 2 in an unconstitutional manner.

In its original petition, CASE argued that there are constitutional dimensions to a California statute that

requires that "like salaries shall be paid for comparable duties and responsibilities." The mandate is contained in the same paragraph as a statutory requirement that salaries be set after consideration of pay of employees performing "comparable service" in other public jurisdictions and private business, but both are superseded if there is a conflicting collective bargaining agreement. CASE argued that salaries are now set so far below the compensation of attorneys and ALJs performing like

*The expert concluded
that the state is the
'employer of last resort'
for attorneys.*

work for other employers that their pay violates the constitutional merit principle. The union attached a declaration from a business professor at the University of California at Los Angeles who castigated DPA's 2007 survey as flawed, inaccurate, and essentially "useless." The average salary of attorneys in the government, non-profit, or education settings is 105 percent higher than the average state attorney's salary, he explained. The expert concluded that the state has made itself the "employer of last resort" for attorneys.

CASE also argued that the way DPA has administered the Dills Act has rendered the SPB's classification re-

sponsibilities largely irrelevant. The union pointed out that deputy attorney generals are paid as low as \$26.97 hourly to send felons to prison and litigate challenges to their convictions and sentences while correctional officers are paid as high as \$34.37 an hour. DPA's application of the Dills Act has undermined the SPB's classification duties, which are enshrined in the constitution.

In addition, contended CASE, the low salaries have caused recruitment and retention problems that have created "an artificial need for the State to rely on private counsel for legal representation that traditionally has been...provided efficiently and effectively by civil service employees." Case law has long held that contracting out state services must be limited to avoid undermining the merit-based civil service system established in the Constitution.

The superior court in Sacramento was not convinced of the need to order DPA to comply with the like-pay-for-like-work principle. The court did not find sufficient evidence that the attorneys' compensation conflicted with the SPB's classification scheme or that DPA was creating an artificial need to contract out legal services.

CASE amended its pleadings. The union now is emphasizing that the low pay is leading to deterioration and diminution of the civil service. An attached declaration from the chief deputy attorney general in the Department of Justice explains that hiring decisions are no longer based on merit as much as whether there is a competent attor-

state attorneys' ethics question

"A credible strike threat is critical to meaningful negotiations," CASE asserts in papers it filed with the Sacramento Superior Court in late August. But it is not clear that government attorneys can strike without violating their ethical obligations to their client-employer. No California court has been presented with the question, but the state's Supreme Court cautioned attorneys about their ethical obligations in a case involving whether a county counsel's union could sue the county employer for breach of the duty to bargain in good faith. (See *Santa Clara County Counsel Attorneys Assn. v. Woodside* [1994] 7 Cal.4th 525, 106 CPER 16.) In *Woodside*, the court noted that the California Rules of Professional Responsibility prohibit an attorney from "intentionally, recklessly or repeatedly" failing to perform legal services with competence. It advised, "An attorney, in pursuing rights of self-representation, may not use delaying tactics in handling existing litigation or other matters of representation for the purpose of gaining advantage in a dispute over salary and fringe benefits."

Charging that low salaries and lack of progress in bargaining have created a legal staffing crisis, CASE is asking the court to issue a declaration that the state's attorneys can engage in job actions without running afoul of their ethical obligations and risking discipline by the State Bar. The Public Employment Relations Board cannot address the ethical questions, the association argues. Only the courts can define the ethical boundaries.

CASE recognizes that attorneys inevitably will have court appearances and filing deadlines to meet on the day a job action is set. It advocates that the court declare the attorneys have a right to strike after giving notice to their employers. The union requests that the court define the obligations of those attorneys who have appearances set or pleadings due during a job action. It also suggests the court may find a subset of attorneys with responsibilities so critical that they may not have the right to strike.

ney who will accept the low pay. Applicants frequently decline job offers on the basis of the compensation. He reports that recruitment difficulties interfere with using merit in merit-pay and promotion decisions and with administering effective progressive discipline, for fear of losing experienced attorneys to better paying jobs. Because some units in DOJ, such as the bond unit, are unable to fill vacancies, the office is forced to contract with expensive outside counsel, he asserts.

CASE argues that DPA is interfering with the A.G.'s constitutional duty to ensure adequate and uniform enforcement of the law. Attorney General

Jerry Brown agrees. In August, he successfully applied to file a friend-of-the-court brief in support of CASE.

The amended petition asks the court to order DPA to adopt a pay parity formula for the bargaining unit as a necessary means to ensure that it fulfills its duties under the state Constitution. CASE explains that it negotiated a pay parity provision that was passed by the legislature in 2001, but that was vetoed by former-Governor Davis. Davis allowed pay parity provisions for highway patrol officers and correctional officers, however. CASE argues that providing pay parity for some, while denying it to others, "conflicts

with the merit principle that the SPB classification system serves."

Request for Mediator

The lawsuit was filed at the end of June, only two months after the union and DPA entered negotiations for a successor to the memorandum of understanding that expired June 30, 2007. Already, however, CASE was frustrated at the pace of negotiations because DPA had not produced a copy of the 2007 salary survey that it was required by both the Government Code and the parties' contract to complete "prior to the negotiations for a new contract."

Four days prior to expiration of the CASE MOU, the union received a copy of the salary survey, which it determined was incomplete. Nevertheless, CASE made a salary demand at the next bargaining session, August 1. It proposed salary parity with other California public attorneys and administrative law judges, and annual unitwide cost-of-living adjustments. It demanded that unit members' pension contribution rates

CASE asked for injunctive relief and requested that PERB appoint a mediator.

be equal to other state employee rates, and that the state increase its consolidated benefit plan contributions to 85 percent of the employee premium and 80 percent of the dependents' premium. DPA did not respond with a comprehensive counterproposal, claims CASE.

On August 14, CASE filed an unfair practice charge alleging that DPA was engaged in surface bargaining. Not only did DPA delay producing the salary survey and fail to make a comprehensive salary proposal, it refused to schedule another bargaining session after August 9, in violation of the parties' ground rules and in spite of the legislature's imminent adjournment in mid-September, CASE contended. DPA told the union it had no interest

in a time frame for reaching agreement, although it usually attempts to present an offer just in time for the legislature's approval. The union also charges that DPA has spent most of its bargaining time discussing the Modernization Project, which CASE asserts is a non-mandatory subject of bargaining. (See story on the project in *CPER* No. 185, p. 55-58.)

CASE also asked for injunctive relief and requested that the Public Employment Relations Board appoint a mediator to assist negotiations. Without this, the union asserted, irreparable harm would be caused to unit members. Since CASE's 2005-07 agreement, the legal professionals have been paying 1 percent more than other non-safety employees in pension contributions, receiving less in health care contributions from the state, and suffering gross underpayment, the request for injunctive relief alleges. Because DPA refused to schedule another bargaining session in mid-August, the parties had no chance to reach an agreement that could be approved by the legislature, which would soon adjourn until 2008. CASE asked PERB to compel DPA to engage in negotiations, bar DPA from insisting on non-mandatory subjects of bargaining, and enjoin DPA from bypassing CASE and communicating with unit members about bargaining.

DPA successfully countered that injunctive relief was not proper because CASE had shown no grounds for appointment of a mediator or a finding of bad faith bargaining. PERB has the au-

thority to appoint a mediator without going to court, it observed, but mediation is not proper because the parties are not at impasse. CASE's allegations that DPA has bargained in bad faith preclude a finding of impasse, DPA argued, because CASE essentially contends that further good faith negotiations are not futile. Besides, said DPA, the parties met regularly. CASE made its first proposal on August 1, and DPA

DPA did offer, with no strings attached, to increase the state's contributions to health care premiums.

made initial responses on August 2. DPA contended its presentation on the Modernization Project is not insistence to impasse on a non-mandatory subject of bargaining, since modernization will entail changes in the classification, evaluation, and compensation of employees. CASE provided no evidence that DPA was communicating its proposals to unit members before it presented them to the union, DPA pointed out.

There was also no need for the extraordinary remedy of injunction, DPA argued. Even if an injunction issued, it would not guarantee that the legislature would approve an MOU before adjournment. And monetary harm is al-

most never sufficient grounds for an injunction since economic harm can be remedied using ordinary PERB procedures. Any delay in receiving economic parity could be addressed with an agreement that salary increases will be made retroactive, DPA argued.

Not only did PERB decline to seek injunctive relief from the court, it also did not find that bargaining was at impasse. DPA agreed to a negotiation session on August 29, then canceled and arranged to meet late in the afternoon on August 30, too late to reach an agreement and meet the legislature's deadline for submission of bills. But DPA

did offer, with no strings attached, to increase the state's contributions to health care premiums, beginning January 2008, to 85 percent of the employee premium, and, after an employee has been employed for two years, to pay 80 percent of the dependents' premium. Still, CASE asserts, the state is not negotiating in good faith. The union castigates DPA for its pleas that it cannot afford the \$300,000 needed to meet the union's demands while offering 15 percent increases worth \$1 billion to the California Correctional Peace Officers Association. *

they supervise. DPA and the Department of Finance opposed the bill because of the pressure it would bring to tie scientists' salaries to those of similar employees in other jurisdictions. The departments lament that agree-

*Some state scientists
are paid less than
engineers they
supervise.*

Everybody Wants Pay Parity

Highway patrol officers have it. Engineers do too. Correctional officers are maneuvering to keep it. Attorneys are suing for it. Health and social services professionals' request for it was not successful. And state scientists knew better than to ask for it — pay parity.

The 2,700 scientists represented by California Association of Professional Scientists may have their more modest request granted. As *CPER* went to press, a bill that would increase the visibility of state scientists' low pay was on the governor's desk. A.B. 385 (Ruskin, D-Los Altos) would require the Department of Personnel Administration to bargain with CAPS on a methodology of surveying California local governments, special districts,

public universities, and state and federal agencies to obtain information about the total compensation they pay to employees in approximately seven classifications. CAPS and DPA would conduct the survey jointly — rather than DPA alone, as it does now — one year before expiration of the parties' collective bargaining agreement. The average total compensation will be calculated, and the survey findings will be reported to the legislature. The bill also declares, "It is the policy of the state to consider comparable salaries prior to making salary recommendations."

CAPS claims that, on average, state scientists are paid at least 20 percent less than their public agency counterparts. Some are paid less than engineers

ments with unions representing highway patrol officers, correctional officers, and engineers have put compensation increases "on autopilot" without regard to the state's fiscal health, and have caused the state to "abdicate its responsibility to determine the appropriate compensation for its employees."

The American Federation of State, County and Municipal Employees sponsored legislation that would require bargaining unit 19 professionals such as psychologists, physical therapists, and pharmacists to be paid the average total compensation of similar employees at Kaiser Permanente or the federal Department of Veterans Affairs. That bill never made it out of the Assembly Appropriations Committee. *

Insufficient Notice of Prohibited Drugs Invalidates Termination

The State Personnel Board abused its discretion when it upheld the termination of a correctional officer who failed a drug test after taking diet pills prescribed by a Mexican doctor, the Court of Appeal has ruled. There was insufficient evidence that the Department of Corrections and Rehabilitation warned the officer not to take the medication, which could cause the test to register “positive” for drugs.

Mexican Prescription

Valenzuela and his wife went to a Mexican doctor for weight-loss advice. Although they went to obtain treatment

for his wife, Valenzuela also was interested in losing weight to maintain fitness for duty as a correctional officer. Valenzuela told the doctor that he was subject to random drug testing at his workplace. The doctor prescribed Esbelcaps and Neobes, and assured him that the drugs would not cause any problems. In fact, Esbelcaps contain a stimulant that the body metabolizes into amphetamine, a byproduct of the drug.

Valenzuela obtained the prescription legally and began taking the pills. Two days later, he was selected for a random drug test, which he failed. He told the department’s medical review

officer, Dr. Lewis, that he had been taking Mexican diet pills. He also provided Dr. Lewis with a letter from the prescribing doctor that advised the medication was a legitimate weight-loss drug. Despite this information, the prison warden fired him.

Valenzuela appealed his termination to the SPB. At the hearing, the administrative law judge received into evidence two memoranda that the department contended notified employees not to take Mexican diet pills. One undated memo warned, “Drivers should not bring back and/or take medications from a foreign country without a prescription from a U.S. physician.” It listed several Mexican diet pills that contained amphetamine or other stimulants that metabolize into amphetamine. One of the listed drugs

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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>

was Esbel. However, there was no evidence about the source of the memo or to whom it was distributed.

The second memorandum was authored by Dr. Lewis on May 9, 2000, before Valenzuela's hire date, and was addressed to Drug and Alcohol Program Coordinators. It also warned of the dangers of Mexican diet pills and their relation to amphetamines. Dr. Lewis testified that he distributed it three times before Valenzuela's hire in March 2001. Again, there was no further evidence of who received the memo.

Valenzuela had heard of a memo about foreign medications, but had not seen it.

Valenzuela testified that he had heard of a memo about foreign medications, but had not seen it and did not know which drugs it listed. He explained he had received assurances from the doctor that the diet pills would not be a problem. His expert toxicologist testified that amphetamines were rarely prescribed in the United States for obesity.

The department argued that Valenzuela admitted he knew about the memo. It also contended he should not be allowed to raise a defense that is available under the Code of Federal

Regulations — that the prescribed drug had a legitimate medical use.

The ALJ upheld Valenzuela's dismissal based on his conclusion that "prescription of amphetamines for routine weight loss programs is prohibited in this country and [Valenzuela] was on notice" of the danger of taking them. The board adopted the ALJ's recommendation to terminate Valenzuela.

Due Process Concern

Valenzuela challenged the SPB ruling in court. The trial court found the SPB had abused its discretion in upholding the termination, and it granted Valenzuela's petition for writ of administrative mandate. It held there was no substantial evidence that Valenzuela was on notice adequate for due process purposes that his prescription could result in a drug-test failure. There also was no substantial evidence that the pills did not have a legitimate medical use. The court ordered Valenzuela reinstated with back pay, but the department appealed.

On appeal, the department argued that Valenzuela's constructive notice of the memo warning not to take unspecified foreign diet pills was sufficient to satisfy due process notice requirements. The department also argued that the evidence about the medical usage of the pills supported the SPB's determination. Valenzuela contended that his conduct should be excused because he did not knowingly violate his employer's standards of conduct.

The Court of Appeal first criticized the ALJ for assuming that Valenzuela's prescription was for amphetamines. The evidence, said the court, was that amphetamines were a byproduct created when the body metabolized the diet pills.

The court also faulted the ALJ for his conclusion that Valenzuela was on notice of the danger of the medication, "because both the content and the format of the notice were proven only to a speculative degree." Dr. Lewis was shown only generally to have warned

There was insufficient evidence to demonstrate an established policy of notifying employees of prohibited conduct.

employees and to have sent memos to coordinators. There was no evidence whether the memos were distributed further or, if so, whether Valenzuela was employed at the time of distribution. There was insufficient evidence regarding the authorization of the warning memos to demonstrate an established policy of notifying employees of the prohibited conduct. In addition, the memo mentioned Esbel, but it was not clear that included Esbelcaps. Valenzuela's admission that he had

heard of a memo was not substantial enough to show he had “sufficient or actual notice of the precise nature of the conduct that would constitute a violation of the employer’s published standards,” the court concluded.

The court did not consider another possible defense that the Code of Federal Regulations provides. The regulations allow an employee who fails a drug test to offer a legitimate medical explanation for the positive drug test by showing that the medication was obtained legally in a foreign country and has a legitimate medical use. Since the SPB administrative law judge never assessed the conflicting evidence whether the medication had a legitimate medical use in either Mexico or the United States, the court did not decide the issue. The court affirmed the trial court’s judgment. (*Valenzuela v. California State Personnel Board [Dept. of Corrections and Rehabilitation]* [7-3-07] 153 Cal.App.4th 1179.) *

Higher Education

CSU Staff Fume While Executives Average 11 Percent Raises

A salary agreement contingent on extra state funding unraveled in late August, sending the California State University and a support staff union on the road to impasse. While the university and the California State University Employees Union haggled over the distribution of a 4.25 percent salary increase, the university's board of trustees awarded raises as high as 17 percent to university presidents and CSU system officers. CSUEU represents 16,000 employees in four units — health care support, operations support, clerical/administrative support, and technical support.

Salary Impasse

CSU and the union reached agreement on a three-year salary package last November before there were warnings that state revenue was leveling off. An agreement Governor Schwarzenegger reached with CSU in 2004 set out expected funding levels for the university in 2007-08. But, if the university were able to garner an extra 1 percent above the compact for employee compensation, the workers represented by the union would receive a 3.696 percent general salary increase, an amount equal to a .992 percent increase for raises to employees who are paid be-

low market rates, and an amount equal to a 1 percent raise for service salary increases that occur on an employee's anniversary date in his or her position. The contingent agreement also provided a boost to the rural health care stipend for employees in areas that have limited health care options. (See story in *CPER* No. 181, pp. 44-45.)

In July, it became clear that there would be no 1 percent augmentation. Under the collective bargaining agreement, negotiations over salaries were to be reopened if the budget contingency were not met. For the 4.25 compensation pool that CSU had offered, the union proposed eliminating the market salary increase, retaining the 3.688 percent general raise and 1 percent for the service salary increase, and providing a \$250 boost to the health care stipend.

CSU countered that it wanted to spend the equivalent of 1 percent of salary to boost the pay of several classifications closer to the market rate. It proposed only a 2.7 percent general salary increase, while maintaining the 1 percent service salary increase. The union is not averse to market-based raises, CSUEU President Pat Gantt told *CPER*, but believes there already are mechanisms in the contract that could

be used to target pay increases for employees with below-market compensation. The parties negotiated an in-range progression provision several years ago that allowed CSU to move employees through open salary ranges to retain employees in classifications with salary lags or to recognize the use of enhanced skills, high performance, and new lead work assignments. The union asserts that CSU has failed to use in-range progression to move employees

Health care and information technology classifications are experiencing double-digit salary lags.

out of the lower end of salary ranges. For example, says CSUEU, in 2005-06, only 6 percent of 16,000 staff employees received such progressions.

In early September, the parties opted to file a joint request for impasse declaration, but actually kept on negotiating. CSU labor relations representative Bill Candella explained to *CPER* that the university had decided to provide a pool of funding equal to 4.25 percent, rather than the 4 percent that CSU received from the state for compensation increases, because there are healthcare and information technology classifications experiencing double-digit salary lags. Therefore, while CSU

moved more money into its proposed general raise, it insisted on retaining a pool equivalent to a .25 percent boost for market-related increase. But Gantt says the amount CSU proposed for market adjustments was unlikely to make a difference in bargaining units where some classifications contain thousands of employees. And a 3.46 percent general increase was just too small for the rest of the unit, he added.

CSU college president salaries were 46 percent behind the \$378,774 average executive pay.

The parties had not discussed distribution of the market-based raises to specific classifications. The recipients were to be negotiated at a later time. In its counter, however, the union proposed that the .25 percent pool for market increases be distributed to all employees in the four units, in essence providing a 3.707 percent increase to each.

CSU rejected the demand despite the union's argument that it had a lobbying strategy in mind. The union believes the university will have better success asking legislators for more funding next year if it can argue the money is for recruiting and retaining employees.

The union received word of the rejection just after the trustees approved double-digit raises for university executives. The amounts of the increases — up to \$44,000 — are higher than some employees' annual salaries, the union fumed. The parties returned to the Public Employment Relations Board for a declaration of impasse.

Another \$44,000 for the Chancellor

Recruitment and retention were the buzzwords used to justify a proposal to increase the salaries for campus presidents and systemwide officers by an average of 11.8 percent. A recent study by the Mercer Human Resources Consulting Group, which conducts salary studies for the California Postsecondary Education Committee, found that CSU college president salaries were 46 percent behind the \$378,774 average executive pay at 20 comparator institutions. However, as Ex-Officio Trustee John Garamendi noted in remarks to the board, the study looks only at salaries, not benefits. CSU provides leave, housing, automobile, health, and retirement benefits to its chancellor and presidents, and one year of "transition pay" to departing executives. (See stories in *CPER* No. 176, pp. 55-56, and No. 182, pp. 60-61.)

Background materials prepared for the trustees explain the upward pressure on CSU executive compensation. The salary history of newer executives arriving from competitor institutions requires higher placement on executive salary ranges than executives who have

been employed for several years. Therefore, the pay of a long-term executive at a larger campus may not be more than the pay necessary to recruit a new president for a smaller campus. Because the marketplace for chief financial officers, chief information officers, and other vice presidents is so competitive, they often are recruited at pay that is within the lower end of the presidents' salary range, causing salary compaction. Due to federal tax laws, the retirement contributions for presidents hired since

Student fees have risen 94 percent since 2002.

1996 have been capped. The current cap on salary to be used for contribution calculations is \$225,000. Newer executives do not receive their full retirement benefit, the materials pointed out. Mercer asserts the CSU executive perks, other than transition pay, are routine among comparator institutions.

Garamendi was very vocal in his opposition to the pay hikes. Student fees have risen 94 percent since 2002, he pointed out. Since no money is in the budget for 2007-08 executive increases, which program will be cut? The raises likely will be covered by student fee increases next year, he predicted. He asserted he had not seen any evidence of difficulty in attracting or keeping executives. Protracted negotiations

with the faculty over their lagging salaries have just concluded, Garamendi reminded the trustees, and the executive pay increases are larger in dollar amounts than new professors take home in a year.

Professors received a 4.7 percent raise this past summer. A third of the faculty is eligible for 2.65 percent service step increases in each year. Executive pay was hiked an average of 14 percent in September 2005, when faculty pay increased 3.5 percent. Executives

The trustees directed the chancellor to attain parity for faculty and executives.

received 4 percent in July 2006, and faculty got 3 percent.

Despite the protests, the executives' raises were approved effective July 1, 2007. The salary of the president at California Polytechnic in San Luis Obispo jumped from \$298,000 to \$328,000. Chancellor Reed's annual pay, which is augmented by a \$30,000 supplemental retirement payment by the CSU Foundation, was hiked to \$421,500.

At the same meeting, the trustees voted to continue to try to bring all employee salaries to market rates over the next four years. The trustees directed the chancellor to attain parity for

faculty and executives with the 20 comparator institutions used by CPEC, phased in over the next four years. Individual executive salary proposals are to be based on "performance, complexity of assignment, years of executive experience, advancement of campus and institutional goals, leadership within the CSU system and national settings, and

market competition." The trustees directed the chancellor to conduct periodic market surveys for other employees, but the guidelines for raises to staff are nebulous: "Annual funding for compensation will be consistent with all other uses of resources within the annual budget." *

Two Bills Would Increase Oversight of California's Public Universities

In reaction to revelations about questionable executive compensation deals at the University of California and at the California State University, the legislature passed two bills to provide more oversight and transparency at both institutions in the final weeks of the session. The bills were waiting to be signed into law by Governor Schwarzenegger, as of *CPE*r press time. (See *CPE*r No. 176, pp. 47-51 and 55-57; No. 178, pp. 44-47; No. 180, pp. 63-74; No. 182, pp. 60-61; and, No. 183, pp. 55-56 for a complete summary of the compensation revelations.)

S.B. 190, introduced by Senator Leland Yee (D-San Francisco) and entitled the Higher Education Governance Accountability Act, provides that state trustees and regents must meet in open session when discussing executive compensation. The bill requires that all executive compensation packages for specified executive positions at U.C. and CSU be voted on in open session of

any subcommittee and of the full governing board. It requires full disclosure of and a rationale for each compensation package and allows for public comment. Compensation is defined to include salary, benefits, perquisites, severance payments, retirement benefits, or any other form of compensation. The bill was unopposed in both the Senate and the Assembly.

Currently, the Regents of the University of California are authorized to meet in closed session to consider or discuss specified matters, including those concerning the appointment, employment, performance, compensation, or dismissal of university employees. However, action by the regents on compensation proposals of principal officers of the regents or the university can be taken only in open session. Now, the law requires meetings of advisory committees to be open and noticed only if the committees consist of three or more persons and are created by formal ac-

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By Carol Vendrillo, Ritu Ahuja and Carolyn Leary
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tion of the body or any member of the body.

A.B. 1413, introduced by Assembly Members Anthony Portantino and Julia Brownley, and entitled the California State University Governance Reform Bill, provides that ex officio members of the board of trustees may send a designee to board meetings. The five ex officio officers are the governor, the lieutenant governor, the superintendent of public instruction, the speaker of the Assembly, and the chancellor of CSU. The university opposed the legislation, taking the position that if the ex officio members could send designees, they would not attend themselves. But the bill's supporters pointed out that most of these officers, with the exception of the lieutenant governor, have not

participated in board meetings because of numerous demands on their time and regular conflicts. Allowing them to have designees attend the meetings would give the ex officio members "eyes and ears" in CSU governance meetings, providing greater oversight of compensation deals, they argued.

