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## letter from the editor

Dear *CPER* Readers:

If you take a quick look at the Table of Contents in this issue of *CPER*, you get a good idea of the broad range of topics that fall under the public sector umbrella. For example, the notice requirement under the Brown Act's personnel exception is the subject of one main article, by Randy Riddle and Erich Shiners, that explains the dilemma facing public employers. Disclosure of peace officer records under the California Public Records Act is a matter that has been the subject of the California Supreme Court's recent consideration. Brian Pellis carefully lays out the holdings in two far-reaching decisions. An entirely new addition to public sector law appears in the form of the Firefighters Procedural Bill of Rights Act. Effective January 1, 2008, this law mirrors the Public Safety Officers Procedural Bill of Rights Act, but it contains some important points of divergence as well, as authors Scott Tiedemann and Connie Chuang observe.

In the Recent Developments sections, the public sector's expansive reach also is evident. PERB's jurisdiction under the MMBA is a hot-button issue in local government, as the recent oral argument in the Court of Appeal revealed. The duty to bargain over contracting out was the focus of the recent appellate court decision in *Rialto* and is a topic of concern among local public agencies. In the Public Schools section, an article about state control of the Oakland Unified School District raises critical concerns that have state and local educational officials at odds.

Higher education topics encompass a race by Lawrence Livermore lab employees for certification under HEERA, just under the wire before the lab's transition to the private sector. There's also a legislative update that records the governor's action on four important bills we've been tracking. And, in the State section, the issue of salary compaction and subcontracting are at the forefront of recent events.

The laws defining discrimination are in a constant state of flux, and this issue takes a look at several new developments, including case law that measures the sufficiency of comparability data and the need to exhaust contractual remedies before filing an FEHA discrimination claim.

Taken together, it's no wonder that *CPER* is viewed as a much needed resource for busy public sector practitioners. As we move forward into another new year, we remain committed to keeping you informed of developments at the bargaining table, from the courts, and in the state house in Sacramento.

Sincerely,



Carol Vendrillo,  
CPER Editor

# The Firefighters Procedural Bill of Rights Act...at First Glance

*J. Scott Tiedemann and Connie M. Chuang*

On October 13, 2007, Governor Arnold Schwarzenegger signed into law Assembly Bill 220, the Firefighters Procedural Bill of Rights Act, giving firefighters many of the same rights as peace officers, and more. It becomes effective on January 1, 2008. The legislation was introduced by Assembly Member Karen Bass and was sponsored primarily by the California Professional Firefighters Association. The bill was opposed by, among other organizations, the League of California Cities and the California State Association of Counties.

*Scott Tiedemann is a partner and Connie Chuang an associate with Liebert Cassidy Whitmore. LCW has decades of experience representing and counseling public safety agencies in personnel matters, and expertise in handling issues involving the rights of peace officers under the Public Safety Officers Procedural Bill of Rights Act, particularly supervisors who now face the intricacies of the Firefighters Procedural Bill of Rights Act.*

Modeled in large part on the Public Safety Officers Procedural Bill of Rights Act, which was legislated over 30 years ago, the FBOR is codified at Government Code Secs. 3250 through 3262. Case law interpreting the POBR is sure to be applied in interpreting the new legislation,<sup>1</sup> but there are both subtle and not so subtle differences that will require the courts to address issues of first impression.

This article does not catalog all of the new law's requirements. It is an introduction to the FBOR's most significant provisions, and it highlights some of the contentious issues expected to arise as a result of the legislation.

## ***Persons Protected by the Act***

The FBOR generally applies to any firefighter employed by a public agency, including a firefighter who is a paramedic or an emergency medical technician.<sup>2</sup> However, the act does not protect inmate firefighters or individuals who are already protected by the POBR, such as arson investigators.<sup>3</sup> Moreover, unlike the POBR, which protects probationary peace officers,<sup>4</sup> the FBOR does not cover firefighters who have not yet completed their probation.<sup>5</sup>

Interestingly, the FBOR states that "the rights and protections described in this chapter shall only apply to a firefighter *during events and circumstances involving*

*the performance of his or her official duties.*<sup>6</sup> This ambiguous language, which does not appear in the POBR — and which did not appear in the bill at its introduction — raises many questions. For example, it is unclear whether a firefighter who is involved in non-work-related misconduct, such as sexual harassment, during work hours would be afforded any procedural protections during his or her employer’s investigation of the alleged misconduct. Indeed, courts have held that public employees generally are not entitled to indemnification by their employers in sexual harassment cases because harassment is not within the scope of employment and therefore does not involve the performance of official duties.<sup>7</sup> The same question arises with regard to off-duty conduct, such as drunk driving, since off-duty misconduct may have a job nexus but, by definition, does not involve the performance of official duties.

It is also unclear whether the FBOR protects volunteer firefighters. The FBOR is silent in this regard, whereas the POBR clearly provides that reserve police officers are not covered. Volunteer firefighters, however, occupy a unique status among volunteers in the public sector, and it is not farfetched to imagine that they would be protected. For example, Labor Code Sec. 1964 permits a volunteer fire department to establish procedures for the dismissal of volunteer firefighters and even allows for the establishment of a probationary period without creating property rights in the “volunteer firefighter job or position.” Yet, in the past, the legislature seems to have taken care to distinguish between professional firefighters and volunteers, clearly stating when the latter are entitled to receive some of the same benefits. For instance, under Gov. Code Sec. 68097, volunteer firefighters are expressly treated as public employees for purposes of payment of witness fees. Since the legislation’s primary sponsor was the California Professional Firefighters, and since the legislation does not specify that volunteer firefighters are protected, it appears reasonable to conclude that the FBOR

was not intended to, and does not protect, volunteer firefighters.

### ***Rights Created by the Act***

***Political activity.*** The FBOR contains the same provisions as the POBR with respect to firefighter political activity. A department may not prohibit a firefighter from engaging in, or coerce or require a firefighter to engage in,

political activity, except when on duty or in uniform.<sup>8</sup> Likewise, no firefighter may be prohibited from seeking election to, or serving as, a member of a governing board of a school or local agency in which the firefighter is not employed.<sup>9</sup>

***Disciplinary investigations.*** Similar to the POBR, the FBOR establishes procedural safeguards that apply in the context of disciplinary investigations. In many respects, the FBOR’s procedural protections mirror the protections afforded peace officers under the POBR, although there are some critical differences.

The FBOR, like the POBR, provides that whenever an interrogation of a firefighter by a supervisor could lead to “punitive action” — defined as “any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment” — a firefighter (1) must be provided certain information (the nature of the investigation, the identities of the officers in charge of the interrogation as well as the interrogating officers and all other persons to be present during the interrogation); (2) cannot be subjected to questioning by more than two interrogators; (3) may record the interrogation; and (4) may access the employer’s recording of the interrogation if further proceedings are contemplated.

A firefighter may not be threatened<sup>10</sup> or be interrogated for more than a reasonable period of time.<sup>11</sup> Moreover, a firefighter cannot be subjected by his or her employer to visits by the press or news media without his or her

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permission.<sup>12</sup> Nor may an employer release a firefighter's photograph, address, telephone number, or other contact information to the press or news media without the firefighter's consent.<sup>13</sup>

Confusion is bound to occur among fire personnel regarding what supervisory communications trigger the FBOR's procedural safeguards. Like the POBR, the FBOR states that it does not "apply to counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other firefighter."<sup>14</sup> Therefore, courts will rely on earlier landmark decisions interpreting the POBR — for example, *City of Los Angeles v. Superior Court (Labio)*<sup>15</sup> and *Steinert v. City of Covina*<sup>16</sup> — in applying the FBOR. Yet, the firehouse is different from the police station and new twists can be expected. Indeed, since firefighters live with each other for days at a time, there will be many more opportunities for seemingly informal conversations between supervisors and subordinates to evolve into formal disciplinary proceedings. How and where to draw this line likely will result in litigation.

Greater confusion will result from the new protections for firefighters who are interrogated about alleged misconduct that may have criminal implications. Similar to the POBR, the FBOR states that if it is "contemplated that the firefighter may be charged with a criminal offense, the firefighter must be immediately informed of his or her constitutional rights."<sup>17</sup> Interpreting the same language in the POBR, in *Lybarger v. City of Los Angeles*,<sup>18</sup> the California Supreme Court held that the requirement that an officer be advised of his or her constitutional rights means that he or she must be (1) *Mirandized* — informed of the right to remain silent, the right to the presence and assistance of counsel, and the admonition that any statements may be used against the employee in a court of law; (2) told his or her silence could be deemed insubordination, leading to administrative discipline; and (3) further told that any statement made under

the compulsion of the threat of such discipline could not be used against him or her in any subsequent criminal proceeding.

Yet, the FBOR includes a significant added protection for firefighters that is not afforded to peace officers under the POBR — the right to formal immunity in exchange for answering an employer's questions regarding potentially criminal misconduct. The FBOR states: "The employer shall provide to, and obtain from, an employee a formal grant of

immunity from criminal prosecution, in writing, before the employee may be compelled to respond to incriminating questions in an interrogation."<sup>19</sup>

That language, which did not appear in the original legislation, seems to have been intended as a hedge against the risk that the Supreme Court will reverse the Court of Appeal's controversial decision in *Spielbauer v. County of Santa Clara*.<sup>20</sup> That decision held that a deputy public defender who was given a *Lybarger* warning could not be discharged for not answering his employer's incriminating questions without a formal grant of immunity. The Supreme Court granted review on May 9, 2007, and the next version of the FBOR introduced included the language in question.

The *Spielbauer*-type language that was added to the legislation is ambiguous and will spur litigation. For instance, it is hard to know what the legislature intended when it said that an employer must not only provide to, but also "obtain from," its own employee a formal grant of immunity. Also, as written, the legislation seems to allow an employer to provide a formal grant of immunity. This may be counter-intuitive to some who will question whether a non-prosecutorial agency can grant immunity when the Attorney General and district attorneys generally possess the discretion whether to file criminal charges. Ironically, based on how the new legislation is written, it appears that what the Supreme Court had sought to avoid by its *Lybarger* decision could come true — "the petty infractor who fails to respond to questioning could be subject to punitive action while the

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criminal offender could refuse to cooperate with absolute impunity.”<sup>21</sup>

The FBOR also creates privacy rights for firefighters that will impact disciplinary investigations but which also apply outside the context of investigations. For instance, similar to the POBR, the FBOR prohibits a fire department from searching a firefighter’s locker or other storage space without either a search warrant or the firefighter’s presence, consent, or prior notification.<sup>22</sup> Moreover, the FBOR provides that an agency may not require a firefighter to disclose personal financial information for the purposes of a job assignment or other personnel action unless required under state law or pursuant to a court order.<sup>23</sup> The FBOR also provides that a firefighter cannot be compelled to submit to a lie detector test. According to the statute, there shall be no negative repercussions for a firefighter who refuses to take one.<sup>24</sup>

**Imposition of discipline.** The FBOR’s protections regarding the imposition of discipline closely parallel the POBR’s provisions, but with some notable differences. Like the POBR, an employer must complete its disciplinary investigation and notify a firefighter of any proposed discipline within one year of the employer’s discovery of alleged misconduct.<sup>25</sup> Unlike the POBR, this requirement applies not only to employers but also to a licensing or certifying agency that may impose discipline against a firefighter.

Another interesting difference between the POBR and the FBOR is what triggers the one-year statute of limitations. Under the POBR, it is triggered by the public agency’s discovery by a person authorized to initiate an investigation of the allegation of misconduct.<sup>26</sup> This generally has meant that the one-year statute begins to run when a supervisor becomes aware of the misconduct. However, the FBOR provides that the limitations period begins to run when the “employing fire department or licensing or certifying agency” discovers the allegation of misconduct. Some

firefighters are certain to argue that this means that the statute begins to run when any member of the employing agency becomes aware of the misconduct, although courts might consider that an unreasonable interpretation of the legislation.

If, following any pre-disciplinary response or procedure, an employer decides to proceed with discipline, the employer

must inform the firefighter in writing of its decision within 30 days but “not less than 48 hours prior to imposing the discipline.”<sup>27</sup> This suggests that, unlike under the POBR, there will be a 48-hour window before discipline can become effective, during which a settlement could be negotiated or a firefighter could seek judicial intervention to prevent the discipline.

**Administrative appeals.** The FBOR, like the POBR, provides that an employee who has completed probation and is subjected to punitive action or denied promotion on grounds other than merit must be afforded administrative appeal.<sup>28</sup> Similarly, prior to removal, the agency must provide a fire chief with written notice, the reasons for

removal, and an opportunity for administrative appeal.<sup>29</sup>

However, unlike the POBR, the FBOR requires any administrative appeal to be conducted in conformance with the rules and procedures adopted by the employer that are in “accordance with” the requirements of Gov. Code Secs. 11500 et seq., the adjudicative process conducted by the Office of Administrative Hearings. This requirement likely will be a subject of litigation. For example, a firefighter who is terminated also has suffered a punitive action under the FBOR and is entitled to an administrative appeal. Most employers, including charter cities and counties, already have elaborate procedures in place for handling appeals from termination. Those existing procedures may parallel, but are unlikely to duplicate, the procedures set forth at Gov. Code Secs. 11500 et seq. Issues will therefore arise regarding if and when an employer, such as a charter agency, must modify its existing appeals procedures to satisfy the FBOR.

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Also, the requirements of Gov. Code Secs. 11500 et seq. apply only when a right, authority, license, or privilege is being revoked, suspended, limited, or conditioned.<sup>30</sup> Therefore, an employer does not have to comply with the appeals procedures contained in Gov. Code Secs. 11500 et seq. in providing a firefighter with an appeal from a punitive action that does not fall within those categories of actions, such as a written reprimand. Under those circumstances, the FBOR does not specify the scope of the appeal that is required.

**Personnel files.** With respect to personnel files, the FBOR generally provides the same rights as the POBR. Specifically, no adverse comment may be entered into a firefighter's personnel file, or any other file used for any personnel purposes, without the firefighter having first read and signed the instrument. A firefighter then has 30 days to prepare a written response to any adverse comment entered into his or her file.<sup>31</sup>

In addition, a firefighter has the right to inspect his or her personnel file during usual business hours and when on paid status. If the firefighter believes there is material in the file that is mistaken or unlawful, the firefighter may submit a request to correct or delete the disputed material. The agency then has 30 days to respond to the request.<sup>32</sup>

The Penal Code defines the term "personnel files" for police officers,<sup>33</sup> but there is no equivalent for firefighters. Because the FBOR specifically states "personnel file or any other file used for any personnel purposes," courts will likely interpret this provision broadly to mean any file maintained by an agency that could impact a firefighter's employment, whether it be the official file kept by a human resources department or a "drop file" maintained by a supervisor.

### ***Remedies for Violations of the Act***

The FBOR generally provides the same remedies as the POBR. Superior courts have initial jurisdiction over alleged FBOR violations. Firefighters can seek injunctive relief, penalties (up to \$25,000 for each malicious violation), and actual damages, if any. In turn, a firefighter who initiates an action in bad faith or that is frivolous may be sanctioned and required to pay the agency's attorney's fees.<sup>34</sup>

The Court of Appeal recently held in *Lozada v. City and County of San Francisco*<sup>35</sup> that a police officer had to file a tort claim with the city before he could seek civil penalties or actual damages for alleged POBR violations. Consequently, a firefighter also will have to file a tort claim prior to filing a FBOR claim for penalties or damages.

Like the POBR, the FBOR provides that "an individual shall not be liable for any act for which a fire department is liable."<sup>36</sup> Many trial courts have interpreted the identical POBR provision to bar individual liability. However, the statute's vague

wording may lead to additional litigation.

### ***Conclusion***

Thirty years later, firefighters have acquired many of the same protections that have long been afforded to their law enforcement counterparts. However, the FBOR provides firefighters with a number of different and significant new rights not afforded to peace officers. After January 1, 2008, life in the fire house will never be the same. \*

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1 *Holmes v. McColgan* (1941) 17 Cal.2d 426, 430 (“Where  
legislation is framed in the language of an earlier enactment on  
the same or an analogous subject, which has been judicially  
construed, there is a strong presumption of an intent to adopt the  
construction of the prior enactment. There is a similar  
presumption in case of a statute patterned after legislation of  
another jurisdiction.”).

2 Gov. Code Sec. 3251(a).

3 *Ibid.*

4 Gov. Code Secs. 3300 et seq.

5 Gov. Code Sec. 3251(a).

6 Gov. Code Sec. 3262.

7 *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th  
992.

8 Gov. Code Sec. 3252(a).

9 Gov. Code Sec. 3252(b).

10 Gov. Code Sec. 3252(e)(1).

11 Gov. Code Sec. 3252(d).

12 Gov. Code Sec. 3252(e)(2).

13 *Ibid.*

14 Gov. Code Sec. 3253(i).

15 (1997) 57 Cal.App.4th 1506.

16 (2006) 146 Cal.App.4th 458.

17 Gov. Code Sec. 3253(h).

18 (1985) 40 Cal.3d 822.

19 Gov. Code Sec. 3252(e)(1).

20 (2007) 146 Cal.App.4th 914, Supreme Court review granted  
5-9-07, S150402.

21 *Lybarger, supra*, 40 Cal.3d at 828.

22 Gov. Code Sec. 3259.

23 Gov. Code Sec. 3258.

24 Gov. Code Sec. 3257.

25 Gov. Code Sec. 3254(d).

26 Gov. Code Sec. 3304(d).

27 Gov. Code Sec. 3254(f).

28 Gov. Code Secs. 3254(b), 3254.5.

29 Gov. Code Sec. 3254(c).

30 Gov. Code Sec. 11503.

31 Gov. Code Secs. 3255, 3256.

32 Gov. Code Sec. 3256.5.

33 Penal Code Sec. 832.5.

34 Gov. Code Sec. 3260, subd. (c)(2).

35 (2006) 145 Cal.App.4th 1139.

36 Gov. Code Sec. 3260.

# Navigating the Murky Waters of Employee Notice Requirements Under the Brown Act's Personnel Exception

*Randy Riddle and Erich Shiners*

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The Ralph M. Brown Act, which took effect in 1953, generally requires that local legislative bodies conduct their business in sessions open to the public. However, there are limited exceptions to that requirement.

The exception for personnel matters allows a local body to meet in closed session to discuss hiring, retention, and dismissal of public employees. It extends to an employee the right to request that complaints or charges against him or her be heard by the legislative body in open rather than closed session. Unfortunately, the statute and cases interpreting it are unclear on exactly what triggers the local body's duty to give the employee notice of this right. This presents a serious problem for public employers, particularly in light of the severe consequences imposed by the Brown Act if the employer gets it wrong.

Before instituting litigation to invalidate an action based on alleged violation of the act, the act requires that a local body be given written notice of the alleged violation and an opportunity to "cure" it. These provisions do not apply, however, when an employer fails to give an employee proper notice that charges or complaints against him or her will be heard in closed session. In those cases, the act voids any action the local body takes against the employee based on those complaints or charges. When the subject of a closed session under the personnel exception is a high-ranking management employee, this result can be particularly problematic.

This article reviews the statute and interpretive case law concerning the Brown Act's personnel exception and provides guidelines for public employers on when the exception requires notice to the affected employee.

### ***Brown Act's Personnel Exception***

As a general rule, the Brown Act requires local legislative bodies to deliberate and act during meetings that are open to the public.<sup>1</sup> The “personnel exception” to the act, however, identifies limited circumstances in which a local body may discuss personnel matters behind closed doors. Under this exception, a local body may hold a closed session “to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee.”<sup>2</sup>

The exception also allows a closed session “to hear complaints or charges brought against the employee by another person or employee.”<sup>3</sup> However, before a body may conduct a closed session, it must give the employee against whom the complaints or charges are made “written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session.”<sup>4</sup> The notice must be delivered personally or by mail at least 24 hours before the closed session is to begin.<sup>5</sup> If the employee is not notified, any action the body takes against him or her based on the complaints or charges heard in the closed session is “null and void.”<sup>6</sup>

By allowing closed session discussion of personnel matters, the exception serves two purposes. First, it allows a local body to engage in a candid discussion.<sup>7</sup> Second, it protects employees from public embarrassment.<sup>8</sup> Conversely, the notice requirement creates an opportunity for an accused employee to publicly clear his or her name by defending against specific allegations of misconduct.<sup>9</sup> The personnel exception and the notice requirement thus constitute a “reasonable compromise” between the interests of the public employer and those of the employee.<sup>10</sup>

While the personnel exception was part of the original 1953 act, the notice requirement is a relatively recent addition. The legislature added the notice requirement in 1993 in an effort to curb perceived Brown Act abuses by local governments.<sup>11</sup> Five years later, the first Court of Appeal

decision interpreting the notice requirement was issued. Since then, the Supreme Court has not construed this provision, and only a handful of appellate court cases have addressed the issue. The central question in all of these cases is whether a particular action by a local legislative body constitutes a hearing on complaints or charges that triggers the notice requirement. This article examines cases where the court found no employee notice was required and cases where notice was compelled.

### ***Evaluation of Performance and Deliberation Cases***

The first Court of Appeal decision to address the personnel exception's notice requirement was *Furtado v. Sierra Community College*.<sup>12</sup> Furtado was a contract librarian at the community college.<sup>13</sup> After reviewing her performance, the faculty evaluation committee recommended against renewing her contract.<sup>14</sup> Furtado submitted written objections to the committee report,<sup>15</sup> and the college's superintendent informed Furtado that the district board would discuss the report in closed session.<sup>16</sup> The superintendent denied Furtado's response for an open session because the board would not be hearing complaints or charges against her.<sup>17</sup> The board met in closed session and voted not to renew Furtado's contract.<sup>18</sup> Furtado filed a writ of mandate claiming that the board violated the Brown Act by taking action in closed session to terminate her employment.<sup>19</sup>

Furtado first argued that the right to request an open session applied to *all* of the actions listed in Gov. Code Sec. 54957(b)(1): appointment, employment, evaluation of performance, discipline, dismissal, and hearing complaints or charges against an employee.<sup>20</sup> The court rejected this argument, reasoning that the disjunctive “or,” the word actually used to separate the first five actions from the phrase “hearing complaints or charges,” indicated that the language allowing an employee to request an open session applied only

*The Furtado court ruled that the language allowing an employee to request an open session applies only to complaints or charges.*

to complaints or charges.<sup>21</sup> The court also noted that subsection (b)(2), which contains the notice requirement, refers only to complaints or charges, not to any of the other actions mentioned in (b)(1).<sup>22</sup> Based on its statutory interpretation, the court concluded that the personnel exception allows an employee to request an open session only when the local body “is hearing complaints or charges against the employee.”<sup>23</sup> It follows that this is the only situation where the local body must give the employee notice.

The court also rejected Furtado’s argument that negative comments about her performance in the committee report constituted complaints or charges against her.<sup>24</sup> The court observed that “complaint” and “charge” both “connote an accusation, something which is ‘brought against’ an individual.”<sup>25</sup> A performance evaluation, the court reasoned, is not an accusation and thus cannot constitute a complaint or charge against the employee.<sup>26</sup>

Two subsequent cases further examined performance evaluations and application of the personnel exception. In *Fischer v. Los Angeles Unified School Dist.*,<sup>27</sup> the employer elected not to renew the contracts of probationary teachers based on reports addressing their job performance.<sup>28</sup> Although the reports contained specific allegations of misconduct by the teachers, the court concluded that the district board did not hear complaints or charges when it decided not to renew the contracts because the teachers had an opportunity to respond to the allegations in prior administrative meetings.<sup>29</sup> In other words, while the board based its decision on the administrators’ conclusions after hearing the complaints, the board itself did not hear complaints or charges against the teachers.

In *Duval v. Board of Trustees*,<sup>30</sup> the court concluded that evaluation of performance includes not just a periodic, formal evaluation but also an informal review that “involves particular instances of job performance.”<sup>31</sup> Unfortunately, because the notice requirement was not at issue in the case,

the court did not distinguish “particular instances of job performance” from complaints or charges against the employee.

The court in *Bollinger v. San Diego Civil Service Commission*<sup>32</sup> dealt not with what constitutes complaints or charges but under what circumstances a local legislative body — rather than some other person or entity — is deemed to hear complaints or charges. The San Diego Police Department demoted Bollinger for misconduct.<sup>33</sup> Rather than hearing the appeal as a body, the Civil Service Commission appointed one of the commissioners, Robert Otilie, to act as hearing officer.<sup>34</sup> Otilie conducted a three-day public evidentiary hearing.<sup>35</sup> He then submitted to the commission a 22-page report that contained his findings of fact and his recommendation

that the discipline be upheld.<sup>36</sup>

The commission’s written agenda stated that it would ratify the report in closed session, and the commission even notified Bollinger of the closed session by phone.<sup>37</sup> During closed session, the commission ratified Otilie’s findings of fact and recommendation to sustain the discipline.<sup>38</sup>

Bollinger filed a writ of mandate alleging that the commission violated the Brown Act by not giving him written notice of his right to request an open session for discussion of Otilie’s report.<sup>39</sup> The commission conceded that the matter involved complaints or charges.<sup>40</sup> The court thus framed the issue before it as whether the commission *heard* the complaints or charges.<sup>41</sup>

The court first distinguished “hearing” from “deliberating.”

The former, the court observed, involves the presentation of evidence while the latter involves making a decision based on facts already found to be true.<sup>42</sup> The hearing before Commissioner Otilie, where the police department presented evidence to which Bollinger had the opportunity to respond, constituted the hearing of complaints or charges.<sup>43</sup> The commission’s later ratification of Otilie’s findings and recommendation, said the court, was merely a deliberation on “whether the complaints or charges justified disciplinary

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action.”<sup>44</sup> Accordingly, the commission’s action in closed session fell into the category of considering discipline against an employee, which does not require notice of the employee’s right to request an open session.<sup>45</sup>

### ***Complaints or Charges Cases***

A noticeable shift in the tide of Court of Appeal decisions on the notice requirement occurred with the ruling in *Bell v. Vista Unified School Dist.*<sup>46</sup> Bell was the head football coach at Rancho Buena Vista High School.<sup>47</sup> After Bell helped an Australian student immigrate to the United States to play football on his team, the California Interscholastic Federation, which regulates interscholastic competition, placed the high school on a one-year probation for recruiting violations.<sup>48</sup> The CIF also found that Bell had violated the federation’s undue influence rule and suggested that the district consider disciplinary action against him.<sup>49</sup>

The district’s board of trustees met in closed session to discuss the team’s probation.<sup>50</sup> While the public meeting agenda included an item stating “public employee discipline/dismissal/release,” the board did not inform Bell that it intended to consider disciplinary action against him.<sup>51</sup> During the meeting, two board members presented the CIF finding concerning Bell’s rule violation to the board,<sup>52</sup> which then discussed the findings and voted to remove Bell permanently from his coaching position.<sup>53</sup>

Bell filed suit in superior court, seeking mandamus and declaratory relief.<sup>54</sup> The court found that the board’s discussion of the CIF findings constituted hearing complaints or charges<sup>55</sup> and declared Bell’s removal from his coaching position null and void. The court also required the district to eliminate any mention of the removal from Bell’s personnel file, and enjoined the board from enforcing its removal decision.<sup>56</sup>

The Court of Appeal affirmed the trial court’s decision. After reviewing the cases discussed above, the appellate court concluded that the CIF’s finding of undue influence constituted a complaint or charge against Bell because it was “an accusation — an indictment brought against him with potential disciplinary consequences.”<sup>57</sup> From this the court reasoned that, although the closed session began as a deliberation on how to respond to the CIF’s imposition of probation, the meeting *evolved* into a hearing on charges or complaints

against Bell once the board members presented the CIF undue influence finding.<sup>58</sup> Under these circumstances, the court observed, Bell was entitled to respond to the finding, especially since the focus of the CIF hearing at which Bell testified was not on his individual conduct but on the Australian student’s eligibility.<sup>59</sup>

Accordingly, the court held that the board was required to give Bell 24 hours written notice that it would hear complaints or charges against him at the closed session.<sup>60</sup> Because the board failed to do so, the Court of Appeal affirmed the trial court’s order nullifying the board’s removal of Bell as head football coach.<sup>61</sup>

The next notice requirement case, *Morrison v. Housing Authority of the City of Los Angeles Board of Commissioners*,<sup>62</sup> presented the flipside of *Bollinger*. The housing authority terminated Morrison for providing confidential information to an unauthorized person.<sup>63</sup> When she appealed her termination to the board, it appointed a hearing officer to take evidence and make a recommendation on her dismissal.<sup>64</sup> The hearing officer found that Morrison did not intentionally disclose the confidential information but rather was negligent in giving it to a former housing authority employee.<sup>65</sup> Consequently, the hearing officer recommended a one-week suspension without pay.<sup>66</sup> Without giving notice to Morrison, the board met in closed session to discuss her discharge.<sup>67</sup> During the meeting, the board rejected the hearing officer’s factual findings and reviewed the record itself but made no final decision on Morrison’s termination.<sup>68</sup> Sub-

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sequently, the board affirmed Morrison's dismissal at an open session.<sup>69</sup>

Just as in *Bollinger*, the Court of Appeal was required to determine whether the board heard complaints or charges against Morrison in closed session.<sup>70</sup> Like *Bollinger*, Morrison received an evidentiary hearing at which she had the opportunity to respond to the misconduct charge.<sup>71</sup> However, the *Morrison* court found this initial administrative hearing did not constitute the hearing on complaints or charges because the board later rejected the hearing officer's factual findings and instead engaged in its own factfinding during the closed session meeting.<sup>72</sup> The court viewed this as essentially the same as if the board had heard Morrison's appeal itself, rather than referring it to a hearing officer.<sup>73</sup> Because Morrison would have been entitled to notice had the board heard her appeal initially, the court concluded that she was entitled to notice under the existing circumstances.<sup>74</sup> Because the board failed to give Morrison the required notice, the court declared the board's decision to discharge her "null and void."<sup>75</sup>

*Moreno v. City of King*<sup>76</sup> is the most recent decision to address the notice requirement. *Moreno* was the city's finance director.<sup>77</sup> The city council met in closed session to discuss *Moreno*'s employment contract without giving *Moreno* notice of the meeting.<sup>78</sup> During the meeting, the city manager presented a memorandum to the council detailing five alleged incidents of misconduct committed by *Moreno*.<sup>79</sup> Although the city manager's purpose in presenting the draft memorandum was to get the council's final approval before giving it to *Moreno*, council members discussed the accusations and then decided to terminate *Moreno*'s employment.<sup>80</sup> Relying on *Bell*, the court held that the council's discussion of the allegations in the city manager's memorandum constituted a hearing on complaints or charges.<sup>81</sup> Because the council failed to notify *Moreno* of his right to have the allegations heard in open session, *Moreno*'s termination was null and void.<sup>82</sup>

Despite their consistency in voiding the local body's action for failure to give notice, the Courts of Appeal in these three cases differed on the body's ability to cure the violation. The *Bell* court raised the possibility that a local body could cure a notice requirement violation. There, the board of trustees argued that because *Bell* asked the board to cure the Brown Act violation, he could not bring his writ action until expiration of the 30-day period for the board to act on the request under Gov. Code Sec. 54960.1(c)(2). The

court rejected this argument on the ground that the board could have cured the violation during this period and thus made *Bell*'s writ action moot.<sup>83</sup> But the *Bell* court proved to be alone in its view that the right to cure might apply in this situation.

