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letter from the editor

Dear *CPER* Readers:

Now that we all have our 2008 calendars, there are lots of upcoming events you might want to pencil in.

If you act right away, you can sign up for the 2008 Conference on Labor and Employment Law set for February 8 in San Francisco. The one-day event is sponsored by the NLRB Regions 20 and 32, the San Francisco Bay Area Chapter of the Industrial Relations Research Association, and the Labor and Employment Law Section of the Bar Association of San Francisco. Of particular interest to public sector practitioners will be a discussion of San Francisco's experience using its charter-imposed interest arbitration procedure.

The San Francisco Bar Association's Labor and Employment Law Section will present its annual Yosemite conference on February 22 and 23. One of the panels will focus on family and medical leave. Another, moderated by *CPER*'s Katherine Thomson, will examine religious bias claims and morals-based speech in the workplace.

In March, the Center for Collaborative Solutions will convene its 19th Annual Labor-Management Conference in Anaheim. I will be leading two panels. One will provide a labor relations update, with participation by attorneys Bruce Barsook and Chris Platten; along with Micki Callahan, the director of San Francisco's Department of Human Resources; and Gerry Fong, negotiations and organizational development specialist for the California Teachers Association. The second panel, an introduction to collective bargaining, will include attorney Charles Sakai; Monica Mora, executive director of the West Orange County United Teachers; Keith Pace, field director for California School Employees Association; and Micki Callahan from San Francisco.

The following week, on March 14, the Industrial Relations Association of Northern California will host its annual program in Sacramento. They've asked me back as their keynote luncheon speaker, so the public sector will be well represented.

And, last but not least, *CPER* and the Labor and Employment Section of the State Bar are cosponsoring the 14th Annual Public Sector Conference in Sacramento. This year, we will provide an update on recent developments in the public sector, and break-out sessions focused on accommodating the disabled public employee, PERB remedies, wage and hour law in the public sector, religion and speech protections in the workplace, arbitration principles, and hot topics in collective bargaining.

For more details concerning these exciting events, check the appropriate websites. I hope to see you there!



Carol Vendrillo
CPER Director

Internet Use and Getting ‘Dooiced’: Regulating Employees’ Online Speech

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Information technology is a double-edged sword for public employers. While it speeds and streamlines an employer’s business operations, it also creates unparalleled vulnerabilities. Public agencies must guard against hackers, viruses, worms, and technical glitches that can disable or compromise entire networks. And, when employees log on to conduct business, there is the risk of decreased productivity as they manage personal affairs and communicate with friends. There is also the potential that online speech will give rise to libel and harassment claims, decreased morale, and a loss of public confidence in the agency as employees move their water-cooler gripes to a vast public forum.

One such forum is becoming increasingly popular: the blog. A blog is an interactive website on which users post information that visitors to the site may review and comment on — giving rise to a new verb, “to blog.” There are more than 100 million blogs on the Internet, with a new one created every 5.8 seconds.¹ According to a recent survey, 5 percent of American employees blog and 9 percent post to blogs about their employer.² In fact, one estimate projects that more than 4.8 billion work hours will be spent annually by employees on blogs.³

Such numbers show that public employers cannot sit back and hope that their employees understand the fuzzy distinction between appropriate and inappropriate Internet use, much less that they are likely to comply with such murky standards. To the contrary, employers and employees alike benefit from clear notice and awareness of expectations. Indeed, the Public Employment Relations Board recently recognized that the implementation of an information technology policy was critical to the performance of a public entity’s mission and, as such, implicated a fundamental managerial prerogative outside the scope of representation.⁴

In the private sector, employers may rely on the doctrine of at-will employment to justify the dismissal of employees based on their Internet activity, even if the

speech was generated offsite on private computers. In a survey of 294 large United States companies, 7.1 percent reported terminating an employee for blogging-related conduct.⁵ In fact, the Internet community has spawned a new word for blog-based terminations: “dooiced.” This term originated from one of the first-reported blog-related terminations, that of Heather Armstrong. She was fired from her job as a web designer after she posted comments about her company and the office holiday party on her website — Dooce.com.⁶

Public employers, of course, are constrained by the free speech, privacy, due process, and access rights of employees and their exclusive bargaining representatives. In addition to analyzing whether an employee’s online speech constitutes protected whistleblowing or union activity, public employers must determine whether it falls within the ambit of Title VII, the Fair Employment and Housing Act, the Labor Code, or other federal and state laws. Thus, the challenge for public employers is in understanding the contours of permissible versus impermissible online speech.

Even though the technological advances and Internet terminology may be new, the jurisprudence relating to the intersection of a public employer’s right to restrict employees’ speech in order to promote the efficiency of its operations, and the right of public employees to speak freely, are long-standing. As discussed below, the U.S. Supreme Court’s *Pickering-Connick* analysis establishes an initial threshold for determining how far a public employer may go in placing limits on its employees’ online activity. The court’s recent decision in *Garcetti v. Ceballos* carved out a significant exception for speech made in the course of one’s official duties and further clarifies the scope of what constitutes protected speech under the *Pickering-Connick* analysis.⁷

PERB, too, distinguishes between matters of public concern, with respect to which employees have a constitutional right to speech, and matters of individual concern, such as an employee’s private grievances, about

which constitutional protection does not attach. PERB has explained that cases raising such issues require “careful consideration of the language, fundamental purposes and doctrinal foundations of [the applicable public sector labor relations statutes]; relevant public policy embodied in fundamental federal and state constitutional and labor law precedent; as well as exploration of the nature of the rights implicated...and the legal standards governing their waiver.”⁸

The First Amendment: Balancing Employees’ Speech With Employers’ Efficient Operations

In a decision almost 40 years ago, the Supreme Court recognized the tension between an employee’s right to speak and the public employer’s legitimate right to perform its mission free of disruption. Confronting the court in *Pickering v. Board of Education* was whether a public school teacher could be lawfully terminated for writing a letter to the newspaper criticizing the local school board’s handling of tax increases.⁹ The court sought to “arrive at a balance between the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁰ In that case, the speech was protected by

the First Amendment because the expenditure of funds at issue was a matter of public concern, while the school district was relatively unharmed by the speech.

Subsequently, in *Connick v. Myers*, the court held that whether an employee’s speech is a matter of public concern may be determined by looking at the private character of the speech.¹¹ In that case, after an assistant district attorney was informed that she was going to be transferred against her wishes, she prepared a questionnaire soliciting the views of her colleagues concerning the transfer policy, office morale, the need for a grievance committee, confidence in

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supervisors, and whether employees felt pressured to work in political campaigns. She then was terminated because of her refusal to accept the transfer, and she was told that her distribution of the questionnaire was an act of insubordination.

The Supreme Court found that the questionnaire was intended to gather ammunition for the employee's controversy with her superiors. The court noted that "[w]hile as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." Thus, even when speech involves a matter of public concern, in certain forms or contexts the same subject spoken privately may not be considered as such.

The *Pickering* balancing test remains largely intact and has been clarified by decisions such as *Garcetti* relating to what is and is not a matter of public concern entitled to First Amendment protection. In *Garcetti*, the court held that an employee is not entitled to First Amendment protection where his speech is specifically related to the official duties he must perform as part of his job. The plaintiff in that case was a prosecutor who was required to evaluate and draft memos pertaining to the efficacy of search warrants. When the plaintiff concluded that an affidavit justifying a search warrant was inaccurate, he told his supervisors, who did not agree. The plaintiff then testified in favor of the defendant, which led to his dismissal. The court held that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."¹²

In summary, an employee is protected from adverse employment action if he or she speaks on a matter of "public concern."¹³ A matter of public concern is "something that is a subject of legitimate news interest; that is, a subject of

general interest and of value and concern to the public at the time of publication."¹⁴ In addition, courts look at the content, form, and context of the speech in determining whether it is a matter of public concern. While speech on matters of public concern is generally protected, the balancing test is applied to determine whether the speech has interfered with the employer's efficient delivery of public services.¹⁵

Additional Considerations Regarding Off-Duty Conduct

Pickering, *Connick*, and their progeny generally involved situations in which public employees commented about governmental policies based on their knowledge and perspective as public employees. The holdings in those cases were buttressed by the employee's rights to speak freely about such matters and the public's right to know such information.

The analysis becomes more complicated when public employees' speech takes place outside of work, on their own time, and on their own computers. Employees have an expectation of privacy in off-duty hours.¹⁶ Under those circumstances, it is more difficult for the public employer to demonstrate a substantial detriment warranting censorship of the speech. In such cases, the court appears to give greater deference to the employee's

speech, holding that such speech has First Amendment protection absent some governmental justification in regulating it that is "far stronger than mere speculation."¹⁷

In addition, when public employee speech takes place off-site and off-duty, constitutional privacy considerations limit a public employer's ability to discipline the employee for such speech. California citizens enjoy broad privacy interests protected by Section 1, Article 1, of the state Constitution. The right to privacy "protects our homes, our families, our thoughts, our emotions, our expressions, our

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personalities, our freedom of communion, and our freedom to associate with the people we choose....”¹⁸ Constitutional privacy rights come into play when employees have a “reasonable expectation of privacy” in their conduct.¹⁹

In addition, Secs. 96(k) and 98.6 of the California Labor Code prohibit employers from discriminating against employees for lawful conduct occurring during nonworking hours away from the employer’s premises.²⁰ However, these protections apply only to off-duty lawful conduct that is otherwise protected by the Labor Code or a recognized constitutional right.²¹

A state or local agency employee may be disciplined for engaging in activities that are “inconsistent, incompatible, in conflict with or inimical to his or her duties....”²²

An additional exception exists for police officers, who can be disciplined for engaging in lawful activities during off-duty hours if such activities are inconsistent with their duties as peace officers and tend “to impair the public’s trust in its police department.”²³

Thus, public employers still may restrict both on-duty and off-duty speech or conduct that creates an impairment or disruption of the employer’s mission or operations.

The principles involving off-duty conduct and the Internet were recently applied by the Supreme Court in *City of San Diego, California v. Roe*.²⁴ At issue in that case was whether the San Diego Police Department violated the employee’s First Amendment rights by dismissing him for his off-duty, non-work-related activities. Specifically, the city terminated the police officer after discovering that he made a video of himself performing sex acts while stripping off his police uniform. He then sold the video on the adults-only section of eBay, the popular online auction site. The officer’s supervisor found out about the video when he discovered an official San Diego Police Department police uniform for sale on the website. Further investigation revealed other items and the sex video, all for sale using the police officer’s online codename.

The court held that the police officer’s conduct “does not qualify as a matter of public concern under any view of the public concern test.” As a result, the *Pickering* balancing test was not even applicable because the officer’s conduct did not constitute protected speech. In addition, the court noted that unlike speech that is wholly unrelated to public employment, the conduct in this case was deliberately linked to the police officer’s employment in a way that compromised substantial interests of the police department. Thus, the court held that not only was the employee’s conduct not protected by the First Amendment, but also the termination was appropriate because the speech “was detrimental to the mission and functions of the employer.”²⁵

Thus, like the word “blog,” the term “dooc” may well make it into the mainstream dialogue of public employees and employers. The foregoing examples demonstrate that blogging and other online speech and activities by public employees raise the possibility of workplace disruption, even if the speech is undertaken outside the workplace, on private computers, and on private networks. The Internet increases the potential for off-duty conduct to create workplace disruption, including breaches of security, decreased productivity and morale, and risks to the employer’s computer network. In addition, online speech by public employees raises the possibility

of employer exposure to liability due to harassing, hate, defamatory speech, or publication of copyright-protected materials. As a result, certain well-defined limitations are appropriate and will likely withstand constitutional challenge.

Other Legal Constraints

The constitutional speech test is not the end of the analysis in considering whether to regulate or discipline Internet-related speech. In the absence of an explicit policy

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and acknowledgment by employees that the employer may monitor the use of computer files at any time, public employees may contend that the Fourth Amendment requires “reasonable suspicion” before the employer may inspect individual, private emails.²⁶ It is critically important that an employer negate any expectation of privacy by employees regarding their computer files.²⁷

Various statutory protections may also apply to employees’ online speech. For example, speech that constitutes whistleblowing enjoys statutory protection in California — a public employee is protected from adverse employment action if the employee discloses information to a public agency or law enforcement about law-breaking or noncompliance with federal or state law. The public employee must have “reasonable cause” to believe the reported conduct is illegal.²⁸

Similarly, employers cannot discriminate against employees who file complaints or participate in proceedings relating to the occupational safety and health conditions at the workplace.²⁹ However, even though the authors of online blogs may complain about various aspects of the workplace, they tend to be passive and indirect in their disclosures. As such, blog content rarely constitutes sufficient disclosure to a public agency or law enforcement, or participation in an OSHA proceeding, to warrant application of these statutes.

State and federal law also prohibits employment discrimination on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person.³⁰ For example, where an employee’s personal website reflects the employee’s sincerely held religious beliefs or the individual’s marital status or sexual orientation, the employer must exercise caution in ensuring that its policies are applied neutrally and are tailored to the disruptive impact to the workplace rather than based on biases relating to the protected content.

Public Sector Union Access Rights

Whether on or off the job, employees’ communications regarding union-related matters, such as working conditions, grievances, negotiations, and job actions, may constitute “matters of public concern” for purposes of constitutional speech rights.³¹ In the absence of a showing that the speech is disruptive to the public agency’s operations, a public employee may not be disciplined for speech on matters of public concern.³²

The precise extent to which public employers can control union-related communications presents unsettled issues of law. On November 29, 2007, the California Supreme Court granted the California Teachers Association’s petition for review in *San Leandro Teachers Assn. v. Governing Board of the San Leandro Unified School Dist.*³³ In that case, the First District Court of Appeal held that the school district was not required to allow its teachers unions to distribute a newsletter containing political endorsements via the district’s internal mail system.

The *San Leandro* court upheld the school district’s mailbox policy, which parallels Education Code Sec. 7054 (“No school district...funds, services, supplies or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate...”), on the grounds that the mailbox system was a nonpublic forum, and that the restriction on the union’s access to school district mailboxes for purposes of political advocacy was reasonable and viewpoint-neutral. Although the union’s writ petition was premised on Article I, Section 2, of the California Constitution, which provides broader speech protections than the First Amendment of the federal Constitution, the court applied a federal forum analysis based on a line of published California decisions involving freedom of expression in the educational context.

In addition to the constitutional issues, the court examined the district’s policy in light of the access provisions

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of the Educational Employment Relations Act. That statute, like certain other California public sector labor laws,³⁴ grants an exclusive bargaining representative “the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, *subject to reasonable regulation....*”³⁵

Under EERA, the *San Leandro* court found that the school district’s policy was a “reasonable regulation” because it served the valid public purpose of limiting the district’s involvement in political activity. This finding is consistent with decisions issued by the Public Employment Relations Board, which will uphold employer regulations limiting union access that are “properly related to justifiable concerns about disruption...[and] narrowly drawn to avoid overbroad and unnecessary interference with the exercise of statutory rights.”³⁶

PERB has held that the decision to implement a computer use policy is within the exercise of managerial prerogative.³⁷ However, the employer is not necessarily relieved of the duty to negotiate the effects of the decision on bargaining unit members if it impacts matters within the scope of representation. The subject matter of a computer use policy may be subject to negotiations if the policy changes the status quo, establishes new grounds for discipline, or relates to the union’s use of email to communicate with employees.³⁸

Moreover, an employer may not discriminatorily limit employees’ use of email for union purposes. Once an employer has opened a forum for non-business communications, employees must be permitted to use that forum for a similar level of union-related communications.³⁹ A policy that restricts a union’s access rights creates a corresponding interference with employees’ representation rights.⁴⁰ Even under the statutory access provisions of EERA and the Higher Education Employer-Employee Relations Act, an employer is not obligated to open to the unions “every and all other means of communication.”⁴¹

Conclusion

As technological innovations continue, it is clear that the Internet, “blogging,” and getting “dooced” are here to stay. This rapidly developing area of the law not only implicates competing legal interests but also involves overarching considerations of employee morale, workplace productivity, government security, public sentiment, and broad societal communications.