The bill also prohibits the trustees from approving a contract for the hiring of an executive officer, including, but not limited to, the chancellor, a vice or executive chancellor, the general counsel, or a campus president, until the contract and its terms are adopted in a duly-noticed meeting of the board. Further, if transition pay is provided to an executive officer, it cannot exceed the compensation he or she received during the last year of regular duties, and

"shall only be paid for actual duties performed." And, if the trustees provide an executive officer compensation in the form of a trustee professorship at the time he or she stops performing his or her regular duties, the compensation can be paid only for actual teaching and cannot be more than the amount a full CSU professor would be paid for a similar teaching assignment.

Seeking to dampen criticism of a policy that gave departing executive employees a year of paid leave whether or not they were employed elsewhere or continued to serve the university, the trustees revised, but did not abolish, the policy in November 2006. The new policy included no minimum or maximum transition period and no compensation guidelines. Those limitations

would be imposed on CSU if the governor signs the legislation.

A lawsuit filed by the California Faculty Association against CSU, claiming the transition payments are illegal, is still pending in superior court. CFA is seeking recoupment of payments already made, as well as an injunction to prohibit the practice. (See story at

*CPER*No. 182, pp. 60-61.) Another suit brought by CFA against CSU as a result of its decision to pay former Chancellor Barry Munitz a salary of \$163,000 to teach one English class as a “trustee professor,” which CFA lost in the trial court, is on appeal. (See story at *CPER*No. 183, pp. 55-56.) *

CPEC surveys private universities such as Harvard and Stanford, and public institutions such as the University of Michigan and the University of Virginia. From 1980 through the mid-1990s, faculty salary scales were adjusted to keep pace with the comparator universities, and actual pay conformed to the scales. Only in “exceptional circumstances” were professors paid 3 to 7 percent above the base rank and step.

Last November, U.C. President Dynes appointed a work group to propose a plan to make salaries competitive, reduce the use of off-scale salaries, and draft new pay scales, if necessary. The group recommended that the Academic Personnel Manual be amended to eliminate the language describing the use of off-scale salaries as a short-term measure in “exceptional”

U.C. Hikes Faculty Salaries

A mounting disparity between University of California faculty pay and the pay at comparable universities nationwide is finally getting noticed. Faculty have been frustrated with meager salary scales and the university’s use of off-scale pay for an increasing number of professors. The academic senate is wrestling with policy wording and the structure of the salary system, but the board of regents of the university acted in September to approve significant increases to the pay scales. In a separate development, U.C. reached agreement with its non-senate lecturers on salaries for the next three years.

Salary Exceptions Rampant

In June 2006, the senate’s University Committee on Academic Personnel reported that only a minority of faculty were compensated consistent with the published salary scales. To hire or keep faculty who might go to other universities for higher pay, the university increasingly has granted exceptions to

the usual rules. By September 2005, only 29 percent of the professors at the nine general campuses — excluding the San Francisco medical campus — were paid according to the proper rank and step of the salary scale. Off-scale salaries were earned by 63 percent of professors, and 9 percent of faculty received pay above the top of the entire scale. The average off-scale salary was \$14,000 higher than the pay for the proper rank and step, and the average above-scale salary was inflated \$25,000. New professors in particular were more likely to be hired at an advanced step. In 2004-05, UCAP reported, only 16 percent of new faculty were paid according to scale.

The driving force behind off-scale and above-scale salaries is the lack of competitive pay. It has been 13 years since faculty pay was in line with eight institutions that the California Post-Secondary Education Commission considers comparable to U.C. To make faculty and executive pay comparisons,

cases. It suggested converting the scales to a salary range system, with points corresponding to the previous steps, and boosting the entire scale to a range that better corresponds with actual pay.

The proposals to change the APM language and the pay structure are still being debated. Several campus-level

*In 2004-05, only
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according to scale.*

academic senates are against removing the language that allows off-scale salaries only in exceptional circumstances. Some dislike the administrative discretion and potential for favoritism of the proposed range structure. However, some favor the changes and note that increasing the scales would benefit women and minority faculty who often are in less-well-compensated disciplines.

Salary Scales Increased

While discussion over policy and structure continues, the university took action to catch up to market pay. In September, the regents approved the president's proposal that the pay scale be adjusted by 4 to 8 percent in addition to a 2.5 percent cost-of-living increase effective October 1. The largest percentage adjustments were made to the lower ranks. Beginning this month,

assistant professor salaries will start at \$53,200, rather than \$48,100, and full professors at Step 9 can earn \$142,000, rather than \$133,500. In fact, however, some professors have been earning 40 percent higher than the top of the scale over the past few years.

From 1980 through the mid-1990s, faculty salary scales kept pace with the comparator universities.

The long-term plan is to increase pay 26 percent over the next four years. The president's office does not expect that state funding increases will fully

defray the salary scale plans. In the first year, \$7.5 million of the \$52.7 million cost will be reallocated from other sources, which were not identified in background materials to the regents.

Lecturers' Pay Boosted

Negotiations also concluded in September between U.C. and the University Council-American Federation of Teachers, which represents about 3,000 non-senate faculty. The parties reopened their 2005-10 contract on the issues of salary and workload. The agreement provides that the salary floor for new lecturers will be nearly \$42,100. For those who have been employed more than six years, the lowest salary will climb to just under \$46,500. Salaries will increase at least 3 percent in October 2007, 2008, and 2009. If tenured and tenure-track faculty receive

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larger raises, lecturers will receive them also.

The parties also negotiated changes to the pay scale effective this month. Rather than varying differences between steps, pay from each step to the next on the new scale will increase 2.5 percent.

Large pay hikes will go to lecturers who have taught over 20 years.

To address the stagnant salaries of long-time, non-senate faculty, the university will make adjustments for those who have been employed at least seven years. On July 1, 2008, lecturers with seven to ten years of service will receive a 2.5 percent increase. Those with more than 10, but fewer than 20, years of service will receive two adjustments, on a sliding scale based on current salary. A lecturer who earns less than \$55,000 will receive a 5 percent increase in July 2008 and another 5 percent hike in July 2009. One who earns between \$55,000 and \$77,000 will receive 5 percent in 2008 and another 2.5 percent in 2009. Salaries over \$77,000 will be boosted by 2.5 percent in both years.

Even larger pay hikes will go to lecturers who have taught over 20 years. Those who earn \$55,000 or less will receive two 7.5 percent raises. Two 5 percent increases will go to non-senate

faculty earning between \$55,000 and \$77,000. Those earning over \$77,000 will receive a 2.5 percent boost in July 2008, and a 5 percent increase in July 2009.

Non-senate faculty also made workload gains. Most who teach writing or foreign language courses will not be required to teach more than eight classes in a year for a full load. Workload credits will not be discounted if a lecturer teaches two sec-

tions of the same course. UC-AFT also negotiated a speedy mechanism for reviewing the workload credit of a course. The parties will form a committee to set workload equivalencies for duties other than teaching.

The university and the union decided to cancel 2009 reopener negotiations. If ratified by the membership this month, the contract will expire in August 2010. *

CSU Academic Support Professionals Disaffiliate From LIUNA

“It wasn’t a good fit.” That is how the president of the Academic Professionals of California, Charles Goetzl, explained why APC disaffiliated from the Laborers International Union of North America. APC represents 2,300 student services professionals, library assistants, and credential analysts at the 23-campus California State University. LIUNA traditionally has represented employees in construction, and did not move into the educational setting as it told APC it was planning to do when APC decided to affiliate in 1995, Goetzl asserted.

Although the per capita fees to LIUNA were not expensive by comparison to other international unions, APC’s statewide council did not think the local union was getting much for its money, Goetzl told *CPER*. The council recommended disaffiliation and

held two meetings in May, at which a LIUNA representative was allowed to make a presentation. LIUNA also mailed its arguments against the disaffiliation directly to members and included a ballot argument in the mail ballot packet. APC explained to its members who participated in the LIUNA pension plan as a supplement to the California Public Employees Retirement System that they would not be able to continue contributions to the LIUNA plan, but would be able to take a lump sum or benefit on retirement from CSU.

Out of approximately 1,600 members, 87 percent voted in favor of disaffiliation in an election conducted by the American Arbitration Association. The change was effective August 31. *

If Signed, Legislation Would Boost Benefits for CSU Employees and Retirees

The California State Legislature passed two bills at the end of its legislative session that will expand benefits for current and retired employees of the California State University. Both were waiting to be signed into law by Governor Schwarzenegger as *CPER* went to press.

S.B. 259, introduced by Senator Gloria Negrete McLeod (D-San Bernardino), would allow academic employees of CSU to receive full service credit while they are on a reduced pay leave, such as a sabbatical. The employee would receive full service credit during the leave if he or she elected to contribute to CalPERS the amount that would have been contributed by him or her if not on reduced-pay leave. It also would require CSU to make all of the employer's contribution for the service credit purchase if the employee elects to make the contributions. The bill specifies that these provisions do not apply to CSU academic employees unless agreed to through collective bargaining.

The bill was sponsored by the California Faculty Association and supported by the American Federation of State, County and Municipal Employees and the California Teachers Association. CFA argued that the legislation was necessary because CSU faculty on sabbatical leave, while receiving reduced pay,

are still considered full-time employees and are expected to work full-time during their sabbaticals.

S.B. 235, also introduced by Senator Negrete McLeod, allows CSU retired employees to participate in a program similar to the Vision Care Program for State Annuitants administered by the Department of Personnel Administration. This is a voluntary program that covers state annuitants and their dependents, but from which CSU was excluded. CSU must implement the annuitant vision care program on or after July 1, 2008. Prior to passage of this legislation, CSU annuitants were eligible for vision care benefits only through their health care provider, not CSU or DPA. The bill provides that CSU may terminate the new program if it determines that it is not economically feasible, as long as it gives written notice to enrollees and notifies the legislature of the decision. *

Discrimination

California Supreme Court Makes It Harder for Disabled Employees to Prove Discrimination

Overruling the Fourth District Court of Appeal, the California Supreme Court has determined that an employee claiming disability discrimination in violation of California's Fair Employment and Housing Act bears the burden of proving he is a "qualified individual with a disability," or capable of performing the essential functions of the job with or without reasonable accommodation. In *Green v. State of California*, a majority of the justices ruled, by a vote of 4 to 3, that the legislature intended the FEHA to require the same burden of proof as the federal Americans with Disabilities Act.

Justice Kathryn Werdegar, joined by Justices Joyce Kennard and Carlos Moreno, wrote a persuasive dissent in which she argued that the inability to perform the essential functions of the job is a defense which employers have the burden to prove.

Factual Background

Dwight Green worked as a stationary engineer for the California Department of Corrections in 1990, when he was diagnosed with hepatitis C, likely job-related. He had no work restrictions until 1997, when he began treatment with interferon and his doctor put him on light duty for a brief period. In

1999, Green injured his back in a work-related incident and again was placed on light duty until his employer placed him on disability leave. In 2000, he returned to work cleared for full duty.

At that time, the employer's return-to-work coordinator determined that Green was not capable of performing his duties and could not return to his job. The coordinator advised Green that unless he could be cleared for full duty, he could not return to work. Green sought permission to return to work, but his request was denied based on 1999 findings in a workers' compensation proceeding which indicated that he had suffered a work-related injury.

Green filed a lawsuit alleging that the state had discriminated against him because of his disability. The jury returned a verdict of almost \$600,000 in economic damages and \$2 million in non-economic damages. The state appealed, and the Court of Appeal affirmed the judgment. It held that the FEHA "does not require plaintiff to prove that he is a qualified individual. Rather, the burden is on defendant to establish that plaintiff is incapable of performing his essential duties with reasonable accommodation." The Supreme Court granted the state's petition for review.

Supreme Court's Decision

The majority disagreed with the Court of Appeal, finding that "legislative intent, case law, and legislative history" support the position that it is the employee's burden to show that he or she is a qualified individual under the FEHA. It began its analysis with the following question: "Why have the California cases, beginning with *Brundage [v. Hahn]* (1997) 57 Cal.App.4th 228, 126 CPER 50], nearly unanimously presumed plaintiffs must prove, like their federal counterparts

The majority found that it is the employee's burden to show that he or she is a qualified individual under the FEHA.

under the [Americans with Disabilities Act], that they are qualified individuals under the FEHA to prevail in their lawsuits?" "The answer lies in the statute's plain meaning, which is clear and unambiguous," it said.

Applying "settled canons of statutory construction," the majority determined that the legislature intended the plaintiff to bear the burden of proof on this issue. The court compared the relevant FEHA provisions with the language found in the ADA. The ADA

provides that covered employers shall not discriminate against a “qualified individual with a disability,” and defines that term to mean “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Citing a number of federal cases, the majority stated that “federal case law interpreting the ADA is clear that an employee bears the burden of proving, among other elements, that he or she meets the definition of a ‘qualified individual with a disability’ in order to establish a violation of the ADA.”

While the FEHA does not use the term “qualified individual with a disability,” the majority noted that it does limit the reach on its proscription of disability discrimination. Section 12940(a) states that the employer is not prohibited from refusing to hire or discharging a disabled employee “where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations....” From this, the court reasoned:

By its terms, section 12940 makes it clear that drawing distinctions on the basis of physical or mental disability is not forbidden discrimination *in itself*. Rather, drawing these distinctions is prohibited *only if* the adverse employment action occurs because of a disability *and* the disability would not prevent the employee from performing the essential duties of the job, at least not with reasonable accommodation. Therefore, in order to establish that a de-

fendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation.

The majority found the FEHA and the ADA “strikingly similar” in this regard and that this similarity “is not a coincidence, but reflects the Legislature’s deliberate effort in 1992 to conform the FEHA to the ADA provision.” In that year, noted the court, the legislature

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FEHA and ADA
‘strikingly similar’ in
this regard.*

amended the FEHA to clarify that an employee must be able to perform the essential duties of the position with reasonable accommodation.

Evidence Code Sec. 500 also supports placing the burden of proof on the plaintiff, reasoned the majority. According to the majority, that section provides that “a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief...that he is asserting.”

The majority rejected Green’s argument, adopted by the Court of Appeal, that inability to perform the duties of the position with reasonable accommodation is an affirmative defense

for which the defendant bears the burden of proof. In support of his position, Green pointed to the difference in language between the FEHA, which extends the prohibition against discrimination to “any person,” and the ADA, which applies only to a “qualified individual.” The majority responded by stating:

We are not persuaded. The FEHA’s use of the term “any person” in listing the various forms of prohibited discrimination does not warrant disregard of the specific language unambiguously providing that an adverse employment action on the basis of disability is *not prohibited* if the disability renders the employee unable to perform his or her essential duties, even with reasonable accommodation. When read together with subdivision (a)(1), subdivision (a)’s reference to “any person” cannot reasonably be understood to specially alter the ordinary burden of proof set forth in Evidence Code section 500. Had the Legislature actually intended to relieve a plaintiff employee of the burden of proving an actionable discrimination on the basis of disability, thereby departing significantly from federal law, we believe it could and would have done so in a more conspicuous manner.

Similarly, the majority rejected each of Green’s other arguments. It did not agree that the FEHA was ambiguous on the issue of burden of proof. Nor did it agree that, because the legislature expressed its explicit intent to provide a greater amount of protection to employees than that provided by the ADA in passing the 1992 amendments, it could not have intended to place the burden of proof of this element on

plaintiffs. In response to Green's argument that his position was supported by the implementing regulations, the majority said, "To the extent the California Code of Regulations arguably creates ambiguity about the element of proof of a disability discrimination claim, we find the Legislature's intent supports defendant's position and must prevail."

The court reversed the judgment and sent the case back to the trial court for further proceedings.

'In effect, the majority creates a presumption that people with disabilities cannot perform in the workplace.'

The Dissent

Justice Werdegar interpreted the statute differently, finding that, while the FEHA "does not expressly assign the burden of proof, established principles of statutory interpretation demonstrate that the reading best according with legislative intent is that inability to perform the job's essential duties is a defense on which employers have the burden of proof."

The majority ignored the structure of the statute, distorted its legislative and regulatory history, and relied on

inapposite authority in coming to its conclusion, she summarized. But, more importantly, she said, "a single logical error" pervades its decision — that, because employers are relieved from liability for firing or refusing to hire a disabled person who cannot perform the essential functions of the job, proof of ability to perform must be part of the plaintiff's case. Werdegar explained:

In effect, the majority creates a presumption that people with disabilities cannot perform in the workplace. Certainly, some disabilities prevent the performance of some jobs, even with reasonable accommodations by the employer; in those circumstances, the Legislature has relieved employers from any liability by affording them the affirmative defense provided in section 12940, subdivision (a)(1). But the rule that individuals with disabilities are presumed unable to work until they prove otherwise is not one intended by the Legislature. The majority simply reads it into the statute.

Observing that nothing in the statute expressly allocates the burden of proof, Werdegar turned to the general rule that "one who claims the benefit of an exception from the prohibition of a statute has the burden of proving that his claim comes within the exception." Section 12940(a) prohibits in general terms, and without any limitation, adverse employment actions taken because of a person's disability, she noted. But, in a new paragraph, Sec. 12940(a)(1) establishes, as an exception to that prohibition, that an employer may terminate or refuse to hire a disabled per-

son where, because of the disability, the person is unable to perform the job's essential duties. This construction is different from that of the ADA, she explained, "which incorporates into its central prohibitory provision a requirement the plaintiff be able, with reasonable accommodation if necessary, to perform the position's essential tasks."

The dissenters also noted that the other two exceptions to the general prohibition contained in Sec. 12940(a)(1) — that an employer is not required to

'One who claims the benefit of an exception has the burden of proving that his claim comes within the exception.'

employ a person who, because of his or her disability cannot perform the essential duties "in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations" — have been deemed by the courts and the administrative agency as creating defenses on which the defendant bears the burden of proof. The rules of statutory construction require that laws be interpreted harmoniously, instructed Werdegar. The majority "now incongruously treats the sentence's two pro-

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visions differently, transforming the inability-to-perform portion from a defense to an element of the plaintiff's case." The majority's interpretation could create confusion, she explained:

An employer's claim that, because of disability, the plaintiff was unable to perform is not always distinguishable from a claim that, because of disability, employing the plaintiff would have endangered his or her health or safety or that of others in the workplace. In the present case, for example, defendant claims plaintiff, because of his disability, could not keep secure physical control over the inmates with whom he worked, with possibly "life-threatening" consequences. This is clearly a safety concern, and on retrial the jury in this case will presumably be given...[an] instruction placing on defendant the burden to prove the health or safety exception applicable. But at the same time, according to the majority, the

jury must be instructed that plaintiff bears the burden of showing he can perform the job's essential duties — duties that, defendant asserts, include maintaining security over inmates. How the jury — or any future jury in a similar case — is expected to follow these contradictory directions is, to say the least, unclear.

The dissenters also pointed out that the Fair Employment and Housing Commission has read the inability-to-perform exception as an affirmative defense, and incorporated that interpretation into its regulations more than 20 years ago. The legislature has acquiesced in "this long-standing administrative interpretation," wrote the dissent, and has never indicated any disapproval or done anything to counter that interpretation when it

amended the law in 1992. "Had the Legislature intended to abrogate the FEHC's construction of section 12940, subdivision (a)(1) by adopting the

*The majority's
interpretation could
create confusion.*

ADA's approach it would presumably have likewise inserted a 'qualified individual' requirement" into the section "and defined that term as in the ADA," Werdegar argued.

In addition, Werdegar chided the majority for eliminating a crucial phrase in Evidence Code Sec. 500. The section actually states that "a party has

the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief *or defense* that he is asserting.” Because the FEHA does not specify which facts are essential to the claim and which to the defense, Sec. 500 offers no support for the majority’s interpretation.

Finally, the dissent argued that the majority’s reliance on *Brundage* was misplaced because in that case the evidence demonstrated the plaintiff was discharged for a nondiscriminatory reason. Therefore, the court had no reason to address, even in dictum, the proper allocation of burden of proof on ability to perform the essential job functions, wrote Werdegar. She concluded:

Brundage did not hold qualification is an element of the FEHA employment discrimination cause of action, and indeed it is not. Every disparate-treatment plaintiff under FEHA must show that the action complained of was taken “because of” a prohibited basis. Where, as in the usual case, the plaintiff seeks to prove discriminatory intent by circumstantial evidence, the plaintiff indeed will need to show he or she was qualified for the position (or, in a termination case, was competently performing the job) in order to make a prima facie case. But in the relatively rare case where the plaintiff has direct evidence of discrimination, as where the employer has expressly dismissed or refused to hire the plaintiff on a prohibited basis, the plaintiff generally need not *also* show that he or she can perform. This is such a case.

In fact, said Werdegar, the only court to address the burden of proof is-

sue was the Ninth Circuit in *Ackerman v. Western Electric Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, where the court found that the burden lay with the defendants. “Oddly, *this* decision the majority completely ignores,” she said.

Werdegar concluded her opinion by arguing that the majority’s “mandate that persons with disabilities be presumed unable to work until they prove themselves able is...precisely what our anti-discrimination law was designed to combat.” By enacting the legislation prohibiting discrimination, while al-

lowing employers to defend on grounds of inability to perform, “the Legislature sought to overcome the then widespread assumption that disabled people had no place in the workplace,” she said. “Now, by reading into FEHA a requirement that persons with disabilities must prove their ability to perform before they can complain of discrimination, the majority effectively endorses this legally discredited assumption.” (*Green v. State of California* [8-23-07] 42 Cal.4th 254.) ❀

California Supreme Court Agrees to Hear FEHA Equitable Tolling Case

The California Supreme Court will decide whether or not equitable tolling applies to extend the one-year administrative filing requirement under the state’s Fair Employment and Housing Act. The court granted limited review of the Second District Court of Appeal decision in the race discrimination and retaliation case of *McDonald v. Antelope Valley Community College Dist.* The Court of Appeal determined that the rule did apply where a library technician’s assistant had not filed her FEHA complaint with the administrative agency within the one-year period but had instead filed an internal complaint. It held that she could proceed with her lawsuit against the district. (For a full discussion of the Court of Appeal decision, see *CPER* No. 185, pp. 69-72.)

The Supreme Court will focus on a single issue in rendering its decision: “Is the one-year statute of limitations for filing an administrative complaint with the Department of Fair Employment and Housing set forth in the FEHA subject to equitable tolling while the employee pursues an internal administrative remedy, such as a complaint with the community college chancellor filed pursuant to state regulations?” (*McDonald v. Antelope Valley Community College* [2007] 151 Cal.App.4th 961; Supreme Court review granted 8-15-07, S153964/B188077.) ❀

Bias Imputed to Employer Where Subordinate Initiates and Influences Investigation

The Ninth Circuit Court of Appeals has determined that, where it can be shown that a biased subordinate influenced or was involved in an investigation of an employee which results in an adverse employment action, the subordinate's animus imputes to the employer. This issue was raised for the first time in the circuit in *Poland v. Chertoff*.

Factual Background

James Poland joined the United States Customs Service in 1974, at the age of 28. He served first as a customs inspector and then went on to hold a number of different positions. In 1991, he became resident agent in charge of the Portland, Oregon, office, a supervisory position. In 1995, he began reporting to Gary Hillberry, who worked in the Denver office. During the time that he supervised Poland, Hillberry was preoccupied with, and frequently commented on, Poland's age and that of the majority of the special agents in the Portland office.

Poland filed an age discrimination complaint against Hillberry with an Equal Employment Opportunity counselor on December 7, 1997. He filed another a month later, alleging that Hillberry had changed his mind about reassigning an agent under Poland's supervision in retaliation for his having filed the first complaint.

In the spring of 1999, Hillberry requested that the Customs Service investigate Poland's performance, alleging that Poland was confrontational, argumentative, and disrespectful towards members of the Denver office. He submitted a lengthy memo that detailed a number of incidents of alleged malfeasance by Poland. Hillberry, without consulting Poland, provided a list of 21 witnesses for the inquiry panel to contact.

The panel determined that Poland engaged in unprofessional and inappropriate conduct, and was argumentative, retaliatory, and ineffective as a manager. The disciplinary review board found that the panel's conclusions lacked sufficient specificity to support an adverse employment action, but concluded that he should be reassigned to a nonsupervisory position in another office. Poland was transferred to Vienna, Virginia. He took an early retirement eight months later. While in Virginia, his salary and benefits remained the same.

Poland sued, alleging that the Customs Service violated the ADEA by failing to promote him, by initiating the investigation against him in retaliation for filing EEO complaints, and by constructively discharging him as a result of the investigation. The district court found in favor of the Customs Service on the first claim, but ruled in Poland's

favor on both the retaliation and the constructive discharge claims. The Customs Service appealed.

Court of Appeals Decision

In order to establish a claim of retaliation, instructed the Court of Appeals, a plaintiff must prove that he or she engaged in protected activity and suffered an adverse employment action, and that there was a causal link between the two. There was no question that Poland met the first two prongs. The filing of EEO complaints was a protected activity and he suffered two ad-

*Hillberry requested
that the Customs
Service investigate
Poland's performance.*

verse employment actions: Hillberry's initiation of the inquiry and his transfer to Virginia. But the Customs Service maintained that he did not meet the third prong, arguing that the independent inquiry and decisionmaking process "severed the causal link between Hillberry's animus-based initiation of the inquiry" and the transfer, and therefore Hillberry's animus should not be imputed to it.