In *Morrison*, the board of commissioners argued that Morrison was required to demand a cure before bringing her suit for mandamus. The court ruled that Gov. Code Sec. 54960.1, by its terms,<sup>84</sup> does not apply to employee notice violations. The court also observed that *Bell* "does not hold to the contrary" because "failure to demand defendant cure or correct its action was not at issue in *Bell*."<sup>85</sup> Similarly, the *Moreno* court stated that "[t]he cure provisions of section 54960.1 do not apply to a violation of section 54957."<sup>86</sup> Therefore, it appears clear that a local body may not cure a violation of the personnel exception's notice requirement. Instead, the statute mandates that the body's action be declared "null and void."<sup>87</sup>

### ***Guidelines for Public Employers***

The paramount concern regarding the notice requirement is that the employee has an opportunity to respond publicly to accusations made against him or her. With this purpose in mind, the following guidelines for public employers may be drawn from cases interpreting the notice requirement.

*The paramount concern regarding the notice requirement is that the employee has an opportunity to publicly respond.*

■ **In evaluating employee performance in closed session, a local body may consider only specific incidents of misconduct to which the employee has had an opportunity to respond.**

According to *Duval*, a local body may consider specific instances of misconduct in evaluating an employee's performance without triggering the notice requirement.<sup>88</sup> In *Furtado*, the employee had previously responded in writing to negative comments in a written performance evaluation.<sup>89</sup> In *Fischer*, the probationary teachers previously had challenged allegations of misconduct against them in meetings with administrative personnel.<sup>90</sup> In both cases, the employees had the opportunity to tell their side of the story before the local body met in closed session to discuss discipline or dismissal. Therefore, provided the local body does not independently evaluate the specific instances of misconduct, it may consider them in evaluating an employee's performance without having to notify the employee of the closed session.

■ **Whenever a local body engages in independent factfinding with respect to charges or complaints, either directly through the presentation of evidence to the body or indirectly through review of an existing factual record, it must give the affected employee 24 hours written notice of the meeting.**

In situations where the employee serves at the pleasure of the appointing authority, like the financial director in *Moreno*, the local body is usually the only entity that hears the complaints or charges against the employee. Under these circumstances, it is clear that the local body must give the employee notice of the hearing. On the other hand, in the case of civil service employees, the local body rarely will be the first to hear the allegations of misconduct. Rather, the local body's review will follow a *Skelly* process during which the employee will have the opportunity to respond.<sup>91</sup>

Once the employee appeals to the local body, however, things get murkier. *Bollinger* says that a local body may meet in closed session to ratify the findings and recommendation of a hearing officer.<sup>92</sup> *Morrison* says that a local body must give the employee notice before independently reviewing the record and rejecting the hearing officer's findings.<sup>93</sup> Between these extremes lies the situation where the local body reviews the record but decides to uphold the hearing officer's findings and disciplinary recommendation.

When viewed in light of *Morrison*, *Bollinger* appears limited to situations in which the local body merely "rubber stamps" the hearing officer's conclusions. In all other situations, it seems that the local body would have to do at least some independent analysis of the record before deciding whether to accept or reject the factual findings. Because under *Morrison* this could be seen as "factfinding" by the local body, it would be prudent for the local body to give the employee notice before it meets to discuss the hearing officer's report.

*An otherwise proper  
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misconduct allegations.*

■ **A local body must take great care that an appropriate closed session meeting does not evolve into a hearing on complaints or charges, such as by presentation of documents containing specific allegations of employee misconduct that have not been reviewed previously by a factfinder.**

As seen in *Bell* and *Moreno*, an otherwise proper closed session can instantly mutate into a hearing on complaints or charges with the introduction of specific allegations of misconduct by an employee.<sup>94</sup> This is not to say that any mention of misconduct must be banned from closed session. If the specific instances are contained in a performance evaluation or other report and the employee had the opportunity to respond to the allegations before the matter reached the local body, the instances may be considered by the body in determining what level of discipline to impose as long as the

body accepts the findings and conclusions reached below without question.

The notice problem arises when the accusations are made for the first time in closed session. In *Bell* and *Moreno*, the employee had no previous knowledge of the accusations.<sup>95</sup> By introducing and considering the allegations in closed session, the local body deprived the employee of the right to respond to the allegations before the body made its decision about discipline or termination. Thus, before presenting any specific allegations of misconduct to a local body, it should be established that the employee already has had an opportunity to respond in a prior proceeding. Otherwise, the local body risks having its closed session actions — and even those taken later in open session based on what took place in the closed session — declared null and void.

### **Conclusion**

The core principle of personnel exception notice requirement cases is that the employee must have the opportunity to respond publicly to accusations of misconduct before the local body makes a decision to impose discipline. To that end, a local legislative body may not engage in factfinding about such accusations without providing the accused employee 24 hours notice. Notice is not required when a local body meets to evaluate an employee's performance based on already established facts that the local body accepts as true. Likewise, no notice is required when a local body deliberates over the proper discipline to impose based on an independent factfinder's report that the body accepts as true. The notice requirement is triggered, however, when the local body (1) reviews a factfinder's findings to decide whether to accept or reject them, or (2) evaluates specific allegations of misconduct itself.

Local bodies should be aware that, unlike violations of other Brown Act provisions, a violation of the notice requirement cannot be cured. Thus, it is imperative that the public employer correctly assess whether notice to an employee of a closed session is required. This is especially true in termination cases, where the local agency could face significant back pay exposure if a court voids the termination and reinstates the employee months, or even years, after the local body's action.

Accordingly, the local legislative body may wish to err on the side of caution and notify an employee whenever it is possible that the body may hear complaints or charges against the employee in closed session or that discipline may result from information first heard by the body in closed session. Only then can the public employer be reasonably assured that its action will not be rendered null and void under the Brown Act. \*

1 Gov. Code Secs. 54950, 54953.

2 Gov. Code Sec. 54957(b)(1).

3 *Ibid.*

4 Gov. Code Sec. 54957(b)(2).

5 *Ibid.*

6 *Ibid.*

7 *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955.

8 *Ibid.*

9 *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876, 882.

10 *Ibid.*

11 Sen. Rules Com., Office of Sen. Floor Analyses, Rep. on S.B. No. 36 (1993-1994 Reg. Sess.) Sept. 9, 1993, p. 5.

12 *Supra*, 68 Cal.App.4th 876.

13 *Id.* at 879.

14 *Ibid.*

15 *Ibid.* It is worth noting that, while it did not play a part in the court's analysis in this case, the fact that an employee had an opportunity to respond to complaints or charges *before* the local body considered them is an important factor in several of the later notice requirement cases.

16 *Ibid.*

17 *Id.* at 879-880.

18 *Id.* at 880.

19 *Ibid.*

20 *Id.* at 881.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Id.* at 882.

25 *Id.*, quoting (1995) 78 Ops. Cal. Atty. Gen. 218, 223.

26 *Ibid.*

27 (1990) 70 Cal.App.4th 87.

- 28 *Id.* at 92.  
 29 *Id.* at 100.  
 30 (2001) 93 Cal.App.4th 902, 151 CPER 39.  
 31 *Id.* at 909.  
 32 (1999) 71 Cal.App.4th 568, 136 CPER 35.  
 33 *Id.* at 571.  
 34 *Ibid.*  
 35 *Ibid.*  
 36 *Ibid.*  
 37 *Ibid.*  
 38 *Ibid.*  
 39 *Ibid.*  
 40 *Id.* at 574.  
 41 *Id.* at 575.  
 42 *Id.* at 574.  
 43 See *Id.* at 578.  
 44 *Id.* at 574.  
 45 *Id.* at 574-575. The court pointed out that S.B. 36, which added the notice requirement, originally required notice prior to holding a closed session “on the complaints or charges to consider disciplinary action or to consider dismissal.” The legislature later amended the bill to remove that language in favor of the language currently found in Gov. Code Sec. 54957(b)(1) that notice is required only when a local body will hear complaints or charges against the employee in closed session. From this amendment, the court concluded that the legislature did not intend for the notice requirement to apply when a local body is solely considering whether the complaints or charges justify disciplinary action. *Id.*  
 46 (2000) 82 Cal.App.4th 672.  
 47 *Id.* at 678.  
 48 *Id.* at 678-679.  
 49 *Id.* at 679.  
 50 *Ibid.*  
 51 *Ibid.*  
 52 *Id.* at 683.  
 53 *Id.* at 679.  
 54 *Id.* at 680.  
 55 *Ibid.*  
 56 *Ibid.*  
 57 *Id.* at 683.  
 58 *Ibid.*  
 59 *Ibid.*  
 60 *Ibid.*  
 61 *Id.* at 692.  
 62 (2003) 107 Cal.App.4th 860.  
 63 *Id.* at 865.  
 64 *Ibid.*  
 65 *Id.* at 866.  
 66 *Ibid.*  
 67 *Id.* at 871.  
 68 *Id.* at 876.  
 69 *Id.* at 871.  
 70 *Id.* at 872.  
 71 *Id.* at 865-866.  
 72 *Id.* at 874-875.  
 73 *Id.* at 874.  
 74 *Id.* at 874-875.  
 75 *Id.* at 876.  
 76 (2005) 127 Cal.App.4th 17.  
 77 *Id.* at 20.  
 78 *Id.* at 21.  
 79 *Id.* at 29.  
 80 *Id.* at 21, 29.  
 81 *Id.* at 29.  
 82 *Ibid.*  
 83 *Bell, supra*, 82 Cal.App.4th at 684-685.  
 84 Gov. Code Sec. 54960.1(a) provides: “The district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section. Nothing in this chapter shall be construed to prevent a legislative body from curing or correcting an action challenged pursuant to this section.” The personnel exception is conspicuously absent from the list of sections whose violations may be cured.  
 85 *Morrison, supra*, 107 Cal.App.4th at 876, fn. 37.  
 86 *Moreno, supra*, 127 Cal.App.4th at 29.  
 87 *Ibid.*  
 88 *Supra*, 93 Cal.App.4th at 909.  
 89 *Supra*, 68 Cal.App.4th at 879.  
 90 *Supra*, 70 Cal.App.4th at 100.  
 91 Under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, a permanent public employee is entitled to notice of the charges against him or her and an opportunity to respond to the charges before discipline is imposed.  
 92 *Supra*, 71 Cal.App.4th at 575.  
 93 *Supra*, 107 Cal.App.4th at 876.  
 94 *Supra*, 82 Cal.App.4th at 683; 127 Cal.App.4th at 29.  
 95 *Supra*, 82 Cal.App.4th at 679; 127 Cal.App.4th at 21.

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# Why Police Agencies Must Disclose an Officer's Name, Salary, and More

*Brian E. Pellis*

The California Supreme Court recently delivered two blows to the once seemingly impenetrable cloak of confidentiality protecting peace officer personnel information from public disclosure. In two separate decisions, the Supreme Court held that Penal Code Sec. 832.7, which provides that "peace officer personnel records" are confidential, did not prevent disclosure of certain personnel information in response to California Public Records Act<sup>1</sup> requests by the news media.

In *Commission on Peace Officer Standards and Training v. Superior Court (Los Angeles Times Comm., LLC)*,<sup>2</sup> the Supreme Court ruled that information in a state database containing officers' names, employing departments, and hiring and termination dates is subject to disclosure under the CPRA. Also, in *International Federation of Professional and Technical Engineers, Loc. 21, AFL-CIO v. Superior Court (Contra Costa Newspapers, Inc.)*,<sup>3</sup> the Supreme Court ruled that names and salaries of public employees earning \$100,000 or more a year with overtime, including peace officers, are subject to disclosure and not protected under the CPRA.<sup>4</sup> The two cases do not merely have academic value but may significantly impact how law enforcement agencies respond to media requests for information, including disclosures made following critical incidents such as officer-involved shootings.

## **The Statutes**

The state legislature enacted the CPRA in 1968, proclaiming that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."<sup>5</sup> Under the CPRA, the public is entitled to inspect public records unless the requested records are specifically excluded from inspection.<sup>6</sup> Exempt records include those that are otherwise

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protected by federal or state law,<sup>7</sup> as well as “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.”<sup>8</sup>

Penal Code Sec. 832.7, enacted in 1978, provides that “peace officer personnel records...or information obtained from these records” are confidential. Penal Code Sec. 832.8 defines a “peace officer personnel record” as “any file maintained under that individual’s name by his or her employing agency and containing records relating to...” personal data; medical history; election of employee benefits; employee advancement, appraisal, or discipline; complaints; or “[a]ny other information the disclosure of which would constitute an unwarranted invasion of personal privacy.”<sup>9</sup>

The overriding issue in *Los Angeles Times* and *Contra Costa Newspapers* was whether Penal Code Secs. 832.7 and 832.8 protected basic information about peace officers from disclosure under the CPRA.

### ***The Los Angeles Times Decision***

In *Los Angeles Times*, a reporter requested that the California Commission on Peace Officer Standards and Training release information in its database regarding all new peace officer appointments from 1991 to 2001. Specifically, the reporter requested officers’ names, employing departments, appointment dates, and termination dates.<sup>10</sup> The *Times* reporter intended to study the movement of peace officers between various departments to detect any meaningful trends.<sup>11</sup> The reporter was interested, for example, in understanding whether and why peace officers may be hired by one agency after being fired by another.<sup>12</sup>

POST denied the request, claiming that Penal Code Sec. 832.7 protects from disclosure all peace officer personnel records.<sup>13</sup> The *Times* then filed a petition for writ of mandate in the superior court. The superior court ordered POST to release the names, appointing agencies, dates of appointment, and termination dates of each officer.<sup>14</sup> POST appealed, and

the Court of Appeal directed the superior court to enter a new judgment denying the *Times*’ request in its entirety.<sup>15</sup> The Supreme Court granted review.

The Supreme Court concluded that the legislature did not intend information to be treated as confidential solely on the basis that the information could be found in a “personnel file,”<sup>16</sup> even one protected under Penal Code Secs. 832.7 and 832.8.<sup>17</sup>

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In other words, the location where information is stored is not the controlling factor in determining what is confidential. The court indicated that such an interpretation of Penal Code Sec. 832.7 would lead to absurd results, such as rendering confidential a newspaper article praising or criticizing an officer, simply because the article was placed into the officer’s personnel file.<sup>18</sup> The Supreme Court discerned no intent by the legislature to make confidential either the identities of peace officers or basic employment facts.<sup>19</sup> Rather, the court concluded that confidentiality

extends only to the specific records enumerated in Sec. 832.8.<sup>20</sup> The court then proceeded to analyze whether the types of information sought by the reporter were those enumerated in Penal Code Sec. 832.8.

POST contended that peace officers’ names, employing agencies, and hiring and termination dates are personnel records because they constitute “employment history...or similar information.”<sup>21</sup> However, the Supreme Court held that the protection for “employment history” information under Penal Code Sec. 832.8(a) extends only to information concerning an officer’s *previous* employment.<sup>22</sup> Because POST records are obtained from the employing department regarding an officer’s *current* status, information in POST’s possession was not protected as “employment history” because the information was current at the time it was collected.

Next, the court discussed whether officers’ names should be considered “personal data” under Penal Code Sec. 832.8(a). The court referred to the definition of the word “personal,” finding that the term carries a connotation of privacy. Noting that officers routinely identify themselves

when they make arrests, sign police reports, and wear badges or nameplates with names or identification numbers, the court concluded that officers' names were not "private" and as such were not "personal data" under the statute. Thus, in finding that names are not protected as "personal data," and that employing departments and appointment and termination dates do not constitute "employment history," the court found that the information requested by the reporter was not privileged pursuant to Penal Code Sec. 832.7 as a "peace officer personnel record." In rationalizing its statutory construction, the majority noted that the court "may assume that in defining personnel records the legislature drew the line carefully, with due concern for the competing interests. Had the legislature intended to prevent the disclosure of officers' identities as such, an obvious solution would have been to list 'name' as an item of '[p]ersonal data....'"<sup>23</sup>

Having concluded that the Penal Code does not protect the information sought by the *Los Angeles Times* reporter, the court then addressed the question of whether the CPRA's provision preventing disclosure of "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy,"<sup>24</sup> applied to the information sought. The court noted that this exception to the policy favoring disclosure of public records requires a court to conduct a balancing test of the competing interests of peace officers on the one hand and the public on the other.

The court began its analysis with the assumption that "[t]he public's interest in the qualifications and conduct of peace officers is substantial...."<sup>25</sup> The court then turned to the specific request for information itself, noting that the request by the *Los Angeles Times* was legitimate, in that the information was sought to determine such important information as whether inappropriate employment practices were occurring and whether officers who are dismissed from one or more agencies are nonetheless hired by another.<sup>26</sup>

Not surprisingly, the court found that information about where a peace officer has served is not likely to cause

unwarranted embarrassment or indignity to the officer. Describing what was being sought as "innocuous information,"<sup>27</sup> the court focused on whether POST could show that releasing the information would constitute an unwarranted invasion of personal privacy. POST argued that the information sought for release has the "potential for mischief,"<sup>28</sup> may cause a safety hazard to the involved officers, and may be used in a harassing manner.<sup>29</sup>

Rejecting these arguments as "purely speculative,"<sup>30</sup> the court ruled that the privacy and safety interests of peace officers do not outweigh the public's interest in the disclosure of the information.<sup>31</sup>

Importantly, the court noted that there may be certain officers, such as those who work in undercover assignments, who have a heightened need to keep information from being disclosed.<sup>32</sup> For that reason, the court remanded the case for further proceedings in the superior court to determine whether the information sought by the *Los Angeles Times* would threaten to reveal the

identities of officers who have a strong interest in maintaining anonymity and whose information should therefore not be subject to disclosure under the CPRA.<sup>33</sup>

### ***The Contra Costa Newspapers Decision***

In *Contra Costa Newspapers*, reporters from that publishing chain requested the City of Oakland to provide the names, job titles, and gross salaries of all city employees who earned \$100,000 or more in the fiscal year 2003-04, including those who earned a base salary of less than \$100,000 but who grossed \$100,000 or more due to overtime.<sup>34</sup> Although the city previously had released such information from 1996 through 2003, and despite the fact that such information was previously published in a local newspaper, the City of Oakland refused to acquiesce, claiming that recent case law increased concerns of financial privacy, and opposition to the release by two unions representing city employees led to a change in policy.<sup>35</sup>

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Contra Costa Newspapers sought judicial enforcement of its request. At the superior court, two employee unions intervened in the case, the Oakland Police Officers Association and the International Federation of Professional and Technical Engineers, Local 21. Following a hearing, the superior court found that the unions and the city failed to show that any privacy interest was violated in disclosing salary information and that even if such a privacy right existed, it nevertheless would be outweighed by the public policy supporting disclosure. Therefore, the city was ordered to disclose the requested salary information.<sup>36</sup> The superior court also rejected OPOA's argument that Penal Code Secs. 832.7 and 832.8 made certain peace officer records confidential and not subject to disclosure. The court concluded that those code provisions did not operate to render the names and salary of peace officers confidential. Local 21 and OPOA sought review by the Court of Appeal. The appeals court ruled in favor of the newspaper, and the Supreme Court granted review.

As in *Los Angeles Times*, the question before the Supreme Court in *Contra Costa Newspapers* was whether the requested information was protected pursuant to an exception under the CPRA or other state or federal law. Noting the same public policies favoring disclosure that it had discussed in *Los Angeles Times*, the court concluded that on balance, disclosure of salary information of government employees generally would not constitute an unwarranted invasion of personal privacy.<sup>37</sup>

The court found that information should be considered private only "when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity."<sup>38</sup> Although the court acknowledged that disclosure of an individual's salary may cause discomfort or embarrassment, the strong public policy supporting transparency outweighed any privacy expectation a government employee may have in salary information.<sup>39</sup> The

court further noted that since 1955, the Attorney General has opined that the name and salary of public employees are matters of public record.<sup>40</sup>

The Supreme Court then proceeded to analyze whether Penal Code Secs. 832.7 and 832.8 provide any special protections to peace officers' names and salary information. The court addressed the question of whether privileged "personal data" as stated in Penal Code Sec. 832.8 includes

names and salary information of peace officers. Finding that a public employee's salary relates to a public interest and not primarily to a private individual matter of the involved employee, the court concluded that the legislature did not intend the words "personal data" to be read so broadly as to encompass all potential information relating to a peace officer, including name and salary.<sup>41</sup>

The court theorized that if the legislature wanted peace officer salary information to be confidential, the lawmakers could have added the word "salary" to the statute, noting that "ordinarily, the enumeration of one item in a statute implies that the

legislature intended to exclude others."<sup>42</sup> Therefore, the court explained, its holding that public employee names and the salary information of those earning \$100,000 a year or more with overtime are subject to disclosure applies equally to peace officers. The court stated: "We reject the notion that peace officers in general have a greater privacy interest in the amount of their salaries than that possessed by other public employees...."<sup>43</sup>

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individual matter of  
the involved employee.*

### ***Current Status of Peace Officer Personnel Information***

Following *Los Angeles Times* and *Contra Costa Newspapers*, the names, employing departments, and employment dates of peace officers are all subject to disclosure. Moreover, salary information for peace officers earning \$100,000 or more a year with overtime is also a matter of public record.<sup>44</sup> However, law enforcement agencies nevertheless must engage

in a case-by-case analysis of each CPRA request to determine whether releasing information is appropriate.

The first issue is whether the information sought is specifically protected by a statute such as Penal Code Secs. 832.7 and 832.8. If so, then it is protected from disclosure under the CPRA. If there is no specific statutory provision, the issue becomes whether the information is otherwise protected because its disclosure would result in an unwarranted invasion of privacy.<sup>45</sup> Moreover, under the CPRA, information may be withheld where “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”<sup>46</sup>

Indeed, it is crucial to note that even if information normally would be subject to disclosure under *Los Angeles Times* and *Contra Costa Newspapers*, there are at least two very important circumstances where disclosure would not necessarily be warranted. Both were addressed by the Supreme Court in *Los Angeles Times* and are outlined below.

Information may be withheld by a law enforcement agency if its release would jeopardize the safety of the peace officer or his or her family, or would negatively impact the officer’s ability to perform his or her duties effectively. This scenario may arise in the context of undercover operations where an officer’s anonymity is critical to his or her safety. The Supreme Court specifically noted:

If the duties of a particular officer, such as one who is operating undercover, demand anonymity, the need to protect the officer’s safety and effectiveness certainly would justify the Commission in withholding information identifying him or her under Government Code section 6255, subdivision (a), which permits records to be withheld if “on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”<sup>47</sup>

For example, if a law enforcement agency can demonstrate that disclosure of the peace officer’s name would jeopardize the safety of the officer and/or his or her family, or if the disclosure would render ineffective the officer’s ability to perform his or her duties such as in an undercover capacity, the name of the peace officer may be withheld under the CPRA.

Second, the identities of peace officers subject to complaints remain confidential pursuant to *Copley Press, Inc. v. Superior Court*<sup>48</sup> and may not be disclosed.<sup>49</sup> Likewise, the names of officers subject to investigation and discipline are confidential.

Interestingly, in *Los Angeles Times*, the court took note that in its 2006 decision in *Copley Press*, it had expressed disapproval of the 1997 finding by the Court of Appeal in *New York Times Co. v. Superior Court*.<sup>50</sup> In *New York Times*, the court concluded that “[u]nder Penal Code sections 832.7 and 832.8, an individual’s name is not exempt from disclosure.”<sup>51</sup> Criticism of the *New York Times* decision, which held that a newspaper *could* learn the names of officers involved in a shooting, had led

some to conclude that the names of officers were never subject to disclosure under any circumstances. However, in *Los Angeles Times*, the Supreme Court explained that its earlier-expressed disagreement with that case could be read to suggest that officers’ names could be discovered in connection with disciplinary matters. It appears that the Supreme Court in *Los Angeles Times* has taken the position that an officer’s identity is confidential only in connection with complaints, investigations, and discipline involving the officer.

This clarification by the Supreme Court is likely to reignite the debate about the right of the news media to learn the names of officers involved in critical incidents such as officer-involved shootings. Some experts interpreted the *Copley* court’s criticism of the *New York Times* case to mean that agencies could refuse to disclose the names of officers involved in critical incidents. It now appears that officers’

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discipline.*

names are likely subject to disclosure unless such exposure would pose a serious threat to officer safety, a decision to be made on a case-by-case basis. The California Attorney General is expected to issue an opinion on this very important subject in the near future.

### **Conclusion**

Following the Supreme Court's decisions in *Los Angeles Times* and *Contra Costa Newspapers*, law enforcement agencies can expect to receive a greater number of CPRA requests seeking information about peace officers. Queries concerning salary and employment-related information are especially likely to increase. Law enforcement agencies are precariously situated, being forced to act as guardians of information that peace officers wish to keep private while complying with the public's right to disclosure of certain data. Given this vital position that law enforcement agencies and managers occupy, it is incumbent upon them to comprehend the requirements and the limitations of the high court's decisions in *Los Angeles Times* and *Contra Costa Newspapers* as well as other case law impacting peace officer information. Understanding both sides of the law will help avoid claims by peace officers that too much information is being released and claims by the public that its right to inspect public records is being infringed. \*

- 1 Gov. Code Secs. 6250 et seq.
- 2 *Commission on Peace Officer Standards and Training v. Superior Court (Los Angeles Times Comm., LLC)* (2007) 42 Cal.4th 278.
- 3 *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (Contra Costa Newspapers, Inc.)* (2007) 42 Cal.4th 319.
- 4 Although the holding was specifically limited to employees earning over \$100,000, the court's decision can reasonably be read to require disclosure of salary information for any employees regardless of the amount.
- 5 Gov. Code Sec. 6250.
- 6 Gov. Code Secs. 6253 and 6254.
- 7 Gov. Code Sec. 6254(k).
- 8 Gov. Code Sec. 6254(c).
- 9 Penal Code Sec. 832.8.
- 10 *Los Angeles Times, supra*, 42 Cal.4th at 286. The reporter also requested the information on dates of birth so that officers with the same name could be distinguished, but that request was later withdrawn. Additionally, the reporter requested information regarding the reasons for termination of the peace officers. However, the trial court did not require POST to disclose this information and the *Los Angeles Times* did not challenge that ruling. As such, whether dates of birth and reasons for termination are required to be disclosed under the CPRA were not addressed by the Supreme Court.
- 11 *Los Angeles Times, supra*, 42 Cal.4th at 286-87.
- 12 *Los Angeles Times, supra*, 42 Cal.4th at 287.
- 13 *Los Angeles Times, supra*, 42 Cal.4th at 286.
- 14 *Los Angeles Times, supra*, 42 Cal.4th at 287.
- 15 *Ibid.*
- 16 *Los Angeles Times, supra*, 42 Cal.4th at 291.
- 17 *Ibid.*
- 18 *Los Angeles Times, supra*, 42 Cal.4th at 290.
- 19 *Los Angeles Times, supra*, 42 Cal.4th at 295.
- 20 *Los Angeles Times, supra*, 42 Cal.4th at 293.
- 21 Penal Code Sec. 832.8(a).
- 22 *Los Angeles Times, supra*, 42 Cal.4th at 293-94.
- 23 *Los Angeles Times, supra*, 42 Cal.4th at 298.
- 24 *Los Angeles Times, supra*, 42 Cal.4th at 299 (quoting Gov. Code Sec. 6254(c)).
- 25 *Los Angeles Times, supra*, 42 Cal.4th at 299.
- 26 *Los Angeles Times, supra*, 42 Cal.4th at 300.
- 27 *Los Angeles Times, supra*, 42 Cal.4th at 301.
- 28 *Ibid.*
- 29 *Los Angeles Times, supra*, 42 Cal.4th at 301-02.
- 30 *Ibid.* Notably, in his dissenting opinion, Justice Chin stated

that it is feasible that someone who is hostile towards the police may use the list of officers' names to locate their addresses in order to harass them and their families. *Id.* at 317.