Many employment disputes, and many blog complaints regarding employment, arise from a lack of clearly articulated policies and clear notice of the employer’s expectations. Employers may be able to forestall public complaints by establishing internal procedures that are receptive to employee criticism.

In light of the interests at stake, public employers must implement computer use policies that recognize public employees’ constitutional and statutory rights but diligently protect the employer’s right to maintain a safe, efficient workplace consistent with the employer’s mission. Careful negotiation of union access provisions in a collective bargaining agreement is an

important first step.

In the public employment workplace, Internet and electronic communications policy should include, at a minimum, the following:

- a disclaimer on Internet postings and personal emails reflecting that the user is expressing his or her own viewpoint, not the employer’s;
- a prohibition against disclosure of confidential information or information that could breach the security of the employer’s computer system in any way;
- an acknowledgment by the employee that the employer may monitor the use of his or her computer files at any time;

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- an acknowledgment by employees that personal Internet use will be kept to a minimum and blogging will be done on the employee's own time and own computer;
- a prohibition against posting any material that would constitute harassment, hate speech, or libel;
- a prohibition against conducting outside business;
- a prohibition against sending or accessing sexually explicit material;
- an acknowledgment that the employer may require immediate removal of, and impose discipline for, material that is disruptive to the workplace or impairs the mission of the employer.

Employers should periodically send memoranda to employees reminding them of the restrictions on the use of agency equipment. These guidelines are intended only as a starting point for an employer's comprehensive computer use policy. *

1 McCann, Rob, *The Blogosphere by The Numbers*, ClickZ Network, Nov. 22, 2004, <http://www.clickz.com/showPage.html?page=3428891Blogcount.com>.

2 See Employment Law Alliance, "Blogging and the American Workplace," (2006) http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf; Edelman and Intelliseek, "Talking From the Inside Out: The Rise of Employee Bloggers," 6 (2005), <http://edelman.com/image/insights/content/Edelman-Intelliseek%20Employee%20Blogging%20White%20Paper.pdf>.

3 Wilson, Trish, *Employees Wasting Time Reading Blogs At Work — Your Boss Is Onto You*, Blogcritics Mag., Oct. 25, 2005, <http://blogcritics.org/archives/2005/10/24/150852.php>.

4 *Trustees of the California State University* (2007) PERB Dec. No. 1926-H, 188 CPER 103.

5 Statistics on Fired Bloggers, <http://morphemetales.blogspot.com/2006/10/statistics-on-fired-bloggers.html> Oct. 8, 2006, 18:35.

6 Stephen D. Lichtenstein & Jonathon J. Darrow, *Employment Termination for Employee Blogging: Number One Tech Trend for 2005 and Beyond, or a Recipe for Getting Dooed?* UCLA Journal of Law & Technology, Fall (2006).

7 *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951, 180 CPER 13 (when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline).

8 *San Marcos Unified School Dist.* (2003) PERB Dec. 1508, 158 CPER 83.

9 *Pickering v. Board of Education of Township High School Dist.* 205 (1968) 391 U.S. 563, 568.

10 *Ibid.*

11 *Connick v. Myers* (1983) 461 U.S. 138, 147-48, CPER SRS 22.

12 Under *Garcetti, supra*, employers are well advised to create broad job descriptions that encompass all of an employee's duties.

13 *Pickering v. Board of Education, supra*, 391 U.S. at 574.

14 *City of San Diego, California v. Roe* (2004) 543 U.S. 77, 83, 125 S.Ct. 521.

15 Thus, in *Brewster v. Board of Education* (9th Cir. 1998) 149 F.3d 971, 131 CPER 46, the Ninth Circuit found that the district was justified in terminating a teacher based on the disruption of his relationship with his principal. The district's interest in maintaining positive working conditions between teachers and their principals — i.e., a close working relationship with frequent contact [that] requires trust and respect in order to be successful" — outweighed the teacher's First Amendment rights.

16 *Edgerton v. State Personnel Board* (2000) 83 Cal.App.4th at 1361, citing *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1096 (the intrusion on employees' privacy rights by random drug testing was significantly enhanced because employees were subject to follow-up drug testing on off-duty time).

17 *United States v. Treasury Employees* (1995) 513 U.S. 454, 465, 475, 115 S.Ct. 1003.

18 *Edgerton v. State Personnel Board, supra*, 83 Cal.App.4th at 1361, citing *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1096.

19 *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 106 CPER 61.

20 Labor Code Secs. 96(k); 98.6 (West 2000). Similarly, Gov. Code Sec. 19572 provides that in order to impose discipline for state employees' off-duty conduct, the conduct must be rationally related to the employment and must be of the nature that would result in impairment or disruption of public service.

21 *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72; *Barbee v. Household Auto. Finance Corp.* (Ct. App. 2003) 6 Cal.Rptr.3d 406, 412.

22 Gov. Code Sec. 19990; Gov. Code Sec. 1126.

23 *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 568, 587, 87 CPER 31.

24 *City of San Diego v. Roe, supra*, 543 U.S. 77; see also *Dible v. City of Chandler* (2007) 502 F.3d 1040, (police officer's sexually explicit website featuring himself and his wife was not an expression of speech on "matter of public concern" because the website did not give the public any information about the operations, mission, or function of the police department).

25 *City of San Diego v. Roe, supra*, 543 U.S. at 80 (per curiam).

26 USCA Const. Amend. IV.

27 *TBG Insurance Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443 (an insurance company defending a wrongful discharge claim may inspect a plaintiff's home and office computers, which had been supplied by the employer with an explicit policy against private use, thereby negating any expectation of privacy by the plaintiff); see also, *Biby v. Board of Regents, of University of Nebraska* (8th Cir. 2005) 419 F.3d 845 (a warrantless search of an employee's computer for work-related material did not violate a clearly established constitutional right since the employer's policy permitted such searches). A full discussion of federal and state law governing electronic surveillance is beyond the scope of this article.

28 Lab. Code Sec. 1102.5 (West Supp. 2006).

29 Lab. Code Sec. 6399.7 (West Supp. 2006).

30 Gov. Code Sec. 12940 (West 2000).

31 *Chico Police Officers Assn. v. City of Chico* (1991) 232 Cal.App.3d 635, 646, 90 CPER 31 (speech concerning employer-employee relationships, officer safety, and loss of confidence in the management of the department are matters of public concern).

32 *Kirchmann v. Lake Elsinore School Dist.* (1997) 57 Cal.App.4th 595, 609, 126 CPER 29, modified on other grounds and rehearing den. (2000) 83 Cal.App.4th 1098; *Waters v. Churchill* (1994) 511 U.S. 661, 675, 107 CPER 16.

33 (2007) 154 Cal.App.4th 866, 186 CPER 28.

34 EERA and HEERA expressly establish a right of access to facilities and various means of communications. (Secs. 3543.1[b], 3568.) Although the Dills Act (Secs. 3512 et seq.) does not contain an express right of access, PERB has found an implied right of access. *State of California (Dept. of Transportation)* (1980) PERB Dec. No. 127-S, 46 CPER 74. The statutory language PERB relied on to find an implied right of access in the Dills Act is also present in the Trial Court Employment Protection and Governance Act.

35 Gov. Code Sec. 3543.1(b). (Emphasis added.)

36 *Regents of the University of California v. Public Employment Relations Bd.* (1988) 485 U.S. 589 (128 LRRM 2009), 77 CPER 3 (postal statutes bar use of an employer's internal mail system).

37 *Trustees of the California State University* (2007) PERB Dec. No. 1926-H, 188 CPER 103; but see *State of California (Water Resources Control Board)* (1999) PERB Dec. No. 1337-S, 138 CPER 66 (employer violated the Dills Act when it unilaterally implemented a new Internet/intranet usage policy without providing union with notice or an opportunity to bargain over that change).

38 *Trustees of the California State University* (2003) PERB Dec. No. 1507-H, 158 CPER 85.

39 *Sierra Sands Unified School Dist.* (1993) PERB Dec. No. 977, 99 CPER 44.

40 *Trustees of the California State University* (2003) PERB Dec. No. 1507-H, 158 CPER 85. At the same time, however, at least one PERB decision holds that the unions' right of access to employees does not apply to every possible means of such access. If the employer offers evidence of disruption, the availability of alternative means of communication will be considered. *Regents of the University of California* (1984) PERB Dec. No. 420-H.

41 *Regents of the University of California v. Public Employment Relations Board* (1986) 177 Cal.App.3d 648, 68X CPER 5.

Down and Out: Economists Assess the Teacher Pay Disadvantage

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As public employees, elementary and secondary school teachers have the enormous responsibility of educating our youth, and much hinges on their success. Teacher quality is the most important input schools contribute to the academic success of their students.¹ The ability of school officials to recruit and retain highly effective classroom teachers is a struggle in many school districts throughout the United States. For decades now, a small and declining fraction of the most cognitively skilled graduates choose to become teachers,² while rigorous national standards and school-based accountability for student performance have pushed the demand for talented teachers to an all-time high.

Prolific career opportunities have made it increasingly difficult to attract the best and the brightest into the profession. Professional women, historically afforded limited choices outside of teaching, have increasingly diverse career prospects. Attractive pay and compensation structures are part of the appeal of these ever-expanding opportunities. For this reason, it is important to ask whether teacher pay has kept up with that of other professions available to college graduates today. This article presents empirical evidence from several sources that documents relative teacher pay in a present and historical context.

Major Findings

A broad array of analysts from across the political spectrum have found trends comparable to those found here — that teachers face an earnings disadvantage, and that this disadvantage has grown over the long run.³

The major findings of this report are as follows:

- An analysis of recent trends in weekly earnings shows that public school teachers in 2006 earned 15 percent less in weekly earnings than comparable workers. This represents a 10.7 percentage-point decline over the past decade.

THE TEACHING PENALTY

This article is a shorter, less-technical version of the book *The Teaching Penalty: Teacher Pay Losing Ground*, by Sylvia A. Allegretto, Sean P. Corcoran, and Lawrence Mishel (Washington, D.C.: Economic Policy Institute, 2008). The book examines issues and questions regarding

methodology and data along with critiques of recent work in the area of teacher pay and compensation. While the depth of the academic research presented here may not seem pertinent to all public employee labor relations practitioners, certain readers might benefit from an explanation of the

methodology. And from the numbers, the authors arrive at some important conclusions concerning teacher pay and compensation, results that should be of interest — but not necessarily a surprise — to many of those involved in the state’s public school system.

- Using U.S. Decennial Census data,⁴ the long-run relative pay gap between female public school teachers and comparably educated women — for whom the labor market dramatically changed over this period — grew by nearly 28 percentage points, from a relative wage advantage of 14.7 percent in 1960, to a pay disadvantage of 13.2 percent in 2000. The pay gap for male teachers was -20.5 percent in 1960 and grew over 10 percentage points to -31.2 percent by 2000.
- An analysis of the weekly earnings of occupations comparable to K-12 teachers confirms the teacher disadvantage in earnings and the substantial erosion of relative teacher pay over the last 10 years. Teachers’ weekly wages were nearly on par with those in comparable occupations in 1996, but are now 14.3 percent, or \$154, below that of comparable occupations.
- After studying trends in relative compensation through the 1990s by age, nearly all of the increase in the weekly earnings gap between teachers and comparably educated and experienced workers occurred among mid- and senior-level teachers. Early-career teachers (aged 25-34) experienced roughly the same wage disadvantage today as in 1990 (about 12 percent).
- Improvements in the non-wage benefits of K-12 teachers partially offset wage differences, such that the weekly compensation disadvantage that faced teachers in 2006 was about 12 percent, about 3 percentage points less than the 15 percent weekly wage disadvantage.

While our study is national in scope, we do present state-by-state pay gaps for public school teachers in the appendix of our book, *The Teaching Penalty* (see section above). In sum, states vary widely in the extent to which public school teachers are paid less than other college graduates. The bottom line, however, is that there is no state where teacher pay is equal or better. In 15 states, public school teacher weekly wages lag by more than 25 percent. And there are only five states where teacher weekly wages are less than 10 percent behind. In California, teachers make just 83.9 percent of that of other college graduates — 86.7 percent for those with a bachelor’s degree and 80.4 percent for teachers holding a master’s degree.

The Long Run: 1960 to 2000

This section sets the stage for an analysis of recent trends in teacher pay by placing this study in the broader context of changes in the last 40 years in the labor market for teachers. A long-run perspective helps to understand the links between relative compensation and the quality of the teaching force, and to recognize the structural challenges facing schools that seek to attract highly skilled graduates into the profession. First, we review the evidence on long-run trends in relative teacher compensation, and then we turn to the decennial census to provide some estimates of change in relative teacher wages between 1960 and 2000.

Perhaps like no other profession, the labor market for teachers was profoundly affected by improvements in work opportunities for women during the mid-20th century. Schools had long enjoyed a captive labor pool in academically skilled women who had few career options outside of teaching, nursing,

and social work. As labor market opportunities for women improved, however, college-educated women were much more likely to pursue careers in medicine, law, science, and management than to enter a traditionally female-dominated profession.⁵

Part of the appeal of these new opportunities was their earnings potential. Wage growth in general for college-educated women outpaced that for men for decades, in professions for both sexes and those within traditionally male-dominated jobs.⁶ Given the high economic returns possible in the most lucrative of these occupations, one might expect that the most academically talented women would have the most to gain from choosing a non-teaching profession.

Indeed, there has been a sharp reduction in the fraction of the highest-achieving female graduates entering the teaching profession since 1960,⁷ and research explicitly links trends over the 1970-90 period to relative earnings opportunities.⁸ Using the National Longitudinal Surveys of Young Men, Young Women, and Youth, research finds that, where relative earnings outside of teaching increased, both men and women were less likely to make teaching their occupational choice, with the highest-aptitude graduates being the most responsive to outside wage opportunities. For example, a 10 percent increase in professional earnings reduced the highest scoring (top 25 percent) graduates' likelihood of teaching by 6.4 percent.

Evidence on how teachers' earnings have fared relative to that of other college graduates is plentiful.⁹ Studies show that female teachers at one time earned significantly more than other female college graduates, but this pay premium has sharply eroded over time.

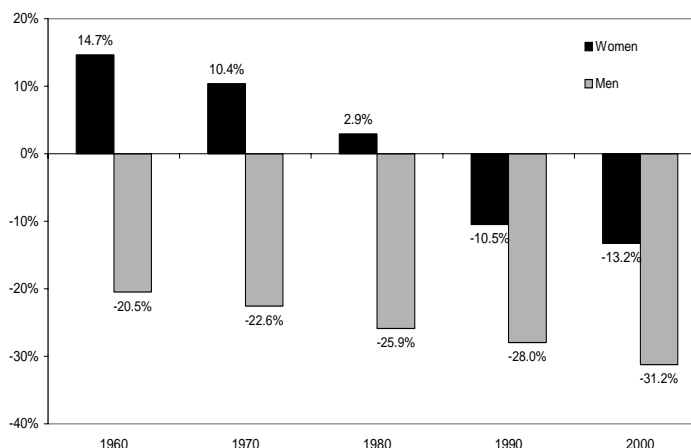
Figure A, right, provides "regression adjusted" estimates of the long-run changes in relative teacher earnings using data from the U.S. Census Bureau or the decennial census¹⁰ from 1960 to 2000. Throughout the paper, the terms "relative" and "regression adjusted" estimates refer to results using an econometric model. The model represents a typical earnings specification that controls for other

characteristics, such as gender, race/ethnicity, age, marital status, geographic, and educational attainment. Therefore, each calculation displayed in *Figure A* is an estimate of the percentage difference in annual earnings between the average public elementary or secondary school teacher and a worker with similar education and work experience. In other words, what regression analysis does is take an average individual that is the same regarding all observable characteristics except occupation — in order to compare the average teacher to the average non-teaching professional.