The court found that the case "raises difficult issues not yet addressed by our circuit concerning how involved in the investigation the biased subor-

dinate must be for the subordinate's animus to be imputed to the employer who took the adverse employment action." It considered three potential rules that it could adopt to resolve this issue.

The court first looked at a "but for" causation test. Under this test, the only applicable inquiry would be "whether, but for engaging in his protected activity, the plaintiff would have suffered the adverse employment action." The court rejected this test as too expansive. "Any time a biased employee, in response to a plaintiff's protected activity, sets in motion the process that leads to an adverse employment action," reasoned the court, "the employer would be liable, even if the employer then conducted an entirely independent inquiry and decision-making process insulated from the animus of the biased employee, and no matter how compelling

the non-discriminatory grounds for taking the adverse employment action."

The second rule considered by the court was the Fourth Circuit's "rubber stamp" or "cat's paw" approach. Under that test, subordinate bias is imputed to the employer only when the final decisionmaker rubber stamps the biased decision of a subordinate. The Ninth Circuit found this standard too narrow.

The court settled on a third approach:

We hold that if a subordinate, in response to a plaintiff's protected activity, sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment action, the subordinate's bias is imputed to the employer if the plaintiff can prove that the allegedly independent adverse employment decision was not actually independent be-

cause the biased subordinate influenced or was involved in the decision or decisionmaking process.

The court found this standard to be consistent with what it had "suggested" in two previous Title VII retaliation cases, *Bergene v. Salt River Project Agric. Improvement & Power Dist.* (9th Cir. 2001) 272 F.3d 1136, and *Galdamez v. Potter* (9th Cir. 2005) 415 F.3d 1015.

In this case, the court found that Hillberry influenced and was involved in the inquiry that led to the adverse employment action. The court clarified that the fact that Hillberry initiated the administrative inquiry would not be sufficient to impute Hillberry's animus to the Customs Service "if it had shielded the inquiry it subsequently undertook from Hillberry's influence." However, in this case, the panel had

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

Written by two experts in the field, this Pocket Guide focuses on the Act's impact in the public sector workplace and explains complicated provisions of the law that have vexed public sector practitioners, like the "salary basis" test and deductions from pay and leave for partial-day absences.

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.

By Cathleen Williams and Edmund K. Brehl • 1st edition (2000) • \$15

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access to Hillberry's memo, and Hillberry provided a long list of witnesses without consulting Poland. Hillberry also provided the panel with notes on Poland's performance from another employee who had greatly increased the frequency of her note-taking after Poland filed his first EEO complaint. "We cannot on this record conclude other than that Hillberry's animus had a pervasive influence on the administrative inquiry that led to the adverse employment action," said the court, which upheld the district court's judgment in favor of Poland on that issue.

Hillberry's animus had a pervasive influence on the administrative inquiry.

However, the Court of Appeals disagreed with the lower court on the constructive discharge claim, finding that "the evidence of transfer and demotion is insufficient, as a matter of law, to establish a constructive discharge." It found no evidence to indicate that Poland's working conditions in Virginia were worse than those a reasonable person could tolerate. The court pointed to the fact that Poland worked at the new position for five months before deciding to retire, and then stayed three more months before leaving. "As a matter of law, these are not the ac-

tions of someone who finds his working conditions so intolerable that he felt compelled to resign," said the court.

(*Poland v. Chertoff* [9th Cir. 7-20-07] 494 F.3d 1174.) *

Employer Vicariously Liable for Employee's Sexual Harassment

In *Craig v. M&O Agencies, Inc.*, the Ninth Circuit Court of Appeals overturned the lower court's dismissal of a complaint brought by an employee who had been sexually harassed by her direct supervisor. The appellate court found that the employer's affirmative defense failed because it could not show that the employee had "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."

Factual Background

Ellen Craig, a branch manager, reported directly to Leon Byrd, the interim president of the company. Byrd made repeated comments about Craig's legs and said that she should wear shorter skirts. Craig and Byrd met on August 8, 2003, for what Craig believed would be a work meeting over drinks. During the meeting, Byrd asked Craig if she had ever thought of making love to him, and he told her he would like to take off the dress she was wearing. Craig left the table and went into the women's bathroom. When she exited the stall, she found that Byrd had followed her into the restroom. He grabbed her arms and gave her an open-mouthed kiss and

stuck his tongue in her mouth. When someone walked into the restroom, Byrd exited. Craig went out and left the restaurant alone while Byrd was paying the bill. Byrd called Craig at home that night but hung up when her husband answered.

He gave her an open-mouthed kiss and stuck his tongue in her mouth.

Byrd called Craig again a week later. He told her she was beautiful and asked her out for another drink, which she declined. He later went into Craig's office and repeatedly asked her to make love to him, to which she said "no." On another occasion, Byrd told Craig that he wanted her and asked her if she remembered telling him that she wanted to make love to him. Craig denied she had ever said that and told him that nothing was ever going to happen between them.

Byrd eventually apologized to Craig. Two days later, however, he asked

why she did not remember saying that she wanted to make love to him, and told her he still had feelings for her though he would leave her alone if she wanted him to. At some point he told her that he did not think he could work with her anymore.

Craig reported Byrd's actions to the company on August 27, 2003. The company instructed Byrd to stay away from Craig and to stop making sexual comments to her. Craig was assigned to another supervisor. An investigation was conducted by outside corporate counsel, who recommended that the company pay for counseling for Craig

'Sexual-based conduct that is abusive, humiliating or threatening is sufficient to make a prima facie claim under Title VII.'

and her husband, that Byrd receive a letter of reprimand, and that Byrd and all of the group managers and supervisors receive sexual harassment training.

Craig was ordered to report to Byrd again. She claimed that Byrd retaliated against her by ignoring her, refusing to communicate with her, and providing her with information in a tardy manner. Craig became ill and had emotional

difficulties. The company claimed that it could not transfer either Byrd or Craig. Craig eventually resigned because of medical problems and stress.

Craig filed a lawsuit against Byrd and the company, alleging sex discrimination and retaliation in violation of Title VII and other causes of action. The trial court dismissed her entire complaint, and Craig appealed.

Court of Appeals Decision

Because Craig could not show that Byrd conditioned her job or a job benefit on her acceptance of sexual conduct, she could not sustain a claim of *quid pro quo* sexual harassment, concluded the Ninth Circuit. However, Craig did show facts sufficient to sustain a prima facie case of hostile work environment sexual harassment, concluded the court, applying the test set out in *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 111 CPER 51. Craig was subjected to verbal or physical conduct of a sexual nature; this conduct was unwelcome; and, the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment.

The court discussed only the third factor in detail, finding that Craig easily met the first two prongs of the *Fuller* test. It was not persuaded by the employer's argument that the conduct alleged was not egregious enough to sustain an action under Title VII. Referring to extreme conduct that occurred in cases cited by the employer

in support of this argument, the court said, "Although these shocking examples amply illustrate a level of conduct that is sufficient, they do not establish minimum behavior." "We have repeatedly held that sexual-based conduct that is abusive, humiliating or threatening is sufficient to make a prima facie claim under Title VII and have found liability in situations where the conduct was much less onerous than Byrd's propositions," it continued.

The employer argued that even if Craig did show sufficient facts to support her claim, it was not vicariously liable for its supervisor's conduct be-

'[W]e do not think that in this situation a 19-day delay is unreasonable.'

cause it exercised reasonable care when it learned of the harassment. The court agreed that a reasonable care defense was available in this situation because Craig had not suffered any tangible employment action, such as being demoted or fired. To successfully assert the defense, said the court, the employer must be able to show that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, *and* that the employee unreasonably failed to take advantage of any preventative or corrective opportunities pro-

vided by the employer, citing *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 131 CPER 14.

The court found that the employer met the first prong of the defense because it had a mechanism in place for filing sexual harassment complaints and, when it received Craig's complaint, it addressed it promptly. However, the employer failed to meet the second prong. The court was not persuaded by the argument that Craig waited too long to report the harassment:

[W]e do not think that in this situation a 19-day delay is unreasonable: an employee in Craig's position may have hoped the situation would resolve itself without the need of filing a formal complaint, and she justifiably may have delayed reporting in hopes of avoiding what she perceived could be adverse — or at least unpleasant — employment consequences. Additionally, Craig's behavior is even more reasonable when one considers that Byrd's behavior continued until at least August 20, 2003. We cannot see how a delay of a mere seven days (including the weekend) rises to the level of being "unreasonable." Craig's delay is markedly different from cases where victims have allowed the harassment to continue for a period of months or years before finally reporting it to the appropriate authority.

The court reversed the trial court's dismissal of Craig's Title VII claim against the employer. It also reinstated Craig's assault and battery claim against Byrd. (*Craig v. M&O Agencies, Inc.* [9th Cir. 8-9-07] No. 05-16427, ___F.3d___, 2007 DJDAR 2172.) *

General

Court Shoots Down Attempts to Scrimp on Pension Contributions

Budget crises spur creative, but not necessarily valid, “solutions.” Freeing up \$960 million or even \$500 million by delaying or financing contributions to pension funds was worth a try when the state was facing billions in debt in 2003 and 2004. But the government’s penny-pinching tactics were found unconstitutional in two cases from the Court of Appeals this summer. The Pension Obligation Bond Committee could not persuade the court to validate its proposal to sell up to \$960 million in bonds to fund the state’s contributions to the Public Employees Retirement System. And the Teachers’ Retirement Board successfully challenged the state’s deferral of \$500 million it owed to the Supplemental Benefit Maintenance Account of the Teachers’ Retirement Fund.

Pension Bonds Violate Debt Limit

In 2003, Governor Davis was wrestling with a budget deficit that he calculated was over \$30 billion. The state’s pension contributions on behalf of state employees were projected to come to nearly \$2 billion. He proposed selling bonds to fund state employee pensions. The legislature agreed, despite warnings that the scheme would

violate the state Constitution’s \$300,000 debt limit. The Constitution allows the legislature to enact bond measures only if passed by a two-thirds vote of each house and a majority of the electorate. The administration’s argument that the bond legislation was valid under an exception to the debt limit — to pay an obligation imposed by law — was rejected in court.

Nevertheless, Governor Schwarzenegger’s budget the next year called for pension obligation bonds to cover part of the \$1.9 billion in retirement contributions the state would need to make in 2004-05. His administration believed the new bond measure would be found valid if accompanied by pension reform that offset the debt by reducing the state’s future financial obligations to PERS. He persuaded SEIU Local 1000, which represents more than half of the state’s non-safety rank-and-file employees, to agree to an alternate retirement program for new hires beginning July 1, 2004. (See story in *CPER* No. 167, pp. 56-57.) The program places 5 percent of a new employee’s salary into an interest-bearing account. If still employed with the state after two years, the employee can place the money in the PERS fund and receive two years of service credit along

with the state’s two years of contributions to the fund. But the employee can also cash out the account or leave the money in the account, relieving the state from any retirement contributions for the first two years of employment.

The administration was betting on savings of \$2.6 billion over 20 years from employees who left state employment or did not choose to place their funds with PERS. The Pension Obligation Bond Committee approved the administration’s request to sell up to \$960 million in pension bonds but not more than the amount of savings that were projected to result from the alternate retirement program. Eventually, the expected savings were recalculated to \$1.7 billion.

The committee sought a court determination that the bond sale was legal, and the Fullerton Association of Concerned Taxpayers opposed the sale. Both the trial court and the Court of Appeal found the proposed bonds violated the debt limit of the state Constitution in *State of California ex rel. Pension Obligation Bond Committee v. All Persons Interested in the Matter of the Validity of the California Pension Obligations to be Issued* (2007) 152 Cal.App.4th 1386.

At the appellate court, the only issue was whether the pension bond legislation fit an exception to the debt limit. The effect of the alternate retirement program savings was not discussed.

Past court cases have established several exceptions to a similar constitutional debt limit that applies to local governments, and the bond committee contended that the pension bond legislation

fit the exception for “obligations imposed by law.” The taxpayer group argued that there should be no similar exception to the state’s debt limit provision. The court avoided deciding whether the exception was available because it found that the bond legislation would not meet the criteria for the exception.

Case law holds that the purpose of the debt limits of the state Constitution is to curb the government’s power to incur debts voluntarily. The debt limit, therefore, does not apply to expenditures that the law requires. Counties have been able to incur debts for

The debt limit does not apply to expenditures that the law requires.

officers’ salaries and construction of courthouses because state law, over which they had no control, set the salaries of the officers and required the counties to construct facilities for the courts.

The court found that the state could not use this exception, though, because its pension obligation was imposed by its own laws. The bond committee argued that the state government had no power to set its own retirement contribution rates because a 1992 proposition had given that power to the PERS board. Usually the legislature’s enactment of statutes and the electorate’s passage of initiatives both are viewed as part of the state legislative power. To avoid the conclusion that

the pension obligations were imposed by the state’s own laws, the bond committee argued that initiatives by the people should be viewed as obligations imposed by law because the state debt limit applies only to actions of the “Legislature.” The people, not the legislature, passed laws that established the pension system and gave the PERS board the exclusive power to set contribution rates, the committee argued. And those laws are part of the state Constitution, which the legislature cannot change, it pointed out. Besides, the committee contended, the bond legislation did not create a debt because the debt was already created by the retirement laws.

The court skirted the question of whether a constitutional provision of an initiative could meet the “obligation imposed by law” exception. Instead, it narrowly construed the pension provisions of the Constitution to find that they did not require the state to make pension contributions. Only statutory law clearly imposes the contribution obligation, and the legislature itself enacted the statutory requirement, it observed. The legislature also has the power to eliminate or amend the obligation, the court asserted, referring to the alternate retirement program.

The committee countered that the state could not eliminate its pension obligations for current employees because of court decisions that treat pension system changes as unconstitutional impairments of contract for current employee, whereas the legislature is

free to change the rights of future employees as it did in the alternative retirement program. The court was not persuaded. It responded:

The fact that the state has a contractual obligation to maintain pension benefits does not mean the obligation is one imposed on the state by law. Rather, as explained above, it is an obligation the Legislature has imposed on itself.

The obligation is subject to legislative action, the court asserted. Therefore, “it is a matter at least in part subject to legislative discretion and not one imposed by law.” The court found the pension bond proposal invalid.

Deferral Violates Contract Clause

A similar fate met former-Governor Davis’ attempt to defer pension-related payments that were due in 2003-04. Budget legislation withheld \$500 million from the Teachers’ Retirement Fund’s Supplemental Benefit Maintenance Account. The SBMA was established to ensure that no teacher’s pension benefit falls below 80 percent of the purchasing power of the teacher’s initial pension payment. It may be paid when the monthly benefit falls below the threshold despite the 2 percent increases that are added to teacher pensions each year.

In 2003, the Teachers’ Retirement Board, which administers the State Teachers’ Retirement System, estimated that there were sufficient funds in the SBMA to protect teachers’ purchasing power for the next 33 years.

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By Rhonda Albey • 1st edition (2003) • \$12

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Therefore, in light of the fiscal crisis, the legislature and the governor found it unnecessary to make the state's annual contribution equal to 2.5 percent of STRS members' salaries. To ensure that the account remained able to fund supplements, the legislature passed S.B. 20x, which suspended the payments and required the board to evaluate every four years whether the fund still was projected to be able to pay required supplements through 2036. If not, the legislation automatically appropriated moneys to meet the fund's obligations up to \$500 million. Unless extended, the law was set to be repealed in 2037. As the court explained, the \$500 million might never be reimbursed if the board's actuary were to determine every four years that the SBMA would be able to provide the required supple-

mental benefits through 2036.

The Teachers' Retirement Board sued on the grounds that the suspension of the payment violated the contract clauses of the state and federal constitutions. Under the constitutional contract clauses, pension rights are vested and protected from detrimental changes unless the amendments are offset by equivalent advantages. The state Department of Finance countered that, because the fund was projected to be able to pay the mandated benefits for years, the appropriation of funds greater than necessary to meet the purchasing power purpose of the law would be a windfall and a gift of public funds. The department acknowledged that teachers have a vested right to supplemental payments if the purchasing power of their benefits declined, but contended

that they did not have a vested right to a particular level of annual SBMA funding.

In a case decided about two months later, the same appellate judges that struck down the pension bonds held that S.B. 20x was unconstitutional in *Teachers' Retirement Board v. Genest* (8-30-07) 154 Cal.App.4th 1012. The court explained that the plain language of the SBMA funding statute conferred vested rights to state contributions "equal to 2.5 percent" of compensation. The statute established a continuous appropriation for the annual contribution and states in part:

It is the intent of the Legislature in enacting this section to establish the supplemental payments pursuant to Section 24415 as vested benefits

pursuant to a contractually enforceable promise to make annual contributions from the General Fund to the Supplemental Benefit Maintenance Account in the Teachers' Retirement Fund in order to provide a continuous annual source of revenue for the purposes of making the supplemental payments....

There is nothing in the language that made the funding obligation contingent on actuarial evaluations, the court pointed out. In fact, a previous version of the statute allowed the state to reduce or terminate contributions to the account. The legislature would not have repealed the prior language if it intended to retain the right to reduce its contributions, the court observed.

The department also contended that the legislature can limit a party's

benefits to those the party could reasonably expect from the contract. Here, it argued, CalSTRS members could only expect to receive purchasing power protection. Again, the court criticized the department's reading of the statute. In fact, said the court, teachers can only expect that the 2.5 percent rate of contributions will be made, and by the terms of the statute are entitled to supplemental payments only if there is enough money in the SBMA.

The court did not accept the department's contention that the continuous funding, despite the health of the account, is a windfall. Prior case law has allowed pension laws that eliminated windfall benefit increases that occurred after an employee retires. But the court pointed out that retired teachers are not entitled to higher benefits

than before the fixed 2.5 percent contribution rate was established. And the supplemental payments are not a gift of public funds, said the court, because teachers accepted and remained in employment in exchange for the benefits that the Education Code provided.

The department also contended that any detrimental effect from deferral of the SBMA contribution was offset by the provisions for later reimbursement of the account. The court emphatically rejected this contention, saying:

The replacement of an express obligation to pay a fixed sum of money with a promise to pay the sum *if you prove you need it* and, even then, *only if you need it before a specific date*, is not a comparable new advantage.

public access to information expanded by high court

The California Supreme Court issued two decisions that expand the public's right to information concerning public employee records. In *International Federation of Professional and Technical Engineers, Loc. 21 v. Superior Court*, the high court held that the California Public Records Act permits disclosure of the salary records of City of Oakland employees who earned more than \$100,000. Weighing the public's right to know against the privacy interest of public employees, the majority concluded that disclosure of the salary data would not constitute an unwarranted invasion of personal privacy. Two justices agreed that the salary information should be made public, but not the names of police officers who earned the high salaries.

In a second case, the Supreme Court called for release of police officers' employment records maintained by

the Commission on Peace Officer Standards and Training. In that case, the *Los Angeles Times* wanted the information to investigate whether "problem" officers were moving from one police department to another. The court ruled that release of the names and agencies where officers have worked is not a confidential record concerning discipline. The same two justices dissented, asserting that peace officer records are confidential.

The two cases will be analyzed in depth in the next issue of *CPER*. (*Commission on Peace Officer Standards and Training v. Superior Court* [8-27-07] 42 Cal.4th 278; *International Federation of Professional and Technical Engineers, Loc. 21 v. Superior Court* [8-27-07] No. S134253, ___Cal.4th___, 2007 DJAR 13105.)

The court pointed out that the state has no obligation to reimburse the \$500 million after 2036, by which time the loss from the skipped payment will amount to \$6.3 billion. This loss will affect the account's ability to make payments after 2036, the court explained.

The court also did not swallow the department's essential contention that there was no impairment of contract because the SBMA was so overfunded

spokesperson H.D. Palmer told *CPER* at press time, however, that the state was still considering whether it would appeal the interest award. Though the state argued in the trial court that a 7 percent rate was appropriate, it lost that contention in the appellate court.

Because the pension obligation bonds were never validated, the state paid its retirement contributions from

the general fund in 2003-04 and 2004-05, and made mid-year adjustments to the budget. Governor Schwarzenegger budgeted the anticipated bond revenues in January 2007, but decided in May to shift those revenues to the 2008-09 budget. That option now is not available since the state did not appeal the decision. *

The plain language of the SBMA funding statute conferred vested rights to state contributions.

that in 60 years it is projected to have five times the funds needed to make supplemental payments. The lack of certainty that actuarial assumptions will come true defeated this argument. The reduction in funding increases the risk to STRS members that the fund will be insufficient to make payments in the future, said the court. And nothing in S.B. 20x offsets this risk. The court ordered the withheld contribution to be paid with interest of 10 percent a year.

Budgeting Shifts

The state paid STRS \$500 million from the \$4.1 billion budget reserves in September. Finance department

Shake Up at PERB

The Public Employment Relations Board underwent a radical transformation this summer with the departure of Chairman John Duncan and the appointment of Tiffany Rystrom as board member. Governor Schwarzenegger tapped Duncan to serve as director of the California Department of Industrial Relations, a post he occupied from 1998 to 1999 under Governor Pete Wilson. Duncan was appointed as member and chair of PERB in 2004.

At the same time Duncan headed back to DIR, the governor appointed Rystrom to fill the fifth seat. Since 2001, Rystrom has worked at the law firm of Carroll, Burdick & McDonough. Her legal background also includes work as a partner in the firm of Franchetti & Rystrom, and service as a deputy attorney general for the California Attorney General's Office and as a deputy district attorney for the Marin County District Attorney's Office.

A few days after Duncan's departure, the governor elevated PERB

Member Karen Neuwald to serve as the new chairperson. Neuwald was appointed by Governor Schwarzenegger in 2005.

With these new appointments, the board now is fully staffed with five members. In addition to Rystrom and Neuwald, the current members are Sally McKeag, Lillian Shek, and Robin Wesley. Thus, for the first time in the agency's history, all members of the board are women.

And, in August, a new administrative law judge was appointed. Shawn Cloughesy joins PERB after 13 years as an ALJ with the State Personnel Board. *

Public Sector Arbitration

State Cannot Add Terms to Arbitrator's Contract Without Unions' Consent

The California Association of Highway Patrolmen, California Correctional Peace Officers Association, Statewide Law Enforcement Association, and CDF Firefighters alleged that the state's Department of Personnel Administration violated their respective collective bargaining agreements by unilaterally requiring arbitrators, hired to adjudicate grievances, and

Several arbitrators returned the master contracts, rejecting the 'Special Terms and Conditions.'

court reporters, hired to transcribe the arbitration proceedings, to enter into personal service contracts that included certain "nonnegotiable" terms.

Arbitrator Joseph G. Grodin held that the contract provisions included to satisfy statutory requirements were valid, but other terms that compromised the neutrality of the arbitrator were prohibited. Additionally, Grodin held that the state could not unilaterally

modify arbitrator contract terms without the union's consent, unless such modifications were acceptable in light of past practice. Finally, the arbitrator ruled that the union and the state have an equal interest and right to select court reporters, and some of the state's non-negotiable terms violated this principle.

Arbitrator Contracts

Since 1982, each of the four memoranda of understanding contained provisions for grievances and arbitration. Arbitrators were expected to sign some form of contract in order to facilitate payment of the state's portion of the fees. Beginning in 1998, the Division of Administrative Services created a master arbitrator's contract to be tendered to those arbitrators frequently selected by DPA and the unions. These contracts were sufficient to cover an arbitrator's fees for several cases. Individual contracts continued to be used for cases where the expected billing would exceed the amount in the master contract.

In 2002, CCPOA and firefighters unions learned that the contracts presented to arbitrators contained a provision limiting an arbitrator's fee to the per diem rate applicable to state employees. Several arbitrators had re-

turned the master contracts, rejecting the "Special Terms and Conditions." Some arbitrators expressed concern about the limitation on expense reimbursements because they felt they would have to personally pay for those expenses. In response to the unions' complaints, DPA said the contracts with the arbitrators were mandated by the Department of General Services.

In January 2003, DPA took steps to modify the standard arbitrators' contract and deleted the "state rate" provi-

DPA said the contracts were mandated by the Department of General Services.

sion. The unions assumed that both their substantive and procedural concerns were resolved. The unions believed there was an understanding that if there were to be any changes in the master agreements, they would be consulted.

Between 2003 and 2005, DPA adopted a procedure that appeared to obviate the necessity for either individualized or master contracts with arbitrators. However, DGS took the position that the procedure was inadequate, and a new generation of standard agreements materialized.

In March 2006, a dispute arose over payment for an arbitrator's can-

cellation fee. In the past, the parties split the fee equally. But DPA took the position that CCPOA was responsible for the entire fee because it was solely responsible for the cancellation. The dispute was resolved, but the arbitrator warned the union that the General Services Administration had advised DPA that a settlement with CCPOA could not include an agreement to pay an arbitrator's full cancellation fee. The arbitrator also complained that GSA had adopted a position that, if it went to court to vacate an adverse arbitration award, the arbitrator would have to personally pay the state's attorney fees. The arbitrator also expressed concern that these "extra-record" matters might affect the union's view of the arbitrator's neutrality.