- 31 *Los Angeles Times, supra*, 42 Cal.4th at 303.  
 32 *Ibid.*  
 33 *Ibid.*  
 34 *Contra Costa Newspapers, supra*, 42 Cal.4th at 327.  
 35 *Ibid.*  
 36 *Contra Costa Newspapers, supra*, 42 Cal.4th at 328.  
 37 *Contra Costa Newspapers, supra*, 42 Cal.4th at 330.  
 38 *Ibid.*  
 39 *Contra Costa Newspapers, supra*, 42 Cal.4th at 331.  
 40 *Ibid.* (quoting *State Employees' Retirement Act* [1995] 25 Ops.Cal.Atty.Gen 90, 91).  
 41 *Contra Costa Newspapers, supra*, 42 Cal.4th at 341.  
 42 *Contra Costa Newspapers, supra*, 42 Cal.4th at 343.  
 43 *Contra Costa Newspapers, supra*, 42 Cal.4th at 344.  
 44 The status of other types of information, such as reasons for

separation, dates of birth, and salary information for officers earning less than \$100,000 per year, was technically not addressed by the Supreme Court in either case for various reasons. However, review of the Supreme Court's other decisions in conjunction with its *Los Angeles Times* and *Contra Costa Newspapers* suggests that information regarding the reasons for separation would likely still be considered confidential. There would seem to be little legitimate public need to know officers' birth dates.

- 45 Gov. Code Sec. 6254.  
 46 Gov. Code Sec. 6255(a).  
 47 *Los Angeles Times, supra*, 42 Cal.4th at 301.  
 48 *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 180 CPER 42.  
 49 *Los Angeles Times, supra*, 42 Cal.4th at 298.  
 50 *New York Times Co. v. Superior Court* (1997) 52 Cal.App.4th 97, 122 CPER 53.  
 51 *Los Angeles Times, supra*, 42 Cal.4th at 298 (quoting *New York Times, supra*, 52 Cal.App.4th at 101).

## Recent Developments

### *Local Government*

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#### Appellate Court Hears Oral Argument in PERB Jurisdiction Cases

On October 18, the Sixth District Court of Appeal in San Jose heard oral argument in two cases that involve the ongoing turf battle between the courts and the Public Employment Relations Board. At issue is whether a local public agency covered by the Meyers-Milias-Brown Act may go to superior court to obtain an injunction barring certain essential employees from participating in a work stoppage or whether the employer must go to PERB and ask that agency to seek an injunction on its behalf.

In *City of San Jose v. Operating Engineers Local Union No. 3*, the superior court sided with the union and ruled that the city had to go to PERB to seek relief from the strike. The city appealed to the Sixth District. In *County of Santa Clara v. Service Employees International Union Local 535*, the superior court reached a contrary result and concluded that the county was free to come to court to obtain an injunction. In that case, SEIU appealed.

The two cases were consolidated before the appellate court and were heard by the same three-judge panel made up of Justices Patricia Bamattre-Manoukian, Wendy Duffy, and Richard McAdams.

Deputy City Attorney Robert Fabela started out the presentation by telling the court that, while the parties in the San Jose case have signed a contract, the matter should not be dismissed as moot because it is an important matter that continues to surface in many jurisdictions around the state.

Getting to the main issue, Fabela was asked why the Supreme Court's ruling in *San Diego Teachers Assn. v. San Diego County Superior Court* (1979) 24 Cal.3d 1, 41 CPER 2 — that PERB has exclusive initial jurisdiction in strike cases — was not controlling. That case involved an unfair practice charge levied by the school district, Fabela explained. In the *City of San Jose* case, there was no argument that the union had engaged in an unfair practice in violation of the MMBA. The only issue brought before the superior court was a request that employees essential to the city's operations be prohibited from participating in the job action. And, he said, the determination of who are essential city employees is beyond PERB's expertise.

But, asked the court, didn't the legislature intend to fashion a uniform, statewide forum for these kinds of disputes? The city attorney responded that

uniformity serves no purpose in these types of cases because the determination as to who is an essential employee is not a labor issue.

Fabela made another point that was repeated during the course of the oral argument — that the courts are better suited than PERB to decide if particular employees are critical to the safety of the local community.

The panel of judges also focused the argument on *County Sanitation District No. 2 v. Los Angeles County Employees Assn., Loc. 660* (1985) 38 Cal.3d 564, 65 CPER 2, which announced in 1985

*The question is,  
who are essential  
city employees?*

that there was no common law or statutory prohibition on local government public employee strikes. When that case was decided, the MMBA was enforced by the courts. But all that changed in 2001, when PERB was given jurisdiction to administer and enforce the MMBA. Fabela argued that there is no legal basis for PERB to assert the jurisdiction it was granted in 2001 absent an allegation of an unfair practice. In the *City of San Jose* situation, he said, the MMBA was “completely beside the point” because the union complied with all of its bargaining obligations.

When Deputy County Counsel Lori Pegg rose to address the court, she

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was peppered with questions about why the county had waited until the last minute to go to court seeking the injunction. The questioning from the judges seemed to imply that the county had created the emergency situation by waiting to act. Not so, Pegg said. They

*Local government officials have a duty to protect the public, argued the city.*

received notice of the union's intention to strike on Friday and "scrambled" over the weekend to determine how many employees would be out. The county had to gather evidence to determine who were the essential employees and had to get authority from the board of supervisors to go to court.

Pegg reiterated the city's assertion that *San Diego Teachers* is not controlling because in the county's case there was no allegation that the union had violated the MMBA or that the strike itself was an unfair practice. If the factual circumstances demonstrate that there allegedly has been an MMBA violation, then the county would go to PERB, she said. But absent that link, there is no legal support for the claim that PERB has exclusive jurisdiction.

But, the court wanted to know, wasn't the situation essentially a labor dispute and hadn't the legislature cre-

ated PERB as an expert body that could "see the big picture"? Similar to the argument made by the city, Pegg told the court that the strike was a matter of local concern, and the county's duty to protect the public health and safety could not be delegated to the board. If the county had gone to PERB to seek an injunction and the board had declined to act, Pegg reasoned, local government officials still would have had a duty to protect the public.

Pegg also brought to the court's attention the governor's veto message associated with Assembly Bill 553. (See sidebar for the complete message.) That bill would have added language to MMBA Sec. 3509 expressly empowering PERB with exclusive jurisdiction to determine whether to seek injunctive relief from a court of competent jurisdiction in a strike situation. In his veto message, the governor said that enacting A.B. 553 would "add an unnecessary layer of bureaucracy and potentially place the public at risk." The governor's message, Pegg stressed, specifically stated that "cities and counties have common law and statutory authority over matters of public health and safety." Therefore, argued Pegg, the legislature and the governor saw PERB without exclusive jurisdiction in strike situations under existing law.

Pegg was asked by the court whether PERB and the superior courts could exercise concurrent or simultaneous jurisdiction. Tactfully, Pegg replied that she thought the Court of Appeal had to decide which entity has the

**governor's a.b. 553  
veto message**

To the Members of the California State Assembly:

I am returning Assembly Bill 553 without my signature.

This bill would provide the Public Employment Relations Board (PERB) with exclusive authority to determine whether public health and safety would be at risk in strike or lockout situations. Doing so would add an unnecessary layer of bureaucracy and potentially place the public at risk.

Cities and counties have common law and statutory authority over matters of public health and safety. When local governments seek injunctive relief from a strike, they are doing so because of a potential threat to the public health and safety of citizens. It is therefore imperative that local governments have access to immediate injunctive relief from superior courts during strike situations. As the courts are sufficiently suited to address matters of public health and safety, there is no reason to force decisions on injunctive relief into the slower PERB process.

For these reasons I am returning this bill without my signature.

Sincerely,

Arnold Schwarzenegger

authority. But, she was quick to add, the court cannot give jurisdiction that the legislature did not create.

Next up was Arthur Krantz, representing the union in the *City of San Jose* case. *San Diego Teachers* does control, he said at the outset, and emphasized the Supreme Court's ruling in *Coachella Valley Mosquito and Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 173 CPER 18, which grafted onto the MMBA a six-month statute of limitations based, in large part, on the high court's view that the legislature intended the board to administer the MMBA in the same manner as it administers the other collective bargaining statutes under its jurisdiction. The MMBA would stand alone, Krantz said, if the superior courts are given jurisdiction over strikes by local public employees.

Krantz also took issue with the city and county's contention that PERB is not qualified to determine who is an essential employee. He reminded the panel of judges that PERB already has jurisdiction over prison guards and nurses, clearly employees who can be deemed essential. PERB can certainly identify who are essential employees in the cities and counties operating under the MMBA.

As for the fact that no unfair practice charges were filed by the city or the county in these cases, Krantz argued that is not determinative. What is important is that the employers *could* have filed an unfair practice charge. In 1979, when *San Diego Teachers* was decided, he told the court, public sector strikes were considered by some employers to

be unlawful and injunctions had been obtained by employers from the superior courts. *San Diego* recognized that that prior procedure had been changed with the creation of PERB as an expert agency entrusted with enforcing the Educational Employment Relations Act. "We're in the same place now," Krantz said. *County Sanitation* was decided in 1985 when the courts played a role in strike situations, and that was changed in 2001 when S.B. 739 transferred MMBA jurisdiction to the board.

### *PERB is qualified to determine who is an essential employee, argued the union.*

As for A.B. 553 and the governor's veto message, Krantz told the court that the reason the bill was introduced was to clarify the law because there is confusion among superior courts as to who has jurisdiction. As these two cases attest, he said, some superior courts have assumed jurisdiction in strike cases and others have sent the employers to PERB.

Krantz was asked whether there should be an exception to the rule of PERB's exclusive jurisdiction in cases where the health and safety of the public is at stake and some entity must act quickly. That would be an exception that would swallow the rule, he responded, and it would completely divest PERB of its jurisdiction.

Kristin Rosi, an attorney from PERB's Oakland Regional Office, educated the court on how the board's injunctive relief process works and reviewed the board's regulations dealing with injunctive relief requests. Despite the maximum time limits set out in the regulations, she assured the panel, the board begins to act "the moment we get the papers." It is a fast procedure, she said, adding that the board is mindful of its mandate as a neutral state agency to protect the public interest.

Rosi was also prodded by the court to consider a middle position under which PERB would have initial exclusive jurisdiction except in instances where the public safety is at stake. Rosi did not warm to the court's suggestion. The right to strike is very important to unions, she said, and by allowing a local public agency to go to court to seek an injunction against the strike, the balance is tipped against the unions because, in essence, the court is ruling on the strike itself. If the court can decide who is an essential employee, the court is deciding whether those employees have a right to strike.

Rosi emphasized that a strike does not take place in a vacuum. It depends on the relationship of the parties. And PERB itself generally has an ongoing relationship with the parties and an interest in keeping the labor relations process going. It brings this expertise to the strike situation and, better than the court, can move the parties together toward settlement.

Based on the questions from the panel of judges, there appears to be a desire to craft some method by which PERB and the courts could share jurisdiction in these cases. However, none of the attorneys was receptive to the idea, and they stood their respective grounds on their positions. In any event, this Court of Appeal probably will not

have the final word. PERB's jurisdiction is also at issue in two other pending cases, one from Contra Costa County and another from Sacramento County. In both cases, briefs have been filed but no dates for oral argument have been set. In all likelihood, it may be the Supreme Court that decides this point of law somewhere down the road. \*

charge him was an abuse of discretion because the findings of the board of rights were not supported by substantial evidence.

Moore then filed a motion for a peremptory writ of mandate. In his motion, he again challenged the sufficiency of the evidence produced at the board of rights and, for the first time, alleged that the disciplinary action was barred by the one-year statute of limitations set out in Gov. Code Sec. 3304(d). He argued that the allegations of misconduct came to the department's attention on May 5, 2004, and the city had one year from that date to complete its investigation. Moore was not advised of the discipline to be imposed until completion of the board of rights on August 19, 2005. Citing *Sanchez v. City of Los Angeles* (2006) 140 Cal.App.4th 1069, 179 CPER 37, he argued that the department's failure to advise him of the proposed discipline within one year of discovery of the alleged misconduct ran afoul of the act's statute of limitations provision.

The trial court ruled that it did not have jurisdiction to consider the statute of limitations defense because Moore did not exhaust his administrative remedies by raising that issue before the board of rights.

On appeal, the court noted that one of the protections afforded by the Bill of Rights Act is the speedy adjudication of punitive actions against public safety officers. It affects this goal by providing in Sec. 3304(d) that no punitive action may be undertaken for any

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## Failure to Raise Statute of Limitations Claim at Board of Rights Forfeits Defense

A police officer for the City of Los Angeles unsuccessfully challenged his removal from the force because he failed to raise his statute of limitations defense before the board of rights, the Second District Court of Appeal found in *Moore v. City of Los Angeles*. The court clarified that the officer could have invoked the trial court's initial jurisdiction to remedy a perceived violation of the Public Safety Officers Procedural Bill of Rights Act under Gov. Code Sec. 3309.5. But, having failed to take that action, the court concluded that the one-year statute of limitations defense could not be raised for the first time in a petition for a writ of administrative mandate under Code of Civil Procedure Sec. 1094.5 because there was no record on the timeliness issue for the court to review.

The removal of Officer Tyrone Moore stems from conduct he exhibited during a response to a residential burglary. Moore used unnecessary force against a juvenile who was found

at the residence. An investigation into his conduct was initiated on May 5, 2004, the day of the incident, when another officer reported to a supervisor her concerns about Moore's behavior. After interviewing other juveniles and police officers who were at the scene, Captain Pesqueira recommended that a board of rights be convened to review Moore's conduct. On May 4, 2005, Chief William Bratton of the Los Angeles Police Department signed an order charging Moore with four counts of misconduct. A board of rights convened on July 15 and concluded on August 19, 2005. It recommended that Moore be removed as a peace officer. Chief Bratton agreed and signed the order removing Moore on August 31, 2005.

Moore filed a petition for a peremptory writ of mandate under Code of Civil Procedure Sec. 1094.5 with the superior court, seeking an order to compel the city to set aside his removal. He alleged that the decision to dis-

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

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allegation of misconduct "if the investigation of the allegation is not completed within one year of the public agency's discovery...of the allegation of...misconduct." The statute further provides that if the public agency determines that discipline may be taken, "it shall complete its investigation and notify the public safety officer of its proposed disciplinary action within that year."

The court also focused its attention on the vehicles available to challenge an agency's disciplinary action. Section 3309.5(c) vests the superior court with initial jurisdiction to render appropriate injunctive relief to remedy a violation of the act; a public safety officer is not required to raise a violation of the act at the administrative hear-

ing, said the court. He or she can use the alternative remedy of injunctive relief under Sec. 3309.5 to enforce those rights. The officer can also file a petition for a writ of administrative mandate under Code of Civil Procedure Sec. 1094.5 challenging the result of the administrative hearing and, at the same time, file a separate action under Sec. 3309.5 alleging a violation of the act.

Turning first to the trial court's waiver holding, the Court of Appeal affirmed the ruling that the statute of limitations defense was forfeited by Moore's failure to raise it before the board of rights. "California law has long provided that a statute of limitations defense must be raised at an administrative hearing before relief may be sought on that ground under Code

of Civil Procedure section 1094.5," said the court.

Relying on *Alameida v. State Personnel Board* (2004) 120 Cal.App.4th 46, 167 CPER 61, which held that Sec. 3309.5(c) gives the superior court initial but not exclusive jurisdiction in actions claiming a violation of the act, the court clarified that the statute of limitations must be raised either at the administrative hearing or in a proceeding under Sec. 3309.5(c). Moore never sought to invoke the superior court's injunctive power to enforce his rights under the act pursuant to Sec. 3309.5(c), the court underscored. All Moore alleged in his petition for administrative mandate under Code of Civil Procedure Sec. 1094.5 was that the decision to discharge him was an abuse of dis-

cretion because the board of rights' findings were not supported by the weight of the evidence. "Having failed to invoke the superior court's remedial powers under section 3309.5, and having failed to raise his statute of limitations argument under section 3304, subdivision (d) at the Board of Rights, the trial court properly ruled that the statute of limitations issue was forfeited." There is no suggestion in *Alameida*, said the court, that a public safety officer can raise a statute of limitations defense for the first time by way of a petition for writ of mandate, where the issue was not raised at the administrative hearing and was not the subject of a separate proceeding under Sec. 3309.5. By failing to institute a proceed-

ing under Sec. 3309.5 to enforce his rights, said the court, Moore never "engaged the initial jurisdiction of the superior court."

The court also rejected Moore's argument that it would have been futile to raise the statute of limitations defense at the board of rights. The record of the board of rights hearing reveals that it was conducted thoughtfully and carefully by the board members and, concluded the court, there is nothing to suggest that the board would not have fairly considered the statute of limitations defense had it been presented. (*Moore v. City of Los Angeles* [10-24-07] 156 Cal.App. 4th 373.) \*

On the day the council was to vote on this proposal, it posted a letter to the association offering to meet and confer on the effects of the potential decision to contract with the sheriff's department. It did not offer to meet and confer over the decision itself. Hours later, the council voted to cede authority over law enforcement to the sheriff's department.

The association filed a complaint and a writ of mandate in superior court, seeking to compel the city to meet and confer over the decision to contract with the sheriff's department, and sought injunctive relief barring the city from entering into the contract with the department.

The trial court granted a temporary restraining order and, thereafter, a preliminary injunction enjoining the city from contracting with the sheriff's department. It set aside the city council's decision and directed the parties to meet and confer over the issues. After meeting and conferring pursuant to the court's directive, the city entered into a new two-year MOU with the association and agreed not to contract out law enforcement services during the term of the parties' new agreement.

On appeal, the court's analysis of the scope of representation under the MMBA was guided by *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 180 CPER 21, and *Building Material & Construction Teamsters Union v. Farrell* (1986) 41 Cal.3d 651. After reviewing the test enunciated in those cases, the court found that

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## Decision to Contract Out Law Enforcement Services Subject to Meet and Confer Duty Under MMBA

The City of Rialto was required to meet and confer with the Rialto Police Benefit Association before it entered into a contract with the county sheriff to provide law enforcement services. In a case of first impression, the Fourth District Court of Appeal concluded that the Meyers-Milias-Brown Act required the city to bargain over the subcontracting decision itself because it was not a fundamental policy matter outside the bargaining obligation and because the implication of labor costs as a basis for the city's decision favors resolution within the collective bargaining framework.

The association serves as the exclusive representative of a bargaining unit consisting of all city police officers and most of the civilian personnel employed by the Rialto Police Department. From January 2004 through December 2005, the city and the association were parties to a memorandum of understanding. In September 2005, the city administrator submitted a report to the city council, recommending that it execute a contract with the San Bernardino County Sheriff's Department to provide all law enforcement services for the city.

“without question,” the city’s decision to enter into a contract with the sheriff’s department for law enforcement services affects the wages, hours, and conditions of employment of the city police officers. Relying on *Building Materials*, the court underscored that the transfer of duties outside the bargaining unit has an adverse effect on the wages, hours, and working conditions of the bargaining unit employees.

In further support of these California public sector rulings, the court turned to the seminal private sector

*The transfer of duties outside the bargaining unit has an adverse effect on wages, hours, and working conditions.*

case, *Fibreboard Corp. v. NLRB* (1964) 379 U.S. 203, in which the United States Supreme Court held that contracting out of work being performed by employees in the bargaining unit was within the meaning of the phrase “terms and conditions of employment,” and was a proper subject of collective bargaining. Federal case law makes clear that the employer is obligated to bargain over the decision to remove work from the bargaining unit, said the court, not merely over its effects on employees.

In light of these holdings, the Court of Appeal turned to the city’s contention that its action was not contracting out work because the city had changed the direction and scope of its enterprise by getting out of the business of law enforcement. The court was not persuaded, commenting that “the City did not *eliminate* police services but instead entered into an arrangement under which the Sheriff’s Department would provide such services.” Again citing *Building Materials*, the court underscored that the permanent transfer of work away from a bargaining unit has a significant effect on the wages, hours, and working conditions of bargaining unit employees, and is subject to the duty to bargain. So, too, is the transfer of bargaining unit work to an independent contractor or to established or newly hired employees outside the bargaining unit.

The court also relied on *San Diego Adult Educators v. Public Employment Relations Board* (1990) 223 Cal.App.3d 1124, 85 CPER 45, where the court held that a community college district had engaged in an unfair practice by contracting with an independent agency to provide instruction on a college campus without bargaining with the union. In that case, the court said that “the transfer of work from existing employees to employees of others by subcontracting the work is a decision which requires negotiation with the union.”

Next, the Court of Appeal considered whether the city’s decision was exempt from the bargaining obligation as a fundamental public policy. While *Build-*

*ing Materials* drew a line between the decision to close an operation and the decision to transfer work duties between various employees, the court remarked that existing case law provides no clear resolution as to whether the city’s decision is a fundamental management policy exempt from the duty to bargain. But, said the court, even if the decision to contract out police services to the sheriff’s department was a fundamental policy, the third step of the analysis instructs that such a decision still is within the scope of bargaining if “the employer’s

*Federal case law makes clear the employer is obligated to bargain.*

need for unencumbered decision making...is outweighed by the benefit to employer-employee relations of bargaining about the action in question.”

In applying this step of the test, the court noted that the administrator’s report recommending the transfer of work to the sheriff’s department emphasized the city’s finances and the cost savings that could be accomplished by contracting out public safety services. And, said the court, the city’s decision did not involve discontinuing the provision of services, but merely the means by which those services were to be provided. These points are noteworthy, said the court, in light of the analysis offered in

*First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, where the Supreme Court recognized that subcontracting is bargainable when there is no fundamental change in a company's operation, and the rationale for the contracting out is cost savings. *Fibreboard*, too, recognized that an employer's desire to reduce labor costs is a matter "peculiarly suitable for resolution within the collective bargaining framework."

With these cases in mind, the court observed that, to the extent the decision to transfer services to the sheriff's department was motivated by economic considerations, the association could offer concessions to reduce the city's financial problems. Where an employer's decision to subcontract unit work is driven by labor costs or some other difficulty that can be overcome through collective bargaining, the court reasoned, the decision itself is a mandatory subject of bargaining under *Fibreboard*.

"In sum," said the court, "as stated in the City's own staff report, the City's decision was motivated by the desire to reduce costs as well as issues involving employee morale, level of service, and management conflicts. These issues are eminently suitable for resolution through collective bargaining." Accordingly, the court concluded, the city was required to meet and confer with the association over its decision to enter into a contract with the county for the provision of law enforcement services. (*Rialto Police Benefit Assn. v. City of Rialto; County of San Bernardino, RPI*; [10-3-07] 155 Cal.App.4th 1295.) \*

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## Adverse Arbitration Award Does Not Bar Statutory Claims

An Orange County employee who unsuccessfully challenged her reassignment and demotion before an arbitrator under the terms of a memorandum of understanding is not barred from bringing statutory claims for workplace retaliation in violation of the Labor Code, intentional infliction of emotional distress, or violations of her federal civil rights. In *Marcario v. County of Orange*, the Fourth District Court of Appeal reversed the trial court and concluded that the arbitration of a labor grievance cannot have binding effect against an employee's statutory claims unless the agreement expressly states that it will. And, said the court, any statute of limitations applicable to her statutory claims are tolled during the time she pursued the internal grievance procedure.

Anita Marcario was hired by the county in 1988 and held the position of secretary I. In the course of her work, she discovered that the contractors employed by the county's Housing and Community Redevelopment Department were performing in a substandard manner and out of compliance with code requirements. She also discovered that building inspectors sent by HCRD to assess the quality of the contractors' work were unqualified to do so.

Marcario's complaints and the subsequent investigation generated much publicity. As a result, the county retali-

ated against her in connection with her employment. She was denied several placements within the secretary I classification despite excellent performance evaluations, and was transferred to a position and put to work as an information processing technician. Initially, she retained her classification as a secretary I and was compensated at

*The contract made no specific reference to grievances pursued to remedy statutory violations.*

the same pay rate. However, in June 2001, she was notified that her job had been reclassified and that she was thereafter an IPT. At that point, she was compensated at a rate 5.5 percent lower than a secretary I.

In July 2001, Marcario filed a grievance under the MOU between her union and the county, challenging her reassignment and demotion. The MOU states that a grievance may be filed if management's interpretation of the contract adversely affects an employee's wages, hours, or conditions of employment. The contract makes no specific reference to grievances pursued

to remedy statutory violations; it provides that the decision of the arbitrator is final and binding.

In November 2003, the arbitrator in Marcario's case denied her grievance, concluding that there was insufficient evidence to sustain the charge that her reassignment and reclassification were retaliatory. In June 2004, however, Marcario filed a lawsuit in superior court, alleging that she had been retaliated against in violation of Labor Code Sec. 1102.5, which affords whistleblower protections, and had suffered intentional infliction of emotional distress and civil rights violations under 42 USC Sec. 1983.

The county persuaded the trial court that the adverse arbitration decision precluded her effort to litigate the Labor Code claim and that the other causes of action were barred by applicable statutes of limitations.

On appeal, the court relied on the seminal cases of *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, *Barrentine v. Arkansas-Best Freight System, Inc.* (1981) 450 U.S. 728, and *McDonald v. West Branch* (1984) 466 U.S. 284, all denying the preclusive effect of a labor arbitration decision under a collective bargaining agreement. In these cases, as well as in *Wright v. Universal Maritime Service Corp.* (1998) 525 U.S. 70, the Supreme Court has held that a mandatory arbitration provision in a negotiated agreement is not enforceable where there is no clear and unmistakable waiver of the right to file suit.

Those federal cases were relied on in *Taylor v. Lockheed Martin Corp.* (2003) 113 Cal.App.4th 380, where a California appellate court concluded that a collective bargaining agreement negotiated between a union and an employer could not be used as a means to dispense with important statutory rights afforded to individual workers under state law. The Court of Appeal cited several other California cases which have held that an employee cannot be compelled to participate in an arbitra-

*Marcario could have pursued her civil claim earlier, but she was not obligated to do so.*

tion proceeding mandated by a collective bargaining agreement if the claims at issue are based on state statutes.

Cases relied on by the county are distinguishable, said the court, because they did not involve a collective bargaining agreement or arbitration, but rather the findings of an administrative agency created by the governmental entity and which culminated in a hearing before a civil service commission. Under those circumstances, the personnel decisions that result are, in effect, made by the public agency itself, said the court, acting in a quasi-judicial capacity. Here, the court stressed, the county did not resolve

Marcario's grievance through an internal administrative process. Instead, it was referred to an outside arbitrator for a binding decision. As a consequence, Marcario had no right to challenge the decision by writ of mandate as she would have had, had she been afforded a forum for administrative review.

Accordingly, the court concluded, because the MOU between the union and the county made no reference to statutory claims, and its grievance procedure was seemingly limited to ascertaining whether the county had violated the terms of the contract, the arbitration award did not operate as a waiver of her rights to pursue her statutory claims in court and the arbitrator's award could not be given preclusive effect.

The court also concluded that the statutes of limitations may properly be tolled for the period during which Marcario pursued her remedy in arbitration. The county's suggestion that Marcario could have filed her lawsuit during the pendency of the grievance arbitration is not determinative, said the court. The fact that Marcario *could have* pursued her civil claim earlier does not mean that she was obligated to. The court found no evidence that the county would be prejudiced by application of the equitable tolling doctrine in this case. And, when the court excluded the time expended during the grievance process, it calculated that Marcario's lawsuit was filed within the appropriate statute of limitations period. (*Marcario v. County of Orange* [9-19-07] 155 Cal.App.4th 397.) \*

# Public Schools

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## School District Must Designate Senior Management Employee

Under the Education Code, a classified employee becomes a senior management employee only when the school board so designates, ruled the First District Court of Appeal in *Gately v. Cloverdale Unified School Dist.* Absent that designation in this case, the district's business manager was not entitled to have her employment contract renewed.

### Factual Background

Kim Gately was hired as the district's business manager for a three-year period running from July 1, 2001, to June 30, 2004. At no time did the school board pass a resolution designating the business manager as a senior management employee.

On February 28, 2005, the board voted to terminate Gately's employment agreement, which already had expired in 2004. On June 15, 2005, the board voted to eliminate the position of business manager, based on a lack of funds and work. Gately was notified by letter that she was laid off effective July 31, 2005.

Gately filed a petition for writ of mandate alleging that she had been a senior management employee under Education Code Sec. 45108.5(a)(2)

and, therefore, her three-year contract had been renewed automatically when she was not notified of its termination 45 days before June 30, 2004, when it expired. She also alleged that the layoff based on lack of funds and work was pretextual, and that she actually had been terminated for disciplinary reasons without notice or opportunity to be heard.

The trial court denied the petition, and Gately appealed.

### Court of Appeal Decision

"There are two general categories of public school employees under California law: certificated employees, or teachers, and classified employees," explained the court. "Most classified employees who pass a probationary period of up to one year become 'permanent' employees subject to disciplinary action only for reasonable cause," it continued. Certain employees categorized as "senior management" are exempt from permanent status and its attendant protections. However, they cannot be terminated unless they are given written notice 45 days before the expiration of any contractual term of employment, instructed the court. If timely notice is not given, the senior

management employee's contract is automatically renewed for the same length of time and under the same terms, according to the Education Code.

The district argued that, under Sec. 45100.5, a classified employee does not become a senior management employee unless so designated by the board. That section provides, in relevant part, "(a) The governing board of a school district may adopt a resolution designating certain positions as senior management of the classified service...." Subsection 45108.5(b) specifies a maximum number of positions that may be designated as senior management, determined by the average daily attendance of the district.

*Gately argued that her three-year contract had been automatically renewed.*

Gately pointed to subsection 45108.5(a) in support of her position. It reads, "Senior management employee means... (2) An employee who acts as the fiscal advisor to the district superintendent." She argued that, under this subdivision, employees performing the role of fiscal advisor are senior management even if they have not been so designated by the board.

The court agreed with the district, and ruled against Gately. It acknowledged that “read in isolation” the section cited by Gately “could arguably be interpreted” as she suggested. However, said the court, statutory provisions that are “related to the same subject, should be construed together as one statute and harmonized if possible.” The court noted that Secs. 45100.5 and 45108.5 were enacted at the same time and relate to the same subject matter —

*‘Read in isolation’ the section cited by Gately ‘could arguably be interpreted’ as she suggested.*

senior management employees. It reasoned that if the definition of senior management employee under Sec. 45108.5(a) “is interpreted to mean that certain employees are senior management whether or not they are designated as such, the numerical restrictions of subdivision (b) would be rendered meaningless because any number of employees might qualify as senior management under the definition provided” in Sec. 45108(a). “On the other hand,” it continued, “if the definition of senior management employees” in Sec. 45108.5(a) “is read to limit and define the types of positions that the

school board may designate as senior management, each of the various provisions of section 45100.5 and 45108.5 is given full force and effect.” It elected the latter construction and found support for its position in the legislative history.