Figure A illustrates dramatic erosion in relative teacher earnings since 1960. In 1960, female teachers had a relative pay advantage of 14.7 percent which continually declined over four decades and was a -13.2 percent pay disadvantage by 2000. Altogether, the annual pay differential between female teachers and non-teachers has shifted almost 28 percentage points over a 40-year period. Male teachers — who always experienced a negative earnings differential during this timeframe — also had a growing pay gap between 1960 and 2000, but to a lesser extent than women (10.8 percentage points). Combining male and female teachers, the overall pay gap grew nearly 20 percentage points over these 40 years.

With this steep erosion of relative pay, it is not surprising that several analysts¹¹ have presumed that there is a likely link between relative wage declines and "a drop-off in average teacher quality."

Figure A Annual wage premium of public school teachers, by gender, 1960-2000



Source: Authors' regression adjusted analysis of US decennial Census data.

Recent Trends in the Relative Earnings of Teachers

It is important to historically situate the long-run trend in teacher pay in order to grasp how the vastly changing economic environment has affected labor market outcomes. Over the last several decades, and more so recently, there have been enormous shifts in the liberalization of gender norms, ever-increasing globalization, and transformed occupational structures. Addressing recent trends in teacher pay will put into perspective the current debates regarding educational policy and issues concerning teacher quality.

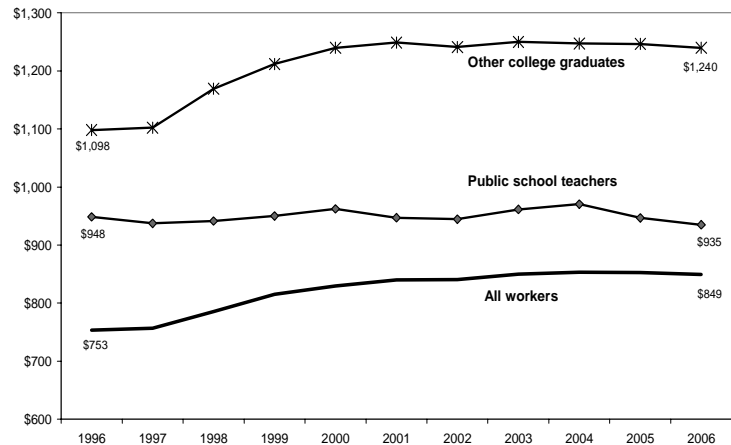
This section focuses on the period from 1996 through 2006. The analysis relies on weekly wage reports from the Current Population Survey-Outgoing Rotation Groups as the primary source of data; it is adjusted for differences in worker education levels, experience, region, and other relevant differences.

The CPS data, used extensively by economists to study wages and employment, is particularly useful because of its large sample size and information on weekly wages. This analysis presents separate estimates by gender and by highest level of education, examining workers whose highest degree is a B.A. and those with an M.A. or higher.¹²

First, there are several issues to address. This analysis of the relative wage of teachers relies on comparisons of weekly earnings, rather than annual or hourly earnings, an approach taken by some authors.¹³ We did this to avoid measurement irregularities regarding differences in annual weeks worked (i.e., teachers' traditional "summers off") and the number of hours worked per week that arise in many studies of teacher pay.

It is often noted that the annual earnings of teachers cannot be directly compared to that of non-teachers because teachers typically work only a nine-month year. But differences arise over exactly how much time teachers devote to their work outside the traditional school year. Teachers spend some of the summer months in class preparation, professional development, and other activities expected of a professional teacher. Teachers who wish to earn additional

Figure B Real weekly wage trends for teachers and others, 1996-2006 (2006 dollars)



Source: Authors' analysis of CPS data.

income during those three months often can do so, but they are unlikely to work at the same rate of pay as during the academic year.

Similarly, attempts to compare the hourly pay of teachers and other professionals have resulted in considerable controversy. As economist Michael Podgursky has noted, "comparing the hourly pay of teachers and non-teachers just sets off an unproductive debate about the number of hours teachers work at home versus other professionals."¹⁴ It is noteworthy, however, that in addition to our comparisons of weekly earnings, we compared the relative hourly pay of teachers using CPS data and found no discernible difference in our results.

Such decisions regarding the pay interval (weekly, annual, or hourly) become irrelevant when the focus is on changes in relative pay over time. Results can be expected to be similar as long as the relative work time (between teachers and comparable professionals) remains constant. For example, if the ratio of weekly *hours* worked by teachers relative to the *hours* worked by comparable workers remains constant over time, then estimates of changes in either relative weekly or hourly wages will be the same. Similarly, estimated changes in relative *annual* earnings will parallel those for weekly earnings as long as the *annual* weeks and hours worked by teachers have not changed relative to those of comparable workers.

The Pay Gap

The level differences in basic weekly wages for public school teachers and non-teacher college graduates are striking — as is apparent in *Figure B*, left. Simply comparing average weekly wages shows that, in 2006, teachers earned, on average, \$935 compared to \$1,240 for other college graduates. Compared to the overall workforce, many of whom do not have college degrees, teachers fared a bit better, as would be expected.

These data also allow an examination of how teachers’ “real” or inflation-adjusted wages have fared relative to other college graduates over the last 10 years. The basic story is simple. Weekly wages of public school teachers have almost kept up with, but have not risen faster than, inflation since 1996. This is true for teachers at all education levels and of either gender. By contrast, non-teacher college graduates saw a remarkable 12.9 percent gain in their inflation-adjusted wages between 1996 and 2001. After 2001, wage growth was unfavorable for teachers and non-teachers alike, though teachers (particularly women) lost ground relative to other college graduates in this period as well

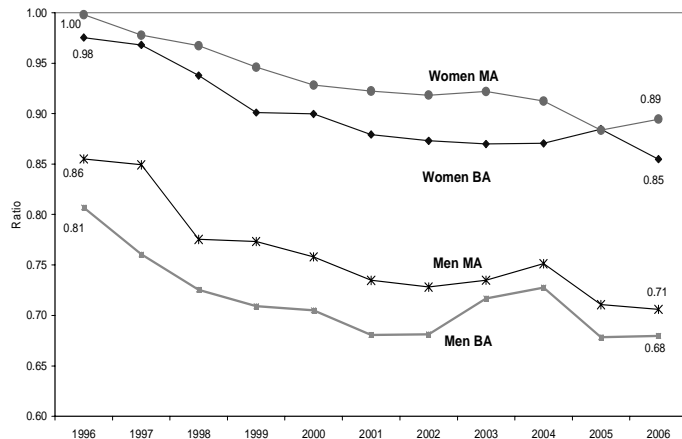
Figure C, right, focuses on educational attainment and examines the ratio of teacher weekly wages to other non-teacher graduates, by gender. Women with a bachelor’s or master’s degree were close to pay parity with other female college graduates in 1996, but the ratio has declined considerably since. In 1996, male teachers with either degree were paid substantially less than other male college graduates with the same degree, and these pay disparities grew much worse over the decade.

Regression-Adjusted Estimates of Relative Teacher Wages

The next stage in our analysis is to estimate regression-adjusted relative teacher wages.¹⁵ Teachers are more likely to hold a master’s degree than other college graduates,¹⁶ therefore, we include separate identifiers for those with a bachelor’s degree alone, those with a master’s degree, and those with education beyond a master’s degree (i.e., doctorate or professional degree).

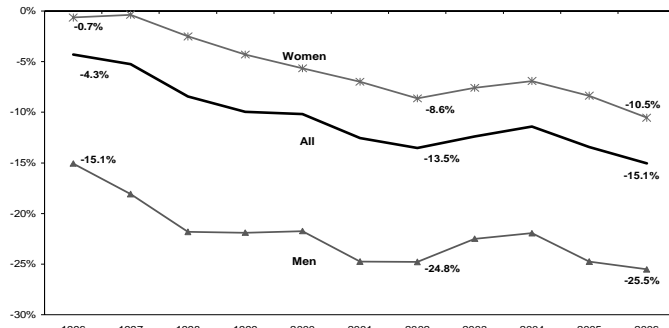
The regression-adjusted estimates of relative teacher wages from the CPS are presented in *Figure D*, below, with

Figure C Teacher/non-teacher weekly wage ratios, by education and gender 1996-2006



Source: Authors’ analysis of CPS data.

Figure D Relative wage premium of public school teachers, by gender, 1996-2006



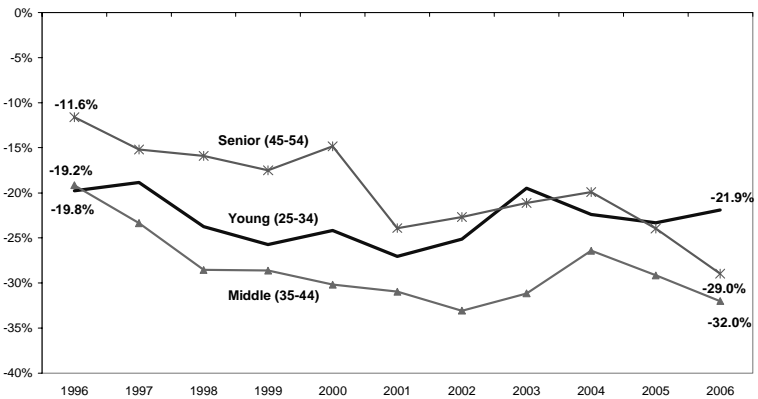
Source: Authors’ regression adjusted analysis of CPS data.

estimates presented separately for all teachers and for teachers by gender. In 2006, female teachers had a pay differential of -10.5 percent, while male teachers were -25.5 percent behind similar college-educated workers.

The regression approach shows a 10.8 percentage-point erosion of the teacher relative-wage since 1996; similar erosion occurred whether one looks at all teachers together or strictly at male or female teachers. This estimate is somewhat smaller than that using unadjusted wage ratios, where relative wages fell about 12.4 percentage points.

The estimates with annual wage data (*Figure A*) confirm the findings based on weekly wage data — that there has been a substantial erosion of teacher wages relative to that of comparable workers over the last 10 years or so. The magnitudes of the erosion of relative teacher pay using weekly and annual wage data differ, but they tell the same basic story. A comparison of trends in annual earnings in the March CPS with an analysis of trends in the decennial census (1980 to 2000) confirms this pattern.¹⁷ Taken together, these findings show a large erosion in relative teacher pay over the last 10 years and since 1960.

Figure F Change in male teacher weekly wage premium by age range 1996-2004



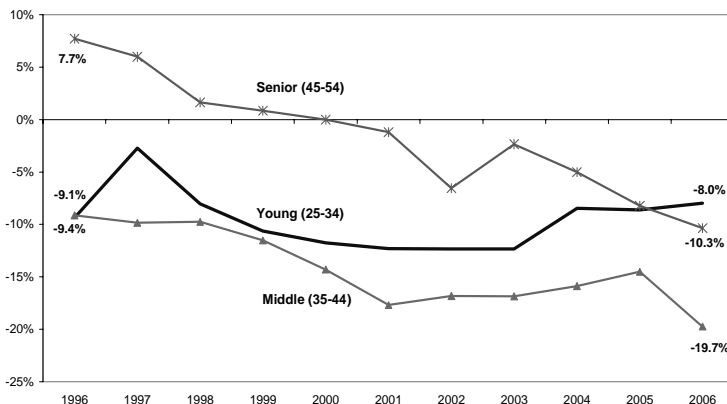
Source: Authors' regression adjusted analysis of CPS data.

Recruitment and Retention: An Age Analysis

This section examines relative teacher wages by age using three age categories: “young” (25-34), “middle” (35-44), and “senior” (45-54). The erosion in relative teacher pay, documented above, may ultimately affect teacher quality through its effects on recruitment and retention. An analysis that explicitly examines pay trends by age provides valuable insight. The results, by gender, are presented in *Figures E*, below, and *Figure F*, above.

The pay gap for young teachers overall and by gender was relatively constant over the last decade. In fact, the relative wage disadvantage among younger female teachers diminished slightly over this period — falling from a -9.4 percent gap to -8.0 percent. For young male teachers, the gap increased slightly from -19.8 percent to -21.9 percent. The figures illustrate that the erosion of relative teacher earnings has fallen most heavily on experienced teachers, aged 45 to 54. For instance, senior female teachers had wages just above those of comparable workers in 1996, but by 2006 earned 10.3 percent less than comparable workers, an erosion of 18.0 percentage points. The erosion from 1996 to 2006 among middle female

Figure E Change in female teacher weekly wage premium by age range 1996-2004



Source: Authors' regression adjusted analysis of CPS data.

teachers (35-44) was less, but still considerable at 10.3 percentage points.

For men, erosion rates over time were similar, although they started and ended this timeframe with greater pay disparities compared to women for any age cohort. Similar to female teachers, senior-level male teachers experienced the largest pay gap increase from 1996 to 2006 — an increase of 17.4 percentage points. This may help explain why women still dominate the profession and the gender make-up of teachers has changed little over time.

These results suggest that trends in relative teacher earnings over the last 10 years may not have had a substantial impact on the recruitment of new teachers, though recruitment must still overcome the -8.0 percent and substantial -21.9 percent wage gap facing young female and male teachers, respectively. However, the doubling of the wage gap that teachers experience as they age, from their younger years (25-34) to mid-career (35-44), suggests that retention may have become more difficult. The erosion of pay for mid-career and more-senior teachers might also affect teacher recruitment to the extent that potential teachers consider their lifetime earning capacity in the profession.

An issue that frequently arises when discussing relative teacher compensation is whether teachers receive better benefits that offset their lower wages. The answer is “a bit,” with an overall (wages plus benefits) compensation disadvantage perhaps 2 percentage-points less than the wage disadvantage.¹⁸ Our study finds that teachers do have somewhat better benefits but not as much as critics claim. Furthermore, the scale of benefits is far too small — only 20 percent of total compensation — to offset the overall 15 percent wage disadvantage indicated in *Figure D*.

The Earnings of Teachers Relative to ‘Comparable’ Occupations

Teacher salaries are frequently compared directly with those of specific professions thought to be “comparable” to teaching. For example, the American Federation of Teachers, in its annual survey of salaries, compares teacher salaries to those of accountants, buyers, attorneys,

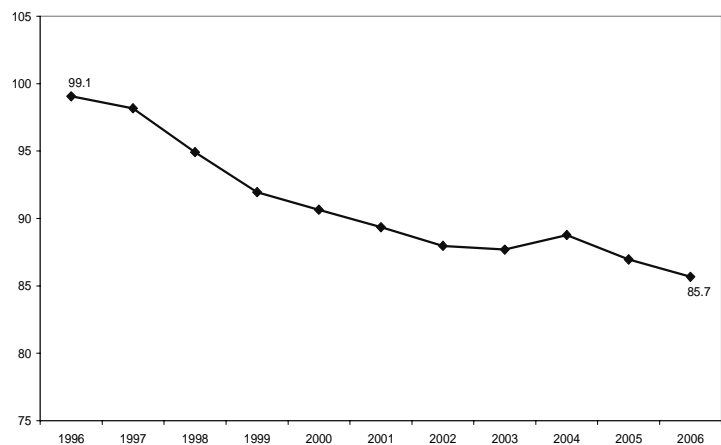
computer systems analysts, engineers, and university professors. Unfortunately, these professions are chosen based on limited data availability or are chosen arbitrarily without reference to any selection criteria.