In June 2006, the four unions filed a grievance complaining about the state's insistence that arbitrators enter into contractual agreements that are one-sided and inappropriate under the collective bargaining relationship. The unions specifically objected to the "in-

demnity clause," making arbitrators pay the state's attorney fees for vacated decisions. Additionally, the unions argued the state improperly made changes to contract terms without first consulting with them.

In August, DPA attempted to draft amendments to the contracts to address the unions' concerns, but the proposed modifications were not satisfactory. The matter proceeded to hearing.

Before the hearing took place, the state offered to eliminate certification requirements, such as the requirement for pro bono services, the sweat-free code of conduct, domestic partner certification, and the resolution certification. It was proposed that certain clauses be moved from certification under penalty of perjury to the standard provisions. Additionally, DGS approved the removal of the indemnity provision. The unions found the proposal unacceptable.

During the hearing before arbitrator Grodin, the unions emphasized that arbitration is a jointly established pro-

cess for the resolution of disputes by a neutral arbitrator who serves both parties equally. Requiring arbitrators to agree to terms in their service contracts imposed unilaterally by the state, the unions argued, would violate the implied terms of the collective bargaining agreements. Furthermore, the unions charged that the state's insistence that arbitrators submit to unilaterally established contract terms created the erroneous impression that the state is the more important party to the process, and that some arbitrators, unhappy with the imposed terms, will decline to serve.

Many of the terms that the state imposed on arbitrators in recent years, the unions argued, are inconsistent with the neutral role of the arbitrator and are substantively objectionable because they impose conditions and obligations that arbitrators should not have to accept. The contract provision allowing the state unilaterally to terminate the contract suggests that if the state is not happy with the results in one arbitra-

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**Pocket Guide to
Public Sector
Arbitration:
California**

A clear explanation of every step in the arbitration process — from filing a grievance to judicial review of arbitration awards. Specifically tailored to the public sector, the guide covers the hearing procedure, rules of evidence, closing arguments, and remedies. The Guide covers grievance arbitration, as well as factfinding and interest arbitration. Included are a table of cases, bibliography, and index.

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tion case, it can cancel the arbitrator's contract for the next case.

Furthermore, the unions argued, if arbitrators are required to sign a contract with the state, it should be limited to provisions that are traditional in labor relations. Any terms beyond these traditional provisions are inconsistent with the concept of arbitration implicit in the collective bargaining agreements, and inconsistent with the Dills Act, implicitly rendering inapplicable the requirements otherwise imposed on other state contractors.

Finally, the unions argued that the unilateral communications that occurred between state representatives and individual arbitrators violated the concept of neutrality implicit in the collective bargaining agreements.

For its part, the state argued that it was bound by provisions of applicable law, citing Public Contracts Code Secs. 10335(a) and 10351, which require both the formation of a service contract with arbitrators and the particular disputed terms presently contained in those contracts. Nothing in the Dills Act supersedes these provisions, the state contended. And, while DPA may have different views with respect to the terms of an arbitrator service contract, it is bound to comply with the determinations of DGS.

The state argued there is no evidence on which to determine what provisions of the services contract are "traditional," either in labor relations generally or in the private sector. Thus, the state emphasized, it would be impos-

sible to judge new contract terms by that measure. Finally, the state argued it had not engaged in communications with arbitrators concerning the merits of any case, and it is not improper to discuss the terms of a contract between a public entity and an arbitrator.

Arbitrator Grodin explained that in the private sector, it would be unacceptable for one party to seek unilateral control over an arbitrator's practices, to enter into a separate contractual arrangement with the arbitrator, or to engage in unilateral discussions with

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applicable law.*

the arbitrator over such matters without notice to the other party and an opportunity to participate. Any such separate contractual arrangement or discussion would compromise the neutrality of the arbitrator and encroach on the terrain reserved for mutual bargaining. Thus, Grodin explained, if this case were to arise in the private sector, the grievance would be granted.

In the public sector, Grodin instructed, it is now clear that an MOU under the Dills Act may provide for arbitration of disputes arising out of the agreement. In *State Personnel Board v. Personnel Administration* (2004) 37

Cal.4th 512, 164 CPER 57, the California Supreme Court held that the public sector is bound by constitutional provisions, and an MOU may not provide for arbitration that transcends those boundaries. While the Dills Act provides that an MOU may supersede a number of specified statutory provisions, there are by implication other statutory provisions that are not subject to supercession.

Arbitrator Grodin cited a number of ways for resolving or minimizing the tensions between the unions' pleas for neutrality and DPA's concerns with statutory constraints and DGS precedent. However, the arbitrator emphasized his decision rested on whether the state violated the implicit terms of the respective bargaining agreements by insisting on standard agreements with arbitrators.

In *Foley v. Interstate Data* (1988) 47 Cal.3d 654, the California Supreme Court announced that "every contract imposes upon each party a duty of good faith and fair dealing in its performance." At a minimum, this means that a party may not engage in conduct that defeats the purpose of the contract. In light of this, Grodin found that the purpose of the arbitration provisions contained in the MOUs is to have contract disputes resolved by an arbitrator who is selected by both parties, who is neutral, and who serves as their joint agent under terms jointly negotiated and accepted. To support this point, arbitrator Grodin explained that it would not require an explicit MOU provision to

establish that the state may not insist that all prospective arbitrators sign a contract certifying they have never decided a case in favor of a union. The arbitrator also confirmed that an MOU's implicit terms would be violated if one of the parties unilaterally insisted that an arbitrator would not be considered for selection if he or she could not issue a decision within seven days.

The arbitrator explained that since 1982, unions have been aware that the state has insisted on some form of contract between the state and each arbitrator, and the unions have never categorically objected to that practice. Considering this history, the arbitrator found that the MOUs cannot be said to contain an implicit prohibition against *any* form of contract between the state and the arbitrators.

Accordingly, Grodin said that the implied terms of the MOUs are not violated by the state's insistence on including in its contracts with arbitrators reasonable provisions that are necessary because the state is a public entity, such as provisions designed to assure that public money is spent for a legal and authorized purpose. The arbitrator found some provisions of the standard agreement as ancillary to that objective.

It also does not violate the implied terms of the MOUs for the state to insist on inclusion of terms expressly mandated by the legislature, the arbitrator held. The inclusion of statutorily mandated terms does not, by itself, compromise the neutrality of the arbitrator, and insofar as compliance with

them may be considered burdensome for the arbitrator, that alone is not a basis for finding an implied prohibition.

However, Grodin also found that the MOUs implicitly precluded the state from unilaterally dictating the terms on which arbitrators shall serve, except if those terms are explicitly required by applicable law, are necessary to assure that public money is being spent for an authorized purpose, or have been accepted by the unions. Arbitration is a bilateral process, Grodin

The MOUs implicitly preclude the state from unilaterally dictating the terms on which arbitrators shall serve.

explained, and the arbitrator draws his or her authority from the MOU. For the state unilaterally to dictate the terms upon which arbitrators serve not only gives rise to the appearance that the state is the controlling party in the process, but also preempts terms which, by implication from the nature of the process, are appropriate subjects for the meet and confer process.

Grodin explained that particular terms of an arbitrator's contract may improperly intrude on an area in which

the union has a joint and equal interest with the state, and on the province of the arbitrator. For example, with respect to cancellation fees, the standard agreement stated, "unless DPA and the union agree otherwise, DPA shall not be obligated pursuant to this contract to pay a cancellation fee if the cancellation is made at the request of the union." Apart from the fact that it may be difficult to determine who is responsible for a cancellation, the arbitrator concluded that such a default rule may be contrary to what an arbitrator, interpreting the MOU for equal cost sharing, might decide.

Arbitrator Grodin also found intrusive the provision allowing the state to terminate the contract of an arbitrator with or without cause unless the arbitration has already commenced. The arbitrator found it unclear what legitimate purpose this provision serves, since the state can always veto the selection of a particular arbitrator. As phrased, the provision suggested that the state could remove an arbitrator from a case on which he or she already has been selected. Also, in the case of two MOUs, the provision improperly allowed the state to delete an arbitrator from a list that already has been agreed to by the parties.

Unions have an interest in maintaining the availability of a roster of competent and acceptable arbitrators, Grodin said. And, because the standard agreement included provisions that were unduly burdensome or intrusive, Grodin found a risk that competent ar-

bitrators would be deterred from offering their services to the parties.

The arbitrator held that the state had no authority to unilaterally adopt the rule requiring an arbitrator who needs more time to submit an award to make a request of DPA “within 30 days of discovery of the problem.” Although the rule may be reasonable, Grodin said, it cannot be unilaterally adopted.

Grodin found a risk that competent arbitrators would be deterred from offering their services to the parties.

The arbitrator explained that it is a breach of the MOU for the state to engage in unilateral communications with arbitrators over contract terms, except with consent of the union, or in accordance with accepted custom and practice because such communications jeopardize the neutrality of the arbitrator.

Court Reporter Contracts

The unions argued that the state’s practice of insisting on arbitration reporters’ contracts containing unilaterally imposed terms and requirements also is contrary to the premise of grievance arbitration as a jointly established

process. The unions contended that the preference some arbitrators have for certain reporters should be respected. Requiring reporters to fill out lengthy and time-consuming forms, have the ability to do “real time” reporting, or report a half-hour before the hearing starts, the unions argued, might disqualify reporters whom the arbitrator or the union would prefer.

The state argued that, with respect to reporters, there is no neutrality concern; only competence is required. The state contended that reporters are “fungible,” and it is therefore not feasible for the state to maintain a separate list, and separate requirements, for reporters in arbitration cases.

The state asserted it was entitled to insist on reporter qualifications that it deemed necessary and appropriate and that the unions had no right to veto. The state argued that the standard reporter agreement complied with applicable law and that there is no evidence that reporters were deterred by the prospect of filling out the forms or entering into the standard agreement.

Grodin agreed with the state that since court reporters do not decide cases, the issue of neutrality is substantially different than in the case of arbitrators. In light of history and applicable statutes pertaining to contracting, Grodin reasoned the state is not impliedly prohibited from insisting on some form of contract with reporters.

But, Grodin explained, a reporter in a labor arbitration case is no more the agent of the state than the union.

The reporter provides a service to both parties jointly, and while the requirements for the position or the manner in which transcription is performed is seldom a matter of controversy, in principle the state is no more in a position to establish such requirements than are the unions.

Since court reporters do not decide cases, the issue of neutrality is substantially different.

Disagreeing with the state, arbitrator Grodin found that the reporters are not “fungible” because they may develop specialized expertise in dealing with labor arbitrations, and unions may prefer these reporters. Also, Grodin asserted that arbitrators may prefer reporters with whom they have had prior experience, and the union may legitimately consider that the process would benefit if that preference were accommodated.

Grodin held that various provisions of the prior standard agreement for reporters offended the principle of bilateralism, as exemplified by the “real time” reporting requirement, the penalty for late transcripts, and the requirement for prior approval for travel over 50 miles. The arbitrator found that most of those violative provisions had been altered or deleted by modifica-

tions, and that the standard agreement is generally consistent with the state's obligations.

However, the arbitrator made note of one yet-to-be modified requirement that reporters be at arbitration hearings 30 minutes before they start. As long as the requirement is not applied to inhibit arbitrators from bringing a preferred reporter to a hearing, Grodin said, it does not appear to impinge on a significant union interest. (*In Re: CCPOA, CDFE, CAHP & CAUSE and State of California, DPA* [7-23-07; 22 pp.]. *Representatives* Warren C. Stracener [DPA deputy chief counsel] for the state; Ronald Yank [Carroll, Burdick & McDonough] for the unions. *Arbitrator*: Joseph G. Grodin.)*

Arbitration Log

• Discipline — Just Cause

City of Beverly Hills and Grievant (6-26-06; 9 pp.). *Representatives:* Roy A. Clarke (Richards, Watson and Gershon) for the employer; Leslie S. McAfee (Law Offices of Leslie S. McAfee) for the grievant. *Arbitrator:* Edward Scholtz (CSMCS Case No. ARB-06-0339).

Issue: Did the City of Beverly Hills have just cause to terminate the grievant?

City's position: (1) The grievant challenged a coworker to a fight and punched him after the coworker told him to "knock off the gay crap...grow a set...and talk to [him] like a man." The coworker's comments were prompted by the grievant jokingly asking the coworker to "escort" him to the police pancake breakfast in an effeminate voice.

(2) The grievant's misconduct violated the city's "zero tolerance" policy for workplace violence of which the grievant was admittedly aware. Therefore, the city had just cause to terminate the grievant.

Grievant's position: (1) The supervisor present at the incident had a duty to intervene, and had he acted promptly, violence would have been avoided.

(2) The grievant acted in self-defense. He endured psychological trauma following an attack by a transient while on the job several months prior to the incident. This caused him

to fear that he was going to be attacked by his physically larger coworker.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) The supervisor knew that the grievant and his coworker were friends who frequently took breaks together and joked with each other. The supervisor heard only a small part of their conversation and at first thought they were joking. When the supervisor realized things had escalated, he approached them and told them to "knock it off." The grievant threw a punch before the supervisor reached the men and could intervene. Based on these facts, there is no basis to shift responsibility for the fight from the grievant to his supervisor.

(2) After he was insulted, the grievant walked away from his coworker and sat in his vehicle. This demonstrated that the grievant had the opportunity to avoid the conflict and could have chosen to resolve the situation by filing a complaint with the city regarding any inappropriate comments made by his

coworker. Instead, the grievant chose to walk back to his coworker "to find out what his problem was," and shortly thereafter, punched his coworker after telling him to "take [his] best shot." This behavior negates any assertions of self-defense.

(3) The grievant was well aware of the city's policy prohibiting violence in the workplace, and immediately after the incident the grievant admitted to his supervisor and the police that he was at fault and subsequently offered his resignation.

(4) The city did not abuse its discretion in selecting termination as the proper level of discipline.

(Advisory Grievance Arbitration)

• Discipline — Just Cause

• Drug and Alcohol Abuse

University of California, Berkeley, and Alameda County Building and Construction Trades Council, AFL-CIO, U.A. Loc. 342 (3-12-07; 25 pp.). *Representatives:* Kenneth T. Phillippi (labor relations analyst) for the university; Scott M. DeNardo (Neyhart Anderson Freitas Flynn & Grosboll) for the union. *Arbitrator:* Bonnie G. Bogue.

Attention Attorneys and Union Reps

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Issue: Was the grievant terminated for just cause?

Employer's position: (1) Terminating the grievant was reasonably warranted by the grievant's admission to on-duty illegal activities, including drug and alcohol use and timesheet fraud.

(2) Progressive discipline is not required considering the severity of the grievant's misconduct, for which termination can be imposed for a single violation.

(3) The grievant did not refute the assertion that his illegal activities violated the university's conduct code, or show that his signed admission was procured through duress.

(4) The grievant was offered and declined a representative although he was advised at the outset of the investigative interview that he could be terminated. Also, he was told he could leave the interview if he wanted.

(5) The fact that the grievant's position as a steamfitter contractor is not designated as "safety sensitive" is irrelevant given the dangerous nature of his work and risk of injury or death to others.

(6) According to the auditor's report, the grievant claimed 17 hours of work time when he was playing volleyball. Such timesheet fraud and theft cannot be tolerated.

Union's position: (1) Before taking the grievant's statement, the university had no cause to believe that he had consumed alcohol or used controlled substances while on duty. The university has no evidence other than the grievant's statement that he was "under the influence" while on duty; no drug and alcohol tests were introduced.

(2) The interviewers' misrepresentation that no discipline would result from truthfulness caused the grievant to make statements against his interests. Since neither investigator understood what was meant by *Lybarger* rights, the grievant could not be expected to either. The grievant and other interviewed employees felt intimidated by the investigators, but were told that if they were truthful, they would be "okay" because of prior exemplary service.

(3) The employer bears the burden of proof that the grievant falsified his time card; it is not incumbent on the grievant to prove he did not. Minimal time card discrepancies were either condoned by the grievant's supervisor or allowed to be made up by working through breaks. There was no direct evidence that the grievant left work early or arrived late.

(4) One supervisor testified that he and other employees frequently drank alcohol on campus during lunch hour. And, of the three individuals in the grievant's unit who were also terminated on the basis of their written statements, only the grievant was not reinstated.

(5) The grievant's written statement was not in his own words. The investigator "dictated" what he wrote. The interviewer acknowledged that he showed the grievant a "declaration checklist" and told him that the language was an optional template.

(6) The grievant's admissions must be discredited because they were coerced and involuntary. He made the statements under the duress created by

the interview itself and because the grievant was led to believe he would not be terminated if he were truthful.

(7) Even if discipline is justified, discharge is unwarranted because the contract requires progressive discipline.

Arbitrator's holding: Grievance sustained in part.

Arbitrator's reasoning: (1) To support the worktime allegations, the university relied on the grievant's written admissions that he played volleyball beyond his half-hour lunch period and that he submitted time cards for a full workday when he left early. The university also relied on an auditor's report that the grievant was seen playing volleyball beyond his scheduled lunch period on 15 occasions.

(2) The grievant convincingly testified that the undercover operative could not observe that he worked through his 15-minute breaks to extend his lunch period to play volleyball. Also, the university never reprimanded or issued warnings to employees who extended their lunches to play volleyball.

(3) The grievant was justified in relying on his boss's instructions that, as a lead, he must report his time fairly, but he did not have to report variations in start and stop times. There is insufficient evidence to satisfy the university's burden of proving time card falsification, fraud, or theft.

(4) The university discharged the grievant for drug and alcohol use based solely on the grievant's own admissions of alcohol and illegal drug consumption

during his work day. No drug or alcohol test was requested or taken, and there was no empirical evidence of drug use.

(5) The grievant testified that he admitted to the investigator only that he had smoked marijuana on campus years ago as a youth. He also testified that the only two occasions he had used "meth," or "speed," were when he was on all-night standby during a campus emergency. He testified that he had not used drugs on campus since 1999. This testimony directly conflicts with the grievant's written admission that he recently smoked marijuana and used speed several times a year.

(6) A comparison between the grievant's written statement and the investigator's checklist shows marked similarity in language, and thus appears to have been "dictated." However, the factual statements concerning the timing and frequency of the grievant's drug and alcohol use were provided by the grievant. Also, the grievant was told he could add his own explanations and he did so after using canned phrases.

(7) The grievant's testimony that he had been assured he would not be disciplined if he was honest is belied by his written statement. The grievant did

not write that he had been truthful because of these assurances. He asserted that his drug use did not affect his job performance, and that his long and successful work record militated against discipline. Also, the grievant's denial of timesheet fraud demonstrates that his written admissions were not induced by a promise of leniency.

(8) The manager's pre-investigatory *Lybarger* warning was not misleading and did not induce the grievant into making self-incriminating statements. The managers let the grievant know that his statements could not be used to charge him with a crime, but said nothing of disciplinary immunity, and the investigator advised that he could be terminated. The tape recording of his oral statement corroborates that the investigator did not promise anything in exchange for admissions but only made the grievant aware he would not be prosecuted based on his statement.

(9) The evidence does not support the union's contention that the interview was intimidating or coercive and improperly induced the grievant to confess to wrongdoing against his will. Also, the grievant had been told, and

understood, that he was free to leave the interview at any time.

(10) The grievant declined union representation, and thus the university did not act unlawfully by conducting the interview. The grievant's written admission is credible and not the result of improper investigatory procedures. Therefore, the university proved that the grievant used alcohol and drugs on university property during work time.

(11) The grievant and all department employees were provided with copies of the Code of Conduct, which expressly prohibits illegal drug use; as a past chair of the department safety committee, he was aware of safety ramifications.

(12) Evidence demonstrated that certain supervisors and managers were aware of the consumption of beer at lunch, but took no corrective action prior to 2002. However, there was no evidence that supervisors or managers condoned the use of illegal drugs during working hours.

(13) The grievant was aware of the no-alcohol rule, but chose not to follow it because he believed he would not be disciplined. However, the prior failure to enforce a clearly stated rule does not preclude the university from enforcing it when evidence of significant rule violations was acquired.

(14) The university's decision to terminate the grievant did not constitute disparate treatment because the three other employees terminated by the university were reinstated by arbitrators. Each case must be decided based on its own facts, but deference to

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principles of progressive discipline that influenced other arbitrators' decisions must apply equally to the grievant's case.

(15) Under progressive discipline, termination is customarily not appropriate for a first offense, unless the misconduct is particularly serious. Here, repeated on-duty use of illegal drugs and alcohol is serious misconduct because of the dangers inherent in the grievant's job. The grievant regularly drove a university vehicle on campus and on city streets. This activity was inherently dangerous and created an unacceptable risk of liability for the university.

(16) Numerous factors militate against the grievant's termination, despite his serious misconduct. These include the grievant's long-term and successful employment record and high skill level. He has received good performance evaluations, promotions, and commendations, and has no prior disciplinary record. Additionally, public policy favors rehabilitation for drug and alcohol abusers. This is reflected in the university's employee assistance program. Together, these factors favor giving the grievant an opportunity to rehabilitate himself and save his career.

(17) The grievant is reinstated without back pay, but with restoration of seniority to the date of his termination. However, reinstatement is conditioned on the presentation of proof that the grievant successfully completed a drug and alcohol rehabilitation program and that he tested negative for the presence of drugs and alcohol. Also, as a condition of continued employment, for a

period of two years, the grievant will be subjected to random tests for alcohol and controlled substances, at the discretion of the university.

(Binding Grievance Arbitration)

- **Contract Interpretation**
- **Past Practice**
- **Holiday Pay**

Milpitas Police Officers Assn. and City of Milpitas Police Dept. (5-28-07; 8 pp.). *Representatives:* Edward L. Kreisberg (Meyers Nave Riback Silver & Wilson) for the city; David P. Clisham (Law Offices of Clisham & Sorter) for the association. *Arbitrator:* C. Allen Pool (CSMCS Case No. ARB-06-0161).

Issue: Did the city violate article 18.02 of the memorandum of understanding by paying eight hours holiday pay to all employees including police officers regularly working nine- and ten-hour shifts?

Pertinent contract language: Section 18.02: "Whenever a holiday falls on a working day, full time employees shall be granted the day off with pay. Personnel employed on a permanent part-time basis for less than forty hours a week shall be entitled to paid holidays on a pro-rata basis."

Association's position: (1) The city violated the clear and unambiguous languages of Sec. 18.02 when it failed to compensate nine officers at a rate based on their nine- or ten-hour scheduled shifts, and instead paid them eight hours holiday pay for the July 4, 2006, holiday.

(2) The officers were adversely affected in that their regular pay was diminished by one or two hours for the

Independence Day holiday. As a remedy, they should receive payment for the full nine- or ten-hour regular work day for the holiday.

City's position: (1) The city did not violate Sec. 18.02 of the MOU by paying the nine officers eight hours of holiday pay for July 4, 2006. Section 18.02 is not clear and unambiguous.

(2) The city has a consistent 25-year practice of paying eight hours holiday pay to all employees, including officers who regularly work nine- or ten-hour schedules.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) The goal of any contract interpretation dispute is to determine the intent of the parties at the time and within the context that the parties mutually agreed to the disputed language.

(2) The intent of the parties with respect to Sec. 18.02 cannot be determined without looking at when employees began working alternative schedules, such as the 9/80 schedule. Under the 9/80 schedule, which few city employees were working in the 1990s, employees work eight nine-hour days and one eight-hour day for a total of 80 hours in a two-week period. Employees on the 9/80 schedule received eight hours of holiday pay without question prior to 2001.

(3) The city's Personnel Rules and Regulations which contained language concerning holidays and holiday pay existed well before they were last amended in February 1991. Section 9.05.1 of the rules listed the paid holi-

days for all employees, and Sec. 9.05.2 stated “where one of these holidays falls on a working day, all employees shall be granted the day off with pay.” The language of Sec. 9.05.2 is virtually identical to the language in Sec. 18.02 of the MOU. It can be inferred that when the parties mutually agreed on the language in Sec. 18.02 they “cut and pasted” the language from the personnel rules.

(4) The language of Sec. 18.02 must have appeared after the MMBA was adopted in 1968, but before employees began working alternative schedules. The record shows employees were working alternative schedules as early as 1989, and paid eight hours of holiday pay in accordance with either the personnel rules or the existing MOU. When employees first started working alternative schedules, the city continued its practice of paying eight hours for holidays to all employees, including those working alternative schedules.

(5) Nothing in the record shows that the parties intended, by agreeing to the contract language, anything other than to pay eight hours in holiday pay.

(6) The association alleged that during the last negotiations, the parties reached an understanding that employees would be paid the extra one or two hours holiday pay for working a 4/10 or 9/80 shift. The evidence did not support that contention because there was no written record of such an agreement.

(Binding Grievance Arbitration)

• Tenure

Shasta-Tehama-Trinity Joint Community College Dist. and Shasta College Faculty Assn. (5-29-07; 11 pp.). *Representatives:* Ralph D. Stern (College Legal Services of California) for the district; K. Thomas Smith, Jr. (Weils, Small and Selke) for the association. *Arbitrator:* Philip Tamoush.