Gately argued that there was another way to harmonize the statutory scheme. The legislature intended to create two classes of senior management employees, she contended, “those designated by the school board, who are not accorded permanent status but who are entitled to notice of termination 45 days before the expiration of the employment term” pursuant to Sec. 45100.5(c), “and those high level administrators and financial advisors who meet the definition of ‘senior management’” under Sec. 45108.5(a), and who are not exempt from permanent status.

The court was not persuaded. It found nothing in the language of the statutes or in the legislative history to support this interpretation, and noted that it “fails to harmonize the numerical limits on senior managers” set out in Sec. 45108.5(b).

The court concluded by stating, “Gately was never designated a senior manager, and she was not entitled to an automatic renewal of her contract based on District’s failure to provide notice of termination at least 45 days before the expiration of her three-year term of employment.”

The court also disagreed with Gately’s claim that the “lack of work/lack of funds” rationale for her termi-

nation was pretextual. She maintained that the true reason for her termination was the personal antipathy of the school superintendent. She pointed to the fact that after her position was eliminated and she was advised of the layoff, the district created the position of chief financial officer, which included her business manager duties and paid a higher salary.

*Evidence supported ‘an inference that the layoff was made for legitimate fiscal and organizational reasons.’*

The court found sufficient evidence to support “an inference that the layoff was made for legitimate fiscal and organizational reasons,” including that the district’s finances were in “dire straits” and that “significant reorganization was necessary.” In addition, said the court, the CFO position “required skills that Gately lacked.” The court concluded that because “substantial evidence supported the trial court’s implied factual finding that the layoff was not pretextual and that the business manager position would have been eliminated for financial reasons” regardless of Gately’s job performance or the animosity of the superintendent, it did not need to resolve “whether, notwithstand-

ing the provisions of her three-year contract, Gately qualified as a permanent, classified employee subject to termina-

tion only for cause.” (*Gately v. Cloverdale Unified School Dist.* [10-26-07] 156 Cal.App.4th 487. \*

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## Governor Vetoes Bill to Return Oakland USD to Local Control

Governor Schwarzenegger has vetoed a bill introduced by Assembly Member André Swanson (D-Alameda) that would have restored local authority to the Oakland Unified School District after four years of management by State Superintendent of Public Instruction Jack O’Connell. A.B. 45 set out a detailed plan to return control to the local school board. (See *CPER* No. 185, pp. 41-42, for the bill’s specifics.)

The legislation was opposed by O’Connell, who took the position that the state should decide when the district is in shape to be run by the school board. The governor agreed. In his veto message, he expressed concern with the bill’s proposed process for determining return of local control. “The pace at which it seeks to restore the authority of the school board may surpass the pace at which the state administrator can imbed sustainable reforms,” he wrote. “Current law contemplates the return of the district to local control once the [Superintendent of Public Instruction] has a level of confidence that the improvements in the district are sustainable,” he continued. “In the in-

terest of the educational well being of the students, it is well worth investing the time to allow the SPI to finish the work that has already begun.”

Kimberly Statham, the second of two state administrators appointed by O’Connell to oversee OUSD since the state took control, abruptly resigned last September. Before her resignation, Statham said the district still owes \$90 million of the \$100 million loaned by the state when it took control and that the district is operating with a \$4.7 million deficit this year.

In reaction to the governor’s veto, Assembly Member Swanson an-

nounced plans for hearings “to study the effectiveness of California’s statutes governing state takeovers of school districts.” Swanson is chair of the California Select Committee on State School Financial Takeovers, a committee established by Assembly Speaker Fabian Nunez earlier this year. Swanson said the committee “will be looking at all of the state takeovers and in particular will be observing Oakland to make sure the progress continues.” He anticipates hearings will begin early next year.

The State of California has taken over control of seven local school districts since 1990: Richmond/West Contra Costa in 1990, Coachella Valley Unified in 1992, Compton Unified in 1993, Emery Unified in 2001, Oakland Unified and West Fresno Unified in 2001, and Vallejo City Unified in 2004. Only the Oakland and West Fresno districts remain under state control. \*

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## Schwarzenegger Signs Bill to Protect Gay and Lesbian Students; Opponents Vow to Fight

Governor Schwarzenegger signed into law S.B. 777, which amends the Education Code to specify that it is illegal to discriminate against any person in the public or private elementary and secondary schools and postsecondary educational institutions on the basis of

gender or sexual orientation. The bill, introduced by Senator Sheila Kuehl (D-Santa Monica), defines “gender” as “sex, and includes a person’s gender identity and gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at

birth.” “Sexual orientation” is defined as “heterosexuality, homosexuality, or bisexuality.”

Prior law prohibited discrimination in schools because of “sex, ethnic group identification, race, national origin, religion, or mental or physical disability.” It also prohibited a teacher from giving instruction, and a school district from sponsoring any activity, that “reflects adversely” on persons because of their “race, sex, color, creed, handicap, national origin, or ancestry.” S.B. 777 substitutes the terms “disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code,” for

the prohibited bases. It also substitutes the words “promotes a discriminatory bias” for the words “reflects adversely.”

Opponents of the new legislation have filed a referendum petition against S.B. 777 with the state Attorney General’s Office, starting a 90-day process that requires the collection of 433,971 valid voter signatures to qualify for the June ballot. The effective date of the bill, previously set for January 1, must now be extended until completion of the referendum campaign.

Karen England, who filed the petition and heads Capital Resource Institute, a conservative public policy group that focuses on family issues, claims the law will make teaching about “traditional family values” discrimina-

tory. “If I’m a teacher instructing kids about families and I only cover heterosexual lifestyles, am I promoting a bias toward heterosexuality?” she asked. “The answer would be yes.” “It’s going to silence Christian teachers in the classroom,” she continued. “It’s going to force them to violate their conscience or lose their job.”

Randy Thomasson of Campaign for Children and Families, an organization that opposes the legislation, wrote that “S.B. 777 introduces new mandates that will indoctrinate schoolchildren as young as kindergarten,” in favor of homosexual, bisexual, and transgender lifestyles. “The purpose of California schools must be academics, not indoctrination,” he wrote. \*

*cper*

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## Los Angeles USD Claims Payroll Problems Are Fixed

After almost a year of frustration that has, on occasion, exploded into protests and boycotts, the Los Angeles Unified School District announced in early November that teachers and other employees finally can expect to be paid the right amount, or close to it. Payroll problems began at the beginning of the year, when the district implemented a new computerized payroll system as part of a \$95 million technology up-

*The vast majority of errors have been overpayments.*

grade. Since then, thousands of employees have received inaccurate paychecks every month. The cost of fixing the system is estimated at somewhere between \$37 million and \$50 million.

Although some teachers did not receive any paychecks for months, forcing them to take out loans and run up credit card bills, the vast majority of errors have been overpayments. The district estimated that, as of November, employees have been overpaid by \$53 million. Most of the overpayments occurred in the paychecks issued on June 5, now referred to as "Black Tuesday."

Superintendent David L. Brewer cautioned employees not to spend the extra money while the district tries to calculate the amounts that have been over- and under-paid, and works with the union on how to recoup the funds. "Put it in an interest-bearing account," Brewer advised. However, at this point, many employees do not know if they have been overpaid because their paychecks have fluctuated so dramatically.

A.J. Duffy, president of the United Teachers Los Angeles, claims that "the district, in its infinite wisdom, bought a computer payroll system off a shelf," and that it should have either bought a system tailored to its needs or contracted out the whole thing.

District officials have acknowledged that the system had not been properly programmed to handle all the assignments and pay scales in the district, and that it was rushed into operation before clerks and timekeepers received proper training. But the district also blamed the problem on its complicated teacher payroll system, and called on the union to work with district officials to simplify the rules.

Union members have staged protests at district headquarters, and Duffy called for teachers to boycott after-school faculty meetings, which many have done. He also threatened a walk-out if the pay problems were not fixed

soon. District Counsel Kevin Reed, in a letter to Duffy, warned that such job actions were prohibited by the teachers' contract with the district, which states that union leaders cannot "cause, encourage, condone or participate in any strike, slowdown or other work stoppage." "I would point out to Mr. Reed that it is also illegal not to pay employees accurately and on time," Duffy responded. "When they start paying teachers accurately and on time, then the job actions will stop."

*District officials acknowledged that the system had not been properly programmed.*

The union also filed an unsuccessful lawsuit against the district, asking the court to order it to remedy the problem.

Despite the district's claims, employees reported inaccuracies in their November paychecks. Even if the system does get fixed, and accurate paychecks are issued in December, employees worry that their problems will not be over. It is not clear that the district will be able to figure out each employee's correct earnings before W-2 forms are issued and income tax returns must be filed. \*

## New Bills Modify State Teachers' Retirement Law

Several bills enacted by the California legislature in its last session make changes to the State Teachers' Retirement Law.

### A.B. 757

A.B. 757, introduced by the Assembly Committee on Public Employees, Retirement and Social Security, makes a number of changes to the law, several of which are outlined below.

The bill extends certain provisions of the law to employees who provide pre-kindergarten instruction. It states that the amount of service required to equal "full-time" for the purpose of calculating the minimum standard for benefits under the Defined Benefit Program for employees providing kindergarten through 12th grade instruction shall also apply to those teaching pre-

kindergarten children. It also provides that pre-kindergarten teachers can vote for and serve as members of the Teachers' Retirement Board. Existing law allows school districts to employ district interns to teach kindergarten through 12th grade bilingual and special education classes. The bill extends that authority to pre-kindergarten classes.

A.B. 757 authorizes the Teachers' Retirement Board to request, and requires members to provide, financial statements, certified copies of tax returns, evidence of financial status, and employment, legal, or medical documentation. It authorizes the State Teachers' Retirement System to release information filed with it by a member or beneficiary to specified persons in relation to disability claims or if the information is detrimental to the member.

In the situation where a member is granted a disability allowance and attains normal retirement age, the disability allowance is terminated and the member is eligible for service retirement. Existing law prohibits STRS from calculating service retirement based on service credited for unused sick leave. A.B. 757 extends that prohibition to service credited for leave of absence for education.

A.B. 757 requires a member who marries or enters into a domestic partnership after retirement, and who elects to name his or her new spouse or partner as his or her option beneficiary, to provide a certified copy of his or her marriage certificate or a certificate of registration of domestic partnership.

*cper*

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Other provisions impact the timing of cost-of-living adjustments, deposits into the Teachers' Deferred Compensation Fund, and the right of members to purchase service in the United States uniformed services.

#### **S.B. 901**

This bill, introduced by Senator Alex Padilla (D-Pacoima), addresses post-retirement earnings. It extends the expiration date of certain exemptions concerning the amount of post-retirement compensation that may be earned in specific types of employment

### *A.B. 757 extends certain provisions to employees who provide pre-kindergarten instruction.*

by a retired member before a reduction in his or her retirement benefits is necessitated. The date is changed from January 1, 2008, to June 30, 2009. The bill also sets a cut-off date of June 30, 2009, for the exemption from the earnings limitation compensation received from a retired member providing direct remedial instruction.

#### **A.B. 1316**

Introduced by Assembly Member Karen Bass (D-Los Angeles), A.B. 1316 permits a member of the Defined Ben-

efits Program who is eligible and applies for a disability allowance or disability retirement to apply for and receive a service retirement pending a determination of his or her application. If the member dies prior to a determination of the disability application, any subsequent payments to the beneficiary will be based on the service retirement allowance. If a member dies after he or she is granted a disability allowance or disability retirement, but prior to receiving notification of the approval, the disability allowance or disability retirement will be paid to the member's beneficiary.

#### **A.B. 1432**

The State Teachers' Retirement Law permits a STRS member to purchase service credit while employed by a public educational institution located in another state or while employed by the United States. Contributions for the purchase of service credit are deposited into the State Teachers' Retirement Fund. This bill removes exceptions regarding certain transfers of contributions and rollover distributions for non-participant domestic partners. It also permits members to purchase credit for service as an employee of an educational institution located outside the United States that receives a portion of its funding from a foreign or domestic source. \*

# Higher Education

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## Court Overturns PERB's Reading of CSU Arbitration Statute

The Public Employment Relations Board's understanding of two statutes was clearly erroneous when it decided that the California State University could not insist to impasse on a proposal limiting the scope of an arbitrator's authority, the Court of Appeal has held. Although academic employees are entitled to a final arbitration decision on grievances concerning appointment, reappointment, tenure, and promotion, nothing in the law requires unlimited remedial authority as a minimum statutory right that cannot be superseded by a collective bargaining agreement, the court held. The opinion overturned *Trustees of the California State University* (2006) Dec. No. 1823-H, 177 CPER 45, in which PERB found the university had engaged in an unfair labor practice.

### Statutory Floor

The legislature provided academic employees with grievance and arbitration rights in the Education Code in 1976. Section 89542.5 requires CSU to have a grievance and arbitration procedure for allegations that an employee "was directly wronged in connection with the rights accruing to his or her job classification, benefits, working conditions, appointment, reappointment, tenure, promotion, reassignment, or the like."

The statute requires a hearing by a faculty committee, which makes a recommendation on the grievance to the college president. If the president disagrees with the faculty committee's decision, the statute provides that "the matter shall go before an arbitrator whose decision shall be final."

The legislature took its definition of a "grievance" from a CSU executive order that was in effect at the time. That order provided for binding arbitral review if the committee and the president disagreed. But it allowed the arbitrator to decide only whether the president's rejection of the committee recommendation was arbitrary, whether unfair procedural defects affected the president's decision, and whether the president ignored substantial evidence favorable to the grievant. The arbitrator's remedies were limited to upholding the president's decision, following the committee's recommendation, or remanding the case to the committee.

After Sec. 89542.5 was enacted, CSU issued a new executive order. It limited the president's authority to reject the committee's recommendation. But if the president and the committee disagreed, the matter could be submitted to an arbitrator. If the arbitrator deemed the president's disagreement

unjustified, the arbitrator was required to adopt the committee's recommendation. If found justified, the president's decision was to be adopted. If the arbitrator found substantially prejudicial procedural errors at the committee level, the arbitrator could adopt the president's decision or resubmit the matter to the committee. The arbitrator's decision was final, as long as it was "consonant" with CSU policies or state and federal laws.

The Higher Education Employer-Employee Relations Act took effect in 1979. It provided that, when a collec-

*The statute provides that 'the matter shall go before an arbitrator whose decision shall be final.'*

tive bargaining agreement conflicted with Ed. Code Sec. 89542.5, the agreement would control. CSU and the California Faculty Association negotiated grievance procedures that included arbitral review of the president's decision on appointment, reappointment, tenure, or promotion, but that did not contain a provision for a faculty hearing committee. Over the years, the memoranda of understanding between the parties always contained restrictions on the authority of the arbitrator to set aside the president's decision.

In late 2001, S.B. 1212 became effective. It added Government Code Sec. 3572.5(b)(1), which provides that, except for a clause concerning payment of the arbitrator, Sec. 89542.5 “provides a minimum level of benefits or rights, and is superseded by a memorandum of understanding only if the relevant terms of the memorandum of understanding provide more than the minimum level of benefits or rights set forth in that section.”

### University Proposal

S.B. 1212 became effective while CFA and CSU were negotiating for a successor agreement. The parties disagreed whether S.B. 1212 allowed restrictions on an arbitrator’s authority. CSU’s proposal would have maintained the prior MOU’s limitations. It prohibited the arbitrator from overturning a decision on appointment, reappointment, promotion, or tenure unless there was clear and convincing evidence of a prejudicial procedural error. The university prescribed that the normal remedy for procedural errors was remand to the level where the error was made. The MOU allowed the arbitrator to grant appointment, reappointment, promotion, or tenure only in “extreme cases” where it was certain that the decision would have been favorable but for the fact the decision was not based on reasoned judgment, and only where there was no other practicable remedy.

CSU insisted on these contractual limitations on arbitral authority. CFA

requested an impasse determination and filed an unfair practice charge. CFA contended that CSU did not participate in good faith in impasse procedures because finality of the arbitrator’s decision is non-negotiable under S.B. 1212.

PERB concluded that the university violated its duty to bargain in good faith by insisting to impasse on a proposal that would limit the arbitrator’s remedial authority. Relying on statutory

## *CSU insisted on contractual limitations on arbitral authority.*

language and the legislative history of S.B. 1212, PERB reasoned that restrictions on an arbitrator’s remedial authority would undermine the minimum right to a final decision. CSU petitioned for review.

### Plain Meaning of ‘Final Decision’

The Court of Appeal criticized PERB for looking at the legislative history of S.B. 1212 instead of concentrating on the minimum rights defined in Sec. 89542.5. Senate Bill 1212 did not declare what rights were established as a floor for collective bargaining agreements, the court emphasized. It stated only that Sec. 89542.5 establishes “a minimum level of benefits or rights” and shed no light on the meaning of the Education Code.

PERB had reasoned that the legislature was aware of CSU’s executive orders and the parties’ agreements when it passed S.B. 1212, and would have incorporated the limitations on arbitral authority into the provisions of S.B. 1212 if it had intended to include them as minimum rights. But the court pointed out that PERB had erred by turning around the rule of statutory construction. When the legislature is aware of a practice and does not change it, the court instructed, the proper inference is that the legislature acquiesces in or impliedly approves of the practice, not that it disapproves.

The court also rejected PERB’s concerns that allowing MOUs to curtail the power of the arbitrator would dilute the right to a final arbitration decision and make S.B. 1212 an idle act. Before S.B. 1212, the court pointed out, “the university had the power to negotiate away the core grievance procedures of section 89542.5,” such as the right to a faculty committee hearing, the right to representation, the right to a record, and the right to an arbitration at university expense in particular circumstances. Now, because of the passage of S.B. 1212, CSU cannot eliminate those rights through collective bargaining.

PERB’s focus on S.B. 1212 when identifying unwaivable minimum rights was flawed, the court reiterated. The plain language of Sec. 89542.5 states only that the arbitrator’s decision “shall be final.” The common understanding of a “final decision” in California law

has meant a decision that is binding on the parties and subject to limited judicial review, the court instructed. It has not meant that the arbitrator's scope of review or choice of remedies could not be restricted. And nothing in the language of Sec. 89542.5 indicates that the legislature had a different view of finality at the time of enactment, the court observed.

The university's proposed limits on arbitrators' remedial authority

*The proposed limits on arbitrators' remedial authority would not affect the finality of an arbitrator's decision.*

would not affect the finality of an arbitrator's decision, the court found. The decision would be binding and would settle the dispute, subject only to limited judicial review. The court turned aside CFA's concerns that arbitral authority could be restricted to the extent that the decision would not be final. If the normal remedy for procedural error is reconsideration rather than appointment, tenure, or promotion, CFA argued, further proceedings would be necessary and might even lead to another arbitration. The court replied:

If the allegation were that the employee was directly wronged by a pro-

cedural error..., an arbitral resolution finding procedural error but remanding for error-free reconsideration is a binding resolution of the particular claim made. It is thus "final" as the term is generally understood in the arbitration context.

The court also rejected the union's contention that the university's proposal would permit review only of procedural errors rather than the merits of the president's decision. CSU's proposal is not so restrictive, the court pointed out, since it would allow the arbitrator to decide whether the president's decision was based on reasoned judgment.

**Legislative Intent Misused**

The plain language of the statutes was sufficient for the Court of Appeal to reach its decision, but since PERB relied on legislative history, the court also examined that indicator of legislative intent. The court pointed out that when the legislature was considering the language of Sec. 89542.5 in 1975, it was aware of the CSU executive order that limited the arbitrator's authority. Committee reports referred specifically to the executive order and asserted it contained "substantial similarities" to the proposed legislation. While several differences between the CSU procedure and the legislation were itemized, no reference to the finality of the arbitration decision was made. The lack of reference, said the court, shows that limits on the arbitrator's authority were not inconsistent with the legislature's intent in 1975.

The court did not examine the legislative history that led to S.B. 1212. PERB had relied on legislators' concerns that CSU had been trying to reduce the due process and arbitration rights of academics as a weapon against the faculty's demand for higher wages and benefits. But the court found the legislative history of S.B. 1212 irrelevant to the task of defining minimum

*The court did not examine the legislative history that led to S.B. 1212.*

faculty rights. The legislature "did not purport to characterize the meaning of a 'final' arbitration decision.... Even if it had, the validity of such a retroactive characterization would be questionable at best," the court explained.

The court directed PERB to vacate its decision and deny the unfair practice charge. CFA intends to ask the Supreme Court to review the court's decision. (*Board of Trustees of the California State University v. Public Employment Relations Board; California Faculty Assn.* (9-26-07) 155 Cal.App. 4th 866. \*

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## U.C. Student Employees Gain New Benefits

Unfair practice charges were filed, and a strike loomed as academic student employees at the University of California counted the days until their collective bargaining agreement would expire on September 30. After several hour-by-hour time extensions of the contract, the university and United Auto Workers Local 2865 settled on a new agreement in the early morning of October 1. The 12,000 teaching assistants, graders, and tutors at the university have new child care, parental leave, and health care benefits, along with higher wages and greater workload protections.

### Takeaways Proposed

Bargaining started in March. The prior contract provided for in-state student fee remissions and health insurance premium waivers for graduate students teaching at least 25 percent time. The UAW demanded that health insurance coverage be expanded to all students in the unit, and proposed that the university waive campus and professional fees — rather than just educational and registration fees — for all unit employees. But, despite a recent academic senate committee report recommending increased graduate student support, the university was interested only in capping premium remis-

sions and establishing fixed-dollar fee remission amounts. U.C. also wanted to change the grievance procedure, limit students' rights to express agreement with other unions during labor actions, and eliminate a contract provision that allowed students to attend a paid orientation session which included information on union rights and benefits.

The UAW lost patience with the university in mid-June, after U.C. resisted union demands to increase the transparency of hiring procedures, further regulate workloads, and submit workload disputes to arbitration. The union called a "grade-in/tutor-in" to highlight its claims that unit members teach over half of the undergraduate classes throughout the university. A thousand students showed up to per-

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**Pocket Guide to the  
Higher Education  
Employer-  
Employee  
Relations Act**

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

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

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

By Carol Vendrillo, Ritu Ahuja and Carolyn Leary  
1st edition (2003) • \$15 • <http://cper.berkeley.edu>

form their grading and other work in public on seven campuses.

Bargaining picked up some momentum over the summer as the parties agreed on language to protect employees from discrimination on the bases of pregnancy and gender identification. They also reached a tentative agreement to leave the grievance procedure unchanged. They discussed the union's demands for child care stipends and rights to paid leave for student employees with family responsibilities.

*The parties agreed to protect employees from discrimination on the bases of pregnancy and gender identification.*

According to the union, however, the university was dragging its heels on producing information necessary for negotiations over its health care proposals. The university insisted that the union pay consultants to collect quotes from insurance carriers for expanded coverage to all unit members and dependents, but the union believed insurance companies would be glad to provide U.C. with free information on the cost of various coverage proposals.

The union made its wage demand on August 24. The university re-

sponded September 5 with its proposal to nudge salaries only 2 percent. Facing a September 30 expiration of the collective bargaining agreement and difficulty scheduling bargaining dates, the UAW encouraged students to contact administrators to pressure the university to bargain fairly. The union claimed U.C. had engaged in dozens of unfair labor practices. It also publicized a June 2006 academic senate committee paper that reported an average shortfall of \$2,000 in financial support for U.C. graduate students compared to graduate students at peer institutions. The committee asserted poor financial support has forced departments to limit recruitment of non-resident graduate students and has led to a 10 percent decline in students in the university's doctoral programs.

On September 27, the UAW filed dozens of unfair practice charges with the Public Employment Relations Board. The union alleged U.C. had failed to provide information necessary to assess proposals and had sent negotiators to the table without authority to bargain. The UAW also claimed the university had made unilateral changes on some campuses. The union warned that teaching assistants would strike if the university continued to engage in unfair practices and stalling tactics. In support of the union, the U.C. Student Association announced it would hold the university responsible in the event that academic student employees went on strike.

### **'Historic' Gains Made**

Hours after the prior contract was set to expire, the parties hammered out an agreement. The union avoided any concessions and made significant gains in the areas of leave and workload.

The new pact provides for a 5 percent wage increase effective this past October 1, and another 5 percent on October 1, 2008, contingent on state funding. The minimum increase will be 1.5 percent. Tutors' hourly wages will rise to \$12 at the Berkeley, Davis,

*The UAW succeeded in extending the existing fee assistance to undergraduate teacher assistants.*

and Riverside campuses. Those students who work in academic student employee positions during the summer will be paid the same rate as the work pays during the school year. As a result, with the 5 percent increase, most summer pay will rise 12 percent.

The UAW staved off the attempt to move to fixed-dollar fee remissions. It succeeded in extending the existing fee assistance to undergraduate teaching assistants who teach at least 25 percent time, setting a precedent for academic student employee contracts na-

*cper*

**Pocket Guide to  
Unfair Practices:  
California  
Public Sector**

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

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

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

<http://cper.berkeley.edu>

tionwide. In response to an academic senate committee recommendation, the parties will form a committee to study the possibility of providing fee remissions to non-resident graduate students.

Health benefit premium remissions will not be capped, and the university has promised to include dental and vision benefits in the Graduate Student Health Insurance Program beginning in the fall of 2008. A committee will study possible expansion of the program to dependents, and broader coverage for mental health and other services.

For the first time, academic student employees will have rights to paid leave — other than legally required leaves — rather than leave being dependent on the university's exercise of

its sole "discretion." Bereavement leaves of three days will be provided. Salaried unit members appointed at 50 percent time will be eligible for two days per quarter or three days per semester for illness, disability, or family emergency. The same leave benefit will be prorated for those with less than 50 percent appointments. They also will be eligible for up to four weeks of paid leave for childbearing, and up to two weeks for serious illness or care of an ill family member or newborn or newly adopted child.

U.C. has agreed to post on the Internet all known hiring policies and job allocation procedures for academic student employees. Unit members will receive standardized appointment documents that describe their duties. Once per term, they will have the right

to notice of materials added to their personnel files.

After being hired, academic student employees will be protected by an eight-hour per day limit. Unit members will be notified of their percentage assignment and policies on class sizes. If an employee finds that the workload is exceeding the maximum hours for the assignment, the employee may notify the university, which must increase pay or decrease workload. Workload disputes will be subject to an expedited grievance and arbitration process that includes a hearing within 14 days of submission to arbitration.

The new pact provides for an increased flow of information to the union regarding class sizes. The university will also provide the union with electronic information on the appointment,

pay, dues deduction, and location of academic student employees.

Spokespersons from both parties indicated the agreement coalesced around shared goals and interests. Faculty have repeatedly voiced their perspective that graduate students are es-

sential to academic and research excellence at U.C. "We all have a stake in the ongoing success of the university," emphasized Howard Pripas, U.C.'s executive director for systemwide labor relations. \*

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## Lab's Skilled Crafts Workers Certified Under HEERA Days Before Transition to Private Sector

A rush to organize employees at the Lawrence Livermore National Laboratory ended on October 1, when management of the lab changed hands from the University of California to a private entity. Over U.C.'s objections, the Public Employment Relations Board certified the Society of Professionals, Scientists, and Engineers, UPTE Local 11, as the exclusive bargaining representative of approximately 250 skilled tradesworkers at the lab on September 26, 2007. The union had stepped up its organizing drive to fend off threats to job security and benefits that it claims have arisen at its sister facility, Los Alamos National Laboratory, after a private consortium began managing that lab in June 2006. (See stories in *CPER* No. 178, pp. 47- 51, and pp. 51-52.)

### Race Against Time

U.C. has managed LLNL under a contract with the federal government since 1952 without competition from other would-be contractors. After a series of security lapses and U.C.'s ter-

mination of two whistleblowers at the Los Alamos facility, however, Congress voted to open up the management contracts for both labs to other bidders. To address concerns about U.C.'s handling of business and security aspects of lab operations, the university joined a consortium of public and private entities to bid on the Los Alamos contract — Los Alamos National Security, LLC. That approach was successful, and U.C. teamed up with many of the same private entities in its proposal to run the Livermore facility.

Livermore employees watched closely how workers fared during the transition from university to LANS employment and did not like what they saw. Because the contract between LANS and the federal Department of Energy required that employees of the new entity be placed into a different retirement plan, those employees remaining at the Los Alamos facility could not continue to accrue service credit in the generous U.C. pension plan. Unless they were eligible for retirement, they were forced to choose

between rolling their assets into a new, smaller pension system with different benefits or taking inactive status in the U.C. plan and starting a new 401(k) plan. Many workers became at-will employees with little protection from termination or layoff.

Both SPSE and a non-exclusive local union at the Los Alamos lab are affiliated with the University Professional and Technical Employees, CWA Local 9119, which is the exclusive representative of research support and technical workers at U.C. campuses and the university-run Lawrence Berkeley National Laboratory. UPTE and its

## *U.C. teamed up with private entities in its proposal to run the Livermore facility.*

affiliates have been vocal in opposing the change in management of the labs and advocating to the federal government that the successor entity maintain benefits as similar as possible to those received under U.C. management.

As it became certain that U.C. no longer would be the sole operator of the Livermore lab, SPSE-UPTE began an organizing drive. Its urgency was based on a difference between the organizing laws that govern U.C. and those that govern private employers. Under the Higher Education Employer-Employee

Relations Act, a union can become recognized as the exclusive representative of a bargaining unit by presenting to PERB authorization signatures from a majority of the employees in the unit. This “card-check” method is not available for unions organizing private sector employees. The National Labor Relations Board, which administers labor relations laws for the private sector, requires a secret ballot election. Unions assert that the election method allows employers to intimidate or dissuade employees from supporting a union, while card-check enables unions to organize with less employer interference.