One innovation of our earlier study¹⁹ was to systematically and empirically identify professions that represent “proper” comparison occupations to teaching. This was done using occupational “skill level” data from the Bureau of Labor Statistics’ National Compensation Survey to identify professions similar to teaching in terms of specific skills used on the job. In other word, the NCS provides a ranking of occupations, and from these rankings we identified 16 professions that were “comparable” to teaching, based both on their raw skill requirements and on the market valuation of these skills. We then compared their weekly wage levels and trends to those of teachers.

We used six occupations as the “comparable” group in the analysis below.²⁰ Given the dominance of this group in the earlier computations, it should not be surprising that the relative teacher wage in 2002 (the year of analysis in our prior study and a year for which all data are available) is the same under the “new” group.

Figure G, below, presents the trend in teacher wages relative to this comparable group of occupations from 1996 to 2006. What is striking is that the increasingly downward trend is very similar to all the results set out above. In 2006, teachers earned 85.7 percent as much (or 14.3 percent less, or \$154 less) in weekly wages as those in the group of comparable

Figure G Teacher wages relative to comparable occupations, 1996-2006



Source: Authors' analysis of NCS and CPS data.

occupations. The erosion of relative teacher wages using comparable occupations from 1996 to 2006 parallels the erosion found using regression estimates.

This exercise represents another convincing piece of evidence that teacher pay is behind that of other professionals and that the gap has widened over the past decade. Even though one may argue over the precise magnitude of the gap, it is the trend that represents the ever-increasing pay disadvantage of teachers that is most important.

Conclusion and Policy Implications

Based on this study, it is clear that public school teachers earn less than similarly educated and experienced professionals, and that this disadvantage has grown substantially over the last decade. The earnings gains that seemed to benefit all college-educated (and other) workers during the late 1990s appear to have bypassed teachers. Moreover, in recent years the average college graduate has experienced stagnation in real wages, and teachers have fared even worse.

The longer view is that female teachers enjoyed an earnings advantage in 1960 relative to other women college graduates. But, as women's opportunities have expanded, their earnings from teaching have fallen substantially behind those of similarly educated women. The pay of male teachers, which has always been behind that of other male professionals, only worsened over the last four decades

While it is true that teachers, on average, enjoy benefits that are better than other professionals, the difference is much less than conventional wisdom suggests. In fact, benefits are a small share of overall compensation (about 20 percent) so that accounting for differences in benefits does not alter the outcome much — it shaves off only 2 percentage points from the overall pay gap.

The real curiosity is that the extensive policy discussions of teacher pay seem to ignore the persistent and growing teacher pay disadvantage. Any effort to alter the quality of the teacher workforce by changing recruitment and retention must address this issue. It is essential if we expect to change

the profile of the teaching profession, which is what is required to achieve a substantial impact on education outcomes. Efforts to provide one-time bonuses to a small minority of teachers (especially small bonuses) leaves the compensation of the most effective teachers below that of the labor market and can hardly be expected to improve retention and recruitment conditions for the “best” teachers, let alone the typical teacher. *

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- 1 Hanushek and Rivkin 2006; Rice 2003.
 - 2 Corcoran, Evans, Schwab 2004.
 - 3 For dissenting views, see two widely cited analysts, Jay Green and Michael Podgursky. In Allegretto, Corcoran, and Mishel 2008, 2004, it is clearly explained why the data they examine are inappropriate for measuring relative teacher pay.
 - 4 Decennial data is information collected at 10-year intervals.
 - 5 Black and Juhn 2000; Goldin 2006.
 - 6 Murphy and Welch 2001; Bacolod 2007.
 - 7 Corcoran, Evans and Schwab 2004.
 - 8 Bacolod 2007.
 - 9 See Temin 2002, 2003; Hurley 2003; Peterson 2003; Hanushek and Rivkin 2007.
 - 10 Public-Use Microdata Samples, or PUMS.
 - 11 Such as Hanushek and Rivkin 2007, Temin 2002, and others.
 - 12 This analysis focuses only on public school teachers.
 - 13 See e.g., Hanushek and Rivkin 1997; Greene and Winters 2007.
 - 14 See <http://www.nctq.org/nctq/publications/debate.jsp>.
 - 15 This accounts for any changes in the composition of the workforce and controls for observables that may account for differences in pay. Our earnings specification uses the natural logarithm of weekly wages as the dependent variable, with controls for education, age, gender, marital status, region, race, and ethnicity. The coefficient on a teacher indicator variable provides an estimate of the relative teacher wage that controls for these other worker characteristics. This analysis also focuses only on public school teachers. In practice this means having a dummy variable for public school teachers in the model along with a dummy variable for private school teachers.
 - 16 Larsen 2006.
 - 17 We do not show the evidence from the March CPS here but it is detailed in Allegretto, Corcoran, and Mishel 2008.
 - 18 Employer Costs for Employee Compensation data from the Bureau of Labor Statistics was used for this analysis and is explored in detail in Chapter 4 of Allegretto, Corcoran, and Mishel 2008.
 - 19 Allegretto, Corcoran, and Mishel 2004.
 - 20 Unfortunately, it has not been possible to link current occupational wage data to historical wage data because of changes in occupational coding. Fortunately, there is comparability for the six largest occupations (accountants, reporters, registered nurses, computer programmers, clergy, and personnel officers) that comprised 83 percent of the aggregate employment of the initially selected 16 occupations.

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Karen Neuwald Talks About PERB

Carol Vendrillo, CPER Editor

■ **CV: Let's start with the basics. What labor relations experience did you acquire before coming to PERB?**

KN: I began my career in California 25 years ago in the Legislative Analyst's Office. As a legislative analyst, I worked on labor-related budget issues that included state employee compensation, collective bargaining, health care, and retirement. In several LAO publications — such as the *Analysis of the 1982-83 Budget Bill*, the *1983-84 Budget: Perspectives and Issues*, and the *1984-85 Budget: Perspectives and Issues* — I discussed the legislature's involvement in the collective bargaining process and developed recommendations to help the legislature play a more meaningful role.

This year, Karen Neuwald became the seventh chairperson of the Public Employment Relations Board...the first woman ...and the first person to chair an all-woman team. Neuwald talks to CPER Editor Carol Vendrillo about the experience so far.

In 1985, I moved to the Department of Personnel Administration, where I spent the first five years working on policy and legal issues. At times, I was included at the bargaining table as a policy expert on such issues as labor/management health benefit trusts. I helped institute a substance abuse testing program for state employees in sensitive positions. Later at DPA, I headed up the legislative program for six years, working on a variety of labor-related bills including retirement and health benefit issues, workers' compensation reform, civil service issues, the creation of the long-term care program at CalPERS, and legislative ratification of state employee MOUs.

In 1996, I switched gears a little and ran the legislative shop at the Department of General Services. While there, I collaborated with labor groups to achieve successful outcomes on legislation related to contracting out, the design-build construction modality, and labor-compliance programs.

Before I arrived at PERB, I was chief of governmental affairs at CalPERS, overseeing its legislative program and serving as the system's main legislative

advocate. In many ways, my position at PERB returned me to my old policy interests where I started my career, engaging with many of the same advocates and constituents from my LAO and DPA days.

■ **What did you know about PERB before you were appointed? And what has been the most surprising part of the job as board member?**

Actually, I was quite familiar with PERB before being appointed. During my tenure at the LAO, I met extensively with PERB staff, especially Chuck Cole, who was then the executive director. He was quite generous with his time, offering a hand to a “green” analyst and educating me on the roles and functions of the agency. In the course of my career, I have collaborated with many folks who have either worked at PERB or served as board members.

I always have been impressed with the high caliber of employees at PERB and how the agency has stayed true to its neutral role. It is a treat having highly regarded staff available to mentor the next generation of PERB employees. The constituents, too, have shown themselves to be smart and involved. In fact, with their input, we have successfully reinvigorated some of our training programs and conferences.

Another pleasant surprise is how much I enjoy being a policy decisionmaker, after spending almost 25 years in a staff position. My previous experience has provided a firm foundation, and I was ready for this challenge.

■ **How would you define what you bring to the board’s current composition?**

The major assets I bring are my years of executive and legislative experience, with extensive knowledge of the workings of state government. I am also familiar with the policy issues on which we deliberate, from both a practical

and legal perspective. During my career, I have learned how to appreciate the various perspectives of all the interested parties when working on legislation. With that background, I value collaboration with colleagues to achieve resolution of the issues posed by the cases that come before the board.

■ **What kind of marks would you give the board since you’ve been there?**

High marks. First, let me say that it is a great pleasure serving with my colleagues, getting to know them, and seeing the value we each bring to the board. While we all come from different backgrounds, we share a common goal to continually improve our work and practices at PERB. We are lucky to have the PERB advisory committee on which to rely for recommendations to further that cause. As you know, PERB is not a large agency, and our challenges often center around limited resources. Nevertheless, the board and staff are dedicated to producing high-quality work — and I think we succeed.

The board, of course, puts a special focus on workload. Our caseload was greatly expanded in 2001 with the added jurisdiction over local governments covered by the Meyers-Milias-Brown Act and, then, with the enactment of the court employee, court interpreter, and transit acts; nonetheless, we continue to work diligently and carefully. And, I think it’s fair to say that the board also has had to focus more resources on litigation, which has become a growing part of PERB’s workload.

■ **What do you see as PERB’s role in the collective bargaining process in the state? And, how does the position of chair factor into the equation?**

First and foremost, PERB’s primary role is to administer and enforce the laws under our jurisdiction. But from a big-picture perspective, I firmly believe in, and place tremendous value on, PERB’s role in bringing the parties together to

Our caseload was greatly expanded with the added jurisdiction over local government and court employees, court interpreters, and transit employees.

resolve their labor disputes. As many already know, most complaints issued by PERB result in voluntary resolution by the parties due to PERB's settlement-conference process. These informal settlement conferences are hugely important. Likewise, when the voluntary processes don't result in a resolution, we provide the parties a forum to litigate their disputes effectively before an experienced group of administrative law judges.

In many ways, my role as chair is to serve as a sort of head "cheerleader" for PERB, its mission, and its function in California's labor-relations arena. We adjudicate significant matters for a broad spectrum of constituents and, many times, the process culminates in heightened attention from elected policymakers and/or involvement by the courts. As the chair, part of my role is to work closely with our executive staff and represent PERB before the legislature.

■ **Can you comment on complaints about the board's delays in deciding cases?**

Let's be honest...we can always get better in deciding cases. I think that, as chair, part of my task is to foster coordination among board offices so that we issue decisions that are clear, concise, and, of course, as timely as possible. And the entire board works hard toward this end. Likewise, the board is focused on reducing the number of cases on our docket. This is a top priority for me. As of December 2007, we have roughly 65 cases pending, 19 of which are more than a year old.

■ **If you had to pick the most important case you have confronted during your tenure on the board, what would it be?**

I don't think I can pinpoint "the most important case," in part because each case is equally important to the parties involved. That said, some significant PERB law has resulted during my tenure.

What first comes to mind is *State of California (State Personnel Board)* (2006) Dec. No. 1864-S. The complaint alleged that the SPB violated the Ralph C. Dills Act by refusing to approve settlement agreements in disciplinary actions for employees in specified state bargaining units who participated in a collectively bargained "board of adjustment" procedures. After establishing that the board possessed jurisdiction, the board reversed the proposed ALJ decision and dismissed the unfair practice charge and complaint because the Dills Act did not provide the claimed right. Specifically, the State Supreme Court found it unconstitutional for parties to negotiate a process whereby ad hoc arbitral boards review discipline, even if the decision, couched as a "settlement," is submitted to the SPB after the fact.

Another important decision is *County of Orange* (2006) Dec. No. 1868-M. There, the board affirmed the dismissal of an untimely charge in which the union alleged that the county's signature requirement for decertification petitions was unreasonable. In order to invoke the continuing violation doctrine, the offending party must commit a new wrongful act and that act must be timely challenged by the charging party. The mere existence of an allegedly unreasonable signature requirement, standing alone, is insufficient to invoke

the doctrine in this case.

Then there is *Madera Unified School Dist.* (2007) Dec. No. 1907. That charge alleged the district violated the Educational Employment Relations Act by unilaterally changing the district's contribution to health care benefits for current employees and retirees. The board held that retirement health care benefits are within the scope of bargaining. However, the board found that based on the terms of the relevant collective bargaining agreement, the district did not engage in a unilateral change.

And finally, *Delano Union Elementary School Dist.* (2007) Dec. No. 1908, where the charge alleged that the Delano Union Elementary School District violated EERA, first, by

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unilaterally changing matters within the scope of bargaining without giving the association prior notice and an opportunity to bargain the charges; second, when the district allegedly discriminated against and imposed reprisals against association officers; and third, when it interfered with EERA-protected rights. The board adopted the board agent's dismissal and deferral of the unilateral change allegations and discrimination but remanded the case for issuance of a complaint regarding the interference allegation. This case provided the first-ever discussion on the issue of a stable collective bargaining environment necessary for deferral to the contractual grievance procedure.

■ I know you probably can't comment on cases currently on the board's docket, but what are some of the issues facing the board at this time?

In a nutshell, new case law in the Court Interpreter Act, Trial Court Act, and MMBA law inclusive of local rules. And we of course await with interest a judicial resolution in the essential-employee strike litigation.

■ Speaking of that, what is your opinion with regard to the ongoing jurisdictional dispute between PERB and the Superior Courts in MMBA jurisdictions?

I guess my opinion, although it may seem obvious to say, is that this is an area of law that's less than clear, and clarity is critical for all involved. Like our constituents and others, I am eager for the appellate courts to rule, and I look forward to a final resolution of this issue.

■ Until Lilian Sheck's term expired at the end of December, you presided over the first five-member female board. Any comment?

Over the years, PERB has had many women board members, several serving in the capacity of chair. It was certainly a special opportunity to be a part of a "first ever" board of five women members. Nonetheless, for me, working with a group of women who are committed to PERB's mission is what made this opportunity really special. *

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Recent Developments

Public Schools

Governor Slams Schools in His 'Year of Education'

Governor Arnold Schwarzenegger who, just months ago, declared 2008 the "Year of Education," started the year by proposing \$4.8 billion in cuts to the public schools. Schwarzenegger announced his plan on January 10, just one day after release of a report ranking the state as 43rd in the nation in per-pupil spending. The cuts are part of Schwarzenegger's overall plan to reduce an estimated \$14.5 billion deficit in the state's budget.

The governor hopes to convince the legislature to suspend Prop. 98.

Schwarzenegger is proposing \$400 million in mid-year cuts to schools that could take effect as soon as this spring, along with a 10 percent cut, or about \$4.4 billion, in the fiscal year that starts this July. He hopes to accomplish this feat by convincing the legislature to suspend Proposition 98, passed in 1988, that provides a minimum funding guarantee for K-12 school districts and the

community colleges. Suspension requires a two-thirds vote by the legislature and has been done only once before, during the fiscal crisis of the 2004-05 budget. At that time, in exchange for their support, Schwarzenegger allegedly promised educators and legislators that he would restore the resulting \$2 billion reduction in school financing in subsequent years. (See story in *CPER* No. 164, pp. 35-36.) His failure to do so outraged teachers unions and other advocacy groups, and resulted in a lawsuit brought by the Education Coalition, an umbrella group of organizations representing teachers, administrators, school board members, parents, and others, joined by State Superintendent of Schools Jack O'Connell. The case was settled for \$2.9 billion earmarked for the neediest schools in the state. (See story in *CPER* No. 178, pp. 27-28.)

Schwarzenegger tried to get around Prop. 98 again in 2005, by means of an initiative put before the voters. The California Teachers Association and other education advocates vigorously opposed the plan, and it was defeated. (For a complete background on the battle between Schwarzenegger and education groups, see *CPER* No.

170, pp. 35-39; No. 173, pp. 26-27; and No. 175, pp. 30-31.)