Issue: Was the decision not to grant tenure to the grievant unreasonable? Did Shasta College violate, misinterpret, or misapply any of its policies and procedures concerning the evaluation of the grievant?

Association's position: (1) There was insubstantial evidence to support the final decision of the Individual Tenure Review Committee to deny the grievant tenure status.

(2) Basic bias existed against the grievant within the committee, especially on the part of the chairperson.

(3) Committee members did not consider positive student evaluations or faculty observations in its most recent reviews of the grievant's performance. Omission of these factors is a failure to consider evidence regarding the grievant's obvious competency.

(4) Subjective opinions formed the basis of the committee's assessment, rather than objective facts. Bias against the grievant resulted in the overall recommendation to deny tenure.

(5) College administrators and faculty failed to assist the grievant in improving performance where, admittedly, there were some deficiencies.

(6) The grievant should be made whole, both in terms of lost salary and

whatever other appropriate remedies provide him with his deserved status as a tenured instructor.

District's position: (1) The burden of proof in this case is with the grievant, as no disciplinary action is involved.

(2) The grievant failed his probationary period job review because he did not improve sufficiently over the four years of his employment to warrant tenure. The committee's evaluation included substantial written information regarding the grievant's failures.

(3) The college does not grant tenure to employees without evidence. In this case, as witnesses testified, the grievant's performance was observed, records kept and reviewed, and a valid conclusion reached to deny tenure.

(4) Management has shown its objectivity in determining that the grievant did not meet the qualifications for a permanent position.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) The district management had substantial evidence on which to base its decision not to grant the grievant tenure.

(2) After reviewing the witness' testimony and substantial written peer evaluations, student comments, and other documents, it is apparent that the district followed all required procedures in reaching its conclusion to deny the grievant tenure.

(3) It is not correct to “second-guess” the decision of the committee based on the written record here. Thus the decision not to grant tenure is sustained.

(Binding Grievance Arbitration)

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

Hayward Unified School Dist. and Hayward Education Assn., CTA/NEA (7-30-07; 12 pp.). *Representatives:* Joshua A. Stevens (Fagen Friedman & Fulfroast) for the district; Bill McMurray (chapter services consultant for CTA) for the association. *Arbitrator:* Paul D. Staudohar.

Issue: Is a certificated employee entitled to a remedy for teaching two classes in addition to his responsibilities as a full-time computer technology coordinator?

Association's position: (1) The grievant is the only technology staff development coordinator in the district who works full-time in that capacity while also teaching two classes during the year. He is the only employee who is "double assigned," and assigned teaching duties without being paid for them.

(2) The grievant was hired at Hayward High School to work as a technology staff development coordinator. Additional teaching duties were assigned without a reduction in his original responsibilities. Although the high school principal exercised a management right when she made changes in the grievant's job duties, those changes were not reasonable because the grievant's original duties were not reduced.

(3) Any procedural arbitrability argument raised by the district must be rejected because arbitration is limited to the "precise issue submitted," and the district did not raise an arbitrability challenge.

(4) The contract does not contain language requiring that a grievance be forfeited if it is not timely filed. The grievant has been teaching classes for several years, making this a continuing grievance that is ripe for arbitration through the grievance procedure. By waiting to raise the issue of timeliness until the day of the arbitration hearing, the district waived its right to contest the matter on procedural arbitrability grounds.

(5) The district violated both the collective bargaining agreement and a March 6, 2006, letter of agreement regarding implementation of a modified block system schedule. It ignored past practice at two other district high schools where the computer technology coordinators who perform the same job as the grievant are assigned to eight blocks a year. The grievant receives a two-block assignment for performing the same duties.

(6) The district violated the contract by failing to compensate the grievant for his assignment to teach two blocks during the 2006-07 school year in addition to his full-time duties as a computer technology coordinator. Although there is no specific contract language regarding additional payment for employees assigned to teach extra blocks, it is a well-established past practice.

(7) The district should assign the grievant to a full-time computer technology position for 2007-08, or compensate the grievant at his per diem or pro rata salary for the two classes taught in 2006-07.

District's position: (1) The grievant was given the exact or similar assignment for the past four years, yet he did not file a grievance until October 4, 2006. The contract provides that a grievance must be filed in writing 30 days from the occurrence of the event, which the grievant did not do.

(2) Under the contract, the district appropriately exercised its management right to assign the grievant to teach the classes.

(3) Pursuant to the March 2006 side letter, the grievant was assigned two instructional blocks per term for his computer technology responsibilities and one instructional block per term to teach his class. The grievant actually received more instructional blocks than were required by the side letter.

(4) The association failed to introduce any evidence to support its allegation that the grievant's assignment violated a past practice.

(5) The grievant has never been required to work more hours than are contractually provided. He did not work "double duty" by teaching two classes because he was never required to work more than 7.25 hours a day.

(6) The high school principal testified that the grievant never filed a complaint alleging discrimination, nor did he ever claim he was the victim of discrimination. The grievant's own testimony supports that he had not been discriminated against.

(7) Even if an inequality exists between the grievant and the computer technology coordinators at the other

two district high schools, that disparity is not discrimination because management has the right to create a master schedule, and assign teachers and other staff as they see fit.

Arbitrator's holding: Grievance sustained.

Arbitrator's reasoning: (1) The district acknowledged that procedural arbitrability was not raised in its denial at levels one and two of the grievance. Because the contract provides that "[t]he arbitrator...shall confine the decision to the precise issue submitted..." and because the issue submitted made no reference to procedural arbitrability, that will not be considered as a ground to preclude arbitration.

(2) This grievance is continuous and renews itself until resolved or no longer relevant. The contract language is permissive and does not contain a forfeiture clause specifying that unless the timing requirement is met, the grievance is lost. The grievance is procedurally arbitrable.

(3) The side letter defined the work day as four 90-minute blocks. Alternatively, full-time duty is 7.25 hours a day. An employee is considered to be full-time if assigned a total of eight blocks a year, four per semester, with six being instructional blocks and two being preparatory. It is not clear from the evidence that the number or allocation of blocks to the grievant is incorrect. Also, the grievant's current assignment does not require more than 7.25 hours of on-site duty-time a day.

(4) The principal testified that the grievant is assigned four blocks per se-

mester, one to teach, one to prepare, and two as the computer technology coordinator. Because the principal is required to assign the grievant only one block for his assignment as computer technology coordinator but he receives two blocks, she concluded that he is assigned more blocks than the contract or side letter require.

(5) The computer technology coordinators at the district's two other high schools receive eight blocks a year as full-time employees in the same position as the grievant. Their job responsibilities are virtually the same as the grievant's except neither of the men are assigned to teach.

(6) Based on the grievant's prior teaching experience and his ability to do so, the district properly assigned the grievant to the additional teaching duties, which he was certified to perform.

(7) There is nothing in the contract or the side letter providing for additional payment for employees assigned to teach extra blocks.

(8) Although the grievant is not required to work more than 7.25 hours a day, his work day is significantly more difficult than it would be if he were responsible only for his computer technology duties. During his preparation periods, he spends some time performing teaching duties. Moreover, the grievant spends part of his 30-minute duty-free lunch period assisting students and teachers.

(9) Compensating teachers for performing extra work is not an unprecendented past practice. Technically the grievant is assigned only four blocks

per semester, but the extra work that the teaching entails is encroaching on his preparation time, in effect causing him to work harder. Performing both the teaching and computer technology work at high levels requires extra effort and stress. Also, he is performing work he was not hired to do.

(10) Although the district has the right to assign the grievant teaching responsibilities, it is equitable and just that he be paid for the extra work.

(11) The grievant is not relying on discrimination charges to justify a remedy, and he has admitted that he was not discriminated against.

(12) The district inequitably applied the past practice by assigning the grievant to teach two classes without extra pay, in addition to his responsibilities as a full-time computer technology coordinator. The remedy is to compensate him at his per diem or pro rata salary for the two classes he taught during the 2006-07 school year. In accordance with the association's request, the arbitrator will retain jurisdiction in the event of a dispute over the remedy.

(Binding Grievance Arbitration)

Resources

Taking Back the NLRB

Pro-labor critics often question the effectiveness of the National Labor Relations Board. Some go so far as to call the board labor's enemy number one. In a book that is sure to be controversial, Ellen Dannin argues that the blame actually lies with judicial decisions which have radically "rewritten" the National Labor Relations Act. And she offers solutions for change.

Dannin calls for labor to borrow from the strategy mapped out by the NAACP Legal Defense Fund in the early 1930s to eradicate legalized race discrimination. She lays out a long-term litigation strategy designed to overturn the cases that have undermined the NLRA and frustrated its policies. As with the NAACP, this strategy must take place in a context of activism to promote the NLRA policies of social and industrial democracy, solidarity, justice, and worker empowerment. Dannin contends that only by promoting these core purposes of the NLRA can unions survive — and thrive.

Taking Back the Workers Law: How to Fight the Assault on Labor Rights by Ellen Dannin (2006) 208 pp. Cornell University Press, <http://www.cornellpress.cornell.edu/>. Hardcover, \$35.

Job Openings at the Top

A consultant to colleges and universities in their searches for presidents and other senior officers, author Jean Dowdall offers guidance about the academic search process. Her book provides sample documents for candidates as well as for the search committees, and includes a substantive bibliography. From her vantage point outside the institution, Dowdall provides a unique point of view on the complex and often daunting process of the academic executive search.

Searching for Higher Education Leadership: Advice for Candidates and Search Committees, Jean A. Dowdall (2007) 216 pp. Ace/Praeger Series on Higher Education, <http://www.greenwood.com/>. Hardcover, \$49.95.

The Truth About Liars

According to David Shulman, deception is a pervasive element of daily work life. Sometimes it is an official part of one's work — as in the case study he offers of private detectives, who lie for a living. But more often it is simply part of the fabric of life on the job. Writes Shulman: "There are always clients to please, rules to subvert, difficult tasks to perform, work to shirk, and upward mobility to seek....Most people with work experience have encountered at least some version of exaggerated resumes, exploitative bosses, self-interested shirking, collusion against disliked colleagues, lying to clients, and countless other variants of lies on the job."

Shulman argues that workplace cultures socialize individuals into using deception as a tool in performing their everyday work. To make his point he focuses not on extreme cases but rather on less obvious forms of deception, such as pretending to show deference, crafting misleading accounting reports, making false claims to customers and coworkers, and covering up business transgressions. Shulman analyzes the motives, tactics, rationalizations, and ethical ramifications of acting deceptively in the workplace. This book offers readers both detailed accounts of workplace lies and new ways to think about the important effects of everyday workplace deceptions.

From Hire to Liar: The Role of Deception in the Workplace, by David Shulman (2006) 232 pp. Cornell University Press, <http://www.cornellpress.cornell.edu/>. Hardcover, \$49.95; softcover, \$18.95.

The Basics of Managing Information

This first-of-its-kind textbook addresses the new National Association of Public Affairs and Administration curriculum requirements on information management. The book is written specifically for the public sector and addresses unique public sector issues and concerns. While designed as a stand-alone text for an information management course in a public administration program, the book also serves as a professional resource for public managers.

Managing Information in the Public Sector covers both the basics of information technology and the managerial and

political issues surrounding the use of these technologies. Unlike other works written for MBA programs or that require a general survey course in management information systems, technical basics are explained in clear English with as little technical jargon as possible.

Managing Information in the Public Sector, by Jay D. White (2007) 336 pp. M.E. Sharpe, <http://www.mesharpe.com/>. Hardcover, \$89.95; softcover, \$39.95.

Looking Abroad for Health Care Solutions

Although the United States spends 16 percent of its gross domestic product on health care, more than 46 million people have no insurance coverage, while one in four Americans report difficulty paying for medical care. Indeed, the U.S. health care system, despite being the most expensive in the world, ranked 37th in a comprehensive World Health Organization report. With health care spending only expected to increase, Americans are again debating new ideas for expanding coverage and cutting costs. According to historian Paul V. Dutton, Americans should look to France, whose health care system captured the World Health Organization's number-one spot.

Author Dutton debunks a common misconception among Americans that European health care systems are essentially similar to each other and vastly different from U.S. health care. In fact, the Americans and the French both distrust "socialized medicine." Both groups cherish patient choice, independent physicians, medical practice freedoms, and private insurers in a qualitatively different way than the Canadians, the British, and many others.

The United States and France have struggled with the same ideals of liberty and equality, but one country followed a path that led to universal health insurance; the other embraced private insurers and has guaranteed coverage only for the elderly and the very poor. How has France reconciled the competing ideals of individual liberty and social equality to assure universal coverage while protecting patient and practitioner freedoms? What can Americans learn from the French experience, and what can the French learn from the U.S. example? *Differential Diagnoses* answers these questions

by comparing how employers, labor unions, insurers, political groups, the state, and medical professionals have shaped their nations' health care systems from the early years of the twentieth century to the present day.

Differential Diagnoses: A Comparative History of Health Care Problems and Solutions in the United States and France, Paul V. Dutton (2007) 272 pp. Cornell University Press, <http://www.cornellpress.cornell.edu/>. Hardcover, \$29.95.

Economic Realities of the Low-Skilled

Over the past few decades, the economic prospects for workers with relatively few skills have worsened as the demand for skills in the labor market has increased. Even in jobs that might be categorized as low skilled, workers require a diverse set of skills to succeed, and many of these can be obtained only through schooling or job training. This is why workers lacking skills find it difficult to attain a foothold in the labor market and why employers have difficulty filling low-skilled jobs.

Maxwell surveyed 405 employers and queried them about jobs requiring no more than a high school education and one year of work experience. From their responses, Maxwell arrived at the following five key points: (1) Low-skilled jobs require skills; (2) shortages of appropriately skilled workers in low-skilled jobs exist, even when labor markets are slack; (3) skills are rewarded in the labor market for workers in low-skilled jobs; (4) low-skilled jobs offer promotional opportunities; and (5) hiring requirements in low-skilled jobs are relaxed in tight labor markets.

In her book, Maxwell defines low-skilled jobs, identifies the populations who fill these jobs and the economic realities facing them, and offers policy solutions aimed at facilitating the career development of individuals with limited skills. These solutions include building skills while attending public schools and publicly funded employment and training programs; increasing the demand for low-skilled workers; and refining the nation's workforce development programs to better steer individuals into jobs providing economic self-sufficiency.

The Working Life: The Labor Market for Workers in Low-Skilled Jobs, Nan L. Maxwell (2006) 193 pp. W.E. Upjohn Institute, <http://www.upjohninst.org/>. Hardcover, \$40; softcover, \$20.

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

Duty of Fair Representation Rulings

Union's failure to file unfair practice charge did not breach DFR: SEIU.

(*Burnett v. SEIU Loc. 1000, CSEA*, No. 1914-D, 6-27-07; 1 pp. + 9 pp. R.A. dec. By Chairman Duncan, with Members Shek and Neuwald.)

Holding: The union did not breach its duty of fair representation by failing to file an unfair practice charge on the charging party's behalf or by failing to inform him of the status of his grievance arbitration request.

Case summary: The charging party is a member of bargaining unit 15, which is exclusively represented by Local 1000. In July 2006, the charging party filed a grievance against the state employer. In August, after the grievance was denied, the charging party requested that the union appeal the grievance to arbitration. The union central coordinator stated that he did not see any contract violations by the employer, but nevertheless, forwarded the arbitration request to the union's chief legal counsel for review.

The charging party discussed his arbitration request with the union in September; at that point, the union coordinator stated he would not convey anything in writing regarding the arbitration request. On January 18, 2007, the union advised the charging party that it would not pursue his grievance

to arbitration. This denial was never received in written form.

According to the charge, on September 6, 2006, the charging party submitted a completed unfair practice charge to the union for review as required by union procedure. The charge was related to the grievance. The charging party alleged that the union failed to file the charge with PERB by the October deadline. The charging party further asserted that the union assured him that the matter was "being taken care of," but failed to present anything in writing regarding its actions in reviewing the charge, and needlessly let time elapse until the filing deadline. Based on this behavior, the charging party argued that the union violated its duty of fair representation guaranteed by Dills Act Sec. 3515.7(g), Sec. 3519.5(b), and *California State Employees Assn. (Norgrad)* (1984) Dec. No. 451-S, 64 CPER 61.

The R.A. explained that the duty of fair representation imposed on the exclusive representative extends to grievance handling. However, in order for the duty to be violated, the charging party must show that the union conduct was arbitrary, discriminatory, or in bad faith, the R.A. explained. In *Coalition of University Employees (Buxton)* (2003) Dec. No. 1517-H, 161 CPER 94, the board held mere negligence may constitute arbitrary conduct in cases where the individual interest at stake is strong and the union's failure to

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

perform a ministerial act completely extinguishes the employee's right to pursue his claim. However, the R.A. emphasized, as a general rule, PERB will dismiss charges that the duty of fair representation has been breached by refusal to pursue a grievance if a union has done an honest, reasonable determination that the grievance lacks merit.

The R.A. held that the union did not breach the duty of fair representation by failing to update the charging party on the status of his arbitration for four months. In *Coalition of University Employees*, the union failed to inform an employee of the employer's response to her grievance for 10 months, and the board found that the union's conduct only approached the standard for arbitrariness, but did not meet it, the R.A. analogized.

The R.A. found that the charging party understood it can take over six months before a hearing is held to decide the merits of an arbitration request. Furthermore, the R.A. found no evidence to suggest that the union had failed to follow its procedure to determine whether to submit the grievance to arbitration. Citing *Service Employees International Union, Loc. 250 (Hessong)* (2004) Dec. No. 1693-M, 171 CPER 98, the R.A. affirmed that a disagreement as to the merits of a grievance between the union representative and the grievant does not breach the duty. Thus, the R.A. found that the charging party's assertion that the union coordinator disagreed with him regarding the strength of the evidence supporting the grievance did not establish a breach of the duty of fair representation.

The R.A. further found that the union did not have a duty to file an unfair practice charge on the charging party's behalf. Citing *California State Employees Assn. (Paris)* (1989) Dec. No. 733-S, 81 CPER 83, the R.A. explained that an exclusive representative does not owe a duty of fair representation to unit members in a forum over which the union does not exclusively control the means to a particular remedy. Since PERB is a forum outside the contract, the R.A. continued, the union did not have to file the unfair practice charge with the board.

Finally, the R.A. addressed the charging party's allegation that the union committed an unfair practice in violation of Sec. 3519.5(a) by causing or attempting to cause the state

to violate the act. The R.A. explained that in *State of California (Department of Corrections)* (1993) Dec. No. 972-S, 99 CPER 46, the board held that an individual employee does not have standing to pursue violations of the rights of an employee organization. The R.A. also noted that in *United Teachers of Los Angeles (Hopper)* (2001) Dec. No. 1441, 149 CPER 68, the board ruled that an individual employee does not have standing to challenge the violation of another employee's rights. By the same token, an individual employee lacks standing to allege that an employee organization violated the rights of an employer.

The board found the R.A.'s dismissal free of prejudicial error and adopted it as the decision of a board itself.

No DFR breach for failing to represent charging party in unemployment hearing or advising him to resign: Union of American Physicians & Dentists.

(*Menaster v. Union of American Physicians & Dentists*, No. 1918-D, 8-9-07; 1 pp. + 12 pp. R.A. dec. By Chairman Duncan with Members Shek and McKeag.)

Holding: The union did not breach its duty of fair representation by failing to represent the charging party at an unemployment hearing because the duty does not exist in extra-contractual proceedings. Advising the charging party to resign instead of filing grievances alleging retaliatory conduct by the employer was not without rational basis or honest judgment.

Case summary: The charging party filed an unfair practice charge against the union alleging that it breached its duty of fair representation. According to the record, the charging party was hired by the State of California, Department of Social Services, as a psychiatrist on October 31, 2005. Within the first year of his employment, the department placed the charging party on probation and then on administrative leave, at which point he resigned.

In his charge, the charging party alleged that the department violated his rights by mischaracterizing working conditions during the hiring process, denying reasonable working accommodations, retaliating against him for whistleblowing, denying rights to progressive discipline and due process, and violating his rights to freedom of speech and

assembly. The R.A. explained that a union is not responsible for the actions of an employer and dismissed allegations regarding employer misconduct because the charge was filed against the union, not the employer.

The charging party alleged that the union violated the duty of fair representation by warning him not to assert his rights or engage in protected activity, offering no representation during his unemployment appeals hearing, failing to oppose department declarations, failing to file grievances to oppose discipline, failing to inform him of his rights, failing to keep any documentation of meetings with the employer, and failing to respond to his inquiries.

The R.A. began by explaining that PERB's jurisdiction is limited, and does not extend to enforcement of the Americans with Disabilities Act, the U.S. Constitution, the Whistleblower Protection and Reporting Act, or improper government activity, sexual harassment, defamation, or the unemployment insurance process. The R.A. dismissed all allegations made by the charging party regarding the violations of statutes outside PERB's jurisdiction.

Next, citing Dills Act Sec. 3514.5(a)(1), which prohibits PERB from issuing a complaint with respect to any charge based on an alleged unfair practice more than six months prior to the filing of the charge, the R.A. dismissed the charging party's allegations of misconduct that occurred before January 19, 2006.

The charging party alleged that the union violated Dills Act Secs. 3515 and 3516 by failing to help him gain reinstatement into his former position. The R.A. explained that Sec. 3515 sets forth employee organizational rights, maintenance of memberships, fair share fees, and self representation rights, and Sec. 3516 defines the scope of representation, the matters over which the exclusive representative and employer must negotiate. The R.A. found that the charge did not provide any facts indicating that the union violated either of these sections.

The charging party asserted that the union violated Dills Act Sec. 3519.5 when it retaliated against him for participation in protected activities by failing to respond to the department's refusal to reinstate him. Citing *Novato Unified*

School Dist. (1982) No. 210, 54 CPER 43, the R.A. explained that in order to demonstrate a violation of Sec. 3519.5(a), the charging party must show that the employee exercised rights under the act, the exclusive representative had knowledge of the exercise of those rights, and the exclusive representative imposed or threatened to impose reprisals, discriminated, interfered with, or coerced the employee because of the exercise of those rights. The R.A. emphasized that the refusal to rehire the charging party was conduct attributable to the department, not the union, and that no facts demonstrated that the union had an obligation to help the charging party get reinstated. Thus, the R.A. found that the charge did not establish that the union's inaction was adverse or retaliatory.

The charging party also argued that the union violated Sec. 3519.5 by submitting a declaration regarding the charging party at the unemployment appeals board hearing, which enabled the department to violate the act. The R.A. explained that Sec. 3519.5(a) provides that it is unlawful for a union to cause or attempt to cause the state to violate Sec. 3519. The R.A. found that the state did not violate Sec. 3519 because it did not unlawfully retaliate against the charging party by defending its position that he was not entitled to receive unemployment insurance benefits because he had resigned. Thus, the union's submission of its declaration did not cause the state to commit any violations of the act. The R.A. dismissed this charge.

Next, the charging party alleged that the union violated its duty to negotiate in good faith under Dills Act Sec. 3519.5(c). However, citing *Alum Rock Education Assn., CTA/NA (Kirkaldue)* (1995) No. 1118, 115 CPER 65, the R.A. clarified that the duty to negotiate in good faith is owed to the department, not to unit members. Thus, the R.A. dismissed this allegation.

According to the allegations, when the charging party sought unemployment insurance benefits, the department opposed his application. The union then refused to represent the charging party, and claimed that it did not provide representation services for unemployment hearings. The charging party alleged that the union's refusal to represent



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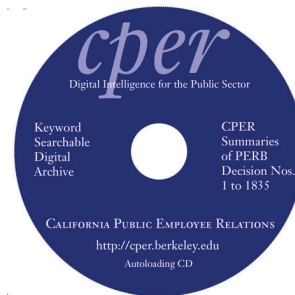
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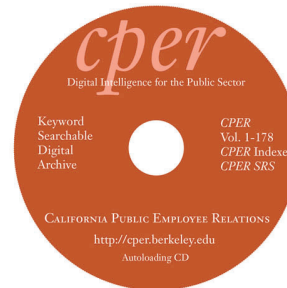
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him at these hearings violated of his right to fair representation guaranteed by Dills Act Sec. 3515.7(g) and Sec. 3519.5(b) under *California State Employees Assn. (Norgard)* (1984) No. 451-S, 64 CPER 43.

The R.A. noted that the duty of fair representation extends to grievance handling. However, citing *California Union of Safety Employees (John)* (1994) No. 1064-S, 110 CPER 63, and *California State Employees Assn. (Carrilo)* (1997) No. 1199-S, 124 CPER 81, the R.A. explained that the duty of fair representation does not attach to an exclusive representative in extra-contractual proceedings before agencies such as the Employment Development Department. Thus, the R.A. dismissed the charging party's allegation that the union failed to represent him in his hearing before EDD. Based on the same reasoning, the R.A. also dismissed the allegation that the union violated its duty of fair representation by failing to assist the charging party when the department ignored his request to be rehired. Observing that the charging party chose to resign from his position, the R.A. held that the union's duty of representation does not extend to include post-resignation requests, as they are extra-contractual in nature.