*The university had advocated in 1982 that machinists at the lab be placed in the technical unit.*

In October 2006, SPSE-UPTE began to collect authorization cards in six bargaining units that PERB carved out in the early 1980s when several unions unsuccessfully tried to become certified representatives of different groups of lab employees. The union pointed out that a provision of the DOE request for proposal required the lab’s successor employer to respect organiz-

ing and bargaining rights. If certified, the union would have greater power to fight against reductions in benefits and bargain for job security.

By April, it became clear that skilled crafts workers were the group most likely to collect enough authorizations, and the union concentrated its efforts in that unit. SPSE-UPTE claims that U.C. illegally attempted to hinder organizing efforts by forbidding employees to discuss union issues in the lunch room, their offices, or near water coolers. SPSE president and lab employee Jim Wolford told *CPER* that he was required to ask permission to talk about organizing to other employees during lunch. The union requested that PERB seek injunctive relief against the anti-organizing tactics. PERB granted the request, but the parties worked out a settlement before PERB went to court.

#### University Objections

At the end of June, SPSE-UPTE submitted to PERB authorization cards from a majority of the members of the skilled trades unit. The university filed objections to the unit on August 8. It argued that laborers should not be in the skilled crafts unit, and that machinists — whom PERB had placed in the technical unit in 1982 — should be included. U.C. also asserted that 13 employees wanted to withdraw their authorization cards.

In response to the university’s objections, the union agreed to drop laborers from its requested unit. It also temporarily waived any objections to

the authorization revocations. Even taking into account the revocations, PERB found that SPSE had presented proof of majority support. Once the laborers were excluded, the union’s requested unit was virtually identical to the unit description that PERB had approved in 1982.

U.C. asserted that PERB should hold a hearing on the remaining issue, inclusion of machinists in the unit. PERB Regional Director Anita

*U.C. argued this summer that machinists should be included in the skilled crafts unit.*

Martinez acknowledged in her September 26 administrative decision that unit determinations are not intended to be fixed forever. But, she found that a hearing was not necessary because the university’s arguments and declarations had not presented facts that indicated a change in the original 1982 skilled crafts unit description might be appropriate.

The regional director noted that the university had advocated in 1982, that machinists at the lab be placed in the technical unit because they worked with the lab’s scientific teams to fabricate equipment for scientific experi-

ments. Employees in the skilled crafts unit, on the other hand, did not share a community of interest with machinists because they were involved in maintaining the lab's infrastructure. Unless U.C. had evidence that there were significant changes in the machinists' community of interest, the 1982 unit determination would stand, the regional director explained.

The university argued that management changes called for a modification of the unit description. The lab

### *The lab asserts that employees should have a secret ballot election.*

now has a management structure that "seeks to integrate policies and procedures for its many business units notwithstanding the specific mission of each unit," U.C. asserted. But the regional director found no support for these claims in the declarations submitted by the university. In addition, the asserted changes did not support a closer community of interest between the skilled trades and machinists as opposed to other groups. The regional director pointed out, "Taken to its logical conclusion, LLNL's argument would place virtually all LLNL employees in a single unit, contrary to legislative design and PERB precedent."

U.C. also listed many working conditions, such as tools, training, and

work locations, that it contended supported finding a community of interest. The regional director turned these assertions aside, however, because there was no evidence that any of these shared working conditions represented new developments since the original unit determination. The university acknowledged that machinists continued to be integrated with the scientific community rather than with skilled tradesworkers.

#### **Parties at NLRB**

U.C. had 10 days from the date of the September 26 certification decision to file an appeal. However, rather than appeal, which would have postponed a final decision at PERB, U.C. took no action. According to lab spokesperson Susan Houghton, U.C. did not have time to appeal to PERB before October 1. Instead, on October 19, the new entity, Lawrence Livermore National Security, LLC, requested the NLRB to intervene in the case. In its request, the lab asserts that employees want to revoke their authorizations. It argues that

employees should have a secret ballot election because they are not comfortable asking for their cards back.

SPSE-UPTE also went to the NLRB with charges that LLNS was refusing to recognize the unit and bargain with the union. Union president Wolford told *CPER* that he expects no quick resolution. In the meantime, the union is busy with new issues. Due to congressional budget problems, DOE has instructed LLNS and other national labs to submit restructuring plans, and some supplemental and casual employees at the Livermore lab have been let go. SPSE-UPTE has proposed to the lab's director that he work with the union to secure federal funding and public support for the lab's mission. At the same time, the union is asking that management avoid layoffs and agree not to subcontract work that current employees perform. Lab spokesperson Houghton told *CPER* that the lab is "looking for cost efficiencies. As a last resort, it will look to the workforce for cost savings." \*

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## **Legislative Update**

In the last issue, *CPER* reported on four bills affecting higher education, all of which were sitting on Governor Schwarzenegger's desk as of press time. Two of the bills, S.B. 190, introduced by Senator Leland Yee (D-San Francisco), and A.B. 1413, introduced by

Assembly Members Anthony Portantino and Julia Brownley, were designed to increase oversight of the University of California and the California State University. (For the complete story, see *CPER* No. 186, pp 56-58.)

The governor signed S.B. 190 into law, requiring that all discussions regarding executive compensation at the two institutions now be held in open session. Further, all executive compensation packages for specified executive positions at U.C. and CSU must be voted on in open session. Full disclosure of, and a rationale for, each compensation package is required and public comment is allowed.

However, the governor vetoed A.B. 1413, meaning that CSU *ex officio* members will not be authorized to send designees to meetings of the board of trustees and that specified limits on transition pay will not go into effect. In his veto message, the governor stated he did not want to micromanage hiring practices at the university.

The second set of bills, S.B. 259 and S.B. 235, both introduced by Senator Gloria Negrete McLeod (D-San Bernardino), would have increased benefits for CSU employees and retirees. (For the complete story, see *CPER* No. 186, p. 61.) Because the governor vetoed S.B. 259, academic employees will not be able to receive full service credit while on a reduced pay leave, such as a sabbatical. The governor did sign S.B. 235, permitting CSU retired employees to participate in a program similar to the Vision Care Program for State Annuitants, administered by the Department of Personnel Administration, a program from which they were previously excluded. \*

# State Employment

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## Supreme Court Bats Down Another PEEG Attempt to Skirt Prop. 35

In a unanimous opinion, the California Supreme Court invalidated a provision of a memorandum of understanding designed to preserve the work of state engineers and architects on the ground that the provision violates Article XXII of the state Constitution. Article XXII, added to the Constitution by Proposition 35, exempts architectural and engineering services from the general civil service limitations on contracting out work that civil service employees perform. Despite the parties' attempts to draft exceptions to the contractual obligations that would avoid constitutional challenge, the court in *Consulting Engineers and Land Surveyors of California v. Professional Engineers in California Government* held that the legislature violated Article XXII when it approved the MOU between the state and PEEG. Nor could the executive branch agree to terms that conflicted with the electorate's constitutional amendment, said the court.

### Proposition 35

Article XXII provides that the "State of California...shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of im-

provement. The choice and authority to contract shall extend to all phases of project development...." It also states, "Nothing contained in Article VII of this Constitution shall be construed to limit, restrict or prohibit the State...from contracting with private entities for the performance of architectural and engineering services."

Article VII of the California Constitution establishes a civil service system under which appointment and promotions in state employment must be based on merit. While the civil service article does not expressly outlaw contracts for services, courts have found that the article limits private contracting because contracting out traditional state services would eventually erode the civil service system's protections against political patronage appointments.

Proposition 35 prohibited statutory amendments to its provisions unless they "further its purposes" and are passed by a two-thirds vote of each house of the legislature and signed by the governor.

### Labor-Management Committee Review

The MOU between the state and PEEG recited in Article 24 that the

union had presented evidence the state was incurring "unnecessary additional costs" by contracting out unit work. The Department of Personnel Administration, which represents the state in collective bargaining, agreed that the state would make "every effort to hire, utilize and retain Unit...employees before resorting to the use of private contractors." Exceptions were made for "extremely unusual or urgent, time-limited circumstances, or under other circumstances where contracting out is

*The committee was charged with determining 'which contracts should and can be terminated immediately.'*

recognized or required by law, Federal mandate, or court decisions/orders." The purpose of the provisions was "to guarantee that the State does not incur unnecessary, additional costs by contracting out work appropriately performed at less expense to the State by Unit 9 employees."

The state agreed to provide PEEG with requests for bids or proposed contracts to allow the union to present alternatives to contracting out services while satisfying the state's needs. But

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

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

By Emi Uyehara  
(First edition, 2005)  
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the union gained more than access to new contracts. Article 24 set up a committee that allowed representatives of PECG, DPA, the Department of Finance, and the contracting state entities to review existing contracts. The committee was charged with determining “which contracts should and can be terminated immediately,...which contracts may continue,...and how...to transition contract employees or positions into civil service.” Determinations could be made only by mutual agreement.

The MOU also allocated any savings from terminated contracts toward several purposes, such as avoiding layoffs or displacements in the bargaining unit. Employees in the unit had preference over contract employees if the duties being contracted were consistent with the employee’s classification, the employee was qualified to perform the job, and there would be no disruption in services. If an employee was threatened with displacement, the employing agency had to review existing contracts to determine if work in the employee’s classification was being performed by a contractor. If the labor-management committee determined it was permissible under the contract to assign the work to the employee, Article 24 required that the assignment “be implemented consistent with the other terms of this [provision],” and provided that the state and PECG would meet and confer about the assignment.

The agreement recited, “The state is mindful of the constitutional and statutory obligations...as [they pertain] to restrictions on contracting out.”

### **CELSOC Challenge**

The MOU was approved by the legislature and then-Governor Davis. The state agreed to similar provisions in the MOUs of several units of state employees. Only architectural and engineering services are exempted from Article VII’s proscription against contracting out, however. And private engineering and architectural firms vigilantly protect that exemption from incursions by PECG.

## *The Kempton court turned aside the union’s separation of powers argument.*

The Consulting Engineers and Land Surveyors of California filed a petition for writ of mandate charging that the contracting out section of the MOU was invalid under Prop. 35. The trial court found that the MOU’s terms limited the ability of the state to contract freely for architectural and engineering services in violation of Article XXII. It issued an injunction against implementation of the contracting-out language and declared the provision invalid. The intermediate appellate court affirmed the judgment, and PECG petitioned the Supreme Court for review.

### ***Kempton Prevails***

PECG argued that Article 24 was a constitutional exercise of the legislature’s authority to set policy. In its view, Prop. 35 expanded the legislature’s power to decide whether to contract for services by removing constitutional restrictions on contracting. The union based this argument on an assertion that the phrase “State of California” in the initiative measure referred to the legislature. If, in fact, the phrase encompassed individual state agencies, the union contended, it would violate the separation of powers doctrine by shifting legislative authority to set policy regarding contracting of services from the legislature to executive agencies.

The union had made similar arguments in *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 184 CPER 59, and repeated them in briefs in this case before the Supreme Court issued its decision in *Kempton*. After *Kempton*, the court asked the parties for supplemental briefing. Although PECG dropped the unsuccessful arguments, and in some ways argued contrary to its initial position, the *CELSOC* court discussed and rejected both the old and the new contentions, largely relying on its holdings in *Kempton*.

In *Kempton*, PECG had argued that statutory provisions which allowed contracting of services under specified conditions were still in effect because the legislature had authority to regulate contracting out and had chosen not to amend the statutes. The court de-

cided, however, that Caltrans was justified in ignoring those statutes, which allowed contracting that fell within constitutionally based exceptions to Article VII, because Prop. 35 impliedly repealed them. Since the proposition authorized contracting of architectural and engineering services free of Article VII restrictions, the *Kempton* court found that statutes which conditionally authorized private contracting were inconsistent with Article XXII.

*The electorate has  
co-equal authority  
with the legislature to  
set state policy.*

The *Kempton* court concluded that the purpose of Prop. 35 was broader than merely removing Article VII restrictions on the legislature's authority to regulate contracting out. It rejected the union's assertion that the phrase "State of California" referred only to the legislature, and based on the initiative's language, found that all three branches of government gained authority to contract with private entities for architectural and engineering services.

The *Kempton* court also turned aside the union's separation of powers argument. A constitutionally empowered entity — the electorate — exercised its own legislative authority to set policy on contracting for services, the court pointed out.

In this case, the court reiterated the principle that the electorate has co-equal authority with the legislature to set state policy. "Further," the court said, "the electorate also chose to limit the Legislature's ability to set policy in this area" by restricting legislative amendments to the initiative. Prior case law has held that the state Constitution empowers the electorate to limit legislative amendments to an initiative.

Contracting for services with private companies is not mandated, the union pointed out, and argued that the legislature has authority to choose to approve restrictions on contracting, which it did when it approved PEGG's MOU. The court reminded the union that the legislature could not approve an MOU that contravenes a constitutional provision.

Many of the provisions of Article 24 echoed the previously invalidated statutory restrictions on the ability of the state to enter into contracts for architectural and engineering services, the *CELSOC* court found. Therefore, it held, legislative approval of the MOU violated Article XXII of the Constitution.

**Agency Choice Prevails**

Having had its arguments in *Kempton* rejected, PEGG offered new theories. It contended that the executive branch had authority to make policy choices about private contracting and that legislative approval of the contracting provisions of the MOU was not necessary. The union also asserted that Article 24 only required data gathering and analysis, not termination of any

contracts. It maintained that the provisions did not revive the previously invalidated statutory restrictions because the purpose of the MOU was not to promote the civil service system.

The court dismissed PEGG's executive branch argument. The executive branch can no more violate the Constitution than the legislative branch, the court said. It reiterated its conclusion that Article 24 mirrored the invalidated statutes. The purpose of the

*PECG contended that  
the executive branch  
had authority to make  
policy choices about  
private contracting.*

MOU provision is not determinative, the court found, since its effect was to restrict the ability of state agencies to contract for architectural and engineering services. The court also rejected PEGG's contentions that the MOU merely created a committee to analyze public data to determine whether the state is incurring unnecessary costs on contracting services, pointing to terms that allowed for termination of contracts and that protected the interests of state employees.

The court found "curious" the union's emphasis on clauses that sidelined the state's contractual obligations

when contracting out was “recognized or required by law.” The court rejected as ineffective these attempts to save the article from invalidation. “This argument appears to amount to a concession that any provisions of article 24 in conflict with Proposition 35 as we construed that initiative in *Kempton* are a nullity,” it scoffed.

The most interesting discussion is contained in a footnote that addresses the legislature’s friend-of-the-court brief. The court rejected the contention that construing Prop. 35 to constrain the discretion of the executive branch converts Article XXII to a mandate in favor of private contracting. The court’s response indicates individual state agencies have the authority, unfettered by any executive branch hierarchy, to decide whether to contract out architectural and engineering services. But one phrase suggests that even state agencies could not make a policy choice to use state employees unless their criteria were consistent with Prop. 35.

[S]tate agencies have the choice and authority to use private contractors so, clearly, they can choose not to if they conclude that a particular public works project can be more efficiently performed by civil service employees. Moreover, Proposition 35 does not preclude state agencies from imposing conditions consistent with Proposition 35 on private contractors that perform such work. What the state may not do is to impair an individual agency’s choice to engage in private contracting in derogation of the authority conferred on it by Proposition 35. Neither the Governor nor the Legislature, separately

or jointly, can undo by MOU what the electorate enacted through Proposition 35.

The Supreme Court affirmed the judgment of the Court of Appeal. (*Con-*

*sulting Engineers and Land Surveyors of California v. Professional Engineers in California Government* [11-5-07] Supreme Court S145341, \_\_\_ Cal.4th \_\_\_, 2007 DJDAR 16547.) \*

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## CSEA and Affiliates Reshape Their Future

The continuing struggle for autonomy of the four affiliates of the California State Employees Association has led to bylaws changes that grant greater autonomy to the Service Employees International Union Local 1000 and the other former divisions of CSEA. In October, delegates from each affiliate to the general council approved a package of bylaws amendments proposed by the Committee on the Future of CSEA. Union leaders hope that the amendments and the election of new CSEA officers will end more than a decade of wrangling between CSEA and Local 1000.

### Organizational Changes

Prior to 2004, CSEA had four divisions of members — rank-and-file state employees represented by the Civil Service Division, California State University employees, state supervisors, and retirees. The battle between the CSD and CSEA began in the early 1990s when a conflict over bargaining arose between negotiating teams for the bargaining units and the 25-member CSEA board, which was disproportionately dominated by retirees. Since that time, the rank-and-file union has at-

tempted to gain control over its own stewards and bargaining teams, bargaining strategy, dues, and staff.

In 2000, the CSD general council voted, in accordance with CSEA bylaws, to incorporate as an affiliate of CSEA. But it took years of litigation before CSEA was forced by court order to issue a charter to the rank-and-file affiliate. (See story in *CPER* No. 163, pp. 61-64.) Charter status allowed the CSD, which affiliated with Service Employees International Union and became known as the Union of California State Workers, SEIU Local 1000, to be named as the exclusive bargaining representative on the certifications of nine state employee bargaining units. It also gave Local 1000 the power to collect dues and control its own assets. As an affiliate, Local 1000 elected delegates to CSEA’s council, which sets CSEA’s budget.

As all the former divisions became affiliates, CSEA found itself struggling to define its role in employee representation. It has legal, communications, lobbying, and accounting staff that perform functions for a single affiliate at times and that service all affiliates at

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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>.

other times. Its service agreements with the affiliates required the affiliates to pay both the direct costs and a share of indirect expenses. But Local 1000 claimed a right to hire its own staff and conduct its own lobbying campaigns, and it refused in mid-2005 to make full payments to CSEA because it objected to having to fund a large share of indirect costs.

Even after an arbitrator decided some of these issues and remanded others back to the parties to settle on their own, the parties were still at odds over personnel management and the amount of money Local 1000 owed CSEA. (See story in *CPER* No. 177, pp. 53-55.) In another arbitration, the arbitrator sided with CSEA when Local 1000 tried to hire back an organizing director whom CSEA had fired because he allegedly had been physically abusive to other staff.

In August 2006, the parties reached an agreement with the help of a mediator. CSEA acknowledged that Local 1000 could hire its own staff for financial and computer services. The agreement contained terms covering

*Local 1000 tried to  
hire back an  
organizing director  
whom CSEA  
had fired.*

financial support of CSEA, endorsement of political candidates, contributions to the CSEA staff’s pension fund, and cooperation during negotiations

with the staff union. The parties agreed to let SEIU President Andrew Stern appoint neutral individuals to help the parties work on their relationship and to resolve disputes. The most important provisions, however, may turn out to be terms that established a commission to recommend to the general council “how best to make CSEA successful for its members.”

**Committee on the Future**

The committee began meeting in March with the assistance of Larry Fox and veteran labor representative Josie Mooney, two consultant/mediators appointed by SEIU President Stern. Four representatives from each affiliate and the umbrella CSEA organization met for over 100 hours, in addition to time spent in subcommittee meetings.

The committee recommended a package of bylaws changes that the general council approved in October. The amendments obligate affiliates to facilitate the transfer of members to another affiliate after changes in employment or retirement and allows them to organize non-state employees. CSEA will be able to offer its support services, such as printing, personnel management, and legislative services, to non-affiliated organizations.

*The amendments allow affiliates to hire and fire employees while recognizing that CSEA is the formal employer.*

CSEA will continue to service and support affiliates, and may designate staff to assist an affiliate, but the amendments allow affiliates to hire and fire employees while recognizing that CSEA is the formal employer. If an affiliate and CSEA disagree whether an employee should be terminated, the matter will be sent to binding arbitration.

Affiliates will be able to establish their own political action committees and choose which candidates or measures they support or oppose.

Other bylaws amendments reflect decisions made in 2005 to add affiliate representatives and drop CSEA re-

gional directors from the CSEA board, which will decrease CSEA's representation on the board. Affiliates will nominate candidates for appointment to CSEA committees, but the association's president has the power to appoint committee members and remove them, subject to a vote of the board.

The amendments delineate specific conduct for which an affiliate's charter can be cancelled. They provide that an arbitrator will preside over hearings to determine whether grounds exist for charter cancellation and will sub-

mit a decision to the board. The board may act to implement the arbitrator's findings that it is in the best interests of CSEA to cancel the charter.

Before the general council met in October, SEIU Local 1000 and CSEA overcame disagreements that had delayed a new service agreement. With the election of Local 1000-supported candidate Dave Hart as president of CSEA, union leaders are optimistic about the relationship between the association and its affiliates. \*

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## **CDF Firefighters and State Chip Away at Salary Compaction**

High vacancy rates in the supervisory ranks and a union lawsuit prompted the Department of Personnel Administration to boost pay a bit for assistant chiefs and managerial fire suppression employees in the California Department of Forestry and Fire Protection, also known as CalFire. The raises are consistent with DPA's recent efforts to maintain a 5 percent differential between the highest rank-and-file pay and the salaries of supervisors in other state agencies.

### **Compaction**

In 1999, the legislature enacted a new law designed to prevent compaction of salaries that had resulted in officers in some departments earning more than their supervisors. Govern-

ment Code Sec. 19849.18 requires that employees who supervise employees in bargaining units 5 (highway patrol officers), 6 (correctional officers), and 8 (firefighters) receive "salary and benefits changes that are at least generally equivalent to the salary and benefits granted to employees they supervise." The term "salary" is defined to exclude overtime pay. The statute continues, "The benefit package shall be the economic equivalent, but the benefits need not be identical." It provides that the benefit package be determined through the meet and confer process afforded to supervisors in the Excluded Employees Bill of Rights Act.

Despite the law, salary compaction at CalFire continued. After the parties reached agreement on the 2001-06

memorandum of understanding, the base pay of the highest-ranking bargaining unit members, battalion chiefs, rose substantially. Battalion chiefs were placed on an 84-hour schedule that included 19 hours of planned overtime at nearly one-and-a-half times their regular hourly pay. They also continued to have opportunities to work unplanned overtime assignments at even higher rates of pay. Assistant chiefs, however, were not eligible for overtime pay, and their compensation was actually lower than the pay of battalion chiefs.

### *Some assistant chiefs asked to demote to battalion chief.*

The salary inversion — where supervisory pay was lower than rank-and-file pay — was a disincentive for battalion chiefs to apply for promotions to assistant chiefs. Some assistant chiefs even asked to demote. The vacancy rate for assistant chief rose to over 30 percent in 2006.

#### **Legal Claim**

As the vacancy rate climbed, CDF Firefighters, the union that represents both rank-and-file and supervisors in CalFire, decided to sue the state for violation of the statute which gives supervisory personnel the right to compensation that is equivalent to salary and benefit changes bargained with the

rank-and-file union. Soon after the lawsuit was filed in May 2006, the parties agreed to roll over the MOU with a few compensation changes. The MOU reduced the workweek to 72 hours for new battalion chiefs by shaving off 12 hours of planned overtime, and decreased the pay slightly for planned overtime hours. (See story in *CPER* No. 179, pp. 66-67.) Although the new base compensation for battalion chiefs was at least 5 percent higher than the next-lowest rank, fire captain, it remained nearly as high as the salary for assistant chiefs.

Early that fall, DPA decided to increase supervisor and managerial pay retroactive to July 1. Base compensation for assistant chiefs was boosted to 5 percent above the pay for 72-hour battalion chiefs, and salaries for unit chiefs and forestry and fire protection administrators was raised to 5 percent above the assistant chief salary. DPA also increased by 5 percent the extended-duty pay that supervisors and managers earn from May through September as compensation during the wildland fire season. In addition, DPA implemented temporary recruitment and retention bonuses of \$22,000 for assistant chiefs, which bumped their pay to 5 percent above the wages of 84-hour battalion chiefs and gave similar temporary increases to their managers. The temporary bonuses were to expire in June 2009. DPA reasoned that current 84-hour battalion chiefs needed an incentive to promote to assistant chief, but many were expected to retire in the

next few years. Retiring battalion chiefs' replacements would earn the lower 72-hour battalion chief salary, and the need for the higher assistant chief salary to entice promotions would end.

In November 2006, the court knocked out much of the union's central claim on the basis that planned overtime was overtime under the statute and therefore could not be included when comparing battalion chief pay to assistant chief salaries. The union was left with a choice between an expensive appeal of the issue and the surviving, smaller side claims.

### *The parties reached a deal to make the \$22,000 assistant chief pay differential permanent.*

#### **Reworked Differential**

After meeting several times, the parties reached a deal to make the \$22,000 assistant chief pay differential permanent and subject to Public Employees Retirement System deductions. Battalion chiefs on the 84-hour schedule who promote to assistant chief before July 1, 2009, will also receive the differential permanently. While the union attempted to eliminate the 2009 expiration of the unit chiefs' recruitment and retention bonus, it was unsuccessful.

ful. The parties will meet and confer on salaries for supervisors on the forestry side of the department who received only a 3.5 percent increase in July 2006. CDF Firefighters agreed to dismiss its lawsuit.

The "significant vacancy problem" in the assistant chief classification was the primary motivation for the settlement. The parties hope that the pay levels provide an incentive for 84-hour battalion chiefs to apply for promotions to assistant chief, and for current supervisors and managers to remain in the department. The union believes, however, that the vacancy crisis will be pushed up to the unit chief/forestry and fire protection administrator level once the bonuses for those ranks expire.

## CAPS' Efforts to Raise Salaries Stymied

Despite its moderation, A.B. 385 (Ruskin, D-Los Altos) was vetoed by Governor Schwarzenegger. The bill would have required the Department of Personnel Administration and the California Association of Professional Scientists to negotiate a methodology for surveying scientist compensation in other public agencies, to jointly survey and calculate the estimated average total compensation of specified scientist classifications in public service, and to report the survey results to the legislature. It echoed the requirement of Government Sec. 19826 that the state must consider comparable salaries prior to

making salary recommendations. (See story in *CPER* No. 186, p. 50.)

Governor Schwarzenegger's rationale for vetoing the bill was that it was redundant and harmful to collective bargaining. State law requires that DPA conduct a survey of compensation for public employees in similar positions in other agencies. The collective bargaining agreement improves on that law by mandating a jointly conducted survey of salaries for specified positions. While CAPS was attempting through the bill to put salary data in front of the legislature, the Department of Finance was concerned that the bill would lead to rigid pay parity.

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**Basics of  
Labor Relations**

It takes time and experience to understand the nuances of labor relations, but here's a start.

If you are a manager who has just been given an assignment that includes labor relations responsibility, or if you are a newly appointed union representative, you may be feeling a bit overwhelmed. It's easy to make mistakes, and there's pressure from both sides. This Pocket Guide will help you get your bearings and survive the initial stages of what can be a difficult, but rewarding, line of work.

This book will tell you...why we have public employee unions...state laws that regulate labor relations...the language of labor relations...what is in the typical contract...how to negotiate and administer labor agreements...how to handle grievances...what to do in arbitration and unfair practice hearings...how to handle agency shop arrangements...and, how to cope with extraordinary situations (including downsizing and/or restructuring, work actions, and organizing drives).

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

<http://cper.berkeley.edu>

“If the State of California is to have good faith collective bargaining, then employee wages, hours, and terms and conditions must not be legislated,” said the governor in his veto message. He indicated, however, that he was concerned scientists’ salaries may have fallen behind and directed DPA to pay serious attention to the issue. State scientists gained a 3.5 percent increase for 2006-07 and 3.4 percent on July 1, 2007, in an MOU reached in August 2006, despite a 2006 survey that showed 9 percent to 48 percent lags behind other scientist salaries in the public sector job market.

The union’s efforts to boost supervisor salaries also has been thwarted. A year ago, CAPS filed an administrative challenge with DPA that claimed the department was violating the “like pay for like work” principle of the Government Code. In an April 2007 hearing, CAPS presented evidence that state scientists in supervisory classifications historically were paid comparably to supervising engineers. But, CAPS pointed out, recent increases in engineer compensation negotiated by the Professional Engineers in California Government have resulted in distortions of the state salary structure, such as the 14.1 percent increase that supervisory engineering classifications enjoyed in July as compared to the 3.4 percent increase that supervisory scientists received. As a result, CAPS argued, scientists are being paid significantly less than engineers at a comparable level, and often with overlapping

duties. Some scientists supervise engineers who make more money than their supervisors. CAPS gave examples of scientists who transferred to engineering classifications because of the pay disparity — while remaining in the same job. The union requested equity increases of 6 to 17 percent to restore the historical salary relationships between similar scientists and engineers.

The union expected a decision in July, but never saw one. Instead, in September, DPA Director David Gilb sent the matter back to the hearing panel

*‘Employee wages,  
hours, and terms and  
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be legislated,’ said  
Schwarzenegger.*

for further evidence on 10 questions. He indicated that he wanted to know the numbers of supervisors affected and whether there was evidence, such as interviews of managing engineers or experts, to confirm the testimony of the scientists who appeared before the panel in April. What is the history of the two supervisory classes? And should there be only one class? Gilb also questioned whether the 13 allocation factors that DPA has used to evaluate salaries are appropriate measures of evaluation, considering evidence that the work of the

supervising engineers and supervising scientists is at times nearly identical.

In its response, CAPS reiterated its view that the two supervising classes do similar and comparable work at the same organizational level, not identical work, although the tasks sometimes overlap. The union requested that the panel seek CAPS’ input on whom to interview or at least make any further evidence available to the union. Further hearings were scheduled for late November. CAPS’ Chris Voight told *CPER* that state scientists want to see an answer quickly. “We’re confident that the evidence supports our position.” \*

# Discrimination

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## No Need to Exhaust CBA Remedies Before Filing FEHA Lawsuit

The First District Court of Appeal ruled that a public employee is not required to exhaust internal grievance procedures created by a collective bargaining agreement culminating in arbitration prior to bringing a lawsuit alleging violations of the Fair Employment and Housing Act. The court distinguished the facts in *Ortega v. Contra Costa Community College Dist.* from those in which courts have required administrative or judicial exhaustion.