The same coalition of educators has vowed to fight Schwarzenegger's newest plan. "This is going to be one of the most painful, vocal, public, fierce debates about education funding that we have ever seen," said Brian Lewis, executive director of the California Association of School Business Officials. "We are going to come out of the woodwork opposing any suspension of [Prop.] 98 and any further undermining of this minimal guarantee to children."

And opponents have plenty of ammunition. According to *Education Week's* annual "Quality Counts" report released January 9, the state ranks 40th

'This is going to be one of the most painful, vocal, public, fierce debates.'

in the nation on the likelihood that students will thrive in school and have successful adult lives. It is 38th in academic achievement. Only 23 percent of fourth-graders were proficient in reading, compared with 32 percent nationwide. *Education Week* gave California a "D+" for its education financing system, finding that it spends about \$2,000 less per student than the national average. Schwarzenegger's plan would reduce that amount by another \$300 per pupil.

Education advocates point out that Schwarzenegger's plan directly contradicts the advice of his own education panel. It is reported that the Governor's Committee on Education Excellence, in a document not yet released by the governor's office as of *CPER*'s press-time, has recommended a huge increase in spending to educate English learners and low-income students. The report calls for a new data system to better track students' progress and a school inspection plan to increase the accountability of schools. It recommends the state expand preschool programs and provide all-day kindergarten classes. It also proposes performance-based pay for teachers and administrators. The panel estimates its reforms would cost approximately \$6.1 billion that could be paid for with anticipated increases in Prop. 98 funding.

The governor's plan represents the deepest cuts to education ever proposed in the state. "The governor's budget takes a giant step backward,"

said Superintendent O'Connell. "I fear that the 'Year of Education' will become the year of education evisceration." *

Proposition 92 Runs into Heavy Opposition

By the time this issue of *CPER* reaches your desk, the fate of Proposition 92, designed to cut community college fees and set a guaranteed funding level for the community college system, will have been decided. But, win or lose, the problems that gave rise to the initiative will not have been solved.

The proposition, which appears on the February 5 ballot, is backed by the California Federation of Teachers and the Community College League of

California, among others. It would establish a separate funding guarantee for the 109 community colleges, based on a formula that takes into account the state's population of young adults as well as the unemployment rate. It would allocate funds based on potential enrollment, rather than on the number of students actually served. The proposition, if passed, would reduce students' fees from \$20 to \$15 per unit and limit further fee increases to the state rate of

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This edition — packed with five years of new legal developments — covers reinstatement of the doctrine of equitable tolling, PERB's return to its pre-*Lake Elsinore* arbitration deferral policy, clarification of the rules regarding the establishment of a prima facie case, and an updated chapter on pertinent case law.

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inflation. It would restructure the system of overseeing the community colleges, giving them more autonomy.

Supporters of the measure argue that the community colleges have not been receiving their fair share of funds guaranteed by Proposition 98, the initiative passed in 1988 which mandates that 40 percent of the state's general fund revenue go to finance K-14 education. While the system is supposed to receive 11 percent of Prop. 98 funds, it has re-

Proponents estimate that the community colleges have been underfunded by \$4 billion over the past 10 years.

ceived the full amount in only one year since 1989, when the proposition became law. Proponents estimate that the community colleges have been underfunded by \$4 billion over the past 10 years.

Supporters promote the value of investing more in the two-year institutions in order to build California's economic base. Community colleges educate approximately 2.5 million students a year, compared with 180,000 students at the University of California and 380,000 students at the California State University. Two-thirds of all Califor-

nia State University graduates and one-third of all University of California graduates started at community colleges. More Latino and African American students attend community colleges than attend both the CSU and U.C. systems combined, and 60 percent of the student population is female. Two-thirds of community college students work while going to school.

According to the legislative analyst's calculations, Prop. 92 would increase K-14 spending by an average of \$300 million a year over the next three years, while the reduction in student fees would mean \$70 million a year less in revenues. The additional funds would be split evenly between K-12 districts and community college districts in the first two years, with most of it going to the community colleges in the third year. It is unclear what would happen in subsequent years.

Proponents argue that the amount of money which would go to the community colleges would be very small compared with the state's \$102 billion general fund budget. They point to studies showing that the average income of community college students increases substantially after graduation, contributing to the tax base, and that every dollar of public investment in the community colleges generates at least \$3 in increased local economic activity.

Opponents of the measure argue that the state, facing an estimated \$14 billion deficit, cannot afford yet another proposition that guarantees a piece of the budget pie to a specific entity. The

opposition includes some heavy hitters in the education field, like the U.C. regents and the CSU board of governors. The four-year universities fear that an increase in funds for the community colleges would mean cuts in their budgets. "Passage of Proposition 92 could result in a reduction in the university's state-funded budget, which in turn could result in erosion of university programs and services," read the U.C. board of regent's resolution opposing the measure.

Prop. 92 would increase K-14 spending by an average of \$300 million a year over the next three years.

The California Teachers Association is also against the initiative. It has, as an alternative, promised to sponsor legislation which would guarantee that the community colleges receive their full 11 percent share of Prop. 98 funds. The split between the two main teachers unions in the state over the proposition might be explained by the fact that community college teachers make up about 30 percent of CFT's membership, but only 2 percent of CTA's. CTA has contributed approximately \$600,000 to oppose the proposition,

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while CFT has spent more than twice that supporting it. But the ranks are divided. United Teachers of Los Angeles, a CTA affiliate, supports Prop. 92, “because it keeps K-12 funding guarantees in place while ensuring a baseline of support for community colleges.”

Opponents argue that the reduction in fees, which already are the lowest in the country, would have little impact on community college affordability. Fees make up only about one-tenth the cost of a community college education for those students living at home, and much less than that for those living independently. Opponents also point to the fact that somewhere between one-fourth and one-half of all community college students receive fee waivers. Proponents respond that in 2004, when the legislature last increased fees, 305,000 fewer students enrolled.

Whether Prop. 92 passes or fails at the ballot box, the funding problems in California’s educational system will not go away. U.C., CSU, community col-

leges, and K-12 systems all will continue to jockey for position to grab the most dollars possible to pay for their increasingly underfunded programs. *

California Supreme Court to Review Unions’ Use of School Mailboxes

The California Supreme Court has granted review in *San Leandro Teachers Assn. v. San Leandro Unified School Dist.* (2007) 154 Cal.App. 4th 866, 186 CPER 28. The case involves the issue of whether a teachers union is prohibited by Education Code Sec. 7054 from using school district mailboxes to distribute materials that contain political endorsements. The First District Court of Appeal ruled in the affirmative, finding that “section 7054 unambiguously decrees that school district resources may not be used in furtherance of po-

litical activities, regardless of the identity of the actor or the cost to the district.” In doing so, the appellate court overruled the trial court’s decision and rehabilitated the Public Employment Relations Board’s interpretation of the statute. (See discussion of the superior court’s decision in *CPER* No. 179, pp. 47-50, and PERB’s ruling in *CPER* No. 175, pp. 5-9.)

According to Priscilla Winslow, attorney for the union, briefing should be completed this spring. *

Governor Announces Plan to Reform Low-Performing School Districts

In his January 9 State of the State address, Governor Schwarzenegger called for the creation of intervention teams to institute reforms at those school districts that do not comply with the guidelines of the federal No Child Left Behind Act. Ninety-eight districts in the state meet this definition, and they serve approximately one-third of the state's students. The Los Angeles Unified School District, with nearly 700,000 students, falls into this group.

There were reports of disagreements within the governor's staff.

Under the NCLB, the state Board of Education is charged with the task of bringing errant school districts into compliance with the act. If attempts are unsuccessful, the state risks losing federal funding. Under the governor's plan, the administration and superintendent of schools would assess the needs of each district and recommend to the state Board of Education interventions on an individual, district-by-district basis. The available options range from doing nothing to abolishing the district. Intermediate measures could include

hiring consultants, changing curriculum or training procedures, replacing school boards or superintendents, or a total state takeover of the district.

Leading up to the governor's speech over the tactics to be adopted, there were reports of disagreement within his staff, with some members advocating for harsher penalties and others, including State Superintendent of Schools Jack O'Connell, resisting that approach. Apparently, a compromise was reached. "We're working collaboratively to help design a plan to help districts who need assistance," O'Connell said after the speech. "It's not intended to be punitive and this is not a one-size-fits-all approach."

The 11-member state Board of Education is chaired by Ted Mitchell, former president of Occidental College, who also serves as chair of the Governor's Committee on Education Excellence. That committee reportedly has recommended to the governor a number of reforms to improve K-12 education. (See story on p. 28 of this issue of *CPER*.) Instead of promoting any of the committee's recommendations, which would cost an estimated \$6.1 billion, the governor has focused on the 98 failing school districts, proposing a relatively low-cost fix. This reform was the only one mentioned in the governor's speech, in spite of the fact that he has proclaimed 2008 as the "Year of Education."*

Local Government

Bill of Rights Protections Do Not Apply to Criminal Investigations

The Public Safety Officers Procedural Bill of Rights Act extends procedural protection to police officers subject to administrative investigations, but not to criminal investigations, announced the Court of Appeal in *Van Winkle v. County of Ventura*. In that case, where an officer's incriminating admissions were made during the course of a criminal interrogation, the county was not barred by the Bill of Rights Act from using those statements in a civil service hearing to support the officer's termination.

The facts giving rise to this ruling began in 2005, when the internal affairs unit of the Ventura County Sheriff's Department began an investigation following a citizen's complaint that Deputy Sheriff Michael Van Winkle was having an extramarital affair while on duty. The commander of the internal affairs unit also had evidence that Van Winkle had embezzled firearms, a criminal offense. However, because internal affairs did not have the authority to conduct criminal investigations, the commander referred the matter to the sheriff department's major crimes bureau. According to department policy, internal affairs stopped its investigation pending the outcome of the criminal inquiry.

The major crimes bureau has no authority to conduct administrative investigations or to make recommendations regarding discipline of department employees. However, learning that Van Winkle and another deputy were engaged in a scheme to retain — rather than destroy — confiscated weapons, the sheriff's department conducted a “sting operation” and recorded a telephone conversation that incriminated Van Winkle. He then was arrested and interviewed by a detective who advised him that because the questioning involved a criminal matter, not an administrative matter, he could not order Van Winkle to speak. However, Van Winkle waived his *Miranda* rights and admitted that he took home a gun that had been brought to the station for destruction.

The district attorney's office declined to prosecute Van Winkle; however, he was terminated by the department. He then filed an administrative appeal of that decision and sought injunctive relief from the court, alleging that the county had violated PSOPBRA by obtaining statements from him during the criminal investigation without affording him the advisements required by the Bill of Rights Act, and by attempt-

ing to use these statements in support of its decision to fire him.

The trial court found that the sting operation and the pretextual phone calls were not interrogations within Sec. 3303 of the Bill of Rights Act, but that criminal investigations of law enforcement officers by their employers fall within PSOPBRA. It enjoined the county from using Van Winkle's responses during his custodial interrogation in any administrative proceeding.

Section 3303(i) does not cover ‘an investigation concerned solely and directly with alleged criminal activities.’

The Court of Appeal clearly rejected the lower court's ruling and found that the Bill of Rights Act did not apply to the criminal interrogation conducted in this case. First, the court noted, the Supreme Court in *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 87 CPER 31, held that the protections of the act “apply when a peace officer is interrogated in the course of an administrative investigation that might subject the officer to punitive action....” The statute itself also instructs that it does not apply to all investigations and interroga-

tions. Section 3303(i) provides that it does not cover any interrogation conducted during “the normal course of duty, counseling, instruction, or informal verbal admonishment,” and it does not cover “an investigation concerned solely and directly with alleged criminal activities.”

The court found no factual support for Van Winkle’s claim that the sheriff’s department had initiated the criminal investigation for ulterior motives or as a “sham” to conduct a disciplinary investigation without affording Bill of

The court found ample support that this was an independent criminal investigation.

Rights protections. There were no factual declarations to support a finding that the criminal bureau investigators were acting in dual capacities or in conjunction with internal affairs. To the contrary, the court found ample support in the record that this was an independent criminal investigation.

The Court of Appeal rejected Van Winkle’s reliance on *California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, which read the Bill of Rights Act more expansively to encompass criminal investigations of law enforcement officers by their employers. The court said that

this conclusion was dicta and conflicted with the express language of the statute and the legislative history that reflects that there was no need to regulate purely criminal investigations because officers can rely on *Miranda* protections.

The court also turned aside Van Winkle’s contention that Bill of Rights Act protections apply to statements made during sting operations. Under Van Winkle’s theory, said the court, if a department began a sting operation without warning an officer, it could not pursue disciplinary proceedings because all evidence obtained would be excluded due to the absence of prior PSOPBRA warnings. This would deprive the department of an effective tool for uncovering crime and corruption. And, said the court, it would place the law enforcement agency in the position of having to either condone ongoing criminality in its ranks or face

Bill of Rights sanctions in order to conduct an effective sting operation.

Referring to the facts in this case, the court noted that when Van Winkle was interrogated by the crime bureau detective, he was advised that it was a criminal investigation, not an administrative one. He knew this because he had been arrested and was in custody. He made statements voluntarily after he waived his *Miranda* rights. He was advised that because it was not an administrative investigation, the detective could not order him to speak. Nor was there any evidence in the record that Van Winkle was confused about the nature of the investigation or his rights. With these facts in mind, the appellate court reversed the trial court’s ruling and vacated its injunction. (*Van Winkle v. County of Ventura* [2007] 158 Cal.App.4th 492.)*

Officer’s Unfitness for Duty Established by Administrative Record

The trial court misapplied the standard of review when it reversed Yuba County’s decision that one of its deputy sheriffs was unfit for duty. In *Sager v. County of Yuba*, the Third District Court of Appeal instructed that the lower court should have begun with a strong presumption that the county’s decision was correct, and should have placed on the deputy the burden of proving that the decision was against the weight of

the evidence. The appellate court also concluded that a deputy’s fitness is to be measured against relevant statutory provisions and requirements that are incorporated into every peace officer’s job description through Police Officer Standards and Training.

The case involved the conduct of Sharon Sager, a peace officer with over 30 years of experience, including 20 years as a deputy with Yuba County. She

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

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experienced a mental health crisis in 1992, was off work for six weeks due to mental health problems in 2000, and attempted suicide six months later. She harassed a deputy district attorney who Sager suspected was having an affair with her husband, also a deputy district attorney. And, in 2001, Sager entered a courtroom during a preliminary hearing conducted by her husband and told the same woman, who was in attendance, to “stop fucking my husband.” The criminal proceeding was not disrupted, but people present in the courtroom heard her statement.

The trial court misapplied the standard of review when it reversed the county’s decision.

After Deputy Sager obtained a positive fitness evaluation from her own expert, the county obtained a second evaluation from Dr. Gordon Wolf, who found her unfit for duty due to her mental condition. In 2002, the sheriff found her unfit for duty. Sager filed an appeal that was heard by an administrative law judge, who concluded that she was not able to perform her duties. The ALJ found Wolf’s opinion more persuasive than the opinion of Sager’s doctor and that Sager’s conduct could subject the public to significant risk.

Sager sought to overturn the ALJ’s finding, and the trial court complied. It found that it was free to exercise independent judgment and make its own findings. The appellate court disagreed. “The trial court should have begun with a *strong presumption* that the County’s decision was correct, and placed on Sager the *burden of proof* to show that the decision was against the weight of the evidence.” Relying on Supreme Court precedent, the court admonished, “Rarely, if ever, will a board determination be disturbed unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts.”

Guided by this standard, the court concluded that the trial court had mischaracterized Dr. Wolf’s testimony and disregarded the testimony of two police experts who found Sager unfit for duty because of her mental illness. The court commented that although the two police officers who testified were not mental health experts, both had many years of law enforcement experience and had known and worked with Sager for over 15 years.