The charging party alleged that the union stewards assured him that he would not be subject to discipline for his productivity problems, but the department used productivity as a basis for rejecting him on probation. The charging party alleged that the union violated its duty of fair representation by making those assurances and failing to file a grievance regarding these productivity expectations.

Citing *United Teachers of Los Angeles (Collins)* (1982) No. 258, 56 CPER 76, the R.A. explained that in order to establish a violation of the duty of fair representation or Sec. 3515.7(g), the charging party must show that the union's conduct was arbitrary, discriminatory, or in bad faith. Citing *Reed District Teachers Assn., CTA/NEA (Reyes)* (1983) No. 332, 59 CPER 85, the R.A. further explained that in order to demonstrate arbitrary conduct violating the duty of fair representation, there must be an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment.

The R.A. observed that on January 19, 2006, a union steward explained to the charging party that his supervisor was expressing concerns about his productivity because that was the only way the supervisor could concretely complain about the charging party's socializing. The steward told the charging party that while his supervisor would not hold his productivity against him, due to the supervisor's awareness of the charging party's mental impairment, he should be more careful about his socializing. Based on the record, the R.A. found that the evidence did not demonstrate that the union engaged in arbitrary, discriminatory, or bad faith conduct. Instead, the R.A. believed the facts indicated that the union steward made a rational determination that the department's concerns regarding the charging party's productivity were a peripheral issue only brought to the forefront by the department's other concerns with his behavior. The R.A. concluded that the charge did not demonstrate that the union's failure to file a grievance, and the union's advice to concentrate on correcting those issues that it believed were more likely to affect the charging party's probationary report, were devoid of honest judgment. Thus, the R.A. dismissed these allegations.

The charging party alleged that on February 10, 2006, the union told him that his supervisor denied his request to have a union representative present during an investigatory meeting, but informed him that without a representative, he had the right to refuse to answer questions. The charging party contended that the union breached its duty by failing to file a grievance about his supervisor's failure to allow him union representation. The R.A. dismissed this allegation because the charge did not demonstrate that the collective bargaining agreement included a provision regarding the right to union representation during an investigatory meeting, making the filing of a grievance on this point groundless.

Finally, the charging party alleged that the union violated the duty of fair representation when the union steward advised him to resign. Instead, he asserted, the steward should have filed complaints or grievances regarding the state's conduct. More specifically, the charging party argued that the union should have filed grievances regarding the department's

failure to use progressive discipline and its retaliatory conduct. The R.A. noted that the charging party was a probationary employee and that his unit manager had received complaints regarding his behavior immediately after he was hired. Also, the unit manager spoke to the charging party about the recurrent complaints on several occasions, the R.A. observed. Under these circumstances, the R.A. found that the charge did not demonstrate that the union steward's advice to resign rather than face termination was without rational basis or devoid of honest judgment; nor was the decision not to file grievances irrational.

The board found the R.A.'s partial dismissal of the charge free of prejudicial error and adopted it as the decision of the board itself.

EERA Cases

Unfair Practice Rulings

Belated discovery of 'concerns' about dismissal letter does not excuse late filing: San Leandro USD.

(*Mandell v. San Leandro Unified School Dist.*, No. Ad-366, 7-10-07; 2 pp. By Member McKeag, with Members Shek and Neuwald.)

Holding: The charging party's discovery of language in an R.A.'s dismissal letter that caused him "serious concern" does not warrant a finding of good cause to excuse the untimely filing of his appeal.

Case summary: The charging party was served with an R.A.'s dismissal of his unfair practice charge. The charging party filed his appeal 10 days after the filing deadline, and the board's appeals assistant determined that the appeal was untimely filed.

In support of his appeal of this ruling, the charging party stated that he "just discovered," after the deadline, certain language in the R.A.'s dismissal letter that caused him "serious concern." PERB Reg. 32136 provides, "A late filing may be excused at the discretion of the board for good cause only." The board asserted that, at a minimum, parties to an unfair practice charge have a duty to carefully review all

documents filed in connection with their case. The board held that the charging party's late discovery of statements contained in the dismissal letter was insufficient to warrant a finding of good cause in this matter. Thus, the board concluded it would not excuse the late filing of the charging party's appeal of the dismissal and declined to accept the document and hear the appeal.

Threat of reprisals for on-campus association meeting constitutes unlawful interference: Desert CCD.

(*CSEA and its Chap. 407 v. Desert Community College Dist.*), No. 1921, 8-10-07; 16 pp. By Member Shek, with Chairman Duncan and Member McKeag.)

Holding: The district impermissibly interfered with the employees' and association's rights by threatening discipline or criminal prosecution for participants at a members-only on-campus meeting where an upcoming board of trustees election was to be discussed. Education Code Sec. 7054 prohibits the use of district funds, services, supplies, or equipment for the purpose of urging the support or defeat of any ballot measure or candidate, but does not apply to the use of district premises.

Case summary: The case came before PERB on exceptions by the district to an administrative law judge's proposed decision. The ALJ held that the district violated EERA when it directed the association to revise an agenda item for a union meeting entitled "COD (College of the Desert) Board of Trustees Election" and threatened employees with discipline or criminal prosecution for discussing the election or other political matters at the meeting. The ALJ found that this conduct interfered with protected employee rights and denied employee organization rights in violation of EERA Secs. 3543.5(a) and (b).

The ALJ further held that Ed. Code Sec. 7054 did not prohibit the association from discussing political matters at its regular meeting. Additionally, the ALJ found that the district's emails threatening employees with reprisals for engaging in political discussions at the meeting constituted unlawful threats of reprisal, although that violation was not alleged in the complaint.

The board affirmed the ALJ's findings that the district violated Sec. 3543.5(a) and (b), and that the district's emails contained unlawful threats of reprisal, but it upheld the violations based on its own rationale.

According to the record, on September 22, 2003, the association placed in unit employee mailboxes a notice of an upcoming association membership meeting to be held on September 25 at the district's college campus. The agenda included an item titled, "COD Board of Trustees Elections."

Upon discovering the agenda, the district vice president contacted the association chapter president and asked for an explanation of the election agenda item, inquiring whether the association would be endorsing any board of trustees candidates at the meeting. The chapter president said she did not think the question was appropriate and that politics would not necessarily be discussed, although the location of the election would be specified. The vice president insisted the agenda be changed. The chapter president also testified that the district vice president may have said the police might be called to stop the meeting, but the vice president emphatically denied mentioning the police, and the ALJ credited the vice president's denial.

Subsequently, the district's vice president contacted the association's labor representative and asked if he would be bringing a board of trustees candidate to the meeting. According to the vice president, the representative said that he might or might not, depending on how the meeting went. The vice president also asked the representative for clarification of the agenda item in writing. On September 23, in an email message, the vice president advised association officers that he was extremely concerned about the agenda item. He insisted that it be revised immediately because the discussion spurred by the item would qualify as political activity on school property and time, and with school equipment and, thereby, would violate Ed. Code Secs. 7050 through 7054.

On September 24, the association's labor representative responded to the email, citing relevant statutory and case law. He noted that the meeting would be open only to unit members who were on released time, and not on work

time, and concluded that the association was permitted to use district facilities for its meeting and could lawfully discuss political issues and candidates.

Notwithstanding the representative's assurances, association officers testified that after receiving the district vice president's emails, they were fearful that if they attended the meeting they risked losing their jobs or being arrested. The officers also testified that some unit members told them they would not attend because of those fears. One unit member testified that her supervisor warned a group of employees to be careful because the meeting was against the law and that they could lose their jobs.

Just hours before the chapter meeting was to begin, the district vice president sent another email to association officers, unit members, and district supervisors, reiterating that discussion of the agenda item would violate the Education Code. The email warned that those not complying with the law would be subject to disciplinary action and possible criminal prosecution pursuant to Sec. 7054(c).

The association meeting went forward without change to the agenda. However, one association officer stationed himself at the back of the room and kept an eye on the door in case police arrived. Approximately 27 members and officers attended, fewer than the 35 or more who usually attend the first meeting after summer break. The police were not called.

Before the ALJ, the association contended that it has the legal right to discuss political matters in general on campus, and that before the current situation, had exercised this right without facing threats from the district.

The district defended its conduct based on Ed. Code Sec. 7054, arguing that the section prohibits it from allowing a district meeting room to be used for political activity. The district vice president claimed he never got a clear answer as to whether the association planned to endorse school board candidates at the meeting, which is why he sent the warning emails. The vice president denied threatening to call the police, and argued that if employees were spreading such rumors, they were responsible for creating a climate of fear.

The board saw the issue as whether the district vice president's emails seeking to remove the election agenda item from a members-only union meeting held on district premises constituted unlawful interference with the protected rights of the employees and the association. In its exceptions to the proposed decision, the district argued that the ALJ erred in finding that the agenda item was protected activity under EERA, and by concluding that the prohibitions set out in Sec. 7054 did not apply.

The board explained that union meetings on community college district property are protected under EERA Secs. 3543(a) and 3543.1. In *Compton Unified School Dist.* (2003) No. 1518, 161 CPER 88, the board held that an employee's attendance at a union meeting is a protected activity.

The district alleged that employees do not have a protected right under EERA to urge the support or defeat of board of trustees candidates at a union meeting on school premises. It argued that the act only protects activities within the scope of representation, which is defined in Sec. 3543.2(a) to include matters relating to wages, hours, and other terms and conditions of employment.

Citing *Richmond Unified School Dist./Simi Valley Unified School Dist.* (1979) No. 99, 43 CPER 88, the board explained that school employer regulation under Sec. 3543.1(b) should be narrowly drawn to cover the time, place, and manner of the activity, without impinging on the content unless it presents a substantial threat to school operations. In that case, the board held that the school districts' rules prohibiting the distribution of certain types of materials through the schools' internal mail systems unlawfully interfered with the employee organizations' access rights under Sec. 3543.1(b). The board noted that it subsequently has substantially limited an employer's ability to censor or impose prior restraints on the content of union communications. Applying the *Richmond/Simi Valley* test to the case here, the board found the record contained no evidence that the inclusion of the election agenda item would present a substantial threat to school operations. Therefore, the board concluded, under *Richmond/Simi Valley*, the district violated Sec. 3543.1(b) when it attempted to restrict the content of the union meeting agenda.

The board agreed with the district's contention that the right of access conveyed by Sec. 3543.1(b) is limited to matters that concern employer-employee relations, but found that the requirement was met in this case because the meeting was scheduled to discuss matters indisputably related to employer-employee relations. While the board cautioned in a footnote that not all political speech is necessarily protected by EERA, it found no evidence that the disputed agenda item did not concern employer-employee relations. Therefore, the board concluded that the association meeting and its agenda were protected under Sec. 3543.1(b).

The board held that the district's actions tended to or did result in some harm to protected employee rights. By asking the association to revise the agenda, and implying that discussing the board of trustees election during the union meeting could subject employees to disciplinary action and possible criminal prosecution, the district created a chilling effect on the exercise of protected rights. As a result of the district's preemptive measures, the board found that certain union members who otherwise would have attended the union meeting felt intimidated and did not attend. Additionally, the board noted that certain members who attended the meeting curtailed their comments regarding the election.

Citing *Carlsbad Unified School Dist.* (1979) No. 89, 41 CPER 49, the board explained that a charge of interference does not require that unlawful motive be established; it requires only that at least slight harm to employee rights results from the conduct. Citing *Novato Unified School Dist.* (1982) No. 210, 54 CPER 43, the board further explained that where the harm to employees' rights is slight, and the employer offers justification based on operational necessity, the competing interests of the employer and the rights of the employees will be balanced and the charge resolved accordingly.

Here, although the board found that the harm to employees' rights was slight, it could find no operational necessity for the district's actions. Therefore, the board held that the district impermissibly interfered with the employees' and association's rights under EERA Secs. 3543.5(a) and (b).

Finally, the board considered whether Ed. Code Sec. 7054 prohibited discussion of the election agenda item at the union meeting. The district alleged as an affirmative defense that its actions were compelled by Sec. 7054.

Section 7054(a) states, "No school district or community college district funds, services, supplies or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district." The board emphasized that the provision prohibits only the use of district funds, services, supplies, or equipment, but does not include mention of district property or premises. Because Sec. 7054 does not include the terms "premises" or "property," the board found that it did not apply to discussions during the September 25 meeting.

The district cited *San Diego Community College Dist.* (2001) No. 1467, 152 CPER 86, in which the board held that Sec. 7054 prohibited the use of the college mail system and photocopying services for distribution of political flyers. The board distinguished *San Diego Community College Dist.*, noting that in that case, the union used district services and equipment, not only its premises.

The board explained that the legislature authorized community college districts to regulate political activities on college premises under Ed. Code Sec. 7055. That section authorizes local agencies to establish rules regarding political activities on the premises of the local agency. Here, the board found the district had not enacted a rule under Sec. 7055. In support of its holding, the board cited *California Teachers Assn. v. Governing Board of San Diego Unified School Dist.* (1996) 45 Cal.App.4th 1383, 119 CPER 44, where the appellate court held that the school's ban on political advocacy could not be enforced in non-instructional settings because school employees have the right to express their political viewpoints to each other on school property. In *San Diego*, the court held that, under Sec. 7055, the school district could prohibit teachers from wearing political buttons in the classroom, but not in non-instructional settings. Thus, the board concluded that Sec. 7054 did not give the district

the right to impose a prior restraint on the association's discussions at its meeting.

Representation Rulings

Recognition ordered for adult education teachers unit: United Teachers of Santa Clara, CTA/NEA.

(*Santa Clara Unified School Dist. v. California Federation of Teachers; United Teachers of Santa Clara, CTA/NEA*, No. 1911, 6-26-07; 2 pp. + 17 pp. L.R.S. dec. By Member Neuwald, with Members McKeag and Shek.)

Holding: The union's petition for recognition of an adult education teachers unit was granted because the teachers had a separate and distinct community of interest, and the board upheld an interpretation of EERA that allowed teachers from the same district to be a part of different unions.

Case summary: In April 2005, the California Federation of Teachers filed a request with the Santa Clara Unified School District seeking to represent a unit of all hourly adult education instructors. The request was filed on behalf of a committee of adult education teachers who, after meeting with CFT and the United Teachers of Santa Clara, CTA/NEA, decided that they would benefit most from CFT representation.

The district filed a response to CFT's petition for recognition, arguing that the proposed unit was inappropriate. The district contended that employees classified as a "program specialist" in the adult teachers program were supervisory and managerial employees, and their inclusion in the same unit as certificated employees would be inappropriate. The district further argued that it was unable to grant recognition to the proposed unit because it already recognized UTSC as the exclusive representative of all certificated employees of the district.

In September, UTSC was informed that the district had asked PERB to determine the appropriate bargaining unit for the hourly adult education instructors. UTSC expressed an interest in representing the adult education teachers.

Following a formal hearing, a PERB labor relations specialist issued a proposed decision outlining his findings

of facts relevant to the appropriateness of the petitioned for unit. He observed that, unlike “regular” K-12 teachers, adult instructors teaching ESL and “traditional adult diploma” courses are not required to have teaching credentials, often work at sites where regular teachers do not work, and have little contact with school site personnel. The specialist noted, however, that a few regular teachers receive supplemental pay for teaching adult education classes.

Unlike regular classes, adult education classes are taught in four year-round, multi-week segments. Adult students, unlike school children, sign up for classes voluntarily and may drop a class at any time. Unlike regular students, adults are required to buy textbooks. Line supervisors of the adult education program are program specialists who evaluate each teacher and class, performing the duties that a school site principal or administrator would perform in a regular school setting. Adult education teachers are required to report to program specialists with any problems or absences due to illness.

Unlike regular teachers, adult education instructors are paid a district-established hourly rate that is not based on the collective bargaining agreement between UTSC and the district. Qualified adult education teachers have received medical coverage since 2004, but do not receive full dental, vision, and health benefits received by regular teachers. The specialist highlighted that adult education teachers do not sign employment contracts as do regular teachers, but do participate in the State Teachers Retirement System.

The relevant statutory criteria for unit determinations are included in Sec. 3545, “ (a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

(b) In all cases (1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least in-

cludes all of the classroom teachers employed by the public school employer.”

PERB interpreted this language in *Peralta Community College Dist.* (1978) Dec. No. 77, 40 CPER 66. The board found a conflict between the “In each case” language of Sec. 3545(a) and the “In all cases” language of Sec. 3545(b). The board concluded that the legislature meant to minimize the dispersion of school district faculty into unnecessary negotiating units, while at the same time recognizing the possibility that critical negotiations-related differences between groups of teachers might compel unit separation.

In order to satisfy the legislative preference for the largest viable unit of teachers, the board in *Peralta* established a rebuttable presumption that all teachers were to be placed, prospectively, in a single unit, with the burden of proving the inappropriateness of a comprehensive unit placed on the party opposing it.

In this case, the district argued that because in *Peralta* the board gave little weight to past practices, it misinterpreted Sec. 3545. Therefore, it urged, the *Peralta* decision should be rejected and the board should uphold the clear language of the statute.

The specialist noted that PERB has consistently upheld the underlying principle of *Peralta*. In *Long Beach Community College Dist.* (1989) Dec. No. 765, 82X CPER 19, for example, a residual group of part-time faculty employees excluded from existing units filed a representation petition for a separate unit. In that case, there was no mechanism for adding to an existing unit if the exclusive representative chose not to file a unit modification petition. In *Long Beach*, the board found that it would not effectuate the purposes of the statute to expand the unit by forcing the union to represent employees against its will. Instead, the board gave great weight to the fact that denial of the petition for a separate unit would effectively preclude the part-time faculty from exercising their statutory rights.

The specialist also cited *Santa Clarita Community College District* (2003) Dec. 1506, 158 CPER 85, where the board considered an attempt by the employer and the incumbent union to add part-time faculty to an existing unit of full-time

faculty while a rival union was gathering employee support. The board concluded that under EERA Secs. 3543 and 3543.5 and National Labor Relations Board accretion cases, in order for an employer to voluntarily extend exclusive representative status to unrepresented employees, there must be evidence that the unrepresented employees support such representation.

Here, despite the district's urging to reverse well-established precedent, the specialist found no wavering in the board's disinclination to disturb units that are stable and have been in existence for a lengthy period of time. He stressed that at no point since 1981 has either the district or UTSC modified the recognition article of their written agreements or attempted to modify the unit through PERB procedures. Nor has UTSC ever challenged CFT's petition with evidence of employee preference for UTSC, which is required for unit modifications. Thus, the specialist rejected the argument that the district is precluded from recognizing another employee organization that has adequately petitioned for a group of unrepresented employees.

The specialist observed that PERB has found units of adult education teachers to be appropriate units standing alone. In *San Jose Unified School Dist.* (1978) Dec. 90, 41 CPER 60, the board upheld the finding that adult education teachers were distinct and should be in a separate unit.

The specialist also noted that at the time the initial petition for recognition was submitted in 1976, there were no adult education teachers working for the district. Since 1981, when adult education teachers were hired, they have been without representation. Testimony of adult education teachers revealed that there was and continues to be little contact between regular teachers and their adult education counterparts. The two groups do not usually interact in development of course work, faculty meetings, social events, training courses, or even in the parking lot. The specialist emphasized the unique features of adult education teachers with regard to work location, work hours, supervision, school year, students, pay rates and benefits, lack of employment contract, credentialing requirements, and funding sources. Based on these factors, the specialist concluded that

there is a separate community of interest among adult education teachers.

Balanced against these similarities the specialist considered the impact of a separate unit on the efficiency of the district's operations. He observed that the district did not assert that the requirements of meeting with an additional employee organization would be burdensome.

He concluded that CFT had met its burden of demonstrating that a unit of adult education teachers is an appropriate unit and ordered the district to recognize CFT as the exclusive representative under PERB Reg. 33480 and Gov. Code Sec. 3455.1, so long as it excluded all management, supervisory, confidential, program specialists, and other certified employees.

The board found the specialist's proposed decision free of prejudicial error and adopted it as the decision of the board itself.

HEERA Cases

Unfair Practice Rulings

University's failure to recognize union not unfair practice: U.C. Regents.

(*State Employees Trades Council United v. Regents of the University of California*, No. 1912-H, 6-26-07; 2 pp. + 21 pp. R.A. dec. By Member Neuwald, with Chairman Duncan and Member McKeag.)

Holding: The university's failure to recognize the charging party as the exclusive representative of a skilled crafts unit did not violate HEERA, and the allegation concerning the mistaken deduction of union dues from employees in the proposed unit was untimely filed.

Case summary: The charging party, the State Employees Trades Council United, alleged that the Regents of the University of California violated HEERA by deducting union dues from three skilled crafts unit employees and recognizing IUOE Local 39 as the exclusive representative of the skilled crafts unit at the U.C. Merced campus.

U.C. Merced opened in August 2005. That September, three employees were hired by U.C. Merced to perform maintenance duties as physical plant mechanics. UCLA ran the payroll operation at the Merced campus and, when these employees were hired, UCLA payroll assigned an incorrect bargaining unit code for them. As a result, they were coded as members of the UCLA skilled crafts unit. Each of the three new hires was notified that their position was in the UCLA skilled crafts unit, which, at the time, was exclusively represented by IUOE Local 501. Bargaining unit members who were not members of Local 501 were required to pay an agency fee. Due to the incorrect payroll codes, an agency fee was deducted from the three employees' paychecks and remitted to Local 501.

In September, SECT-United filed a decertification petition seeking to represent the UCLA skilled crafts unit. An election was held, and in January 2006, PERB certified SETC as the exclusive representative of the UCLA skilled crafts unit. Agency fee deductions for the three employees ceased.

In July 2006, Stationary Engineers, Local 39, petitioned for recognition of the skilled crafts employees at U.C. Merced, indicating there would be 12 employees in the proposed unit. No interventions were filed, and PERB determined that Local 39 had demonstrated majority support. The university granted voluntary recognition to Local 39 in September 2006.

When it was discovered that the three employees had been incorrectly entered into the payroll system, the labor relations director ordered that the payroll records be corrected regarding the employees' representation unit, but left unresolved the issue of a refund for the improperly deducted dues.

In October, U.C. Merced skilled crafts employees signed interest cards with SETC. Subsequently, SETC filed an unfair practice charge with PERB, alleging that the university violated HEERA by deducting the union dues from the three employees and recognizing Stationary Engineers, Local 39, as the exclusive representative of the skilled crafts unit. SETC also filed a request with the board for recognition for a unit of skilled trade employees at U.C. Merced.

In November, the board denied the union's petition because the employees petitioned for by SETC were already represented by Local 39. The board also dismissed SETC's decertification petition based on Gov. Code Sec. 3577(b)(2), as another union, Local 39, had been certified as the exclusive representative within 12 months of the filing of the petition.

The three employees were next issued a \$1,000 signing bonus that should have been paid only to UCLA skilled crafts employees. In December, they were informed by the university that they would have to return the bonus. In its amended charge, SETC alleged that payment of the bonus to the three employees constituted interference with their rights.

The charging party alleged that by improperly deducting IUOE, Local 501, dues from the three mechanics' compensation, the employer intentionally interfered with their rights to form and join the union of their choice. The charge also proposed that these employees would have chosen SETC as their representative if Local 501 dues had not been improperly deducted.

The R.A. explained that the test for whether an employer has interfered with the rights of employees under the act does not require that unlawful motive be established; instead only slight harm to employee rights must result from the conduct. HEERA Sec. 3565.2(a) prohibits the board from issuing a complaint with respect to any charge based on an alleged unfair practice occurring more than six months prior to the filing of the charge. The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge.

The R.A. found that the improper deduction of agency fees could reasonably tend to interfere with an employee's right to join a union of his or her own choosing. However, the R.A. agreed with the university that the charge was untimely because the last deduction occurred in March 2006. While the employees did not realize the deductions were being made until much later, the R.A. reasoned that they received constructive notice of the dues deductions both in the September 2005 notice from UCLA payroll and in their

monthly pay-stubs for each month in which deductions were made. Thus, the R.A. dismissed the allegation as untimely.

The R.A. also dismissed the charging party's claim that at a meeting convened by the university for the purpose of determining a repayment method of the mistakenly awarded \$1,000 bonus, the employees were denied union representation. As the R.A. noted, one of the mechanics was informed of his right to have a Stationary Engineers, Local 39, representative present prior to the meeting. He also observed that the university was willing to postpone the meeting to arrange for union representation. And, the employees were accompanied to the meeting by a labor consultant. Thus, while the university refused to recognize SETC as the employees' exclusive representative, it nevertheless permitted the employees to bring a representative of their choosing to the meeting to discuss the \$1,000 bonus. Accordingly, the R.A. held that the charging party failed to establish interference with employees' rights to representation.