### Factual Background

Jose Ortega was demoted from his position as head football coach at Contra Costa Community College in March 2004, and then terminated in June 2005.

After his demotion, Ortega filed a statement of grievance alleging a violation of the collective bargaining agreement between United Faculty, the union representing Ortega, and the district. His grievance was denied by the college president for failure to follow proper procedure and failure to comply with grievance time lines. Ortega requested that a factfinding panel be convened, a procedure contemplated by the contract, and the union and district each suggested a panel member. But the process did not go forward.

On August 12, 2004, after receiving a right-to-sue letter from the Department of Fair Employment and Housing, Ortega filed a lawsuit against the district, alleging that he was demoted as a result of race discrimination in violation of the FEHA. He also made claims of intentional infliction of emotional distress and negligent supervision.

### *A public employee may choose to ignore statutory civil service remedies for employment discrimination.*

Ortega filed a second statement of grievance on June 28, 2005, alleging he was improperly terminated. The grievance was denied for failure to properly request a hearing and failure to allege any specific violations of the contract. No further action was taken.

Ortega filed a second lawsuit relating to his termination on December 27, 2005. Again, he alleged race discrimination and retaliation in violation of the FEHA, intentional infliction of

emotional distress, negligent supervision, and wrongful termination.

The trial court dismissed both lawsuits, finding that Ortega had failed to prove that he had exhausted the grievance process created by the collective bargaining agreement in the demotion case and failed to allege such exhaustion in the termination case. Ortega appealed.

### Court of Appeal Decision

The court determined that the trial court had erred: Ortega's FEHA claims were not barred by administrative or judicial exhaustion. In coming to this conclusion, the court examined three cases relied on by the district: *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 164 CPER 44; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 144 CPER 33; and *Page v. Los Angeles County Probation Dept.* (2004) 123 Cal.App.4th 1135, 169 CPER 23. The court summarized the holdings of the cases as follows:

[U]nder *Schifando*, a public employee may choose to ignore statutory civil service remedies for employment discrimination and proceed directly to the courts to obtain relief under the FEHA. However, under *Johnson*, if the public employee elects to utilize the civil service remedies provided and receives an adverse finding, that finding binds the trial court in any subsequent FEHA action, unless the finding is overturned in a mandate proceeding. Finally, as *Page* explains, if the public employee has had an evidentiary hearing during the civil service proceedings, the employee may not opt out of those proceedings be-

**NEW** from CPER

# **Pocket Guide to Disability Discrimination in the California Workplace**

by M. Carol Stevens and Alison Heartfield Moller  
(1st edition, 2007) \$16

Disabled California employees who face discrimination in the public sector workplace are protected by the federal Americans with Disabilities Act of 1990 and the California Fair Employment and Housing Act. This Guide describes who the laws cover, how disabilities are defined, and the remedies available to aggrieved workers. It includes:

- Reference to the text of the law and the agencies' regulations that implement the statutory requirements;
- Similarities and differences between the FEHA and the ADA, including a chart that compares key provisions of the laws;
- A discussion of other legal protections afforded disabled workers, including the federal Rehabilitation Act of 1973, the federal Family and Medical Leave Act, and corresponding California Family Rights Act and workers' compensation laws;
- Major court decisions that interpret disability laws, and appendices of useful resources for obtaining more information about disability discrimination.

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fore a final decision is reached in order to file an FEHA claim in court. Instead the employee must exhaust the administrative remedies provided, until a final decision is obtained, and, if the decision is adverse, exhaust the judicial remedy by pursuing mandate relief.

The district argued that, under the reasoning of these cases, because Ortega chose to initiate the internal grievance procedure provided in the contract following each adverse employment action, the doctrines of administrative and judicial exhaustion bar his lawsuits. The court disagreed, stating that the district, in making this argument, ignored the “critical difference” between these decisions “where the employees’ administrative remedies were provided by statute, and Ortega’s cases, where his internal remedies were provided in a CBA.”

The court pointed to the case of *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, in which the United States Supreme Court held that an adverse decision of an arbitrator in a proceeding mandated by a negotiated labor agreement does not bar a claim under Title VII. “The holding in *Alexander* stemmed, in part, from the high court’s concern that the union often exercises control over the presentation of grievances under a CBA, and the union’s interests may not always coincide with an individual employee’s interest in the pursuit of his or her discrimination claim,” explained the court. It noted that in *Camargo v. Portland Cement Co.* (2001) 86 Cal.App.4th 995, the court applied

the holding in *Alexander* to the FEHA, ruling that a contract-mandated arbitration award has no preclusive effect on FEHA claims.

In further support of its position, the court noted that the California Supreme Court found *Alexander* inapplicable to the facts in *Johnson*, where the internal grievance procedure was statutory, not contractual. In *Alexander*, “the arbitration was in the context of a CBA, which by its very nature gives rise to a tension between collective representation and individual statutory rights,” said the *Johnson* court.

*The union’s interests  
may not always  
coincide with an  
individual employee’s  
interest.*

The same reasoning applies in this case, said the court. “As *Johnson* acknowledged, public employees who are provided statutory administrative remedies may be subject to different administrative and judicial exhaustion requirements than employees, like Ortega, who are governed by a CBA. The CBA governing Ortega’s relationship with the District provides for a multi-level grievance procedure if the ‘grievant has been adversely affected by a violation of...this Agreement.’” Here, “the union exercises significant control

over any such grievance,” found the court. “If the grievant wishes to be represented, the union designates that representative.” And, though the employee may unilaterally complain to the college president and appeal to the chancellor, he does not have the authority to demand a factfinding panel. Factfinding is only conducted “with the concurrence and participation” of the union, under the terms of the negotiated agreement. “Yet, as recognized by *Alexander* and *Johnson*, the union may well have good faith representational interests that differ from the employee’s individual interests, and these distinct interests may lead the union to block the fact-finding proceeding or conduct it in a way that is inimical to the employee’s interests,” said the court. “We would ignore this reality if we denied Ortega judicial relief because he did not pursue the fact-finding process he had no absolute right to obtain.”

The district argued that *Alexander* and *Camargo* should not apply to this case because the factfinding procedure mandated by the collective bargaining agreement was not called “arbitration.” The court disagreed. The question is not whether the contract uses the term “arbitration,” but rather whether the grievance procedure provides for a “binding mechanism for resolving disputes between the parties,” said the court. “An arbitration agreement exists where there is ‘(1) a third party decision maker; (2) a mechanism for ensuring neutrality with respect to the rendering of the decision; (3) a decision maker

who is chosen by the parties; (4) an opportunity for both parties to be heard; and (5) a binding decision,” said the court, citing *Cheng-Canindin v. Renaissance-Hotel Assn.* (1996) 50 Cal.App.4th 676, 121 CPER 92. It concluded that the foregoing requirements were met by the grievance procedure set out in the CBA.

Ortega could be barred from bringing his FEHA lawsuits if there was a “clear and unmistakable” waiver of the judicial forum in the collective bar-

*The court did not  
barr Ortega’s  
FEHA-related,  
non-statutory claims.*

gaining agreement and the grievance procedure allowed for full litigation and fair adjudication of the FEHA claim, said the court, citing *Camargo*. It concluded that “neither condition has been satisfied here.”

In addition, the court ruled that Ortega’s FEHA-related, non-statutory claims of intentional infliction of emotional distress, negligent supervision, and wrongful termination were not barred, citing *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708. The court in *Williams* held that “*Schifando’s* exemption must also apply to FEHA-related nonstatutory claims when the resolution of those claims would have a preclusive impact

on the FEHA claim.” Because Ortega’s non-statutory claims were all based on the racial discrimination alleged as the basis for his FEHA claim, an adverse finding on one of those claims that racial discrimination did not occur would have a preclusive effect on the FEHA claim, concluded the court.

The court reversed the trial court’s judgment in both cases and sent them back for further proceedings. (*Ortega v. Contra Costa Community College Dist.* [11-9-07] A113341 and A114313 [1st Dist.] \_\_\_Cal.App.4th\_\_\_, 2007 DJDAR 16831.) \*

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## **Schwarzenegger Vetoes Bill to Counteract *Ledbetter***

Governor Schwarzenegger vetoed a bill designed to protect California workers from the impact of the United States Supreme Court’s recent decision in *Ledbetter v. Goodyear Tire & Rubber* (2007) 127 S. Ct. 2162, 185 CPER 61. In that case, the court ruled that administrative complaints alleging pay discrimination must be filed within 180 days after the last pay decision that demonstrated discriminatory intent, or within 300 days in those states with agencies authorized to accept Title VII charges — not within 180 or 300 days of the issuance of the last paycheck that reflects the discriminatory activity. The effect of this decision is to extinguish the right of a plaintiff to recoup lost wages, even in situations where the victim was not aware of the discriminatory decision until after the 180 or 300 days had passed.

A.B. 435, introduced by Assembly Member Julia Brownley (D-Santa Monica), would have amended the California Equal Pay Act to extend from

two years to four years the amount of time an employee would have to file a lawsuit alleging pay discrimination based on gender. The bill would have extended the time from three years to five years in the case of willful violations. In addition, it would have required employers to maintain wage and job classification records for a period of five years, rather than the two years required under present law.

The bill was supported by the California Labor Federation, Service Employees International Union, United Food and Commercial Workers, and several other unions and women’s advocacy groups. It was opposed by the California Chamber of Commerce, the California Employment Law Council, and the California Hospital Association, among others.

Schwarzenegger, in his veto message, said, “This bill is intended, like others I have vetoed before, to eradicate the historical trend of women earning less than men for doing the same

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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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work. While I support this intent, I still do not believe the provisions of this bill or previous years' legislation are necessary in order to achieve this goal." He stated his concern "that measures like this bill will encourage frivolous litigation against employers and have little impact on the fight against gender pay inequality."

Another bill designed to counteract the *Ledbetter* ruling, and passed by both houses of the legislature, was not sent to the governor before the end of the legislative session. A.B. 437, introduced by Assembly Member Dave Jones (D-Sacramento), would specify that a cause of action for any unlawful employment practice with respect to compensation accrues when a compensation decision is adopted, when an individual becomes subject to a compen-

sation decision, or when an individual is affected by the application of a compensation decision, "including each time when wages, benefits, or other compensation is paid." The bill needed

only a concurrence vote from the Assembly to go to the governor, but Jones placed it in the inactive file on September 12. It can be taken up again when the legislature reconvenes. \*

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## **Governor Vetoes Family Leave Legislation**

Governor Schwarzenegger used his veto power to block the California legislature's attempt to expand family leave and protect from employment discrimination those workers who take care of family members.

Under the federal Family and Medical Leave Act and the California Family Rights Act, all public employers and private employers with 50 or more employees must provide up to 12

weeks of unpaid leave for serious personal illness, bonding with a baby, or caring for a seriously ill child, parent, or spouse. The CFRA also covers employees caring for domestic partners. California's Paid Family Leave Act provides up to six weeks of paid leave to bond with a new child or care for a seriously ill parent, child, spouse, or domestic partner.

A.B. 537, introduced by Assembly Member Sandré Swanson (D-Alameda), would have extended the CFRA to include employees caring for seriously ill siblings, grandparents, grandchildren, and parents-in-law. S.B. 727, introduced by Senator Sheila Kuehl (D-Santa Monica), would have extended the Paid Family Leave Act to the same group.

“While some expansion of existing law may have merit, these laws in combination are too expansive and also fail to recognize the need for reforms to current law,” Schwarzenegger wrote in his veto message. “California has the strongest employment leave and workplace protection laws in the country,” he said. “While these laws have been enacted with the best of intentions, they also have caused much confusion for employers and employees. Unfortunately, many California-only standards in areas such as family leave, overtime, and meal and rest periods have been developed haphazardly and have resulted in needless litigation that has created a perception that California is not friendly to business,” he continued. “Instead of expanding the confusing network of laws that presently exist, employers and employees should be working together to eliminate confusion and create a system of workplace laws that protects workers, provides reasonable leave requirements, and offers both employers and employees flexibility to meet their respective needs.”

The governor also vetoed another bill introduced by Senator Kuehl, S.B. 836, which would have amended California’s Fair Employment and Housing Act to prohibit employment discrimination based on an employee’s family status, including a role as caregiver.

“California has the strongest workplace laws against discrimination and harassment in the country,” said Schwarzenegger in his veto message. “Although I support these laws, expanding workplace protections to include something as ambiguous as ‘familial status’ is not appropriate,” he wrote. “This bill will not only result in endless litigation to try and define what discrimination on the basis of ‘familial status’ means, it will also unnecessarily restrict employers’ ability to make personnel decisions.”

Employers strongly opposed the legislation. The California Manufacturers and Technology Association had made defeat of the bills one of its top

priorities for this year’s legislative session. “There will be indirect costs to the leave bills, such as massive absenteeism and an inability to backfill spots with skilled workers,” said one of its spokespersons. The California Chamber of Commerce said, in a written statement opposing S.B. 836, “Since many employees have a spouse, child, parent or sibling that might need supervision or transportation, status can serve as a new, easy form of discrimination to allege.”

Family leave advocates were greatly disappointed by the vetoes. “Governor Schwarzenegger could have made a difference in the lives of thousands of families,” said Netsy Firestein, executive director of the Labor Project for Working Families, a leader in the statewide Work & Family Coalition that advocated for the bills. “Workers should not have to choose between caring for a sick loved one and keeping their jobs,” she said. \*

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## Union Violates Duty of Fair Representation and Title VII

The Ninth Circuit Court of Appeals, in *Beck v. United Food and Commercial Workers Union, Loc. 99*, upheld the district court’s ruling that an employee’s union violated its duty of fair representation and discriminated against her on the basis of sex when it failed to pursue grievances that were filed to challenge

disciplinary actions which had been imposed for her use of profanity.

### Factual Background

Cheryl Beck was employed as a scanning coordinator by Fry’s Food Stores. The collective bargaining agreement between Local 99 and Fry’s,

which covered Beck's terms and conditions of employment, prohibited the use of "profane, abusive or threatening language toward fellow employees."

On April 13, 2001, in the store's parking lot before work, Beck had a heated conversation with Bob Evans, an employee with whom she had become romantically involved. Evans submitted a statement to management, accusing Beck of using profanity in the course of the conversation.

*Local 99 asked its attorney whether it was legally required to arbitrate the grievance.*

The company suspended Beck and scheduled a meeting for the following week to address the administration of any discipline. Beck reported the suspension to Barbara Cleckner, Local 99's field representative. Prior to the meeting, management told Cleckner that it intended to terminate Beck because she had a "history of a foul mouth." Beck had not been previously disciplined for using profanity. Prior to the meeting, Beck told Cleckner that she had not used profanity in her conversation with Evans and that any statements made during their interaction were not actionable because the conversation took place while she was off duty.

At the scheduled meeting, the company issued Beck a "Final Written Warning," which stated that "any further conduct involving the use of profanity, inappropriate comments or malicious gossip will result in termination." Beck asked Cleckner to file a grievance contesting the warning. Cleckner promised she would, but she did not.

On July 5, 2001, Beck had an argument with another employee who later claimed that Beck had used profanity, which Beck denied. Fry's terminated Beck on July 9, 2001.

Local 99 filed a grievance contesting Beck's termination, at her request. In September 2001, Local 99 asked its attorney to determine whether it was legally required to arbitrate the grievance. The attorney provided a letter stating that, in his opinion, a single incident of alleged profanity would not constitute just cause for discharge. However, he continued, an arbitrator would "almost certainly" conclude that the termination for a second incident constituted just cause when the first incident resulted in an unchallenged written warning issued less than three months earlier. Local 99 decided not to arbitrate Beck's grievance.

Beck filed a lawsuit alleging that Local 99 had breached its duty to represent her fairly and that it had discriminated against her on the basis of her sex in violation of Title VII. The case went to trial before a judge who ruled in her favor.

**Court of Appeals Decision**

***Duty of fair representation.*** A union breaches its duty of fair representation when its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith, instructed the court. Conduct is considered arbitrary "only when it is irrational, when it is without a rational basis or explanation," it continued.

Using this standard, the court analyzed the breach of the duty of fair rep-

*Beck would not have been terminated but for the union's failure to file a grievance.*

resentation on a continuum. On one end is "intentional conduct by a union exercising its judgment." On the other end "are actions or omissions that are unintentional, irrational or wholly inexplicable, such as an irrational failure to perform a ministerial or procedural act." In this case, the court found the union's failure to challenge the April 2001 warning "stemmed not from its evaluation of the merits of Beck's complaint, but rather from a failure to perform the ministerial action of filing a timely grievance." It agreed with the district court that the union's failure to file the grievance was an arbitrary action that substantially injured Beck, specifically because she would not have

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Public  
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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  
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been terminated for the July 2001 incident but for the union's failure to file a grievance contesting the prior incident. The court noted that this conclusion was supported by the opinion letter from the union's own attorney that arbitration of Beck's termination would be futile given the failure to challenge the April warning.

The court found that, because Beck's interest at stake was strong, and the union's failure to file the grievance completely extinguished her right to pursue her claim, the union's failure to file Beck's original grievance was not mere negligence but rather "an egregious disregard of her rights." The court emphasized that "the union should be held to a higher standard of care in discharge cases involving off-

duty conduct because the sanction is severe, and the nexus between job performance and the alleged misconduct is more attenuated," quoting *Johnson v. USPS* (9th Cir 1985) 756 F.2d 1461. "The policies underlying the duty of fair representation would not be served by shielding Local 99 from liability for this unexplained failure," it concluded.

Because the court found the union's failure to file the initial grievance was a breach of its duty of fair representation, and Beck's termination was a direct result of that breach, it did not decide whether its failure to arbitrate her termination was also a breach of the duty.

**Sex discrimination.** The Court of Appeals also upheld the district court's ruling that the union discriminated

against Beck on the basis of her sex in violation of Title VII by failing to provide her with the same quality of representation as it provided to similarly situated males.

At trial, Beck introduced evidence that the grievances of two similarly situated men were handled by the local "with greater zeal" than her grievances and that of another similarly situated female. "Specifically," summarized the court, "Beck introduced evidence that Cleckner and other Local 99 representatives aggressively represented Larry Molitor, a male employee who had been the subject of multiple disciplinary actions, including discipline for using 'profane language, racially discriminatory remarks, and threatening comments,' for threatening a coworker with

a twelve-inch knife, and for ‘unprofessional conduct, threatening of employees, and throwing product and equipment.’” She also introduced evidence that the local had aggressively represented another male employee who was reinstated after being terminated for a physical altercation with another employee. In addition, Beck showed that the local did not aggressively represent a female employee who was terminated for extending the expiration date on some meat. Other male employees had engaged in the same conduct and were not terminated, but union representatives did not use the comparison to help the female employee get reinstated.

The district court determined that only a discriminatory motive could explain why the local did not represent Beck aggressively, while doing so for other similarly situated male employees. It found that Molitor was “similarly situated in all material respects” to Beck, but received more favorable treatment. It also noted that the local’s handling of the other female employee’s grievance strengthened the inference that it intentionally discriminated on the basis of sex.

On appeal, Local 99 argued that Beck’s evidence was “insufficient as a matter of law to support the district court’s inference of discriminatory motive,” because the statistical evidence was based on too small a sample size. The Court of Appeals responded that, in this case, “Beck’s evidence was comparative in nature, rather than statistical,” and cited a number of cases in

which it had upheld “inferences of discriminatory motive based on comparative data involving a small number of employees when the plaintiff establishes that he or she is ‘similarly situated to those employees in all material respects.’” The appellate court concluded that it could not say, as a matter of law, that the evidence was an insuffi-

cient basis for the district court’s determination that the union had intentionally discriminated against Beck. Therefore, it affirmed the district court’s ruling. (*Beck v. United Food and Commercial Workers Union, Loc. 99* [9th Cir. 11-1-07] No. 05-16414, \_\_\_ F.3d \_\_\_, 2007 DJDAR 16461.) \*

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## Age Discrimination Claim Against Google Allowed to Proceed to Trial

The Sixth District Court of Appeal overturned the trial court’s dismissal of a terminated employee’s claim of age discrimination in *Reid v. Google, Inc.* Google maintained that the 54-year-old employee had been fired because his job had been eliminated. But the court found that ageist remarks, statistical evidence, the employee’s demotion, and changed rationales for the termination together created a triable issue of fact that the company’s explanation for the dismissal was pretextual.

### Factual Background

Brian Reid was hired by Google in June 2002 as director of both operations and engineering. He was 52 years old. During his employment, Reid was subjected to age-related derogatory comments by other high-level employees. His opinions and ideas were described as “obsolete” and “too old to matter.” He was told that he was “slow,” “fuzzy,” “sluggish,” “lethargic,” did not

“display a sense of urgency,” and “lacked energy.” Colleagues referred to him as an “old man,” an “old guy,” and “an old fuddy-duddy.” He was told that his knowledge was ancient and that the CD jewel case on his office door should be replaced with an LP.

*Reid’s opinions and ideas were described as ‘obsolete’ and ‘too old to matter.’*

In October 2003, Reid was removed from his position and assigned to a post where he was responsible for developing and implementing a program to retain engineers by enabling them to obtain a master’s degree in engineering. An employee who was 15 years younger than Reid became director of operations, and another, 20 years

younger than Reid, took over his other duties.

On February 2004, Reid was terminated from the engineering department. He claimed he was told that he was being terminated because he was not a “cultural fit.” Google maintained that he was told that the in-house graduate degree program was being discontinued. Although Reid was advised to try to find another job in the company, emails between department heads revealed there was no intention of giving him another position. He left the company at the end of February.

Reid filed a lawsuit against Google, alleging age discrimination in violation of California’s Fair Employment and Housing Act in addition to some other related causes of action. The trial court dismissed the case, and Reid appealed.

### Court of Appeal Decision

Regarding the FEHA claims, the appellate court found that there was undisputed evidence to support both a prima facie case of age discrimination and a legitimate basis for Reid’s termination. Therefore, determined the court, the sole issue was whether Reid had presented sufficient evidence to present to a jury that Google’s stated reason for his termination was pretextual.

The court first considered Reid’s statistical evidence, which showed a significant negative correlation between age and performance rating and between age and bonuses at Google. According to Reid’s expert, for every

10-year increase in age, there was a corresponding decrease in performance rating of director-level employees in the operations and engineering departments. And, for every 10-year increase in age for all director-level employees, there was a 29 percent decrease in the amount of the bonus.

Google objected to this evidence before the trial court, but the court never specifically ruled on Google’s objections. “We infer from the lack of an ex-

### *Reid’s statistical evidence showed significant negative correlation between age and bonuses at Google.*

press ruling on the objections that the trial court impliedly overruled them, and considered the evidence when ruling on the summary judgment,” said the Court of Appeal. However, “the court clearly erred when it determined that there was no triable issue of material fact arising from that evidence,” said the appellate court. “Importantly, *Google does not offer conflicting expert testimony to dispute Reid’s statistical findings*; rather, Google’s counsel offers arguments about why the findings are not sound,” it continued. “Such argument goes to the *weight* of the statistical evi-

dence, a task reserved for a jury, not a court on summary judgment.”

Regarding the ageist comments, the court rejected Google’s argument that they were “stray remarks” that do not raise a triable issue of fact:

We do not agree with suggestions that a “single, isolated discriminatory comment” or comments that are “unrelated to the decisional process” are “stray” and therefore, insufficient to avoid summary judgment. There are certainly cases that in the context of the evidence as a whole, the remarks at issue provide such weak evidence that a verdict resting on them cannot be sustained. But such judgments must be made on a case-by-case basis in light of the entire record, and on summary judgment the sole question is whether they support an inference that the employer’s action was motivated by discriminatory animus. Their “weight” as evidence cannot enter into the question.

Reid argued that his demotion from director of operations and engineering to head the graduate program which was eliminated four months later was also evidence of pretext. The court agreed, noting that the graduate program position had no title and no job description, and that Reid was given no budget or staff. In support of this view, the court pointed to *Torre v. Casio, Inc.* (3d Cir. 1994) 42 F.3d 825, finding the facts “strikingly similar.” In *Torre*, the plaintiff was over 50 when he was hired as a regional sales manager. Casio then moved the employee to a newly created position of “product marketing manager,” and then eliminated the position

one month later. Torre argued that Casio's true motive was to replace him in the regional sales manager position with younger workers, which it did. The Third Circuit Court of Appeals reversed the district court's grant of summary judgment in favor of Casio.

"Here, we see little difference between the district court in *Torre* and the trial court in this case," said the court. "In granting summary judgment in favor of Google, the trial court resolved a number of factual issues in dispute,

*The court found Google's changing rationales for the termination to be evidence of pretext.*

such as the weight and value of Reid's statistical evidence, the validity and weight of the ageist comments made by decisionmakers in Reid's demotion and termination, and whether the newly created position of head of Google's graduate program was in fact a waystation for Reid's ultimate termination," it continued. "These evidentiary evaluations are clearly the purview of the jury, and not the decision of the trial court on summary judgment."

The court also found Google's changing rationales for the termination to be evidence of pretext. "When there

is evidence that an employer's reasons for termination have altered over time, there is 'strong grounds' for opposing summary judgment," said the court, citing *Washington v. Garrett* (9th Cir. 1994) 10 F.3d 1421. The court noted that Reid offered evidence that when he was terminated he was not told the graduate program was being discontinued but rather that he was not a "cultural fit" with Google. He also asserted that Google raised performance issues as a reason for termination for the first time in its summary judgment motion. Google claimed he was told that the program was being eliminated at the time of termination.

"The conflicting evidence that Google's stated reasons for Reid's termination changed after Reid was terminated, coupled with Reid's statistical evidence, evidence of ageist comments, and demotion, created a triable issue of fact as to pretext," concluded the court.

The court, citing *West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, was not persuaded by Google's argument that it was entitled to "an inference against discrimination" because the evidence showed that the only person responsible for Reid's termination was over 50 at the time. The court pointed to evidence offered by Reid that other, younger individuals were involved in the decisionmaking process. (*Reid v. Google, Inc.* [10-4-07] 155 Cal.App.4th 1342.) \*

# Public Sector Arbitration

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## Contractual Notice Requirement Denied in City's Jail Closure

In the summer of 2005, the City of Oakland closed its jail and moved the employees to other city jobs. Arrestees who were detained in the city jail before the closure were processed at a county jail facility in Oakland. The union alleged that by this conduct, the city contracted out bargaining unit work.

The memorandum of understanding between the city and the union requires the city to provide the union with six months notice before engaging in financial planning contemplating a reduction in the workforce. In this case, the union alleged, the city never provided timely notice.

Arbitrator Christopher Burdick held that the city did not engage in outside contracting because no valid contract was ever formed between the city and the county with regard to arrestee processing. But, he found, the city did fail to provide the union with timely notice of its plans to close the jail.

### Events Leading to Jail Closure

The City of Oakland operates on a two-year budget cycle. The budget passed in June 2005 covered fiscal years 2005-07. The Oakland Police Department, along with other police departments in Alameda County, operated its

own jails, but the overall responsibility for incarcerated non-detainees lies with the county sheriff. The Alameda County Sheriff operates two jails; one, the Glen Dyer Jail, is located in downtown Oakland.

Until Oakland closed its city jail in July 2005, the OPD jail accepted for booking and short-term incarceration pre-arraignment arrestees from multiple cities and jurisdictions. This arrangement was convenient for smaller, neighboring city police departments.

Glen Dyer Jail, which is relatively modern, originally was intended to serve as both a booking and detention facility, but, before the city jail closed, it never had been used for booking. Also, its 726-detainee capacity never had been fully utilized. Until July 2005, the GDJ housed only prisoners on trial in the nearby courthouse and "contract inmates" from the U.S. Marshall. The GDJ had no facilities or capabilities for off-the-street booking or pre-arraignment detainees.

The Oakland police chief described the city jail as a neglected, 45-year old infrastructure, with cells too small to meet current standards, "roach activity," dim lighting, sewage leaks, poor air quality, and no outdoor win-

dows or outside recreation. In contrast, the "new generation jails" maintained by the county emphasized contact between staff and inmates, and offered intensive medical services as well as access to education and improved safety systems. Arbitrator Burdick, who toured the county and city jails, found the general conditions far better at the GDJ.

The city jail was staffed by non-sworn correctional officers, cooks, and utility workers, totaling 89 civilian full-time employees. Also, the jail employed five sworn employees: a lieutenant and

*The MOU requires the city to provide the union with six months notice.*

four sergeants. According to a 1995 study, the city jail processed approximately 39,000 OPD arrestees a year.

In October 2004, the union and the city held their annual labor-management retreat. The city's financial administrator made a brief presentation concerning the budget but did not mention the projected \$30 million deficit. An SEIU representative asked about possible layoffs and, noting the city's failure to provide the requisite six-month notice in the past, requested that the parties begin talking as soon as possible. The administrator said the city

would do so, but no one from the city mentioned anything about the jail or layoffs.

In late-November 2004, the city council held a budget workshop that was open to the public. A report made available to the audience, but not provided to the union, predicted that expenses would greatly outpace revenues. The report described budget solutions, including 3 percent across-the-board cuts in departmental budgets and targeted cuts directed at “certain depart-

*A report was made available to the audience, but not provided to the union.*

ments or classifications.” However, no specific reference was made to the jail or to potential layoffs.

In February 2005, the city hired a new chief of police, who was instructed by the city administrator to consider shutting the city jail because she believed the city lacked the financial resources to address significant deficiencies. Thereafter the new chief began planning its closure.

In March, the proposed city budget addressed possible closure of the jail and resulting layoffs of SEIU unit members. A financial report presented at a city council meeting in May recommended closure of the jail.