The Court of Appeal also found that the lower court applied the wrong substantive standard for measuring disability and incapacity for performance of duty. Contrary to the lower court’s assessment, Government Code Sec. 1031 applied to Sager’s fitness “*as a matter of law.*” It requires that police officers be “free from any physical, emotional, or mental condition that

might adversely affect the exercise of the powers of a peace officer.” Likewise, the behavioral requirements articulated by POST are relevant and incorporated into Sager’s job description. Therefore, her ability to comply with them “forms an important part of her ‘usual duties.’” POST requirements mandate that an officer be free from any physical, emotional, or mental condition that *might* adversely affect the exercise of the powers of a peace officer. And, professionals who make that determination must be aware of applicable POST requirements. Therefore, Dr. Wolf’s re-

The lower court applied the wrong substantive standard for measuring disability.

liance on Sec. 1031 and on POST requirements was appropriate.

The court rejected Sager’s position that Sec. 1031 is relevant only to a new police officer candidate or someone with a gap in service. The demands of Sec. 1031 must be maintained throughout a peace officer’s career, said the court, stating that “it would be illogical to conclude the Legislature believed those standards disappeared once an officer began working.” “In our view,” said the court, “the section 1031 standards are incorporated by law into ev-

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**Pocket Guide to
Meyers-Milias-
Brown Act**

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

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

By Bonnie Bogue, Carol Vendrillo, Marla Taylor and Eric Borgerson
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ery peace officer's job description." Therefore, the trial court "had no basis...to reject application of the POST standards, because all of the relevant evidence showed that they were relevant to Sager's job duties." Said the court:

Sager may be able to serve warrants, drive a patrol car and do many of the other tasks listed on her "class specification" job description, as she asserts, but if the evidence shows she is not able to maintain *mental fitness*, that is, control her anger, work with other officers, and make sound judgments, then she is not performing the duties described [by POST] *in the proper manner*.

Finally, the court rejected the lower court's conclusion that the county failed to demonstrate harm to the public service. "This misses the point," said the

court. "The County *should not have to wait until harm occurs* before taking action to have Sager retired due to her mental disability. It is not the appropriate public policy to wait until Sager *actually* shoots the other woman in the courtroom, kills herself on duty, overreacts to a perceived threat or loses her temper in a dangerous situation to con-

clude that she is mentally unfit for duty."

The Court of Appeal concluded that sending the case back to the trial court would be an idle act because there was abundant evidence to support the county's decision and no basis to support Sager's challenge to the evidence. (*Sager v. County of Yuba* [2007] 156 Cal.App.4th 1049.)*

County Civil Service Commission Bound by Disciplinary Terms of MOU

A local government agency may not impose discipline on an employee that is not consistent with the terms of the memorandum of understanding negotiated by the employer and the union. In *Valencia v. County of Sonoma*, the First District Court of Appeal concluded that

the County Civil Service Commission lacked the authority to impose discipline in excess of that permitted by the contract because the commission was bound by the negotiated terms of the MOU.

Joaquin Valencia worked as a counselor in Sonoma County's health services department. He was terminated by the department head for misconduct. Valencia appealed to the civil service commission which, by local county code, is entrusted with adjudicating appeals of disciplinary actions, including dismissals. The commission heard Valencia's appeal, vacated the

The county's contention is illogical because the commission is a subunit of the county.

dismissal, and ordered Valencia to be restored to his former position. As an alternative disciplinary measure, the commission ordered a limited suspension without pay and a temporary reduction in salary. This discipline was consistent with the MOU entered into by the county and the Engineers and Scientists of California, Local 20, the exclusive representative of Valencia and other health care professionals employed by the county.

At a subsequent meeting of the commission, however, a representative of the county counsel's office appeared and asked the commission to reevaluate its decision, contending that the commission lacked the discretion to impose any discipline less than the ter-

mination imposed by the county. The commission agreed to reconsider its decision and ordered that Valencia be demoted from a counselor II to a counselor I position. This resulted in a reduction in salary in excess of 5 percent.

Because the MOU limits reductions in pay to 5 percent, the union challenged the commission's decision and prevailed in the trial court, which concluded that the commission had abused its discretion by imposing a penalty that violated the MOU.

On appeal, the county argued that the commission had not abused its discretion by imposing a harsher penalty because the commission was not limited by the MOU. The court disagreed. Citing the well-established rule first enunciated by the Supreme Court in *Glendale City Employees Assn. v. City of Glendale* (1975) 15 Cal.3d 328, 27 CPER 35, the court affirmed that a memorandum of understanding negotiated by the parties under the Meyers-Milias-Brown Act is "indubitably binding." The procedures established by the MMBA would be meaningless, said the court, if either party could disregard its provisions.

The county did not dispute that *it* was bound by the MOU or that the health department was bound to impose discipline consistent with the contract. Instead, the county argued that the *commission* was not bound by the MOU when exercising its authority to review and revise discipline.

The court was not persuaded. First, it said, the county's contention is illogi-

cal because the commission is a subunit of the county. Once an MOU is approved by the county board of supervisors, reasoned the court, it is binding on the various constituent agencies within the county as well. Moreover, noted the court, the MOU itself defines "county" to include the county commissions.

The MOU itself defines 'county' to include the county commissions.

The court also found the county's contention contrary to public policy because it renders portions of the MOU illusory and thereby undercuts the statutory preference for negotiated terms of employment. Permitting the county and employees to escape the constraints of the MOU by appealing to the commission would undermine the statutory scheme envisioned by the legislature when it enacted the MMBA, said the court.

The court dismissed out of hand the county's contention that the commission was not bound by the MOU because the commission had no involvement in the negotiations or approval of the agreement. Citing *Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, CPER SRS No. 7, the court explained that if a civil service commission de-

cides to make changes affecting public employees, MMBA Sec. 3505 compels the commission to meet and confer over those proposed amendments before doing so. But, said the court, *Los Angeles County Civil Service Commission* does not imply that a civil service commission must always be consulted when changes are made to the terms and conditions of employment of local government employees. "While the Act requires participation by the *employee organizations*," emphasized the court, "it says nothing about the involvement of local [civil service commissions]."

In a similar vein, the county argued that any proposed changes to the civil service rules brought about by the MOU are void if not subject to the meet and confer process directly with the

commission. To this, the court replied, "We need not address this argument, since the MOU does not change the Commission rules. The MOU establishes certain terms of employment applicable to the members of the Union,

*The county claims
the authority to
disregard the MOU
altogether.*

but these terms are effective only for the covered employees and only for the approved duration of the MOU. They are not amendments to the civil service rules."

In a footnote, the appellate court addressed the county's reliance on *Consulting Engineers and Land Surveyors of California v. Professional Engineers in California Government* (2007) 42 Cal.4th 578, 187 CPER 55, where the Supreme Court nullified an MOU provision that precluded the state from contracting privately for the type of work done by the union employees. The court found that the contract conflicted with a constitutional provision expressly authorizing the private contracting of such work. Here, in contrast, the county cannot point to a single provision of the MOU that is in conflict with the commission rules, said the court. Instead, the county claims the authority to disregard the MOU altogether.

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

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Finally, the court rejected the county's contention that the civil service commission has "personal" rights not subject to the authority of the board of supervisors and, therefore, has the authority to determine the scope and breadth of personnel rules governing civil service employment. While case law demonstrates that a civil service commission has a legal existence sufficiently separate from the county to convey standing to engage in litigation as a separate entity, "the precise scope of the Commission's authority with respect to the terms and conditions of employment of County employees is a matter to be determined by the County, in particular by the Board," said the court.

In short, the court found that the county had advanced no argument demonstrating that the commission is not bound by an agreement entered into on behalf of the county by its governing body. (*Valencia v. County of Sonoma* [2007] 158 Cal.App.4th 644.) *

State Employment

PERB Rejects Revocation Cards in Severance Election

The Public Employment Relations Board shunned an opportunity to make new law in a narrowly focused decision that instructed the board agent to ignore revocation cards when determining whether a petitioner has shown sufficient support for a severance election. Although the board agent had based his acceptance of the revocation cards on *Antelope Valley Health Care Dist.* (2006) Dec. No. 1816-M, 177 CPER 26, the board found that *Antelope Valley* did not provide adequate precedent for consideration of revocation cards where a party has challenged their validity. Neither the Dills Act nor the implementing regulations provides authority for counting revocations. And decisions of the National Labor Relations Board that discussed revocation cards did not aid the board in interpreting provisions of the Dills Act because the opinions did not discuss an employee's right to revoke an authorization card.

Since the board recently jettisoned proposed rules that would have provided for consideration of revocations in the card check context, attempts to obtain revocation of signatures in support of an employee organization may require more effort than they are worth.

State Unit 22

In 2006, a group of information technology employees filed a petition seeking to sever a unit of more than 7,000 IT workers from state Bargaining Unit 1, represented by Service Employees International Union, Local 1000. SEIU Local 1000 opposed the severance petition on the ground that the group, IT Bargaining Unit 22, had failed to submit proof of support from a majority of the employees in the proposed unit. With its opposition, Local 1000 submitted over 300 cards from employees who indicated a desire to revoke their signatures on the severance petition. Unit 22 objected to the revocation cards on the ground that they were improperly collected. The competing employee representatives also disagreed about the composition of the unit.

After finding that the size of the appropriate unit was 7,605 employees and that a majority of employees had signed the severance petition, the board agent normally would have arranged an election within the proposed unit to determine whether a majority of the employees desired to be in a separate unit represented by IT Bargaining Unit 22. In this case, however, the board agent had to determine whether to off-

set the number of signatures on the petition with the revocation cards submitted by SEIU Local 1000. Following *Antelope Valley*, he decided to accept the revocation cards as long as the intent of the employee to revoke support for severance was clear. He found that the statement, "I hereby revoke my signature in support of a Unit 22 Bargaining Unit that is not part of SEIU Local 1000," was clear. Once the revocation cards were counted, there was insufficient proof of support for a severance election. (See story in *CPER* No. 180, pp. 60-61.)

Once the revocation cards were counted, there was insufficient proof of support for an election.

Unit 22 appealed the determination to the board on the ground that *Antelope Valley*, decided under the Meyers-Milias-Brown Act, is not applicable to a representation issue governed by the Dills Act.

No Authority

The board focused squarely on legal authority for consideration of revocation cards. It noted several differences between the circumstances in *Antelope Valley* and those in the IT sev-

erance dispute. The *Antelope Valley* decision was in response to an unfair practice charge filed when the hospital district employer refused to recognize a union after a card check. The union

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PERB in Antelope
Valley was not
whether signature
revocations were
permissible.*

collected authorization cards, and some employees collected “no union” cards. The hospital district had issued instructions that informed employees who wished to revoke their authorization

cards how to submit valid revocation letters. Only five revocations complied with those instructions. When the district offset the authorization cards with the revocation letters and “no union” cards and refused to recognize the union, the union objected only to the “no union” cards. The union asserted that the “no union” cards did not show the necessary intent to revoke authorization signatures supporting a union. The *Antelope Valley* board “recognize[d] the right to revoke authorization cards or other proof of support so long as the employee clearly demonstrates the desire NOT to be represented by the employee organization....”

Despite this language, the board in *Unit 22* insisted that the *Antelope Valley* board did not decide whether there is a right to revoke authorization cards, since “the contested issue before PERB in *Antelope Valley* was not whether sig-

nature revocations were permissible under the MMBA, but rather what requirements had to be met for signature card revocations to be considered.” Therefore, *Antelope Valley* did not rule on whether the legislature had intended that authorization cards could be revoked in MMBA card checks, explained the board, and the decision in that case is limited to “MMBA card checks in which the interested parties do not dispute the right to revoke or in effect by their acts acquiesce to such a right.” Since the revocations were disputed by Unit 22, it was an error of law to follow *Antelope Valley* in this case, the board decided.

Nor did the Dills Act or PERB regulations provide any authority for counting revocation cards. The Dills Act does not expressly provide for severance petitions. Instead, it delegates to PERB the responsibility to draft proce-

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

dures for petitions, the board noted. Although PERB Reg. 40200 allows employees to file a severance petition accompanied by proof of majority support, the board instructed:

[T]here is no language in these proof of support regulations or any PERB rules governing severance petitions which provides that this demonstration of an employee's desire to be represented may be controverted by a showing that the employee has subsequently withdrawn his or her support.

The board took pains to note that it was not deciding that PERB had no power to promulgate regulations allowing revocations in severance disputes, only that it had no applicable regulations. As a result, the board agent's consideration of the revocations was not authorized, the board held.

SEIU Local 1000 argued that precedential decisions under federal labor law supported its position that the revocations should be accepted to offset the signatures on the support petition. The board considered *Struther-Dunn, Inc. v. NLRB* (3d Cir. 1978) 574 F.2d 796, and *Blue Grass Industries, Inc.* (1987) 287 NLRB 274, but found them inapplicable. Both cases occurred in the context of union requests that the NLRB order an employer to bargain — despite insufficient support for a representation election — based on allegations the employer had committed unfair practices that undermined a fair election. When examining whether the union in

Struther-Dunn had at one point shown majority support, the NLRB refused to count statements withdrawing support for the union because the union had had no notice of them. The federal Court of Appeals reversed the NLRB decision, but neither body discussed any statutory or regulatory basis for whether a right to revoke an authorization card exists because no party was challenging the revocations, only the method of

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revocation. In *Blue Grass*, there was no discussion of the validity of the cards that the administrative law judge had considered.

The board acknowledged that it would be proper to consider NLRB decisions as an aid in interpreting provisions of California public sector labor relations laws that are identical or analogous to federal statutes or to federal labor relations doctrine developed in case law. However, in the cases SEIU cited, no parallel statutes or regulations were discussed, and no PERB regulations incorporate federal doctrine in the

area of signature revocations. Therefore, the board held, there was no legal basis to consider the federal cases.

The board remanded the case to the general counsel's office for a determination of the sufficiency of the proof of support for Unit 22's severance petition without offsetting signatures with revocations cards. The board agent has verified there was adequate support for the severance election, but still is considering objections to exclusion of some classifications from the proposed unit and inclusion of others.

While this case was pending, the board did propose rules that would have authorized revocation cards when a representation petition "may require recognition of the petitioning employee organization as the exclusive representative of affected employees without an election." At a public hearing, Assemblyperson Loni Hancock, State Senator Gil Cedillo, and various labor unions objected to revocation regulations and asserted the board had no authority to adopt rules allowing revocations. The board decided not to move forward with its adoption because "the issues require further analysis, research, and discussion with interested parties prior to any further consideration of rulemaking." (*State of California and IT Bargaining Unit 22 and Service Employees International Union, Loc. 1000, CSEA* [11-6-07] Order No. Ad-367-S.) *

CASE Loses Legal Challenge to Low Salaries

The union that represents 3,400 state attorneys and legal professionals could not convince the trial court that the lawyers' low pay is so destructive to the constitutional merit principle that the court should order the Department of Personnel Administration to grant unit members pay parity. The California Attorneys, Administrative Law Judges and Hearing Officers in State Employment and the Attorney General had argued that the salaries negotiated with DPA, which represents the governor in collective bargaining, undermined the civil service system sufficiently that the court should find DPA's application of the Dills Act to the attorneys' bargaining unit unconstitutional. (See story in *CPER* No. 186, pp. 46-50.) The court was not persuaded.

CASE provided evidence from an expert who told the court that DPA's 2007 salary survey was inaccurate and that the state is essentially an "employer of last resort" for attorneys because the average salary of a California public attorney outside of state government is more than twice as high as the average state attorney's salary. In October, the Attorney General filed a friend-of-the-court brief which asserted DPA's own compensation survey shows that pay and benefits of entry-level public lawyers in the Bay Area and San Diego total \$188,000 and \$91,000, respectively, compared to \$77,700 for deputy A.G.s.