The charging party also alleged that the act was violated by inappropriate comments made by university supervisors. The first comment was the superintendent's remark that the employees were represented by the same union as the secretaries. Another cited comment made by a different superintendent informed the employees that they "messed up things" by bringing in a union, warning them, "this union thing means no more cross trades." A third remark concerned a superintendent's comment that they were "already represented by a union," their "vote for the Local 39 [was] bogus," and they could no longer unionize.

HEERA Sec. 3571.3 states that an employer's expression, verbal or otherwise, will not constitute an unfair labor practice unless the speech contains a threat of reprisal, force, or promise of benefit, or if an employer expresses a preference for one employee organization over another. In *Los Angeles Unified School Dist.* (1988) Dec. No. 659, 76X CPER 17, the board held that employer statements are to be viewed in their overall context to determine if they have a violative, coercive meaning. Citing *Alhambra City and High School Dist.* (1986) Dec. No. 560, 68 CPER 73, the R.A. explained that the board has placed considerable weight on the accuracy of

the content of the speech in determining whether the communication constitutes an unfair practice. Thus, where employer speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the board will not find the speech unlawful.

The R.A. noted that some of the statements made by the superintendents were inaccurate. However, she found the superintendent's statement, "I think you are already represented...you might want to look into it," was a non-coercive opinion. The R.A. held that the other communication proclaiming the employees' earlier vote was "bogus" and telling the employees that they could no longer unionize, was based on faulty information, and factually incorrect, but did not contain a threat and was not coercive. The superintendents' comments, the R.A. emphasized, were replies to the employees' inquires or follow-up questions from earlier conversations. The R.A. concluded it was unclear how the comments inferred with employees' choice of representative.

Finally, the R.A. rejected the assertion that the bargaining unit members would have chosen to be represented by SETC over Local 39 but for the superintendents' conduct and statements. The R.A. found that the three employees signed representation cards for Local 39 before there was any confusion over whether they were already represented by Local 501 and without any demonstrated fault on the part of the university. The R.A. held that because SETC failed to file an intervention petition during the proper window period, the university was bound by HEERA to grant voluntary recognition to the unopposed Local 39.

The board adopted the R.A.'s dismissal of the charge as the decision of the board itself.

MMBA Cases

Unfair Practice Rulings

Transit district not subject to MMBA: San Diego Trolley, Inc.

(International Brotherhood of Electrical Workers, Loc. Union 465 v. San Diego Trolley, Inc., No. 1909-M, 6-18-07; 2 pp. + 9

pp. R.A. dec. By Chairman Duncan, with Members Shek and McKeag.)

Holding: The board has no jurisdiction over the union's unfair practice charge because the transit district operates under a separate statutory scheme and is not subject to the MMBA.

Case summary: The union filed an unfair practice charge alleging that San Diego Trolley, Inc. violated the MMBA by dealing directly with, and discriminating against, employees. According to the allegations, on August 21, 2006, the trolley company bargained directly with several of its employees, telling them that if they came to work on that day, one unpaid suspension day would be removed from each of their records. The union was not informed of the offer and no bargaining with representatives took place. Prior to August 21, the union had filed grievances seeking the elimination and reduction of disciplinary suspensions for certain employees. To the union's knowledge, none of those employees were offered a reduction in suspension if they came to work on August 21.

The union alleged that the employer dealt directly with employees and thereby violated the MMBA. It also asserted that by offering reductions only to those employees who did not file grievances, the employer engaged in discrimination. The union requested that the employer cease its allegedly unlawful conduct, inform all employees about the action, and make all employees whole by remunerating a suspension day to every employee who had one pending as of August 21 and to all employees who had a grievance pending regarding a disciplinary suspension.

The R.A. noted that San Diego Trolley Inc. is a wholly owned subsidiary of the San Diego Metropolitan Transit System and governed by the Metropolitan Transit Development Board. A transit district, like SDMTS, that has its own statutorily prescribed scheme of administering its employer-employee relations is not subject to the MMBA and PERB lacks jurisdiction over such districts, the R.A. explained.

Local Union 465 argued that PERB has jurisdiction, citing MMBA Sec. 3500(a), a provision broad enough in its scope to include local agencies such as SDMTS. The union

further contended that Sec. 3501(c) extends MMBA coverage to every public agency except for school districts. The R.A. noted that the labor relations provisions governing the MTDB are found in the agency's enabling statutes, at Public Utilities Code Secs. 120500 et seq. Relying on *Golden Empire Transit Dist.* (2004) Dec. No. 1704-M, 172 CPER 96, the union argued that because the MTDB's enabling statute did not provide for the filing of unfair practices charges, PERB had jurisdiction. In *Golden Empire*, the board determined it had jurisdiction on that basis and found that the district violated the MMBA.

The R.A. rejected the union's argument, noting that in *Golden Empire* the issue of jurisdiction was not raised or analyzed. The R.A. explained that California public transit districts are subject to labor relations provisions found in the PUC enabling statutes. Some transit districts are subject to the MMBA while others are not. The R.A. also cited *California Public Sector Labor Relations*, Sec. 2.13, which lists the MTDB as a district not covered by the MMBA.

The R.A. emphasized that in *Public Transportation Services Corp.* (2004) Dec. No. 1637-M, 167 CPER 102, PERB observed that the courts have held that "the MMBA was never intended to include in its coverage transit districts with their own statutory framework for administering labor relations." In that case, the R.A. explained, the board dismissed the union's unfair practice charge, finding it did not have jurisdiction over the employer, Public Transportation Services Corporation, a subsidiary of the Los Angeles County Metropolitan Transit Authority. The R.A. noted that in *Public Transportation*, the board found that the PTSC was not a public agency subject to the MMBA, but instead a transit district subject to the labor relations provisions of PUC Sec. 30750.

The R.A. concluded that, like in *Public Transportation*, the governing labor relations statute here was not the MMBA, but the PUC, and thus PERB did not have jurisdiction. The board found the R.A.'s dismissal free of prejudicial error and adopted it as the decision of the board itself.

Unilateral implementation of mandatory overtime program authorized by contract: City of Ventura.

(*Ventura County Professional Peace Officers Assn. v. City of Ventura*, No. 1910-M, 6-21-07; 13 pp. dec. By Chairman Duncan, with Members Shek and McKeag.)

Holding: The association's unfair practice charge was dismissed in part because the contract between it and the county authorized the county to unilaterally implement a mandatory overtime program to meet public necessity.

Case summary: According to the record, the charging party, the Ventura County Professional Peace Officers Association, is the exclusive representative of correction service officers working at the county's chronically understaffed juvenile detention facilities. On April 15, 2005, the county issued these employees a memo warning them that they might have to work overtime in the future. The association advised the county that their contract requires that the parties meet and confer before there are any changes in working conditions, such as mandatory overtime.

In response, the county advised the association that the right to order mandatory overtime is not subject to the meet and confer requirement under the existing agreement between the parties. In support of its position, the county cited article 10, Sec. 1001, of the contract, which in relevant part states, "[A] department head may require any employee in his department to temporarily perform service in excess of the normal schedule when public necessity or convenience so requires." In May, the county issued another memo to its employees stating that due to staffing shortages, the mandatory overtime plan would be implemented. From May to December 2005, employees worked 8 overtime hours for every two-week, 80-hour work period.

On May 25, 2005, the association filed a written grievance with the county, alleging that the mandatory overtime program violated the contract. The grievance was filed in the name of the association's president and its affected bargaining unit members. The county argued that only individual employees or a group of individual employees could file a grievance under Sec. 3001 of the contract; it stressed that the agreement does not provide for union grievances or

class action grievances filed on behalf of similarly situated employees. Thereafter, the association filed its unfair practice charge with PERB, alleging that the county violated the MMBA by implementing a mandatory overtime program without giving the association the opportunity to meet and confer and by refusing to process the grievance filed by the association.

A PERB administrative law judge found that the county's implementation of its mandatory overtime plan was a change in policy concerning a matter within the scope of representation. And, because the association was not given an opportunity to negotiate, under the "per se" test, the county violated the act. The ALJ agreed with the association that Sec. 1001 of the contract authorizes only individual schedule changes because the language of that provision is phrased in the singular. It permits the county to require "any employee" to work in excess of the normal schedule. The ALJ emphasized that the contract language is phrased as an exception to the norm of an 80-hour biweekly work schedule, and the county's argument would "allow the exception to swallow the norm."

The ALJ also relied on Sec. 1102 of the contract, which imposes on the county the obligation to avoid the necessity for overtime whenever possible and only authorizes forced overtime to meet emergency situations and seasonal peaks in workload. The ALJ reasoned that this clause would have little or no meaning if the county is allowed to impose a months-long generalized mandatory overtime program.

The ALJ also cited Sec. 1003, which requires the parties to meet and discuss problems with, or changes in, work schedules during the term of the contract. Based on this language, the ALJ concluded that the parties' obligation to "meet and discuss" such matters or requests demonstrated that neither party could be forced to agree and neither party could abrogate the existing MOU. Therefore, the ALJ concluded that the county's mandatory overtime plan unilaterally and unlawfully changed the policy established by the contract in violation of MMBA Sec. 3505. The ALJ also concluded that this unilateral action interfered with the right of employees

to be represented by the association and the association's right to represent them in violation of the act.

On appeal, the board explained that, for a unilateral change charge to prevail, the charging party must first establish that the employer breached or altered the parties' written agreement or established past practice. Rejecting the ALJ's determination, the board found that the parties' agreement authorized the county to mandate the temporary overtime program for a group of employees. The board asserted Sec. 1001 of the contract authorizes the county to temporarily assign overtime to "any employee," or group of employees, to satisfy public necessity or convenience. Additionally, the board supported its position by citing Sec. 1002A, which allows the county to "assign employees of [a department] to any other schedule which aids the [department's] ability to serve the public."

The board found that the county's overtime plan was a temporary change serving a demonstrated public necessity or convenience pursuant to the contract. The county's sole obligation, the board explained, was to meet and discuss problems with, or changes in, work schedules with the association as required by Sec. 1003 of the contract. The board held the county satisfied this duty when it met with the association on May 11. Therefore, the board dismissed the underlying charge as to the county's implementation of the mandatory overtime plan.

The board did, however, agree with the ALJ's conclusion that the association had a right to file a grievance with the county. The county argued that the reference in Sec. 3001 of the contract, which defines a grievance, in part, as "a dispute by an employee or group of employees," did not apply to the association because the association is an organization and not a group. The board rejected the county's argument, finding that the association is an organized group within the meaning of Sec. 3001.

In conclusion, the board dismissed the portion of the unfair practice charge dealing with the alleged unilateral implementation of the overtime program, but found that the county violated the MMBA by refusing to process the association's grievance and by unilaterally changing a nego-

tiated portion of the contract that addresses grievance processing.

Deceased employee's brother denied right to file for benefits: City of Beverly Hills.

(Tefasion v. City of Beverly Hills [Transportation Dept.], No. 1913-M, 6-26-07; 2 pp. + 7 pp. R.A. dec. By Member Shek, with Members Neuwald and McKeag.)

Holding: The unfair practice charge was dismissed because the charging party was not an employee, employer, or employee organizations under PERB Reg. 32602.

Case summary: The charging party alleged that the City of Beverly Hills Transportation Department violated the MMBA by denying him his deceased brother's benefits. The charging party's brother worked as a part-time parking permit assistant for the city for 16 years until his death in 2005. The deceased brother was in a part-time unit represented by the Municipal Employees Association. As a unit member, he was eligible for health insurance and retirement benefits through the Public Employees Retirement System. He also accumulated approximately 130 hours of leave benefits. The city's part-time employees may work at or near 40 hours in any particular week or weeks; hours worked over 40 a week are compensated at one-and-a-half times the hourly rate.

The charging party alleged that the city denied him his brother's leave of absence payments and other death benefits. Also, because his brother's pay records indicated that on certain weeks he had worked at, or beyond, the 40-hour mark, the charging party alleged that he was entitled to life insurance. To further support his life insurance allegation, the charging party relied on two pay records showing \$0.93 in deductions for survivor benefits.

The R.A. first noted that, under Sec. 6.A.2 of the MOU, leave hours remaining upon separation from city employment have no monetary value. The R.A. also observed that life insurance was not a benefit that had been negotiated for part-time employees and that it was the charging party's brother's designation as a part-time employee, not the actual hours he worked, that made him ineligible for life insurance.

The R.A. analyzed the charge as a unilateral change, but found that the charging party's brother did not exercise rights under the MMBA that could have triggered that action. Nor did the R.A. find that the city undertook either a unilateral change or discriminated against him in violation of Gov. Sec. 3506 or PERB Reg. 32603(a). Under PERB Reg. 32602(b), only employees, employee organizations, or employers have the right to file an unfair practice charge, the R.A. explained. Because the charging party was not an employee of the city and had yet to file any documentation that designated him as the executor of his brother's estate, the R.A. dismissed the charge.

The board adopted the R.A.'s dismissal of the charge as the decision of the board itself.

No bad faith bargaining when union fails to identify documentation needed for negotiations: County of Sierra.

(*Operating Engineers Loc. 3 v. County of Sierra*, No. 1915-M, 6-27-07; 3 pp. + 8 pp. R.A. dec. By Member McKeag, with Chairman Duncan and Member Shek.)

Holding: The union's failure to respond to the county's request for clarification regarding its documentation request precluded a finding of bad faith bargaining. The county did not violate the act by conditioning the negotiation of economic matters on the resolution of non-economic matters because both the economic and non-economic issues were within the scope of bargaining.

Case summary: In 2004, the union and the county engaged in negotiations over a successor agreement to their collective bargaining contract. Before negotiations began, the union requested certain information from the county in preparation for the bargaining sessions. The county advised the union that it was in the process of gathering the requested information, and would then turn over most of the data to the union. However, with regard to the union's request for copies of all independent service and employment contracts, the county counsel informed the union that he was unsure of what exactly the union was seeking, claiming the request was

too broad. Later, the county stated that individual copies of contracts could be provided upon request.

In April, when the county still had not turned over all the originally requested documents, the union filed a charge asserting that the county had violated the MMBA by only providing part of the information requested.

MMBA Sec. 3500(a) states, "It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes." Citing, *Stockton Unified School Dist.* (1980) Dec. No. 143, 48 CPER 61, the R.A. explained that the exclusive representative is entitled to all information that is necessary and relevant to the discharge of its duty of representation, and failure to provide such documents is a per se violation of the duty to bargain in good faith.

The R.A. noted that, according to the record, the county provided some information, sought clarification as to additional information requested, offered to make copies of items specifically requested, and made some of the information available through the county clerk's office. The R.A. found that the union had not availed itself of the information at the clerk's office, and emphasized that the union bore the burden of identifying the information requested. Based on these facts, the R.A. concluded that the union presented insufficient evidence to sustain a charge.

In October 2004, the county notified the union that it had prepared three drafts of the memorandum of understanding to reflect the agreement for the coming year and wanted to submit them to the county board of supervisors for their adoption. The county asked the union to look over the contracts for any misstatements, omissions, or other errors. After doing so, the union replied that it wanted to return to negotiations to discuss salaries, work related benefits, and the personnel code. The county removed the proposed MOU from the board of supervisor's agenda. The R.A. found that there was no unilaterally imposed contract because the proposed agreement was never implemented.

The union also alleged that the county failed to meet and confer in good faith by engaging in surface bargaining. At the outset of negotiations, the county presented the union

with its list of bargaining proposals. The union agreed to negotiate the county's proposals, but wanted to discuss the time-sensitive matter of health and welfare benefits first. The county was cooperative and these issues were resolved first, in September 2004. Thereafter, the union wished to continue negotiations regarding other issues. The union alleged that the county refused to negotiate a new contract, while the county contended that it offered to return to the table to negotiate over the personnel code and other issues.

The R.A. noted that subsequent to the filing of the unfair practice charge, the union and the county returned to negotiations. However, the union alleged that the county was still unwilling to discuss economic issues, such as wage increases, because the county had conditioned the negotiation of economic matters on the resolution of non-economic matters.

The R.A. explained that PERB previously has concluded that conditional bargaining may demonstrate evidence of bad faith. The R.A. cited *State of California (Department of Personnel Administration)* (1998) Dec. No. 1249-S, 129 CPER 66, where the employer linked pay raises to the union's agreement to support civil service reform legislation and the approval of an income tax cut. The board found evidence of bad faith in the *DPA* case because the employer's pay raise proposal was conditioned on a matter over which the union had no control, approval of an income tax cut. However, in that case, the board also held that conditioning the pay raise on the support of the civil service reform legislation did not demonstrate bad faith because the union could decide whether to support the legislation.

The R.A. emphasized that, unlike in *DPA*, Local 3 had the authority and control over both the economic and non-economic issues that were the subject of negotiations. The R.A. held that the union's allegation that the county had conditioned the negotiation of economic matters on the resolution of non-economic matters was insufficient evidence to establish surface bargaining.

On appeal, PERB focused on correspondence exchanged between the R.A. and the union following the issuance of the R.A.'s dismissal in May 2005. The union filed

additional documentation in support of its charge, which the R.A. ruled was untimely. The board found evidence demonstrating that the R.A. had in fact received the additional documentation in advance of the deadline via facsimile. In June 2005, the R.A. acknowledged receipt of the union's additional documentation, but determined that the documents were not responsive to the defects identified in the warning letter.

The board found that the additional documentation provided by the union addressed the necessity and relevance of its information request. However, it explained, the record reflected that the county provided some of the requested documents and sought clarification regarding the rest. Because the additional documentation failed to establish the requested clarification, the board dismissed this aspect of the charge and affirmed the remaining bases for the R.A.'s dismissal.

No proof that employee was fired for reasons other than retaliation for grievance filing: Jurupa Community Services Dist.

(*Jurupa Community Services District Employees Assn. v. Jurupa Community Services Dist.*, No. 1920-M, 8-10-07; 6 pp. + 25 pp. ALJ proposed dec. By Chairman Duncan and with Members Neuwald and Shek.)

Holding: The charging party established that the district engaged in retaliation by terminating him shortly after he filed a grievance. The district failed to prove that it would have terminated the grievant if he had not done so.

Case summary: On May 31, 2005, the association filed an unfair practice charge alleging that the district terminated an employee in retaliation for filing a grievance. PERB general counsel issued a complaint alleging that by this conduct, the district violated MMBA Secs. 3503 and 3506, and PERB Reg. 32603(a). An administrative law judge conducted an evidentiary hearing.

According to the record before the ALJ, the grievant was employed by the district as a sewer collections worker since July 7, 2003. On January 30, 2004, the grievant's supervisor issued the grievant a performance review for the

period July 2003 through January 2004, in which he was rated “meets job requirement” in each category. However, the grievant’s supervisor noted that the grievant was sometimes abrasive when speaking with coworkers and the public.

On October 12, 2004, the grievant had conversations with his supervisor and an operations manager in which he claimed he should have been paid travel time when called to work while off duty. The next day, the association filed a grievance on the grievant’s behalf, alleging that the district unilaterally changed its practice of paying travel time for “on-call” assignments.

On December 9, 2004, the grievant had an altercation with another employee. As a result of the derogatory remarks the two men used, both employees were issued written reprimands warning them that such behavior was against district harassment policy and its persistence would lead to further discipline and possible dismissal. After this incident, the district general manager asked the grievant’s supervisor if the grievant had been involved in other similar incidents; when the supervisor responded affirmatively, the manager told him to document all the incidents and proceed with a proposed termination.

On December 14, the supervisor issued another written reprimand regarding the grievant’s request for eight hours of compensatory time because the supervisor felt the grievant had falsely accused a supervisor of modifying his time card. The reprimand also criticized the grievant for not completing an injury report form and not providing medical verification after taking a day of sick leave on December 3.

Also on December 14, the operations manager prepared a notice of proposed termination. The notice referenced a number of infractions, including the grievant’s alleged failure to provide proper sick leave verification. Paragraph 4 of the notice cited the following as a reason for termination, “On October 12, 2004, I confronted you with a problem regarding grievance procedures for travel time not allowed within District practice. You responded that you would let the representative go forward. You were warned regarding your attitude during the exchange.”

On December 20, the operations manager issued a corrected notice, in which he changed paragraph 4 as follows, “You responded that you would let the representative go forward with the grievance without following the guidelines. You were warned regarding your attitude during the exchange of information because you were insubordinate during the conversation.”

In January, after speaking with the grievant and other witnesses regarding the various incidents cited in the notice, the general manager issued notice of proposed termination. The letter justified dismissal based on the reasons given in the December 20 notice, but paragraph 4 was deleted.

The ALJ found that when the grievant was called to work while off duty, he claimed travel time on his time card. On December 12, the grievant spoke to his supervisor, who informed him that the district did not pay for travel time. According to the grievant, he told his supervisor that if the situation was not resolved, he would file a grievance. Later that day, the supervisor told the operations manager about the travel time problem and the potential grievance. The operations manager then discussed the potential grievance with the grievant, telling him there were “steps to go through,” and that he must go through the “chain of command.” He told the grievant that the district had an “open door” policy and problems were to be worked out at the personal level. He also told the grievant that the district did not reimburse travel time. The grievant insisted that he would let his representative continue to file the grievance. The operations manager testified that he was upset by the grievant’s attitude and unwillingness to follow procedure. However, the ALJ found no evidence showing abuse of the contractual grievance procedure by the grievant or the association.

When asked why paragraph 4 was omitted from the termination letter, the general manager testified that she did not consider the alleged confrontation “part and parcel” of why she was terminating the grievant; instead, she cited the grievant’s increasingly hostile actions towards coworkers.

In early December, the grievant was involved in a verbal confrontation with a coworker because the grievant believed the coworker had stolen a part from his truck. It was

unclear from the testimony if the grievant made intentional physical contact with his coworker during the altercation. The ALJ emphasized that physical contact was not mentioned in the termination notice.

Under *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 53 CPER 2, in order to establish retaliation in violation of Gov. Code Sec. 3506 and PERB Reg. 32603(a), the charging party must show that the employee exercised rights under the MMBA, the employer had knowledge of the exercise of those rights, and the employer imposed or threatened to impose reprisals, discriminated, or otherwise interfered with, restrained, or coerced the employee because of the exercise of those rights. Furthermore, in *Moreland Elementary School Dist.* (1982) No. 227, 55 CPER 65, the board held that although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or nexus between the adverse action and the protected activity.

Here, the ALJ found no dispute that the grievant spoke with the operations manager about a grievance on October 12, and filed it the next day. Because the decision to terminate employment was made on December 10, less than two months later, the ALJ found the timing to be relevant.

The ALJ further found that the operations manager's remarks during his October 12 travel time conversation with the grievant revealed animus toward the grievant. Additionally, the ALJ noted that the operations manager told the grievant to go up the "chain of command," even though such procedure was not required. The ALJ found that the operations manager accused the grievant of being insubordinate and having a bad attitude because he was angered by the fact that the grievant filed the grievance. Citing *County of San Joaquin* (2003) No 1524, 161 CPER 96, the ALJ affirmed that similar employer conduct has been seen as evidence of an employer's anti-union animus and as pretext for adverse action. The ALJ found that to be the case here. Thus, the ALJ held that the association showed a sufficient nexus between the grievant's protected activity and his termination.

Once the charging party established a prima facie case, the burden shifted to the district to show that its actions were not unlawfully motivated, but that it would have taken the same action even in the absence of the grievant's protected conduct. The district argued that it was motivated solely by the grievant's misconduct. Both the operations manager and the general manager testified that the only reasons for termination were included in the termination notice.

The ALJ explained that because the operations manager and the general manager limited the reasons for their decision to the items in the termination notice, she would consider only those allegations as relevant. Regarding an incident of door slamming, the ALJ noted there was no follow-up with counseling, warning, or discipline. Rather, the ALJ asserted that the incident was so inconsequential that the operations manager ignored it until December when he cited it in the notice. The ALJ held that the door slamming incident did not merit discharge.

The ALJ noted that the grievant denied making derogatory comments to the coworker with whom he was in competition for promotion. Because the coworker did not testify, and because there were no other witnesses, the ALJ found what the supervisor allegedly was told by the coworker to be hearsay. PERB Reg. 32176 provides that "hearsay evidence is admissible but shall not be sufficient in itself to support a finding." Furthermore, the ALJ observed that the testimony of the operations manager and the general manager were contradictory. According to the operations manager, the grievant's supervisor reported that the coworker accused the grievant of repeated verbal abuse. According to the general manager, the grievant did not say anything to the coworker; instead, he told other employees that he should have been promoted before the coworker. The latter of these accounts did not rise to the level worthy of discipline, the ALJ found. Finally, the ALJ emphasized that there was the unexplained removal of reference in the corrected notice regarding the grievant's being previously warned about usage of derogatory comments. The ALJ concluded that the incident did not support the district's defense.

The ALJ found that the supervisor's memorandum regarding the district sick leave policy could not be considered disciplinary or even critical, as the grievant had not yet exceeded the limit of three sick-leave days in the relevant six-month period and had not yet been accused of violating the policy.

Next, the ALJ explained that the grievant's unexcused sick leave on December 3 was the only incident arguably worthy of discipline. However, because the general manager was aware that the grievant was confused regarding the reporting and medical verification policies, and because the district did not prove that the grievant had to file a report in the absence of a workers' compensation claim, the ALJ found that the grievant's failure to supply the documentation did not constitute misconduct worthy of discharge.