The chief of police held a series of discussions with the county sheriff concerning the jail. Eventually, sometime prior to May 18, 2005, the county confirmed its agreement with the city that it would open the GDJ for off-street bookings. The parties discussed how the GDJ would be remodeled to accomplish this task, and the county began planning for the city jail’s closure. While these meetings and planning progressed, Burdick found, SEIU and its correctional officers were “in the dark” and totally “out of the loop,” with the jail’s correctional officers and civilian staff relying on rumors that the jail was going to close.

On April 25, at a training class with about 15 to 20 city jail workers in attendance, the county sheriff finally made the announcement that he believed the jail would close for budgetary reasons and that the chief of police had met with the sheriff and decided the Oakland police department could use the GDJ for its needs. One correctional officer recalled, and an audio recording of the events confirmed, that a county sheriff’s representative told the group he had been instructed by the city manager not to talk about the closure plan and that employees had been purposely uninformed.

On April 29, the police department sent a memorandum to all jail staff, warning that the jail could close as early as July 1. On May 6, the proposed city budget was released to the public and submitted to the city council. It explicitly spelled out the proposed

elimination of 89 city jail positions and the expected budget savings. On May 18, the county confirmed that it would open the GDJ for city police department bookings. The union protested the lack of advance notice of the proposed layoffs, claiming that it had learned about the cuts only by reading the budget following its public release.

The city administrator testified that she first provided notice of the closure to the union at the end of April or

*A county sheriff’s representative said that employees had been purposely uninformed.*

the beginning of May, and that prior to doing so, she already had told the union that there had been serious discussions about the closure. She conceded that she had not wanted to give the union formal notice until the decision was final.

After the budget was sent to the city council on May 6, the city administrator had seven or eight meetings with the union to address the financial impacts. She testified that the union never made any proposal to mitigate the impact of the jail closure but instead challenged the underlying decision itself. The union suggested alternatives to the jail closure, but the city adminis-

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trator felt these measures were infeasible and would not result in sufficient cost savings.

On June 16, the city council voted to close the jail. The next day, the union filed a grievance. When the jail closed, SEIU unit members were “redeployed” and offered other jobs with the city, usually at lower wages. No one was laid off, but a number of the workers elected to retire.

### **Parties’ Positions**

During the arbitration hearing, the union argued that the city administrator knew of the city’s deteriorating financial conditions as early as October or November 2004, and had concluded, at that time, that one way to alleviate the problems was to close the city jail, but she failed to give the six-months notice required by the MOU. Additionally, the union asserted, the new chief of police knew about the closing from the moment he was hired, but also failed to give notice to the union despite drafting a budget that contained

no funding for the jail. The union further contended that the city administrator knew of the closure before delivering her proposed budget to the city council in April 2005, and her failure to give notice to the union led the city to breach the MOU. The union argued that as a result of this breach the laid-off, redeployed, and retired jail employees were entitled to a financial remedy.

The union argued that the resulting layoffs and redeployments were the fruit of an oral contract for service between the city and the county in violation of an anti-outside-contracting provision in Charter Sec. 902(e), MOU Sec. 14.16, and Municipal Code Sec. 2.04.020(E)(3). Based on this, the union asserted that the jail should be reopened, and the employees should be returned to work at the jail and made whole for their economic losses.

The city argued that there was no valid contract with the county because the city administrator never executed one; no such contract was ever approved by the council as the charter requires

for a “contract for services;” no oral agreement occurred; and there was never any offer, acceptance, or consideration paid. The city argued that the statutory booking fees contemplated by Penal Code Sec. 4015(a) were not a “standing offer” that the city accepted by closing its jails and booking inmates with the county; furthermore, these fees cannot be considered a valid consideration because a basic principle of contract law precludes prior legal obligations from being used to support a contract.

Citing *Oakland Unified School Dist.* (2005) Dec. No. 1770, 174 CPER 86, the city contended that the union had the burden of showing the existence of a contract between the city and the county, evidencing a continuing working relationship to carry out daily jail operations. The city argued that none of the transition documents established such a working relationship and there was no evidence that the city in any way influenced the sheriff’s operations.

Finally, the city argued that, at least six months in advance of closure, it

shared with the union financial planning that contemplated the reduction of unit members. To support this claim, the city argued that its administrator provided relevant information in her report during the parties' October retreat, and that the union was at fault for failing to review disseminated documents.

### **Was There a Contract Between the City and the County?**

Arbitrator Burdick explained that if an MOU is ambiguous, the arbitrator can look to the bargaining history and may apply well-established principles of contract interpretation. Here, Burdick found no evidence regarding bargaining history or what was said during negotiations.

The arbitrator found that the city waived its right to argue that its decision to close the jail was a "core management decision" not subject to the bargaining process because the MOU contained a provision regarding the effects of outside contracting. The MOU incorporates the restrictions imposed by the charter, and the grievance procedure applies to claimed violations of any MOU provisions, the arbitrator explained.

The arbitrator dismissed the union's assertions that the decision to close the jail was foolish, counterproductive, and unlikely to result in financial savings. Such arguments are beyond the scope of review in the arbitration forum, he noted.

The union asserted that the city's use of the sheriff's department to perform services previously provided by bargaining unit members fell within the special definition of "contracting out" found in labor cases. Citing *Lucia Mar Unified School Dist.* (2001) Dec. No. 1440, 149 CPER 67, the union highlighted PERB's recognition that diversion of bargaining unit work is not a management prerogative.

The union also relied on *Oakland Unified School Dist.*, where the Public Employment Relations Board found

*The arbitrator  
concluded that there  
was no outside  
contracting.*

outside contracting even though the third party providing the service was an entity with a pre-existing statutory mandate to do the work. PERB noted that the Oakland school district had always had its own police force, and under its new agreement with the Oakland Police Department, it continued to be closely involved in policing. In *OUSD*, PERB recognized the distinction between discontinuance of an operation and contracting out, and concluded that the ongoing, significant involvement of the school district accompanied by a money transfer revealed

that the district had subcontracted its police work.

Arbitrator Burdick distinguished *OUSD* because, here, the city completely left the business in question. It closed its jail, did not maintain jail employees on the police department's payroll, never specified how the county would provide jailing services, never bargained over or paid money beyond the statutory fees, never hired anyone else to provide jail services, and did not maintain a close working relationship with the county.

The arbitrator concluded that because the jail work had entirely disappeared from city employ, to be done elsewhere by others not under the city's control, there was no outside contracting. And the city's action was not prohibited by the MOU, the city charter, or the municipal code. Thus, the arbitrator held that there was no contract between the city and the county.

### **Six-Month Notice**

MOU Sec. 14.2 provides, "the city agrees to keep the union advised of financial planning that contemplates reduction of unit members at least six months in advance. The city will provide the union with a listing of classifications that may potentially be reduced at a future date."

Arbitrator Burdick noted that this section was analyzed in a dispute between the same parties in a 2005 arbitration before arbitrator Carol Vendrillo. Arbitrator Vendrillo found that the six-month notice requirement

referred to financial planning that contemplates a reduction in force, but not to the classification lists mentioned in the next sentence. Vendrillo explained that financial planning is likely to be available six months before any actual reduction takes place, while the list of specific classifications impacted likely would become available thereafter.

While not bound by this reasoning, Burdick believed it to be correct. He found that Sec. 14.2 was unusually vague as to how proper notice was to be delivered to the union. The city, con-

*The city's actions  
'bordered perilously  
close to the edge  
of bad faith.'*

tending that it gave notice during the October retreat, seized on this lack of specificity and argued, as Burdick writes, "for notice by osmosis, under which subtle hints and vague suggestions or clues suffice, thereby putting the union in the unenviable position of having to divine the entrails of any mis-sives for a possible meaning." The arbitrator held that something more specific and directed was surely required.

The arbitrator found that the city administrator and the police chief knew by mid-February that they were going to conduct a financial analysis to see if

money could be saved by closing the jail, but neither gave notice to the union. Then, the chief started meeting with the sheriff's department and shared his intent. Again, the union was told nothing, except at the retreat when the city assured a union representative of quick and early notice of layoff plans. The arbitrator found that this "bordered perilously close to the edge of bad faith."

The arbitrator believed that the date when financial planning commenced and the six-month notice clock began to run was the day the police chief delivered to the city administrator the OPD's draft budget setting forth possible savings from the jail closure. In sum, the arbitrator found that the city first complied, albeit inadvertently, with its six-months advance notice obligation on April 25, 2005, and not in October 2004, but the financial planning started in mid-March. Therefore, mid-March was when the city should have given notice. The arbitrator concluded that the resulting layoffs on July 1, 2005, were too early and the workers laid off or redeployed were entitled to compensation for the breach of contract. (*SEIU Loc. 790 and the City of Oakland* [7-1-07; 37 pp.]. *Representatives*: Vickie Laden and Tracy Chriss [deputy city attorneys] for the city; W. Daniel Boone and Anne Yen [Weinberg, Roger & Rosenfeld] for the association; *Arbitrator*: Christopher D. Burdick, CSMCS Case No. ARB-04-3215.) \*

# Arbitration Log

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- **Contract Interpretation**
- **Past Practice**
- **Holiday Pay**

**Santa Clara Valley Transportation Authority and Amalgamated Transit Union, Loc. 265** (11-21-05; 10 pp.). *Representatives:* Richard Katzman (Office of General Counsel) for the city; William Flynn (Neyhart Anderson Freitas Flynn & Grosboll) for the union. *Arbitrator:* Bonnie G. Bogue.

*Issue:* Should the grievant have been paid for the Labor Day holiday when he was on paid vacation leave immediately before the holiday and returned to his previously approved industrial injury leave thereafter?

*Pertinent contract language:* Section 10.4 states, "Employees shall work the last scheduled work day before and the first scheduled work day after the holidays...to be eligible for holiday pay, except for absences due to military leave, funeral leave, jury duty, or other excused, paid, or partial day absences. This provision applies only to absences of a full day or longer that are due to illness, industrial injury, or unexcused unpaid leave. The purpose of this provision is to discourage extension of the holiday."

Section 10.6 states, "All holidays under this agreement are guaranteed holidays except that holidays shall not be observed during unpaid leaves of absence if such leave has continued for

at least 10 working days prior to the holiday."

*Union's position:* (1) Under Sec. 10.6 of the contract, the grievant, a bus driver, was not ineligible for holiday pay because it guarantees such pay unless the employee is off on unpaid leave for 10 days or more before the holiday. The grievant was not off on unpaid industrial injury leave 10 working days prior to the Labor Day holiday; rather, he was on paid vacation leave.

(2) Section 10.4 does not make the grievant ineligible for holiday pay because the purpose of that provision, requiring an employee to work the day after the holiday to receive holiday pay, is to discourage extension of the holiday. The grievant could not have extended his holiday because he was off due to an industrial injury.

*Employer's position:* (1) Section 10.4 of the collective bargaining agreement requires an employee to work both the day before and the day after the holiday to be eligible for holiday pay. The grievant did not work the day after, nor was

his absence due to one of the enumerated exceptions to the rule. The employee's personal intent not to extend the holiday is immaterial.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) Section 10.6 does not apply to the grievant because the Labor Day holiday fell immediately after a period when the grievant was on paid vacation leave, not after a period of at least 10 days of unpaid leave of absence. Based on the plain language of the contract, had the grievant not broken up the extended industrial injury leave with a week of paid vacation, and merely continued his unpaid industrial injury leave until Labor Day, Sec. 10.6 would have made him ineligible for holiday pay. However, because the grievant was on paid status prior to the holiday, Sec. 10.6 does not render him ineligible for holiday pay.

(2) Section 10.4 precludes the grievant from claiming holiday pay because he did not work the first scheduled day after Labor Day. The contract requires an employee to work both the last regularly scheduled work day before and the last regularly scheduled work day after a holiday in order to receive holiday pay.

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(3) Industrial injury leave is not an exception to Sec. 10.4. The provision expressly states that the day-before and the day-after rule applies to absences due to industrial leave.

(4) The preclusive effect of the plain language of Sec. 10.4 is not altered by the fact that, since the grievant was already on industrial injury leave, his failure to work his first scheduled work day after the holiday did not have the effect of extending his holiday, since he could not have worked that day anyway. Although it is true that the grievant was not absent the day after Labor Day because he was seeking an extra day off, Sec. 10.4 unequivocally states that holiday pay is not available to an employee who is absent the day after a holiday due to industrial injury. Employee intent is irrelevant.

(5) The union failed to produce evidence of the bargaining history to show that the contract was not intended to preclude holiday pay when the absence the day after the holiday is due to an ongoing industrial injury leave. Prior documents are not part of the contract and cannot modify the clear language of the contract.

*(Binding Grievance Arbitration)*

- **Contract Interpretation**
- **Past Practice**

**United Educators of San Francisco and San Francisco Unified School Dist.** (11-28-05; 14 pp.). *Representatives:* Laurie S. Juengert & Nomita Brown (Lozano Smith) for the district; Stewart Weinberg (Weinberg Roger & Rosenfeld) for the union. *Ar-*

*bitrator:* William E. Riker (AAA Case No. 74 390 00221 05 LYMC).

*Issue:* Did the district violate the contract by not paying the grievant the per diem rate for her work in the morning care program?

*Union's position:* (1) At the urging of the district's site manager, the grievant, a substitute teacher, accepted an assignment to teach 2.5 hours in the morning care program. She also taught 3.25 hours in the afternoon. The grievant accepted this assignment based on the site manager's promise that, in exchange for helping "the district out of a bind," she would try to have the grievant's salary increased to the per diem rate, rather than the substitute rate of pay.

(2) The contract mandates that a teacher must be paid at the per diem rate for any augmented hours the teacher is required and directed to teach. Teachers who volunteer for augmented hours are paid at the substitute rate. The grievant's acceptance to teach in the morning program was a coerced, involuntary action based on external persuasion tied to valuable consideration. The district got the benefit of the bargain, and therefore the grievant is entitled to the per diem rate for all hours worked retroactively and prospectively.

*District's position:* (1) There was no violation of the contract in intent or deed. The language of the contract clearly and unambiguously delineates when per diem versus substitute pay rates are applicable. Nothing in the contract entitles the grievant to the per diem rate.

(2) The grievant's 2.5 morning hours constitute extra hours, not augmented hours. Augmented hours are defined by the contract in Sec. 25.10.5.1 as hours of additional teacher service caused by increased school attendance. The 2.5 hours in the morning care program did not arise due to an increase in attendance. Rather, the grievant's hours were added due to a lack of certificated coverage during a normal school day. They were properly considered as extra hours, and she was appropriately paid at the substitute rate.

(3) Even if the grievant's 2.5 hours are categorized as augmented hours, she was properly compensated at the substitute rate of pay. Section 27.5.1.1 clearly states that the district pay teachers at the per diem rate only if they are required and directed to work in the morning care program. There is no evidence that the grievant was directed and required to work the 2.5 hours; instead, she volunteered for these hours.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) The parties' contract recognizes both the value of the child development program and the reality that funds to operate the program are severely limited. In 2003, when the district eliminated the part-time, 3.25-hour morning child development program position, it became necessary to have an employee with the grievant's credentials fill the void.

(2) Contract article 27.2 provides that child development teachers are considered part-time employees if they are assigned 3.25 hours a day, and are

considered full time if they work a 5.75-hour day. The grievant's afternoon assignment is a regular, part-time, 3.25-hour assignment.

(3) There is no basis for combining the grievant's 2.5 morning hours with her 3.75 afternoon hours. The district did not authorize the grievant to combine her split shift to make a full-time position under article 27.2. The site manager's effort to link the two shifts in order to get the grievant the per diem rate was never approved or authorized by the district.

(4) The contract does not address how to compensate a teacher for the additional 2.5 hour assignment, but there is a past practice of classifying additional hours worked by a child development teacher as extra hours. Compensation for such hours is at the substitute rate of pay, unless the additional hours were added due to an increase in attendance. There was no such increase here.

(5) The contract states that "part-time teachers required and directed to teach augmented hours by the site manager for one or more days shall be paid at the full time teacher's per diem rate for each day so assigned." However, the

provision also states that those part-time teachers who volunteer to teach augmented hours shall be paid at the substitute rate of pay. The district director testified that it is a 17-year past practice to compensate extra hours at the substitute rate of pay.

(6) There is a lack of evidence to support the claim that the site director ordered the grievant to take the 2.5-hour assignment or that the site manager was "in a bind" because the district eliminated the morning 3.25-hour position. When asked, the grievant voluntarily agreed to work the 2.5 hours in order to meet the minimum staffing needs of the program. Thus, based on past practice and the grievant's willingness to fill the 2.5 extra-hour assignment, the contract allowed the district to compensate the grievant at the substitute rate of pay.

*(Binding Grievance Arbitration)*

• **Contract Interpretation**  
 • **Personal Necessity Leave**  
**California School Employees Assn. and its Bakersfield College Chap. 336 and Kern Community College Dist.** (3-2-07; 11 pp.). *Representatives:* Mary L. Dowell (Liebert

Cassidy Whitmore) for the employer; Tim Liermann (senior labor relations representative) for the association. *Arbitrator:* William E. Riker.

*Issue:* Did the district violate the contract by denying personal necessity leave to union members?

*Pertinent contract language:* Article 9L3 states: "Earned sick leave to a maximum of seven days each college year may be used by the employee, at his/her election, in cases of personal necessity." Article 9L3D4 defines personal necessity as "personal business of a compelling nature that cannot be conducted outside of the hours of assignment and does not involve payment to the employee for services." Article 9L3D5 states, "All days of personal necessity may be used at the discretion of the employee in accordance with the personal necessity leave language without the employee having to specify which of the allowable conditions have been met."

*Association's position:* (1) Language of the collective bargaining agreement is clear and unambiguous. It allows an employee to take up to seven days of earned sick leave for personal necessity without approval by the employer. Prior language requiring employees to seek approval of the college president for personal necessity leave was deleted so that employees would not be required to specify a reason for using such leave.

(2) The contract affords an employee the right to use personal necessity leave at his or her discretion, and the district has relinquished its right to approve the leave as long as it does not

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involve payment to the employee for services.

(3) The grievants were justified in using entitled, earned sick leave to attend a board meeting relating to collective bargaining and an informational rally pertaining to the potential impact that a change in insurance plans would have on their health and welfare benefits. Attendance at such events was a compelling reason, justifying time off as personal necessity leave.

(4) The only reasonable interpretation of the contract is that it is incumbent on the employee to determine what is compelling to them. Approval of a supervisor or other management employee is not a prerequisite to using the earned benefit. The district is attempting to renege on its agreement and impose contract language that was deleted.

(5) The district should rescind its order denying the use of personal necessity leave to employees who attended board meetings and informational rallies.

*District's position:* (1) The grievants' use of personal necessity leave to engage in informational picketing and to attend a board meeting relating to collective bargaining went beyond the scope of the contract.

(2) Engaging in union activity and charging personal necessity leave for such a purpose is inconsistent with Sec. 9L3D of the contract. The clear and explicit meaning of the provisions interpreted in accordance with ordinary and popular sense governs unless the parties intended to use a technical or special meaning.

(3) Consistent with Education Code Sec. 88207, personal necessity is defined in part as personal business of a compelling nature that cannot be conducted outside the hours of assignment and does not involve payment to the employee for services.

(4) The purpose of the recent contract modification was to address employees' concern and discomfort in having to disclose private and personal issues with supervisors in order to take personal necessity leave. The parties did not intend personal necessity leave to be used for engaging in informational picketing or other union activities.

(5) Absent an express agreement to allow all employees leave time to engage in union activities during working hours, the arbitrator should not rule that the district must permit employees to use personal necessity leave for the reasons noted in the grievance.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) Based on the preponderance of the evidence, informational picketing rallies or other group activities related to collective bargaining issues are neither compelling nor considered personal necessity as intended by the parties and identified in Sec. 9L3D of the contract.

(2) The district's decision to deny the personal leave taken by the grievants is consistent with the parties' intent and with the Educational Code. It is logical to believe that the intent of the parties, when they agreed to the contract modification, was for the pur-

pose of recognizing an employee's right to confidentiality and privacy.

(3) Deletion of the approval provision does not grant employees the unconditional right to take personal necessity leave without any imposed restrictions. Deletion of the approval provision was to assuage employee concerns regarding disclosure of private and personal information. It did not relieve employees from their obligation to use personal necessity leave for reasons consistent with the intent of the parties as memorialized in the contract.

(3) Personal necessity leave may not be applied to rallies, group meetings, or board meetings. These are not matters of personal necessity or of a compelling nature as to warrant application of the personal necessity leave section of the contract. The argument that attendance was personal or compelling to employees misses the mark and is inconsistent with the normal usage of compelling personal necessity.

(4) The contract change conveyed a significant benefit to unit members because they no longer have to provide a reason or explain to their supervisor the personal problem that requires an absence during working hours. Discretion belongs to the individual employee. Along with exercising this option, the employee must display a level of integrity, and must utilize the personal leave for the intended purpose, consistent with the terms of the contract and Education Code.

*(Binding Grievance Arbitration)*

• **Discipline — Just Cause**

**California Faculty Assn. and California Polytechnic State University, San Luis Obispo** (6-4-07; 10 pp.).

*Representatives:* Carlos Cordova (university legal counsel) for the university; Gerry Daley (representation specialist) for the association. *Arbitrator:* C. Allen Pool (AAA Case No. 72-390-1325-06).

*Issue:* Did the university discipline the grievant for good cause?

*University's position:* (1) The university has just cause to suspend the grievant from his position as a professor of social sciences for one academic quarter without pay because he failed to perform the responsibilities of his position.

(2) On multiple occasions, the grievant failed to participate in the post-tenure review process used to evaluate professors' teaching performance, professional growth, and services to the university, as required by the MOU and university policy. The grievant failed to cooperate by not preparing the required working personnel action file (WPAF), which contains documents that illustrate the professor's continued professional growth and service. As a result of these omissions, the review committees were forced to rely on incomplete files for the grievant's evaluation.

(3) The grievant was repeatedly warned of the need to improve his teaching performance and professional development record. Yet, the WPAF for 2005-06 showed no professional growth activity since 1995. The grievant failed to respond to corrective actions despite this notice.

(4) A September 2005 letter of reprimand directed the grievant to prepare an adequate WPAF for 2005-06 post-tenure review and to improve his teaching and professional growth efforts. It warned that failure to comply would result in formal discipline. The grievant purposely did not comply with the directive.

(5) The suspension is justified based on principles of progressive discipline, and the grievance should be denied.

*Union's position:* (1) The university lacked cause to suspend the grievant because the university relied on stale allegations from 10-year-old post-tenure reviews.

(2) The purpose of peer review is to help a professor become a better teacher or return to his or her previous level of teaching. The suspension does not accomplish this. The university used the post-tenure review process in a punitive manner rather than as a corrective tool.

(3) While the allegation of insubordination is, technically, factually correct, in substance it is "picayune." The grievant was not insubordinate.

(4) The grievant has no prior unsatisfactory evaluations or discipline, and incompetence is not a basis for discipline.

(5) Notice of the rules alleged to have been violated was not given.

(6) There was a lack of progressive discipline.

*Arbitrator's holding:* Grievance denied.

*Arbitrator's reasoning:* (1) The negotiated post-tenure review is required by the MOU and university policy. Its purpose is to assure that the faculty member maintains the expected standards of a tenured full-professor. The review also provides assistance from the faculty member's colleagues to maintain and improve the level of performance appropriate to the position.

(2) Faculty members are expected to actively participate in the review process, and the tenured professor is a major and critical participant in the process. A professor is expected to demonstrate a high level of teaching performance, to document his efforts showing professional development service to the university, and to provide a WPAF to the review committee. Without active participation in the review, a fair and equitable evaluation is not possible.

(3) When an employee intentionally fails to participate in the review process, it is a failure and a refusal to perform normal and reasonable duties of the position, constituting an act of insubordination. This failure is a significant matter, a violation of the MOU and university policy.

(4) The review process is, by its intent and structure, corrective in nature. It reveals an employee's strengths and weaknesses. The process requires that the employee and review committee discuss the findings and, if weaknesses are apparent, the employee's peers are obligated to discuss and offer suggestions for improvement in the identified areas.

(5) The allegations against the grievant are not stale. For a period of more than 10 years, he failed to participate in the review process. He ignored suggestions for improving his teaching and repeatedly failed to provide an adequate WPAF.

(6) The grievant neglected to comply with the directive given in the September 2005 letter of reprimand, and he was put on notice that this failure would result in formal disciplinary action. The next step in the progressive discipline scheme was to suspend the grievant without pay for an academic quarter.

*(Binding Grievance Arbitration)*

- **Contract Interpretation**

- **Privacy**

**Bay Area Air Quality Management District Employees Assn. and Bay Area Air Quality Management** (9-25-07; 14 pp.). *Representatives:* Linda A. Tripoli (attorney) for the university; W. David Holsberry (Davis, Cowell & Bowe) for the employee association. *Arbitrator:* Barry Winograd (AAA Case No. 74-390-276-07).

*Issue:* Did the district's adoption of its telecom resources policy, which allowed it to access employee voicemail messages without notice to or consent of the employee, violate the memorandum of understanding between the parties?

*Association's position:* (1) The district's telecom resource policy was adopted by the district over the association's objections. Under the guidelines for the policy, the district can access voicemail messages without no-

tice to or consent of affected employees or callers. This policy violates employee privacy rights under state law and under analogous federal and constitutional authority.

(2) The district's policy on voicemail access is an unlawful provision imposed on the association by unilateral action after negotiations in violation of provisions of the Meyers-Miliias-Brown Act, which are incorporated into the MOU.

*District's position:* (1) The telecom resource policy is appropriate and lawful because it gives the district access to employee voicemails only for business purposes, and only to the extent permitted by law, as the policy expressly states.

(2) The policy does not violate statutory state law because the law applies only to contemporaneous interceptions that are "in transit" and does not apply to communications recorded on voicemail.

(3) Employees at the workplace do not have a reasonable expectation of voicemail privacy, as exhibited by the fact that calls can be forwarded.

*Arbitrator's holding:* Grievance sustained.

*Arbitrator's reasoning:* (1) Penal Code Sec. 631 protects against unauthorized access to "messages" that are "received," not merely communications, as the district argues, that are "in transit." The only exceptions are based on the consent of all parties to the communication, or by a court order. Neither exception applies here.

(2) The district is not protected from the statute by including in the policy that it will review messages only when there is a "business purpose," and to the "extent permitted by law." The former is not a statutory exception, and the latter is too vague.

(3) The policy also conflicts with Penal Code Sec. 632, which bars eavesdropping on communications, because employees who are permitted to engage in personal communications over the district's phone system are entitled to expectations of privacy given the non-business activity that is allowed. The voicemail system uses a personal pass-code-protected model for access.

(4) The association's position is reinforced by California case law, analogous federal law involving wiretaps and stored communications, and Fourth Amendment protections for employee rights.

(5) The district's position that the MOU's management rights section permits adoption of its voicemail policy is misplaced. Management's authority under the agreement is subject to statutory limitations, absent evidence of legislative intent in the MMBA to permit management to unilaterally override a penal statute of general jurisdiction.

(6) The district's adoption of the telecom resources policy to permit access to voicemail messages amounted to insistence on an unlawful term in the course of midterm negotiations over the policy. It violated MOU provisions that incorporate the association's bargaining rights as the exclusive representative conveyed by the MMBA.

(7) Invalidation of the entire policy, the relief sought by the association to remedy this contract violation, is too broad. There is no evidence that other portions of the policy are deficient or that negotiations over such sections were skewed by the district's insistence on an unlawful provision. The district shall cease and desist from access to voicemail messages of bargaining unit employees absent lawful authorization or consent.

*(Binding Grievance Arbitration)*

# Public Employment Relations Board

## Orders & Decisions

*Summarized below are all decisions issued by PERB in cases appealed from proposed decisions of administrative law judges and other board agents. ALJ decisions that become final because no exceptions are filed are not included, as they have no precedent value. Cases are arranged by statute – the Dills Act, EERA, HEERA, MMBA, TEERA, the Trial Court Act, and the Court Interpreter Act – and subdivided by type of case. In-depth reports on significant board rulings and ALJ decisions appear in news sections above.*

### Dills Act Cases

#### Unfair Practice Rulings

#### Charge dismissed for late filing: Dept. of Corrections and Rehabilitation.

*(Horspool v. State of California [Dept. of Corrections and Rehabilitation], No. 1923-S, 9-27-07; 2 pp. + 12 pp. R.A. dec. By Member Neuwald, with Members Shek and McKeag.)*

**Holding:** The charging party's unfair practice charge was dismissed because all the underlying incidents occurred more than six months before the charge was filed, and Dills Act Sec. 3514.5(a)(1) prohibits PERB from issuing a complaint with respect to any charge based on alleged conduct that occurred more than six months prior to the filing of the charge.

**Case summary:** The charging party filed an unfair practice charge against the department, alleging that it violated the Dills Act by retaliating against him after he engaged in protected activities, interfering with his right to engage in such activities, and engaging in bad faith and surface bargaining.

On December 21, 2000, the charging party filed a grievance regarding incorrect and miscalculated payments associated with his Industrial Disability Leave benefits. The state performed an audit that determined the charging party was overpaid; consequently, his pay was docked. Subsequently, the charging party discovered errors in the audit and brought

them to the state's attention during a grievance conference. The charging party alleged that the errors were ignored.

On December 26, the charging party ranked first on an eligibility list to be reclassified from permanent intermittent status to full time. He filed a grievance questioning why he was not granted a reclassification and change in base time. An administrative law judge dismissed this charge because he determined the case had been abandoned. The charging party alleged the charge was on appeal before the board.

On March 9, 2001, the charging party filed a grievance challenging a letter of instruction he had received the day before. The letter was dated July 18, 1998, and concerned an incident that occurred on April 11, 1997. Before the grievance conference took place, the state inadvertently provided the charging party with a copy of its predetermined response to his grievance. The charging party claimed this was proof of surface bargaining. The state allegedly threatened to charge the charging party with insubordination if he did not return the grievance response. Subsequently, the charging party consulted his representative from the California Correctional Peace Officers Association. The state then questioned the CCPOA representative about the incident, which the charging party alleged constituted unlawful interference

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with a protected activity. The charging party alleged that although the grievance was partially granted, none of the remedies was implemented.