The entry-level salary for a deputy A.G. is \$56,088. Senior attorneys fare little better. Their total compensation is 39.4 percent behind the pay of their Bay Area counterparts, 20 percent less than senior-level public attorneys in Los Angeles, and nearly 28 percent below that of senior San Diego public attorneys, according to the DPA survey.

Merit Counts Little

CASE argued that these pay disparities have undermined the civil service system, under which employees must be hired and promoted based on merit and competitive examinations. The union's primary examples were drawn from the Attorney General's Office, which employs most of the state's attorneys.

CASE and the A.G. explained to the court that salaries are so low that job applicants "routinely" decline employment offers once they hear their pay rate. Managers often are forced to hire candidates that do not have the best qualifications. The A.G. hires entry-level attorneys at the mid-level salary range for the classification as long as the applicant can show that he or she previously earned, or has been offered a job at, that salary. The above-minimum offers are based on economics, the A.G. disclosed, not merit. In addition, the A.G.'s office pointed out that it seldom denies an annual merit in-

crease to existing employees because the pay is so low that managers fear losing the employees they have.

The office is having greater difficulties now that baby-boomers are beginning to retire, the A.G. informed the court. Normally, the department must hire new attorneys at the entry-level position and salary, but there have been few experienced applicants willing to

Managers often are forced to hire candidates that do not have the best qualifications.

hire on at the low pay. As a result, the A.G. explained, it had to obtain permission from the State Personnel Board to open up the Deputy A.G. Level III exam to attorneys outside of state service. While the ability to hire more experienced attorneys has been helpful, it has come at a price, the A.G. asserts. Rather than having an opportunity to review employee performance and reward merit through competitive promotions from one level to the next, the office has only six months to evaluate the new level III attorneys during their probation period.

The Deputy A.G. Level IV examination, which previously was a truly competitive promotional exam, has also lost its competitive nature due to

the need to pay competitive salaries to employees, says the A.G. In the 1990s, the promotion rate was about 30 to 40 percent. In 2001, 58 percent of applicants were promoted, and after the most recent examinations, about 70 percent of deputy A.G.s were promoted.

The office cannot even compete with other public law firms, the A.G. asserted.

CASE and the A.G. argued that the compensation disparities and resulting recruitment and retention difficulties threaten the ability of the A.G. to fulfill its constitutional duty to uniformly and adequately enforce the law. In its brief, the A.G. complained:

The quality of attorneys seeking employment with the Office of the Attorney General has diminished because of the compensation disparities. Unlike in years past, the Attorney General's Office is simply unable to attract many applicants from top law schools or firms, or those who have impressive legal experience.

The office cannot even compete with other public law firms, the A.G. asserted. Attorneys on the other side in important, complex work are paid much higher than deputy A.G.s. For example, attorneys hired by the public Habeas Corpus Resource Center, who

challenge death penalty sentences, can be paid as high as \$158,000 while their opponents in the A.G.'s office can earn only \$125,000.

Court Not Persuaded

In its response, DPA attacked CASE's assertion that salary setting has a constitutional dimension. The constitutional merit system governs appointments and promotions, not salaries, DPA argued. In support of its reasoning, the union had cited case law that acknowledges a constitutional basis for limits on contracting out state services, which tends to diminish the civil service workforce and undermine the civil service principle of avoiding political patronage. CASE's analogy to the constitutional basis for limits on contracting out is creative, DPA asserted, but does not hold up logically.

Salary setting is a legislative process delegated to DPA, the department contended, and noted that salaries negotiated by DPA are subject to legislative approval. The Dills Act establishes collective bargaining as the method of setting salaries, so CASE's requested pay parity remedy would contravene the Dills Act, DPA cautioned. The department stressed that the pay parity provisions which benefit other bargaining units were bargained, as required by the Dills Act.

DPA contended that another ground for the union's pay parity remedy — the "like pay for like work" principle of state law — does not have a constitutional basis. The court in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d

168, CPER SRS No. 16, refused to consider whether the principle has a constitutional dimension, the department noted. In addition, DPA emphasized that the parity required by the principle is between state civil service positions, not comparability to salaries of those

CASE's requested pay parity remedy would contravene the Dills Act, DPA cautioned.

outside state service. The like-pay-for-like-work statute requires only "consideration" of salaries in comparable external jobs in the public sector, DPA pointed out.

Even if CASE had a valid legal theory, the evidence does not support its contentions, DPA argued. The A.G. still claims to be able to provide "outstanding legal services," DPA observed, quoting A.G. Jerry Brown's declaration. Routine grants of merit increases comply with the law, which requires merit increases if an employee meets department standards of efficiency. There is no evidence that the A.G.'s office has not routinely granted merit raises in the past, DPA pointed out.

The probationary period is an opportunity to evaluate A.G. III hires whose legal skills were developed and examined before they got the job, DPA argued. And the A.G.'s statistics about

promoting larger numbers of attorneys to A.G. IV could be based on factors such as a larger number of qualified attorneys rather than salary level. Hiring above minimum salary is permitted by statute, the department observed, and it is only speculation that the practice leads to low morale and management problems.

The trial court agreed with the department. In a short “minute order,” the court concluded that the cases, reasoning, and evidence of the union were not sufficient to establish that the governor’s and the DPA director’s actions and application of the Dills Act were unconstitutional.

Exhaustion Defense Rejected

DPA also asserted that CASE should not be allowed to file its claim in court because it had not exhausted its remedies before the Public Employment Relations Board. Nor had the union taken its complaints about the salary survey to arbitration, even though the memorandum of understanding has provisions relating to the survey. The court pointed out, however, that the issue CASE raised was not whether DPA had violated the Dills Act, but whether DPA was violating the Constitution. Exhaustion before PERB was therefore not required. It gave no reason for its ruling that the dispute was not subject to the grievance and arbitration procedure.

CASE is appealing the trial court’s ruling on the merits of its claim. Mean-

while, the parties remain far apart in salary negotiations, according to the union. CASE is asking for equity adjustments on a gradual timeline to address state

budget concerns. DPA is offering only small equity increases for a few positions and one-time bonuses for several others based on work location. *

PERB Issues Complaint on Implementation of Three-Year Final Offer

The Department of Personnel Administration said it was trying to respond to a complaint issued by the Public Employment Relations Board when it changed its plan to implement three years of salary increases for correctional officers represented by the California Correctional Peace Officer Association. Last September, DPA implemented a three-year last, best, and final offer after it was rejected by CCPOA. (See story in *CPEP* No. 186, pp. 43-46.) But in December, the department informed the officers that it would implement only the initial 5 percent salary increase for 2007-08. CCPOA sees the switch as evidence that the governor’s administration never intended to honor a three-year package of wage and benefit increases.

Injunction Denied

CCPOA and DPA were unable to reach an agreement on a contract to succeed the collective bargaining agreement that expired July 2, 2006. The union walked out of mediation last August and then rejected a three-year

last, best, and final offer that included 5 percent annual wage increases, along with restrictive overtime, sick leave, post-and-bid, and transfer provisions. The state quickly notified employees that it was implementing three annual raises, and boosts in shift differentials, the uniform allowance, and recruitment bonuses. Changes were not immediate, since the legislature — which must approve expenditures — was not in session and the departments that employ correctional officers had yet to issue amended policies.

In October, CCPOA filed a request for injunctive relief and an unfair practice charge with PERB. In the request for an order staying the state’s implementation of the final offer, the union argued that implementation would irreparably harm unit members and their exclusive representative. Not only would CCPOA’s stature be diminished, it contended, elimination of union leave and the grievance process would disable CCPOA from union activity. Employees could be disciplined for sick leave use or denied the right to bid on

preferred positions or transfers. The union also would have to reestablish organizational security provisions from which it has benefited for 25 years.

The board denied the complaint for injunctive relief. However, in December, a board agent issued a complaint based on two of the union's arguments. The complaint contained an allegation that the state's discontinuation of union vice-presidents' leave was not comprehended within the last, best, and final offer. But, PERB dismissed several charges that alteration of other union leave provisions were not comprehended within the offer because CCPOA's allegations did not show that the implemented union leave terms were less than those discussed in negotiations *and* less than leave that existed prior to implementation.

CCPOA's contentions about failure to provide information and surface bargaining were time-barred or were found insufficient. PERB also dismissed an allegation that DPA had implemented its offer without a determination of impasse. PERB did make a determination of impasse before mediation, the board agent pointed out, and the statute does not require a second finding of impasse before implementation.

PERB included in its complaint CCPOA's allegation that implementation for a three-year duration denies representation rights of bargaining unit employees and the union's right to represent the unit. The union bases its argument on Government Code Sec. 3517, which requires the governor's administration to meet and confer with an employee organization prior to the

adoption of the *annual* budget for the coming year. The Dills Act contemplates annual negotiations in the absence of a memorandum of understanding, the union contends.

Future Raises Cancelled

In response to the PERB complaint, DPA announced that it would implement only one year of salary increases. It informed employees that it also would continue with its plan to seek legislative approval of increases in employer health benefit contributions, a \$2,000 bonus for employees who successfully recruit new correctional officers, and increases in various stipends, shift differentials, and allowances. DPA withdrew only the future raises, not non-economic provisions of the last, best, and final offer.

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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>

In a December 13 letter to PERB, the state requested that several paragraphs of the complaint relating to the three-year implementation issue be dismissed. It also indicated that it would comply with CCPOA's request for continuation of state vice-presidents' union leave, although it disagreed that it was legally obligated to do so. In light of these actions, DPA requested dismissal of the complaint.

In response, CCPOA President Mike Jimenez wrote to members, "It is with great sadness that we must inform you of the latest Administration LIE regarding our expired contract." The union berated the state for its letter to employees that created the impression that PERB was concerned only about

the implementation of three years of economic terms. In fact, pointed out the union, the PERB complaint encompassed all terms and conditions implemented for a three-year duration. Rescinding only the salary increases does not cure the problem, Jimenez explained. And it is evidence that the administration never intended to offer a fair contract, he claimed.

PERB will not act on DPA's request for dismissal of the complaint until DPA makes a motion for dismissal to an administrative law judge. The case did not settle at the informal conference in early January, and is scheduled for hearing in March. Meanwhile, the parties must begin negotiations for the next fiscal year. *

whose duties included promoting the goals and agenda of the governor and his administration. The second, Lydia Jones, was a special staff assistant who handled constituent correspondence and was expected to be an advocate of the governor's programs.

All staff were advised of the legal limits on their campaign activities. Six months later, Ward was warned against continuing campaign activities. The next day, Ward reported that Jones had complained of sexual harassment. While an investigation was being conducted, Ward and Jones held a press conference criticizing the governor. They were placed on administrative leave until the investigation was completed, when they were fired due to their rumored election activities.

Ward and Jones filed complaints with the EEOC. Jones alleged sexual harassment and pay discrimination based on race and sex. Ward alleged sex discrimination and retaliation.

The EEOC classified the case as falling under GERA. Enacted in 1991, GERA eliminated an exemption from Title VII coverage for personal staff members, immediate advisors, and policymaking assistants of a state's elected officials.

The Governor's Office challenged the discrimination charges under the Eleventh Amendment to the U.S. Constitution, which prohibits citizens from suing states in federal court. The EEOC declined to rule on the constitutional claim, and the Governor's Office appealed.

Government Employee Rights Act Not Effective Against Eleventh Amendment Immunity Claim

Congress' attempt to abrogate the states' immunity under the Eleventh Amendment by extending Title VII protection to state governors' closest advisors was not effective, the Ninth Circuit Court of Appeals has held. The court, in an opinion by Judge Noonan, found that Congress had no evidence of discrimination to justify the Government Employee Rights Act (GERA) as a valid exercise of its lawmaking authority under the Fourteenth Amendment to the United States Constitution. Alaska's legal challenge in this case stems from a line of recent Supreme

Court cases which have found that certain federal anti-discrimination legislation was not a sufficiently valid exercise of legislative power under the Fourteenth Amendment to override state immunity. (See story on *Kimel v. Florida Board of Regents* [2000] 528 U.S. 62, in *CPER* No. 140, pp. 52-54.)

Governor's Staff Fired

Two assistants to the governor of Alaska were suspected of aiding the gubernatorial campaign of the lieutenant governor. One, Margaret Ward, was director of the Office of the Governor,

GERA Unsupported

The text of the Eleventh Amendment prohibits citizens of a state or foreign country from using the federal courts to sue another state. It also has been interpreted to bar lawsuits by the state's own citizens without the state's consent, the court observed. In 2002, the United States Supreme Court extended Eleventh Amendment immunity even further. It held that a citizen could not use a federal entity, such as the EEOC, to sue a state.

There is an exception to state sovereign immunity for suits based on legislation that enforces the Fourteenth Amendment, the court instructed. The Fourteenth Amendment bars the states from violating the rights of citizens or depriving them of due process or equal protection of the laws. The courts will find that Congress has abrogated sovereign immunity if it clearly states its intent and has constitutional authority to do so.

In 1972, an amendment to Title VII of the Civil Rights Act of 1964 extended Title VII's prohibition against employment discrimination to state and local governments. That law was based on lengthy hearings that gathered evidence of gender and racial discrimination by state government employers. However, noted the court, the 1972 law excluded from protection elected officials and their personal staff, policymaking appointees, and "immediate adviser[s] with respect to the constitutional or legal powers of the office."

In 1991, the court recounted, Congress enacted GERA, which eliminated the exemption for elected officials' staff, without making any findings about the existence of state practices of discrimination against the newly covered employees. The court was faced with the question whether, as the EEOC argued, the 1972 hearings produced sufficient findings of state discrimination to justify the enactment of GERA in 1991.

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in 1991.*

Prior cases show that a provision is not a valid abrogation of Eleventh Amendment immunity merely because it is part of or amends a law that is appropriate under the Fourteenth Amendment, the court reminded the parties. The Supreme Court has found that Title I of the Americans with Disabilities Act did not validly abrogate immunity for employment discrimination claims, but that Title II validly overrides states' immunity for lawsuits

involving physical access to the courts. It is the effect of the legislation that matters, the court explained.

The court described how the exclusion of elected officials' staff and policymaking employees from protection of the anti-discrimination laws has been a deciding factor in recent Supreme Court cases addressing states' rights. In *Nevada Department of Human Resources v. Hibbs* (2003) 538 U.S. 721, 161 CPER 5, the court found that Congress' abrogation of Eleventh Amendment immunity in the Family and Medical Leave Act was valid. In part, that holding rested on the fact that the FMLA excluded from coverage state elected officials, their staffs, and appointed policymakers, the court observed. The importance of the state's right to prescribe the qualifications of its own officers was emphasized also in *Gregory v. Ashcroft* (1991) 501 U.S. 452, where the Supreme Court decided that Missouri's mandatory retirement age for judges did not violate the Age Discrimination in Employment Act because judges were policymakers exempted from the act's coverage.

Because the states' interest in selecting its own officers is so great, and no governor can run a state without assistants, the court viewed Ward and Jones in the same category as the governor himself. It reasoned, "To treat these assistants as subject to federal legislation is tantamount to holding that the highest elected official in a state is bound by GERA." Since nothing in the record showed that a pattern of gender

discrimination in a governor's staff existed in 1990, the court found that GERA is not "a proportionate response to a widespread evil identified as the predicate of this legislation." The court granted the appeal and remanded the case to the EEOC to dismiss the charges.

Dissenting Judge Paez wrote a lengthy opinion asserting both that Congress intended to abrogate the states' immunity and that GERA was a valid exercise of Congress' power under the Fourteenth Amendment. Congress did not need much evidence to justify legislation designed to protect against race and gender discrimination, he noted, because sex- and race-based classifications already are subject to heightened scrutiny due to a history of purposeful discrimination. In addition, there was evidence of state employer discrimination from the 1972 hearings, and several recent Supreme

Court hearings have commented on the continuing discrimination against women and minorities.