Regarding the district's allegation that the grievant falsely accused a manager of time-card modification, the ALJ found that the district's decision to terminate on this ground was improperly based solely on hearsay from the payroll secretary. The ALJ observed that the secretary did not testify and that the grievant denied the charge, contradicting the supervisor's allegations. The ALJ found that the supervisor's hearsay testimony could not be credited, and rejected the argument that the grievant had falsely accused a supervisor of altering his time card.

Next, the ALJ held that the December 9 altercation was not a sufficient reason to discharge the grievant. The ALJ found that it was undisputed that the two men swore at each other and there was some physical contact. However, the ALJ noted, there was a dispute about how the physical contact occurred and who was to blame. Both the termination letter and the prior notice lacked allegations of physical abuse. Therefore, the ALJ discredited the testimony of the operations manager and the general manager regarding the intentional physical contact.

Based on the above, the ALJ did not find any of the items in the notice of termination, alone or in aggregate, sufficient to satisfy the district's defense that the grievant was fired for proper reasons. The ALJ found that, except for the technical sick leave violation, all the allegations were un-

true, exaggerated, or based solely on hearsay, and that they were cited in an attempt to mask the true motivation for the discharge, the grievance. Because the ALJ found that the district did not show that it would have discharged the grievant in the absence of his filing a grievance, the ALJ concluded that the district's actions were retaliatory and violated MMBA Secs. 3506 and 3503, and PERB Regs. 32603(a) and 32603(b). The ALJ ordered the grievant reinstated with back pay.

PERB adopted the ALJ's proposed decision as the decision of the board itself, but addressed the district's argument that the operations manager's actions should not be imputed to the district. The board found that at the time the grievant received the notice of termination letter from the operations manager, the manager worked for the district and was acting in his capacity as an agent of the district under its authority.

The district also asserted that rather than relying solely on the operations manager's recommendation to terminate the grievant, the general manager met independently with the grievant and personally interviewed additional witnesses regarding the incidents mentioned in the notice of proposed termination. Therefore, the district argued, the general manager's actions should have been analyzed under the board's holding in *Konocti Unified School Dist.* (1982) No. 217, 54 CPER 66. In that case, the board held that a school district superintendent's anti-union animus could not be imputed to the district because the district conducted its own disciplinary hearing and rejected his recommendation.

The board distinguished the instant case from *Konocti*. It explained that here the general manager did rely on the operations manager's recommendation. She cited and attached the December 14 notice of proposed termination. Also, the board emphasized that the general manager was aware of the grievant's October 12 conversation regarding his potential grievance filing only because she read about it in the operation manager's December 14 notice. Thus, the board concluded that the record supported a finding that the designees' actions were attributable to the district.

Representation Rulings

Rule requiring majority participation in representation elections violates MMBA: County of Imperial.

(Teamsters Loc. 542 v. County of Imperial; California School Employees Assn. and its Imperial County Employees Chap. 2004, No. 1916-M, 6-28-07; 25 pp. By Member McKeag, with Chairman Duncan and Member Shek.)

Holding: A local county rule violated MMBA Sec. 3507.1 when it stipulated that in order for a representation election to be valid, a majority of eligible voters in each bargaining unit must vote. The MMBA requires only that a majority of those voting elect the exclusive representative.

Case summary: In January 2006, the Teamsters sought to decertify CSEA as the exclusive representative of over 750 county employees in the crafts, labor and trades, and clerical and technical units. A representation election was held, and the Teamsters received a majority of the votes cast in each unit. However, since fewer than 50 percent of the eligible workers in each unit voted, the county declared the election invalid under county policy.

Section X(f) of the county employer-employee relations policy provides that a representation election is valid only if a majority of eligible employees vote. Section X(c) of the policy provides that decertification of an exclusive representative does not require the negotiation of a new memorandum of understanding; any MOU in effect remains in force until its expiration and is binding on any subsequently recognized exclusive representative.

The terms of the contracts between the county and CSEA for all three bargaining units ran from July 2004 to June 2007. The agreement contained a reopener provision for the 2006-07 year for health, welfare, wages, and an additional current or new article selected by the parties. CSEA was formulating its proposals to submit to the county at the time of the board's decision here.

Throughout the early-2006 decertification campaign, CSEA, the Teamsters, and the county were aware of and accepted the local majority participation rule. During the cam-

paign, the Teamsters distributed flyers to all eligible voters, advising them that, "Under the rules of the county employee/ employer relations policy a majority of workers from each group must vote in order for the election to be valid." Also, at a meeting between the two unions and the county, a CSEA representative quoted the majority participation rule from the policy without meeting opposition.

On May 22, the Teamsters first protested the majority participation rule, asserting that it violated MMBA Sec. 3507.1. When CSEA learned that a majority of unit members had not participated in the election, CSEA demanded that the election be deemed void. After reviewing the votes, the county declared the elections in all three units invalid because fewer than 50 percent of the unit members participated.

An administrative law judge issued a proposed decision ruling that the majority participation rule violated the MMBA. The ALJ ordered the county to stop implementing the rule. The ALJ also found that implementation of the rule did not impact the tally of ballots, and thus upheld the election results and certified the Teamsters as the exclusive representative based on its receipt of the majority of votes cast in the election. CSEA appealed, arguing for the invalidation of the election based on Sec. X(f).

In agreement with the ALJ, the board concluded that the 50 percent participation rule violated the MMBA and that the county's enforcement of it constituted unlawful interference. The board also found that invalidation of the rule did not impact employee choice in the elections, and upheld the election results. It concluded that the Teamsters should be certified as the exclusive representative of the three units.

Section 3507.1(a) of the MMBA states: "In a representation election, a majority of the votes cast by the employees in the appropriate bargaining unit shall be required." The board found that because the 50 percent rule frustrates the purpose of Sec. 3507.1(a), it is unreasonable and cannot legally be enforced.

Although the MMBA allows a considerable degree of local control, the language of Sec. 3507.1(a) is clear and unambiguous, the board explained, and must be upheld. On its face, the board said that the section provides that a major-

ity of votes cast in representation elections is required, not that a majority of employees must vote. Also, the board emphasized that when the legislature drafted Sec. 3507.1(a) of the MMBA, it was aware of the difference between a majority vote and majority participation because, unlike Sec. 3507.1(a), Sec. 3502.5(d) expressly requires that a majority of eligible voters cast their votes in order to validate an agency fee rescission election. Furthermore, the board noted that the National Labor Relations Board consistently has held that representation is to be determined based on a majority of ballots cast, even where voter turnout is low.

To establish interference with employees' rights under the MMBA, motive need not be established; it is sufficient to show that slight harm to employee rights resulted from the alleged misconduct. Citing *Public Employees Assn. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App. 3d 797, 65 CPER 29, the board explained that in order to establish an unlawful interference charge, it must be proven that the employer interfered, restrained, or coerced employees from engaging in a protected activity without a legitimate business justification. Here, the board found that the employees in the three units participated in protected activity by voting in the representation election.

The county argued that it had not interfered with employees' ability to vote. Citing *Manton Joint Union Elementary School Dist.* (1992) Dec. No. 960, 98 CPER 57, however, the board affirmed that in an election setting, the employer's conduct constitutes unlawful interference if it reasonably tends to coerce or interfere with employee choice. Here, the board held that the county's invalidation of the election based on the local rule wrongfully deprived the employees of their right to select an exclusive representative of their choosing. Despite the fact that Sec. X(f) was a long-standing rule and a product of collective negotiations, the board found it still was unlawful because it disenfranchised employees and deprived them of a right protected by the MMBA. Also, the board found no legitimate business reason to justify the policy.

Finally, the board ruled that it could uphold the election results. The board explained that an election need not be perfect to be valid; the question is whether the mistakes

were sufficient to affect the outcome of the election, and whether the employer's conduct would reasonably tend to coerce or interfere with employee choice. While implementation of the rule violated the MMBA, the board found no evidence that application of the majority participation rule interfered with employee choice. Finding that it did not tend to discourage employees from voting or impact the tally of ballots, the board concluded that there was no reason to invalidate the results of the elections. Accordingly, the board certified the Teamsters as the exclusive bargaining representative in each of the three units.

Duty of Fair Representation Rulings

Case remanded due to incorrectly addressed warning letter: SEIU Loc. 715.

(*Langlois-Dul v. SEIU Loc. 715*, No. 1917-M, 8-2-07; 4 pp. By Member Shek, with Chairman Duncan and Member Neuwald.)

Holding: Because the board agent incorrectly addressed the warning letter informing the charging party that she had 10 days to amend her charge, the board vacated the dismissal, remanded the case, and ordered the general counsel to reissue the warning letter with the proper address.

Case summary: The charging party alleged that the association violated the MMBA by breaching its duty of fair representation to her and eight other employees during meet and confer sessions leading to the ratification of a memorandum of understanding. The charge further alleged that the association negotiated a contract that was unfavorable to her and the other charging parties.

A PERB board agent issued a warning letter on December 19, 2006, and a dismissal letter on January 9, 2007. According to the record, the board agent mistakenly wrote the wrong zip code on both of the letters, and thereby sent the letters to the wrong address. The board agent's first letter warned that because the agent found that the charge failed to state a prima facie case, the matter would be dismissed if the charging party did not amend her charge. Not having re-

ceived an amended charge, the agent's January letter dismissed the case.

On appeal to the board, the charging party alleged that as of January 18, 2007, she had not received any correspondence from PERB or its agents via regular mail. She stated that she had first learned of dismissal on January 18, after PERB sent a copy of the dismissal letter through electronic mail to her, in response to her inquiry about whether PERB had received her unfair practice charge. She also alleged that she had made a similar inquiry in December.

The board explained that under PERB Reg. 32621, the charging party may file an amended charge before a board agent issues or refuses to issue a complaint. The board observed that here, the board agent's warning letter gave the charging party 10 days from the date of the warning letter to file an amended charge. The board found that, due to the use of the wrong address, the board agent was prevented from performing her duties under Reg. 32620, and the charging party was barred, albeit inadvertently, from filing an amended charge pursuant to Reg. 32621. Therefore, the board vacated the dismissal letter, restored the matter to the status quo prior to the issuance of the warning letter, and remanded the matter to the general counsel for the re-issuance of the warning letter for further investigation and processing.

DFR charge dismissed due to lack of facts regarding contact with union: Inlandboatmans Union of the Pacific.

(*Treas v. Inlandboatmans Union of the Pacific*, No. 1919-M, 8-10-07; 2 pp. + 6 pp. R.A. dec. By Chairman Duncan and with Members Wesley and Shek.)

Holding: The charging party's allegation that the union breached its duty of fair representation was dismissed because the charging party failed to provide any facts regarding his contact with the union, thereby failing to establish abuse of discretion or dishonest judgment by the union.

Case summary: The charging party alleged that the union violated the MMBA by failing to secure his sick leave and lunch time pay. According to the record, the charging party was employed by the Golden Gate Transportation Dis-

trict as a deckhand on the Golden Gate Ferry. On May 2, 2006, the charging party received a letter from the district informing him of his assignment as a provisional deckhand during the 2006 baseball season. The letter stated that he would receive medical benefits, pension contributions, fixed or observed holiday pay, sick leave, and vacation accruals.

On January 5, 2007, the charging party filed a grievance against the district alleging that it failed to provide him sick leave, holiday pay, and a uniform allowance. The R.A. found the status of this grievance was unclear.

On March 8, 2007, the charging party filed this charge against the union, contending that it breached its duty of fair representation because it did not secure the additional benefits for him. However, the R.A. found that the charging party failed to provide any facts regarding his contact with the union, such as whom he spoke to or what their response was. The R.A. explained that without such information, it is impossible for PERB to determine if a violation has occurred. Citing *International Association of Machinists* (2002) No. 1474-M, 153 CPER 75, the R.A. further explained that in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without rational basis or devoid of honest judgment. Additionally, the R.A. cited *United Teachers - Los Angeles* (1993) No. 970, 99 CPER 45, where the board held that the burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its duties.

Because the charging party failed to state any facts that could establish abuse of discretion or misconduct by the union, the R.A. dismissed the charge. The board adopted the R.A.'s dismissal of the charge as a decision of the board itself.

Fair Employment and Housing Commission

California Code of Regulations Title 2, Sec. 7435, authorizes the Fair Employment and Housing Commission, an administrative agency charged with enforcing California's Fair Employment and Housing Act, to designate as precedential, any decision, or part of any decision, that contains a significant legal or policy determination of general application that is likely to recur. Once the commission has done so, the agency may rely on it as precedent and the parties may cite to it in their arguments to the commission and the courts.

One of the commission's decisions designated as precedential is summarized below.

Termination of employee due to pregnancy is sexual discrimination.

(DFEH v. Sasco Electric; Scherl, No. 07-02-P, 4-30-07; 1 pp. + 28 pp. ALJ dec.)

Holding: The employer's decision to fire an employee due to her pregnancy, and its subsequent efforts to make it appear that the termination was based on legitimate grounds, constituted sexual discrimination in violation of the Fair Employment and Housing Act.

Case summary: In February 2006, the director of the Department of Fair Employment and Housing issued an accusation against Sasco Electric, Inc., on behalf of a female employee. The allegations accused the company of terminating the complainant because of her pregnancy and paying her less than her male counterparts, thereby discriminating against her on the basis of her sex in violation of the FEHA, Gov. Code Sec. 12940.

The company owns a fishing boat that it uses to entertain its customers. In January 2003, the boat's captain, a Sasco management employee, hired the complainant as a deckhand. Her annual salary was \$28,000. The complainant had 15 years of experience as a sport fishing crew member, had been second captain during her prior employment, and held a U.S. Coast Guard license, certifying her as a U.S. Merchant Marine Officer.

During the 2003 fishing season, when Sasco sent the boat to Mexico, the complainant served on the crew. She tied and untied the boat's moorings, dropped and lifted the anchor, and took shifts on watch, steering the boat when the captain was asleep.

When the second captain left his employment with Sasco, the captain began to groom the complainant for the newly vacant second-captain position. In September, the complainant was reclassified as "assistant captain in training," and her salary was increased to \$30,400 a year. In December, the complainant got married. She met with Sasco's executive director, who, after congratulating her on her recent marriage, said, "Whatever you do, don't get pregnant."

In January 2004, the complainant was promoted to assistant captain, and her salary increased to \$31,200 a year. A male deckhand who had been hired one month earlier was paid \$33,600. In February, the complainant informed the captain she was pregnant, but told him she wanted to continue working as long as possible. The captain asked the complainant to get a medical clearance from her doctor to continue working.

On February 20, Sasco's personnel office advised the complainant that she was entitled to pregnancy leave of up to 88 working days. The letter also stated, "As your job responsibilities entail rigorous work, Sasco will need certification from your physician indicating your ability to perform your regular duties, without restrictions or limitations and without undue risk to yourself or to others."

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On February 24, the executive director informed the captain that, due to budget reductions, the company could pay full-time salaries only to the captain and one deckhand, and one part-time salary during the December holidays. On that same date, the complainant received medical clearance from her doctor to continue to work.

On February 27, the captain told the complainant that her employment was terminated. She felt shocked by the abrupt dismissal. She also felt betrayed because the captain frequently had expressed confidence in her abilities and potential. She was embarrassed because she had just lost her job in a "man's world."

The day after the complainant was discharged, the captain told a deckhand that he had laid off the complainant because "that way we can't be sued." The captain's wife, who also worked on the boat, stayed home for a week after the complainant was laid off, but then returned to her normal duties and received her usual salary.

In March, the complainant telephoned the captain and asked him why she had been terminated. The captain told her that, had she not been pregnant, he would not have terminated her. The captain hired yet another new deckhand with no prior boating experience, at an annual salary of \$33,600.

After the layoff, the complainant felt emotionally crushed and began to distrust people; her relationship with her husband suffered. The marriage was harmed because of the financial pressure caused by the loss of her income. The complainant feared that she would not be able to provide for her baby. In October 2005, after having given birth, the complainant was hired as a deckhand with Sasco, but on a different boat.

Sasco's Equal Employment Opportunity policy included a maternity leave provision that stated, "A woman is allowed to work as long as she and her doctor agree that her health will not be endangered." At no time during her employment was the complainant shown a copy of Sasco's EEO policy or informed of its provisions. Neither the executive director nor the boat captain was aware of the company's policy prohibiting pregnancy discrimination.

In its accusation, the DFEH alleged that Sasco discriminated against the complainant based on her sex in violation of Gov. Code Sec. 12940 by terminating her employment because she was pregnant. Sasco contended that it acted lawfully in selecting the complainant for layoff as part of a companywide reduction in force and that it was further justified because of concerns about her safety during her pregnancy.

Administrative Law Judge Caroline L. Hunt first noted that discrimination by an employer because of pregnancy constitutes discrimination because of sex under Gov. Code Secs. 12926(p) and 12940(a). She explained that such discrimination is established if a preponderance of the evidence demonstrates a causal connection between the complainant's pregnancy and the adverse action taken against her; it need not be shown that the complainant's pregnancy was the sole or dominant cause of her adverse treatment.

The ALJ ruled that the DFEH established by both direct and circumstantial evidence that the complainant's pregnancy was a causal factor in Sasco's decision to terminate her employment. The ALJ found the complainant was a credible and compelling witness, and underscored her testimony that the boat captain had told her that she would not have lost her job if she had not been pregnant. In corroboration, the ALJ cited the testimony of a deckhand who said the captain told him he doubted that the complainant could come to Mexico because she was pregnant. Even the captain's wife testified that her husband told her that the complainant's pregnancy was one of the reasons she was "let go."

The evidence demonstrated that the company's decisionmakers harbored negative stereotypes about pregnant crew members, the ALJ concluded. In support of this, the ALJ referenced the executive director's admonition that the complainant not get pregnant, and the captain's statement that he thought the complainant was "cavalier" for continuing to work.

The ALJ's finding of discrimination also was influenced by the timing of events. The day after the captain learned that the complainant was pregnant, he discussed the company's liability with the executive director should the

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complainant remain a crew member while pregnant. A few days later, the complainant was laid off. From this, the ALJ inferred a causal relationship between complainant's pregnancy and Sasco's decision to terminate her.

As an affirmative defense, Sasco asserted that the complainant was laid off as part of a legitimate reduction in force caused by a downturn in the construction industry. It claimed that the complainant's pregnancy was coincidental to her layoff. The ALJ rejected this argument, finding that Sasco hired two new deckhands in early 2004, soon after discharging the complainant. Also, the ALJ found it suspicious that the only document which supported the claimed need for layoffs was generated by the executive director within days after the captain told him the complainant was pregnant.

Announcing the validity of Sasco's defense turned on the executive director's credibility, the ALJ cited inherent contradictions in the record. For example, the director testified that he did not know when he learned the complainant was pregnant, and testified that he never discussed the company's liability with the captain. The captain, however, testified to the contrary. The executive director testified that he had discussed the need for the layoff before February 24, 2004, but the captain stated that he only found out about the need for layoffs on the date he read the complainant's layoff email. Finally, the director testified that he left all hiring and firing decisions to the captain, but his layoff email specifically instructed the captain to lay off his wife. From this fact, the ALJ inferred that the layoff of the captain's wife was an artifice used to hide the true reason for the complainant's termination. Accordingly, the ALJ did not credit the claim that the complainant's layoff was prompted by a reduction in force.

Sasco next argued that because pregnancy is a disability under the act, the company legitimately terminated the complainant based on its safety concerns. Although the DFEH argued that pregnancy is not a disability under the FEHA, Sasco relied on *Spivey v. Beverly Enterprises, Inc.* (11th Cir. 1999) 196 F.3d 1309, where the circuit court found that the employer did not violate Title VII when it fired a pregnant nurse. The ALJ found *Spivey* inapposite.

Under the FEHA, the ALJ explained, pregnancy per se is not a disability. However, there are circumstances where complications arising from pregnancy or childbirth can be a protected disability. But on the record here, the complainant's condition did not include such circumstances, the ALJ asserted.

The ALJ held that when Sasco terminated the complainant's employment in February 2004, she was not "disabled by pregnancy," as defined by California Code of Regulations, title 2, Sec. 7291.2(g). Testimony of the complainant's doctor established that, at 10 weeks, the complainant was not incapacitated by her pregnancy and was under no work restrictions. Furthermore, the ALJ noted that Sasco did not wait for the doctor's medical clearance before terminating her. Thus, the ALJ ruled that Sasco failed to establish a safety defense.

Sasco next asserted that preclusion of pregnant crewmembers constitutes a bona fide occupational qualification. As the ALJ explained, under the FEHC regulation, a BFOQ defense arises where an employer has a practice that excludes an entire group of individuals on a basis enumerated in the act because all or substantially all of the excluded individuals are unable to safely and efficiently perform the functions of the job, and because the essence of the business otherwise would be undermined. Citing *DFEH v. Hoag Memorial Hospital Presbyterian* (1985) No. 85-10, the ALJ emphasized that the commission has an obligation to construe the BFOQ defense narrowly, particularly one that rests on "sexist constructs."

The ALJ found that Sasco had not adopted a practice of excluding all pregnant employees from its workforce, nor did it show that its business would be undermined by accommodating a pregnant employee's job responsibilities. Therefore, the ALJ ruled, Sasco could not avail itself of the BFOQ defense.

Because the company failed to prove any affirmative defense, and because the DFEH proved that the complainant's pregnancy was the key factor in her termination, the ALJ concluded that Sasco's conduct constituted sexual discrimination in violation of Gov. Code Sec. 12940(a).

In its accusation, the DFEH also asserted that Sasco discriminated against the complainant on the basis of her sex by failing to pay a salary commensurate with Sasco's male deckhands. The ALJ observed that the complainant was paid \$2,400 less per year than the two subsequently hired male deckhands, one of whom had no boating experience. Also, the complainant was replaced by a male assistant captain who was paid \$7,200 more than she was when she held the position. Sasco argued that the three deckhands were paid more because they were paid in cash and did not receive benefits, as the complainant did. But the ALJ found no evidentiary support for these claims and concluded that the complainant's sex was a factor in the company's decision to pay her less than the male crew members.

The ALJ also agreed with the DFEH's assertion that Sasco violated Gov. Code Sec. 12940(k) because it failed to take reasonable steps to prevent discrimination from occurring. She emphasized that neither the executive director, nor the captain, knew whether the company had a policy prohibiting pregnancy discrimination. And, according to Sasco's EEO policy, a pregnant employee can continue to work if she has permission from her doctor. Because the complainant was terminated before her medical clearance documentation was due, the ALJ found that Sasco took advantage of the complainant's lack of awareness of her rights, not only under the FEHA, but under Sasco's own maternity leave policy.

Having established that Sasco had discriminated on the basis of sex in violation of the FEHA, under Gov. Code Sec. 12970, the complainant was entitled to the relief necessary to make the complainant whole for any loss or injury she suffered. Citing *Donald Schriver, Inc. v. FEHC* (1986) 220 Cal.App.3d 396, the ALJ explained that the complainant was entitled to back pay for the wages she otherwise could have expected but for the employer's unlawful conduct.

The ALJ awarded the complainant back pay for 13 months based on an annual salary of \$33,600 commensurate with the amount earned by the male deckhands. Payment at the higher rate effectuated the remedial purposes of the FEHA, the ALJ concluded. She also awarded the complain-

ant compensation for the health care costs incurred because of her unlawful termination.

Government Code Sec. 12970(a)(3) authorizes the commission to award emotional damages in an amount not to exceed, in combination with any administrative fines, \$150,000 per aggrieved person per employer. When determining the amount of emotional damages, the commission looks at the effects of the discrimination on the complainant with respect to physical and mental well-being, personal integrity, dignity, privacy, ability to earn a living and work, family relationships, reputation, duration of injury, and egregiousness of the discriminatory practice.

Citing evidence that the complainant cried every day for a month, was depressed, and experienced physical symptoms, such as headaches, nausea, and sleeplessness, the ALJ ordered Sasco to pay the complainant \$85,000 for her emotional distress.

The DFEH also asked the commission to levy an administrative fine of \$50,000 against Sasco because the company's termination of the complainant was intentional, egregious, and in blatant disregard of the complainant's rights as a pregnant employee. Additionally, the DFEH noted that Sasco attempted to cover up its discriminatory conduct.

To warrant an award of an administrative fine, Gov. Code Sec. 12970(d) requires clear and convincing evidence of oppression, fraud, or malice. The ALJ found that the captain's misguided paternalism in no way excused Sasco's deliberate disregard for the FEHA's protections for pregnant employees. She noted that Sasco's conduct in terminating the complainant's employment because she was pregnant, masquerading the firing as a layoff, then furthering the cover-up by instructing the captain's wife to stay off work for a week, was willful, malicious, and oppressive, undertaken by Sasco in reckless indifference to the complainant's rights. Thus, the ALJ awarded \$25,000 in administrative damages.

The commission, in a 4 to 0 vote, adopted the ALJ's decision as its final decision. The commission also designated the decision as precedential.