On March 16, 2001, the charging party filed a grievance regarding a dispute about his return to work and denial of paid status after receipt of medical clearance. He alleged that the state and the Department of Personnel Administration were unresponsive.

On May 1, 2001, the charging party prepared a grievance on behalf of another employee. The charging party was listed as the representative but was unable to attend the grievance conference. The charging party alleged that the employee had told him that the state admitted fault but denied the grievance for a period of time after the admission.

Regarding the IDL benefit and the denial of paid-status grievances, a board agent earlier had ruled that these allegations involved interpretation of the MOU and thus had deferred them to arbitration. The charging party's representative, CCPOA, refused to proceed to arbitration on the IDL benefits grievance because MOU article 13.06(g) bars arbitration of disputes relating to an employee's denial of benefits. Also, the association refused to proceed to arbitration on the grievance regarding denial of paid status because the state was allowed, under the MOU, to inquire and request clarification of the medical clearance. Subsequently, the charging party filed an appeal with DPA, but DPA asserted it had no jurisdiction over the issues because they were subject to resolution through arbitration provided by the contract.

The R.A. observed that while the state agreed to proceed to arbitration, on April 12, 2005, the association refused to do so regarding IDL benefits and denied paid status. On appeal to the board, the charging party contended that the state's conduct demonstrated that arbitration regarding these two grievances would be futile. The R.A. agreed, finding that the charging party showed that his continued attempts to use the arbitration process for these two allegations was futile. However, the R.A. dismissed the charge regarding these two matters as untimely under Gov. Code Sec. 3514.5(a).

The R.A. observed that the charging party knew or should have known about the conduct underlying the IDL grievance by August 30, 1999, and the charge was filed six years and one month later on October 11, 2005. The R.A.

explained that the statute of limitations is tolled while the grievance is pursued, which for the IDL benefits grievance was from December 21, 2000, to April 12, 2005, four years and three months. Even so, the R.A. calculated that approximately one year and ten months had elapsed since the date the charging party knew or should have known about the underlying grievance. Because this time period exceeded the six-month statute of limitations provided in Gov. Code Sec. 3514.5(a), the charge was untimely. The R.A. used the same calculation to demonstrate that the denial of paid status grievance also was untimely filed.

In *Regents of the University of California* (2004) Dec. No. 1592-H, 165 CPER 79, the board found that a conclusory statement alleging violations of HEERA, followed by 300 pages of documents, failed to provide a clear and concise statement of facts as required by PERB Reg. 32615(a)(5). Citing *Regents*, the R.A. held that although the charging party attached more than 200 pages discussing the five grievances presented in the charge, he failed to meet his obligation under Reg. 32615(a)(5).

In *Oxnard School Dist.* (1988) Dec. No. 667, 78 CPER 49, the board held that individual employees lack standing to allege that an employer has failed to bargain in good faith. Citing *Oxnard*, the R.A. held that because the charging party is an individual employee and not an employee organization, he did not have standing to allege that the state failed to meet and confer in good faith. Additionally, the charge alleged that the state violated Dills Act Sec. 3519(c) by engaging in surface bargaining as demonstrated by its predetermined response to the charging party's grievance. The R.A. explained that surface bargaining refers to unlawful bargaining that occurs in the context of negotiations between an employer and an exclusive representative. The R.A. again found that because the charging party was an individual employee and not an employee organization, he did not have standing to assert surface bargaining allegations.

The charging party contended that the state retaliated against him for engaging in protected activities as exhibited by the outcomes of the grievances. Citing *Moreland Elementary School Dist.* (1982) Dec. No. 264, 55 CPER 65, the R.A. explained that although the timing of the employer's adverse action in close temporal proximity to the employee's pro-

tected conduct is an important factor, it does not, without more, demonstrate the necessary connection or nexus between the adverse action and the protected conduct. The R.A. found that none of the information provided by the charging party demonstrated the requisite nexus.

The charging party alleged that the state's questions put to the association representative about the return of the grievance response was unlawful intervention into a protected activity. Citing *Regents of the University of California* (1983) Dec. No. 366-H, 60 CPER 85, the R.A. explained that the charging party must show the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights. The R.A. found the evidence did not demonstrate that the state's inquiry into the incident tended to coerce or interfere with a reasonable employee in the exercise of any protected rights.

Finally, the R.A. explained, Dills Act Sec. 3514.5(a)(1) prohibits PERB 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. Because all the incidents discussed in the grievances occurred in 2000 or 2001, the R.A. held the charge was filed after the expiration of the limitations period.

The board found the R.A.'s dismissal free of prejudicial error and adopted it as the decision of the board itself.

## EERA Cases

### *Unfair Practice Rulings*

#### **Nexus lacking between termination and protected activity: San Leandro USD.**

(*Mandell v. San Leandro Unified School Dist.*, No. 1924, 10-1-07; 2 pp. + 12 pp. R.A. dec. By Member McKeag, with Chairperson Neuwald and Member Shek.)

**Holding:** The charging party failed to demonstrate that his employment was terminated by the district in response to his protected activity. Instead, the district fired the charging party because it believed that he lacked the teaching credentials required for his employment.

**Case summary:** The charging party was a math teacher at Bancroft Middle School in the San Leandro Unified School District and a member of the bargaining unit represented by the San Leandro Teachers Association. He was hired in August 30, 2006, as a temporary intern teacher through the district's intern program.

During a meeting on September 12, 2006, the middle school vice principle criticized the charging party's classroom rules, contending that they were too subjective. One disputed rule stated that "disrespectful conduct towards others will not be tolerated." In another meeting two days later, the vice principal offered more critique on various teaching issues noted while observing the charging party's class.

The charging party then advised the vice principal that under the collective bargaining agreement, he was providing the vice principal with a formal written grievance asserting a violation of the nondiscrimination clause of the contract. A week later, the charging party filed a complaint with the school administrators, claiming that he was being denied his right to suspend disruptive students from his classroom.

A meeting was scheduled to discuss the grievance. During the meeting, however, there was no discussion of the grievance. Instead, the school principal informed the charging party that he was being fired for "performance concerns," and that he was "not a good fit" for the job. The principal refused to elaborate. Prior to this meeting, the charging party was not informed of any performance-related issues.

Thereafter, the charging party filed an unfair practice charge alleging that the district violated EERA by discriminating against him for his protected activity. In its response, the district argued that the charging party never filed a grievance; rather, he sent several emails to administrators, complaining that the district was failing to comply with the Education Code with regard to student suspensions. The district also argued that the charging party resigned, and that the district never took any adverse action against him. Even assuming the charging party had established that he engaged in protected activity and the district took adverse action against him, the district contended that there was no nexus between the protected activity and the adverse acts.

Finally, the district contended that the charging party had misinformed the district about his eligibility to teach, and when the district learned that he was not in a teacher credentialing program in September 2006, it would have fired him regardless of his protected activity. The district provided a document from the California Commission on Teacher Credentialing, showing that the charging party held no credentials.

The charging party asserted that at the meeting to discuss the grievance, the school principal told him, in the presence of a witness, that she was exercising her right under the Education Code to terminate his employment, and that he must return his classroom keys. Thus, the charging party contended, the resignation he submitted was “forced.” He argued that the district’s conduct established that it did take adverse actions against him, and that he did not quit but was fired.

The charging party provided evidence that he passed the CBEST exam administered to all credentialed teachers, holds a Ph.D. in Chemistry from U.C. Davis, and has at least 18 credits in mathematics, the subject he was assigned to teach. These three facts, the charging party argued, satisfy the California Commission on Teacher Credentialing’s requirements for “certification prior to the first day of employment.” Having satisfied the requirement’s necessary to teach, the charging party argued that the district’s reasons for terminating his employment mid-year were a pretext for its real reason — discrimination for his protected activity.

The R.A. found that even assuming the charging party filed a valid grievance under the contract, and that the district fired him, the charge failed to present facts establishing that he was fired because he filed the grievance. The R.A. emphasized that the charging party failed to demonstrate that other teachers have been allowed to work in the absence of proper certification, or that the district failed to follow established policy with regard to terminating teachers for failure to maintain proper certification.

By his own admission, the charging party was informed at the time he was terminated that one of the reasons for his termination was because he was not enrolled in a teacher

credentialing program. That the charging party was given multiple reasons for his termination, the R.A. found, did not establish that the district gave inconsistent or contradictory justifications for his termination. Rather, the R.A. explained, the district had consistently stated that the charging party’s lack of status in a credentialing program was grounds for termination.

Additionally, the charging party pointed to the employer’s cursory investigation of the employee’s misconduct. However, the R.A. explained that the charging party was never accused of “misconduct.” Instead, he was informed of performance issues, and that he was not currently enrolled in a credentialing program. The R.A. held that the charging party failed to provide any facts that the district failed to follow the proper policy with regard to terminating teachers for failure to maintain proper certification.

Finally, the charging party claimed that the employer’s justification for its decision to terminate him was exaggerated and vague because his inactive status in the credentialing program did not disqualify him from eligibility to teach. The R.A. held that the veracity of this claim was not at issue. The employer’s construction of the California credentialing requirements for teacher certification was not determinative and did not establish that the employer terminated the charging party for his protected activity. Thus, the R.A. dismissed the charge.

The board found the R.A.’s dismissal free of prejudicial error and adopted it as the decision of the board itself.

### **Charge properly withdrawn: Delano Union ESD.**

*(Delano Union Elementary School Dist. v. Delano Elementary Teachers Assn., No. 1925, 10-1-07; 2 pp. By Member McKeag, with Members Shek and Wesley.)*

**Holding:** Allowing the charging party to withdraw its charge was permitted as it was in the best interests of the party and consistent with the purposes of EERA.

**Case summary:** The charge alleged that the Delano Elementary Teachers Association violated EERA by failing to negotiate in good faith. By letter dated August 9, 2007, the district withdrew its appeal of a partial dismissal of the charge

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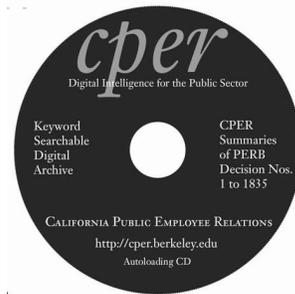
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and the underlying unfair practice charge, and notified PERB that the matter had been resolved. The board found that the withdrawal was in the best interests of the parties and consistent with the purposes of EERA. Accordingly, the board granted the withdrawal.

### ***Duty of Fair Representation Rulings***

#### **Association's decision not to advance grievance to arbitration did not breach DFR: Los Banos Teachers Assn.**

(*Ulmschneider v. Los Banos Teachers Assn.*, No. 1922, 9-11-07; 2 pp. + 8 pp. R.A. dec. By Member Shek, with Members McKeag and Wesley.)

**Holding:** The association did not breach its duty of fair representation where its decision not to pursue the charging party's grievance to arbitration was not arbitrary, discriminatory, or in bad faith.

**Case summary:** The charging party, a foreign language teacher, filed a grievance alleging that the Los Banos Unified School District violated its contract with the Los Banos Teachers Association by misusing the Peer Assistance and Review program. The R.A. noted that the collective bargaining agreement between the district and the association provides that an employee in the PAR program will be evaluated until the employee receives a satisfactory mark or leaves district employment. When the district denied the charging party's grievance at level II, he requested that the association appeal the grievance to arbitration, but the association's representative council voted against doing so. Thereafter, the charging party filed the instant unfair practice charge alleging that the association breached its duty of fair representation by failing to advance his grievance to arbitration.

The regional attorney found that the charging party failed to present facts that sufficiently demonstrated a breach of the duty of fair representation. Citing *United Teachers of Los Angeles (Collins)* (1982) No. 258, 56 CPER 76, the R.A. explained that the charging party must show the union's conduct was arbitrary, discriminatory, or in bad faith.

The R.A. observed that the district had required the charging party to participate in the PAR program for several years, although the teacher did not believe his participation was necessary. The R.A. held that the charge did not demonstrate that the association's refusal to pursue his grievance was a decision made in an arbitrary, discriminatory, or bad faith manner. Instead, the R.A. found that the association rationally determined not to pursue the grievance to arbitration because the contract allows the district to keep employees in the PAR program for more than one year.

The charge also indicated that an association representative was present during several meetings between the charging party and the district. During these meetings, the charging party received reprimands and felt humiliated when they were read aloud in front of his peers. The R.A. found that the association representative provided the charging party with rational advice during the meetings. For example, the R.A. observed, when the charging party tried to leave one meeting, in direct conflict with the principal's directive, the representative advised him to stay. Also, at the charging party's request, the representative asked the district to stop reading the reprimands aloud.

The charging party also alleged that the association representative cooperated with the district because of his candidacy for union office and because of association members' leadership role in the PAR program. The R.A. found that the charge did not provide any facts demonstrating a connection between the charging party's union activity and the association's participation in the program. The R.A. dismissed the charge, and the board adopted the dismissal as the decision of the board itself.

## Activity Reports

### ALJ Proposed Decisions

#### Sacramento Regional Office — Final Decisions

*California Federation of Interpreters-The Newspaper Guild/Communication Workers of America v. Sacramento County Superior Court*, Case SA-CE-4-I. ALJ Bernard McMonigle. (Issued 8-20-07; final 9-24-07; HO-U-923-I.) No violation was found. The grievance procedure allows 10 days to appeal a step 1 denial to step 2. The manager signed a denial on December 19, 2005. Subsequently, the parties had further discussions and the manager sent another denial by email on February 21, 2006. On February 23, the union requested a signed copy of the email; it was sent on March 9. The union filed a step 2 appeal on March 15. The employer responded that the appeal was untimely because the denial date was that of the original email. No unilateral change occurred when the employer relied on the unsigned denial to start the appeal period. The initial MOU did not require a signature. There was no past practice demonstrating a signature requirement as this was the first grievance between the parties.

*SEIU Loc. 790 v. County of San Joaquin*, Case SA-CE-348-M. ALJ Shawn P. Cloughesy. (Issued 9-21-07; final 10-17-07; HO-U-925-M.) The county operated its own methadone clinics and had pass-through contracts with two private providers for methadone services. The county eliminated one of its own clinics, changed its clientele focus, and terminated the contract of one private provider. The county's closure of one of its own facilities while continuing the pass-through services of a private provider was a fundamental managerial or policy decision and not contracting out of bargaining unit work. The county ceased operation of one of its own facilities and merely served as an intermediary, monitoring private providers paid under a state program. No violation was found.

#### Los Angeles Regional Office — Final Decisions

*AFSCME Loc. 1902 v. Metropolitan Water District of Southern California*, Cases LA-CE-304-M, LA-CE-306-M, LA-CE-307-M and LA-CE-309-M. ALJ Ann L. Weinman. (Issued 7-31-07; final 8-28-07; HO-U-922-M.) Two cases (LA-

CE-304-M and LA-CE-307-M) alleging changes in job duties, with no disputed facts regarding timeliness, were found to be untimely filed. There was no equitable tolling of the statutory limitations period for informal discussions that were not part of a bilaterally agreed upon dispute resolution procedure. The remaining cases were consolidated for a formal hearing on the disputed facts and issues.

*IBEW Local Union 465 v. Imperial Irrigation Dist.*, Case LA-CE-291-M. ALJ Thomas J. Allen. (Issued 8-7-07; final 9-10-07; HO-U-922-M.) A violation was found. A union activist was suspended for three days for an unauthorized absence in retaliation for protected activities. The supervisor's declaration filed with the employer's response to the unfair practice charge stated that consideration of whether to impose discipline included the employee's work-related complaints.

*Coalition of University Employees v. Regents of the University of California*, Case LA-CE-830-H. ALJ Christine A. Bologna. (Issued 8-27-07; final 9-24-07; HO-U-924-H.) The charge was not untimely filed where the employer initially required employee authorization for documents and then provided the documents upon the union's objection. There was no unilateral change when the employer required the union to provide written employee authorization to obtain documents from the employee's personnel files. The collective bargaining agreement clearly imposes such a requirement, and it was not superseded by the practice of releasing documents without employee authorization. There was no violation of the obligation to provide the information requested when the union did not object to receiving redacted documents.

#### Sacramento Regional Office — Decisions Not Final

*Stationary Engineers Loc. 39 v. Tehama County Superior Court*, Case SA-CE-7-C. ALJ Bernard McMonigle. (Issued 9-28-07; time running for appeal.) No violation was found. A union made a request for recognition for a bargaining unit of management employees. That union also represents a unit of the employer's non-management employees. The employer denied recognition based on its local rule that an employee organization that represents non-management

employees cannot also be recognized as the representative of a bargaining unit of management employees. The plain language of the Trial Court Employment Protection and Governance Act (Sec. 71637.1) merely precludes management from representing non-management employees. The statute does not preclude a bargaining unit of management employees from being represented by the same union as non-management employees.

#### Los Angeles Regional Office — Decisions Not Final

*Alhambra Firefighters Assn., Loc. 1578 v. City of Alhambra*, Case LA-CE-272-M. ALJ Ann L. Weinman. (Issued 8-17-07; exceptions filed 9-24-07.) The unfair practice charge alleged a change in employer policy by allowing two sets of personnel files, one for the fire department and one for the personnel office. The charge was dismissed as untimely. Past interactions between association officials and the employer demonstrate that the association both knew and should have known of the employer's practice well outside of the statutory limitations period. The testimony of association officials was discredited as contradictory, illogical, unreasonable, and disingenuous. Sanctions, including attorney's fees, were awarded against the association as the case was "without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith or otherwise an abuse of process."

*Alhambra Firefighters Assn., Loc. 1578 v. City of Alhambra*, Case LA-CE-262-M. ALJ Ann L. Weinman. (Issued 8-24-07; exceptions filed 10-2-07.) The unfair practice charge alleged a unilateral change by requiring firefighters to maintain a Class B driver's license for assignment as a relief driver. It was dismissed as untimely. The policy was well-settled and reflected past practice set out in the memoranda, job announcements, and handbook. The association's arguments were unreasonable, illogical, and without merit. The association both knew and should have known of the policy well outside the statutory limitations period. Sanctions, including attorney's fees, were awarded against the association as witnesses were discredited and arguments were without factual or legal merit.

*California School Employees Assn. and its Chap. 106 v. Desert Sands Unified School Dist.*, Case LA-CE-4491-E. ALJ Donn

Ginoza. (Issued 9-14-07; time running for appeal.) The transfer of overlapping duties was negotiable where seven of eight bargaining unit positions ceased performing the work. The new field-trip charter bus service was negotiable where the MOU first required exhaustion of employee driver availability. Cessation of bus driver extra-duty compensation for behind-the-wheel training was negotiable and conflicted with established past practice. Reassignment of the fleet supervisors to bus mechanics was negotiable where it imposed additional work requirements that impacted overtime, ability to schedule time off, and potential for discipline. Violations were found in all alleged unilateral changes.

#### Report of the Office of the General Counsel

##### Injunctive Relief Cases

Nine requests for injunctive relief were filed from July 1 through October 31, 2007. Five of these were denied by the board; three were withdrawn; and in one case, the board directed PERB staff to expeditiously process the underlying unfair practice charge and reserved its decisionmaking authority with respect to the request for injunctive relief.

*Eisenberg v. State of California (Employment Development Dept.)*, IR. No. 525, Case SA-CE-1602-S. On July 9, 2007, Eisenberg filed a request for injunctive relief against the state, alleging it violated the Dills Act by threatening him and other employees with adverse action for using the state's email system to distribute decertification petitions and fair share fee rescission materials. On July 13, the board denied the request.

*California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. State of California (Dept. of Personnel Administration)*, IR. No. 527, Case SA-CE-1614-S. On August 15, 2007, the union filed a request for injunctive relief against the state, alleging it violated the Dills Act by engaging in bad faith bargaining. On August 22, the board denied the request.

*California Fish and Game Wardens Assn. v. California State-wide Law Enforcement Assn.*, IR No. 528, Case SA-CO-304-S. On August 24, 2007, CFGWA filed a request for injunc-

tive relief against the affiliate union, CSLEA, alleging it violated the Dills Act by seizing membership dues. On August 30, the board denied the request.

*California Correctional Peace Officers Assn. v. State of California (Dept. of Personnel Administration)*, IR. No. 530, Case SA-CE-1621-S. On October 2, 2007, the union filed a request for injunctive relief against the state, alleging it violated the Dills Act through implementation of its last, best, and final offer, and by bargaining in bad faith and interfering with and retaliating against the union for its protected activity. On October 11, the board denied the request.

*Kern County Probation Officers Assn. v. County of Kern*, IR. No. 532, Case LA-CE-343-M. On October 11, 2007, the union filed a request for injunctive relief against the county, alleging it violated the Meyers-Milias-Brown Act by unilaterally implementing certain terms of its last, best, and final offer, and by bargaining in bad faith and interfering with the union's collective bargaining rights. On October 18, the board denied the request.

*California Correctional Peace Officers Assn. v. State of California (Dept. of Personnel Administration)*, IR. No. 529, Case SA-CE-1621-S. On September 25, 2007, the union filed a request for injunctive relief against the state, alleging it violated the Dills Act through implementation of its last, best, and final offer, and by bargaining in bad faith. On September 27, the union withdrew its request.

*Kern County Probation Officers Assn. v. County of Kern*, IR. No. 531, Case LA-CE-343-M. On October 9, 2007, the union filed a request for injunctive relief against the county, alleging it violated the Meyers-Milias-Brown Act by unilaterally implementing certain terms of its last, best, and final offer, and by bargaining in bad faith and interfering with the union's collective bargaining rights. On October 10, the union withdrew its request.

*City of Hemet v. Hemet Firefighters Assn.*, IR. No. 533, Case LA-CO-61-M. On October 18, 2007, the city filed a request for injunctive relief against the union, alleging it violated the Meyers-Milias-Brown Act by unilaterally changing the grievance procedure in the parties' MOU. On October 23, the city withdrew its request.

*Sacramento County Deputy Sheriffs Assn. v. County of Sacramento*, IR. No. 526, Case SA-CE-485-M. On August 7, 2007, the union filed a request for injunctive relief against the county, alleging it violated the Meyers-Milias-Brown Act by interfering with and dominating the union's ability to conduct business. On August 15, the board directed PERB staff to expeditiously process the underlying unfair practice charge and reserved its decisionmaking authority with respect to the request for injunctive relief, pending the conduct of a prompt informal settlement conference and, if appropriate, formal hearing before a PERB administrative law judge.

## Litigation Activity

Two new cases were opened from July 1 through October 31, 2007.

*Jurupa Community Services Dist. v. PERB et al.* California Court of Appeal, Fourth Appellate District, Case No. E044031. (No. 1920-M; Case LA-CE-224-M.) In September 2007, the district filed a writ petition with the appellate court, alleging the board erred in No. 1920-M (finding that the district violated the Meyers-Milias-Brown Act by terminating an employee for filing a grievance, and ordering the district to offer the employee reinstatement and to make the employee whole monetarily). PERB sought and was granted an extension of time to November 21, to file the administrative record.

*Sacramento County Deputy Sheriffs Assn. v. PERB*, Sacramento County Superior Court, Case No. 07AS03998. (Case SA-CE-485-M.) In August 2007, the union filed a complaint with, and sought a temporary restraining order from, the superior court to stop PERB from holding a formal hearing, alleging that PERB (1) lacks jurisdiction over unfair practice charges involving a bargaining unit inclusive of both peace officers (as defined under Penal Code Sec. 830.1) and non-peace officers; (2) lacks jurisdiction over the issue(s) presented in this case; and (3) caused irreparable harm to the union by denying its application for joinder. In September, following a continuance on the court's own motion, the superior court issued a TRO and subsequently a preliminary injunction. Also in September, PERB filed its answer to the

plaintiff's complaint, and the court issued a ruling in the plaintiff's favor.

## Representation Activity

### Selected Representation Decisions and Determinations (by Board Agents)

*County of Sutter and Group of Employees and Sutter County Employees Assn., Loc. 1*, Case SA-OS-139-M. (Issued 7-31-07; final 8-16-07.) Division Chief Les Chisholm. A group of employees filed a petition seeking an election to rescind an agency shop/fair share fee provision implemented under the Meyers-Milias-Brown Act by the county and Sutter County Employees Assn., Loc. 1. The agency fee provision had been implemented pursuant to a recent approval vote conducted within the bargaining unit by the State Mediation and Conciliation Service. Local 1 argued, in part, that the petition was untimely, relying on language found in Gov. Code Secs. 3502.5(b) and (d). Section 3502.5(b), describing the election process whereby agency fees may be imposed, references an "election that may not be held more frequently than once a year." Section 3502.5(d), describing the process whereby affected employees may petition for an election to rescind an agency shop provision, states in part that "in no event shall there be more than one vote taken during [the term of a memorandum of understanding]." The board agent, finding the petition timely filed, held that Local 1's argument is not supported by either the plain language of the MMBA or by analogous provisions of other statutes enforced by PERB. Further, the express provisions of PERB Reg. 61630, adopted to implement the statutory language, bar the filing of a rescission petition only "if the results of a prior *rescission* election concerning the agreement or provision in the same unit were certified during the term of the same memorandum of understanding." [Emphasis added.]

*Grossmont-Cuyamaca Community College Dist. and Grossmont-Cuyamaca Community College Dist. Part-Time Faculty Assn., CCA/CTA, and United Faculty of Grossmont-Cuyamaca Community College Dist. and American Federation of Teachers*, Case LA-SV-146-E. (Issued 8-21-07; final 9-24-07; HO-R-167-E.). Regional Attorney Eric J. Cu. A petition

to sever a unit of part-time faculty from the wall-to-wall faculty unit was dismissed pursuant to a finding that all faculty share the same principal job function, the same lines of supervision, the same qualification requirements, and otherwise share a community of interest. Consideration of these factors and the outcome were consistent with PERB case law interpreting Gov. Code Sec. 3545 and create a presumption that all classroom teachers should be placed in a single unit. In addition to the community of interest factors, the hearing officer found that the bargaining agent had represented all faculty since 1984 and negotiated agreements that benefited both full- and part-time faculty alike.

*Lawrence Livermore National Laboratory (LLNL) and SPSE-UPTE, CWA Local 9119*, Case SF-RR-900-H. (Issued 9-26-07; final 10-6-07.) Regional Director Anita I. Martinez. A request for recognition for a unit of LLNL skilled crafts employees was granted administratively when it was determined that the unit was an appropriate one, despite the passage of time since the board's decision in *Unit Determination for Skilled Crafts Employees of the University of California Pursuant to Chapter 744 of the Statutes of 1978 (Higher Education Employer-Employee Relations Act)* (1982) PERB Dec. No. 242-H. In the earlier case, the board held that a skilled crafts unit, excluding laborers and machinists, was appropriate. An election in 1983 yielded no exclusive representative, and the unit remained dormant until the filing of the instant petition. An informal settlement conference failed to resolve the unit configuration or proof of support issues raised by the university. Pursuant to an order to show cause, the regional director determined that the unit remained appropriate because the university had not demonstrated changed circumstances to warrant the conduct of a representation hearing, and the petitioner withdrew its request as to the inclusion of the laborer classification. In addition, the university's arguments regarding the passage of time and changes in LLNL's management and mission were not persuasive. The regional director also found that since the petitioner had demonstrated proof of majority support in an appropriate LLNL skilled crafts unit and the university had not recognized the petitioner, it was appropriate to certify the petitioner as the exclusive representative of the unit.

### **Regulation Adoption and Modification**

On February 16, 2007, the board issued a notice of proposed rulemaking concerning proof of support, revocation of proof of support, and various technical changes to other regulations. A public hearing on these proposed changes was held on April 12. Based on written and oral comments received, the board issued a notice of proposed modifications to interested parties on June 12. The board received and considered additional written comments in response to the notice. At the August 16 public meeting, the board approved the revised rulemaking package, based on the proposed text as modified by the notice of proposed modifications issued June 12. On October 15, PERB submitted the regulation changes approved by the board to the Office of Administrative Law for review. The rulemaking changes include clarifying and technical amendments to proof of support, unit modification, and other sections.

### **Personnel Changes**

Sally M. McKeag was reappointed to the board by Governor Schwarzenegger on February 23, 2007. She has served in this capacity since March 2005. Her term ends on December 31, 2011. Prior to her appointment, McKeag served as chief deputy director of the California Employment Development Department. She also served as deputy staff director of the Governor-Elect's Transition Team. McKeag returned to California after two years in Washington, D.C., where she worked for the U.S. Department of Labor. Specifically, she was recruited to serve as chief of staff to the Department of Labor's Employment and Training Administration Assistant Secretary. Prior to her employment at the DOL, McKeag served in a variety of capacities for the California State Senate and the Wilson Administration. She was director of public affairs for the Senate Republican Caucus where she oversaw the development and implementation of strategies to support Senate members in representing their constituencies. Under Governor Wilson, she served as deputy director of operations for the Department of Consumer Affairs, acting deputy director of the Department of Fish and Game, and director of the Governor's Office of Constituent Affairs.

Phil Callis was appointed as an administrative law judge on October 31, 2007. Callis comes to PERB from the State Personnel Board where he was an ALJ for 22 years, hearing disciplinary cases, discrimination cases, whistleblower cases, and other appeals involving state, county, and university employees. He was the calendar judge at SPB for 10 years and served as acting chief administrative law judge for 22 months. Prior to becoming an ALJ, Callis practiced public sector labor and employment law for 10 years as a staff attorney at the California State Employees Association/SEIU Local 1000, and as a supervising deputy attorney general at the California Department of Justice.

Tammy Samsel, senior counsel, left the board in August 2007, to join the state's Department of Social Services as an administrative law judge.

Katherine Nyman joined the board on October 31, 2007, as staff Counsel for the Sacramento Regional Office. Nyman comes to PERB from Sacramento Child Advocates, Inc., where she had worked as an attorney since mid-2007.