Paez asserted that there was evidence of discrimination at the highest levels of state governments in 1972, and that the exclusion of gubernatorial advisors and personal staff from coverage by Title VII was due only to the senators' political concerns about states' rights. Some senators had voiced these concerns in floor debates. Judge Wallace, who concurred in the majority opinion, scoffed at the notion that congressional intent can be divined from the statements of a few legislators. He cautioned that the court could not assume that political concerns rather than a lack of evidence led to the exclusion, and agreed with the majority opinion that Congress could not validly enact GERA in 1991 without further evidence. (*State of Alaska v. EEOC* [9th Cir. 2007] 508 F.3d 476.)*

CPER No. 179, pp. 65-66, and No. 180, pp. 60-61.) He told *CPER* that the election was prompted by a dues increase that Local 1000 implemented without consulting its members. Because the union charges non-members fair share

PERB did not count the ballots.

fees only \$2 less than dues, non-members got hit with the increases, too. Hintz also believes that fair share fees are used to finance more than the allowable grievance and representation expenses.

About 40 percent of the unit pays fair share fees, while the rest of the employees are union members. Hintz said that he gathered about 16,000 signatures on a petition asking for an election to rescind the fees, but some of those signatures were found invalid. Because the petition showed support of at least 30 percent of the unit for a rescission election, PERB conducted a mail ballot vote ending December 26. PERB received fewer than half of the 44,000 ballots by the deadline. Since the Dills Act allows rescission of fair share fees only by a majority vote of all the employees in the unit, there was no possibility that more than half had voted in favor of rescission. PERB did not count the ballots.

Hintz objects to several aspects of the election. He says he was denied

Fair Share Rescission Election Fails to Produce Enough Votes

An agency fee rescission election that threatened Service Employees International Union, Local 1000, with a \$12.5 million loss in revenue ended in late December without a count. In a unit of approximately 44,000 that comprises about half of the state employees represented by Local 1000, fewer than 18,000 returned mail ballots. But the

challenge is not over, since petitioner Lyle Hintz has filed several objections to the election with the Public Employment Relations Board.

Hintz is a retired information technology employee formerly in Bargaining Unit 1 who spearheaded the rescission petition and a prior severance election for IT workers. (See stories in

email access to Unit 1 employees by several state government offices. While Caltrans eventually allowed him to send emails concerning his rescission campaign, the Department of General Services continued to block them, he claims.

Hintz also complains that PERB did not allow 30 days for the vote since it began counting the 30-day period immediately after it mailed the ballots on November 27, without consideration of mailing time, and the completed ballots were due in PERB's office — not just postmarked — by December 26. A PERB labor relations specialist told *CPEP* that the parties, including Hintz, agreed to the balloting procedures, which were specific about the receipt deadline.

Hintz asserted that some employees told him that their ballots were returned, rather than delivered to PERB, because the return envelope had the employee's address on one side and PERB's address on the other. And Hintz is challenging the Dills Act provision that requires a vote of the majority of the unit, rather than a majority of those voting, to rescind fair share fees. He is pleased, however, that the election put pressure on Local 1000, which changed its policy this fall to allow members to vote on dues increases.

Local 1000 President Jim Hard expressed satisfaction that the election has concluded. "Now that this vote is behind us, we can devote all our resources to improving representation and winning a fair contract," he said.

The contracts for the units that Local 1000 represents expire in late June, while the state faces a \$14 billion deficit. The union has been working to improve the classification system and reduce outsourcing of IT work. It is also

gearing up to fight an initiative, the Public Employee Benefits Reform Act, being circulated by the California Foundation for Fiscal Responsibility, headed by former state legislator Keith Richman. *

Workers' Compensation Is Exclusive Remedy for Injury in State-Owned Residence

A park ranger who was injured while checking on a leaky pipe in his state-owned residence cannot sue the state for negligence and other civil claims. His exclusive remedy is the right to recover workers' compensation benefits, which are more limited than tort damages, but are available without having to prove that the employer was at fault in causing the injury.

Slip and Fall

Marck Vaught had worked as a park ranger for over 20 years when he was offered a new position as a resource ranger, which would require him constantly to be on call. He accepted the position after the state Department of Parks and Recreation agreed he could live in a ranch house in the park. He and his wife paid monthly rent.

A leak developed in one of the bathrooms. While looking to determine whether department personnel had completed the repair, he slipped and sustained an injury.

He sued the state for negligence and other civil claims, but the state

moved for summary judgment on the ground that the action was barred by the workers' compensation exclusivity rule. The trial court agreed with the state, and Vaught appealed.

The Bunkhouse Rule

The Labor Code provides that an employer is liable, without regard to negligence, for compensation to employees for injuries "arising out of and

Reasonable use of the employer-owned residence is part of the employee's compensation.

in the course of employment." This provision is liberally construed for the purpose of offering broad protection to injured workers.

The appellate court applied a special “bunkhouse rule” to determine whether Vaught was injured in the course of employment. When an employee is injured while living on the employer’s premises, the court instructed, the “course of employment” requirement is satisfied “if the employment contract of the employee contemplates, or the work necessity requires, the employee to reside on the employer’s premises.” The rule is based

*Payment of rent does
not prevent
application of the
bunkhouse rule.*

on the rationale that reasonable use of the employer-owned residence is part of the employee’s compensation.

In this case, Vaught conceded that the state-owned residence was an employment benefit. He accepted his position only after being offered residence in the house. The court also found that Vaught lived in the house out of work necessity because he was required to be on call all the time and patrol within the park district. He also used a part of the house as his office.

Vaught argued that the bunkhouse rule did not apply because he was a tenant who paid rent. But the court rejected this contention since the state had offered Vaught use of the residence be-

cause of his employment as a park ranger, not because it wanted a landlord-tenant relationship with him. The bunkhouse rule presupposes a dual relationship of landlord and employer, the court explained, so payment of rent does not prevent application of the bunkhouse rule when the landlord-tenant relationship is subsidiary and collateral to the employment relationship.

An injury sustained in the living quarters is compensable under workers’ compensation, however, only when there is a causal connection between the injury and the employment. Vaught argued that his injury did not arise out of his employment because he was injured on his day off, while engaging in an activity that had nothing to do with being a park ranger. The court also rejected this contention, saying:

[U]nless the cause of injury is so remote that it cannot be deemed incidental to, and thus arising out of, the employment, an injury occurring in employer-furnished housing in the course of employment ordinarily arises out of employment.

Without any other explanation, the court concluded that Vaught’s employment contributed to his injury, “which he sustained while residing on his employer’s premises while engaged in an activity that is incidental to his employment with the state.” The civil claims were therefore barred, and the court affirmed the judgment in favor of the state. (*Vaught v. State of California* [2007] 157 Cal.App.4th 1538, 2007 DJDAR 18618.)*

Higher Education

CSU and Staff Union Reach Agreement on Compensation

Reopened salary negotiations that began in July 2007 and reached impasse in September 2007 have concluded with a new compensation increase distribution plan for the California State University Employees Union. Recent negotiations were prompted by the legislature's refusal to provide California State University with 2007-08 funding beyond the levels set forth in the 2004 agreement, or compact, between Governor Schwarzenegger and the university.

In anticipation of an additional 1 percent increase over the funding provided in the 2004 compact, the November 2006 collective bargaining agreement between CSU and the support staff union, which represents 15,000 workers in four units — health care support, operations support, clerical/administrative support, and technical support — included salary increases for fiscal years 2007-08 and 2008-09. But it also contained provisions that provided for reopener negotiations should CSU fail to garner the additional money. When it became clear, in July 2007, that the legislature would not fund CSU beyond the compact level, the university and the union reopened salary negotiations on distribution of a 4.25 percent compensation pool. (For background on

the reopened salary negotiations, see *CPER* No. 186, pp. 54-56.)

Agreement Highlights

After an impasse and mediation that lasted two months, the two sides came to an agreement on the distribution of compensation increases for the 2007 fiscal year. On November 8, the university offered, and the union accepted, a plan to distribute all but .25 percent of the 4.25 percent compensation pool. The university's proposal was substantially similar to the ones CSUEU had been presenting for several weeks. CSU and the union determined that the reopener agreement was not subject to ratification by the university or the union membership.

The agreement is highlighted by a general salary increase of 3.457 percent, retroactive to July 1, 2007. The raise is below the 3.696 percent envisioned in the original 2006 collective bargaining agreement, which was dependent on the 1 percent augmentation to the 2004 compact. The parties had agreed to the 3.457 percent general salary increase prior to mediation.

Also agreed on before mediation, and included in the agreement, were a 1 percent service salary increase and a 5 percent increase in the SSI maximum

rate — the latter of which is retroactive to July 1, 2007. Thus, those employees who have earned their service salary increases since July 1, 2007, received retroactive checks reflecting the change.

The rural health care stipend, which was increased from \$500 a year to \$750 a year in the 2006 collective bargaining agreement, was given another boost during the latest round of negotiations. For those eligible employees in PERS-designated zip codes without access to HMOs, the stipend now will be \$1,000.

The university's proposal was substantially similar to the ones CSUEU had been presenting for several weeks.

Parking fees also were discussed. Consistent with a side letter negotiated in May 2007, the parties agreed to a 3.457 percent fee increase for employees at campuses where students are paying higher parking fees than the staff. The fee hike is retroactive to July 1, 2007.

In the hopes that before the holidays, employees would receive retroactive checks reflecting the salary increases, the parties agreed to the above

terms and decided to continue separate negotiations on the remaining .25 percent of the compensation pool. The union hoped to dedicate the .25 percent to general salary increases in order to achieve across-the-board improvements. Meanwhile, the university insisted that recruitment and retention of employees required market-related increases for classifications experienc-

The union desired to broaden the scope of the compensation increases.

ing salary lags. Originally, the university proposed using as much as 1 percent of the compensation pool for market-related increases, which would have knocked the general salary increase down to 2.7 percent. The parties continued to participate in mediation over the disputed compensation until reaching a "conceptual agreement" on the .25 percent in December.

The conceptual agreement echoes the sentiment CSUEU President Pat Gantt expressed to *CPER* in October. According to Gantt, CSU has failed to use in-range progression, or IRP, to move employees out of the lower end of its salary ranges even though IRPs are designed to boost salaries in order to retain employees in classifications with salary lags or recognize the use of

enhanced skills, high performance, and new, lead work assignments.

Ultimately, the recent conceptual agreement calls for the .25 percent remaining in the compensation pool to be used for IRPs. While the implementation language is still being developed, the agreement reflects the union's desire to broaden the scope of the compensation increases, and the university's desire to stress recruitment and reten-

tion of employees. The .25 percent, or \$1.6 million, will be distributed on a pro rata basis to the campuses. The Chancellor's Office will not direct the campuses to target specific classifications for IRPs, and the money is not intended to supersede the funds campuses have spent or have committed to spend on IRPs for fiscal year 2007. Finally, any funds not used during fiscal year 2007 will roll over into fiscal year 2008. *

PERB Declares Impasse in Talks Between U.C., Hospital Workers Union

After more than five months, negotiations between the American Federation of State, County and Municipal Employees, Local 3299, and the University of California have reached an impasse, according to the Public Employment Relations Board. Local 3299, which represents 11,000 patient care technicians at nine U.C. campuses, asked PERB for a declaration of impasse on December 14, 2007. U.C. refused to jointly file the request, citing more work that could be done at the bargaining table. However, the university did not oppose the filing.

Negotiations Thus Far

Talks began in August 2007 in anticipation of the September 30, 2007, expiration of the existing contract. AFSCME rejected the university's pro-

posal to extend the contract, which prompted negotiations on a new collective bargaining agreement. Both parties envision some form of a three-year contract.

Economic issues are at the heart of the dispute.

Economic issues are at the heart of the dispute. AFSCME is seeking a 26 percent increase in wages over three years to bring patient care technicians at U.C. facilities closer to workers' wages at community colleges and other hospitals. In addition, AFSCME has demanded automatic, annual step in-

creases to guarantee that every worker will reach the maximum rate. The first wage proposal that the union provided to U.C. also included a credit for years of experience, to be used in determin-

Another 'hot button' issue is healthcare benefits.

ing placement in the step program. Additional requests were made for a statewide minimum wage of \$15 an hour for all U.C. workers and a \$16-an-hour wage for all U.C. classifications that require a certification or license. Finally, the union demanded

guaranteed benefit rates for the life of the contract.

In response, U.C. refused to credit employees with their work experience to determine placement in the step system. Further, U.C. opposes automatic annual movement to the next step. The university is seeking to adopt a step structure in the second year of the contract, with movement through the steps in the third year based on satisfactory or better performance. The union contends that this managerial oversight will allow U.C. to withhold raises.

The university also refused to go along with AFSCME's salary increase proposal. Over the course of negotiations, U.C.'s four proposals have remained fairly consistent, with one notable difference being a boost in wage increase percentages. The second U.C.

proposal offered individual increases ranging from 1.5 percent to 11 percent. The subsequent proposal included, according to U.C., a "modest wage increase," ranging between 2 percent and 11 percent. In its fourth offer, the last before impasse, the university presented two different packages: "Package A" and "Package B." Both packages upped salary increases to a range between 3 and 15 percent. All of the salary hikes are restricted to raises during the first year of the contract, in contrast to the union's 26 percent increase spanning the three-year period.

Another "hot button" issue between the university and the union is healthcare benefits. The employer consistently has stated that it will offer "health care and retirement benefits at the same cost as provided to other UC

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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>

employees,” but the university has not bowed to union demands that the benefit rates remain unchanged throughout the contract period. The union is concerned that flexibility in the benefit rates is tantamount to giving the employer the power to lower wages. According to the union, “Without guaranteed benefit rates for the life of our contract, management could take away any wage increases we win by increasing our benefit rates.”

The union is concerned that flexibility will give the employer the power to lower wages.

That issue has been temporarily resolved. On December 17, three days after AFSCME sought the impasse declaration, the union agreed to a side letter that outlines the patient care technicians’ health benefits in 2008. The side letter provides the employees with the same benefits as other U.C. employees. Overall, the new health benefit fees will decrease for bargaining unit employees, although some may experience an increase depending on their income and health plan.

The union holds the same fear with respect to pension contributions. The last two packages the university presented to the workers specified no changes to the U.C. retirement plan or

defined contribution plan through September 30, 2008. However, the union remains concerned that if the univer-

sity can suddenly demand higher contributions from employees, it is as good as a pay decrease. *

State Audit Finds CSU’s Approach Haphazard When Hiring for Diversity

The California State University has failed to convey uniform guidelines to its campuses, resulting in inconsistent consideration of diversity when hiring professors, management personnel, presidents, and system executives, according to a recent report by the State Auditor.

The December 2007 report comes one month after the release of an audit that called on CSU to strengthen its oversight and establish stricter rules regarding executive compensation. Both audits were requested by Assembly Speaker Fabian Núñez (D-Los Angeles) and Assemblyperson Anthony Portantino (D-La Cañada Flintridge), chairman of the Assembly Higher Education Committee.

The 118-page diversity audit limited itself to five campuses: Fullerton, Long Beach, Sacramento, San Diego, and San Francisco. The audit concentrated on three departments at each campus; mathematics was the only department evaluated at all five sites. The auditor’s scrutiny includes an evaluation of CSU’s systemwide guidance to the individual campuses when hiring professors, presidents, and system ex-

ecutives, and the campuses’ processes for hiring management personnel.

The report, similar to a 2001 audit of the University of California, focuses on the lack of uniform hiring guidelines across the CSU system and the misplaced fear that any recognition of gender or ethnicity would be in violation of state law. California’s Proposition 209, enacted by voters in November 1996, bars state employers from giving preferential treatment to any individual or group based on gender or ethnicity. However, as the report points out, CSU is a contractor with the federal government and, as such, is required to comply with federal affirmative action requirements. These two forces — one forbidding preferential treatment and the other demanding steps towards the employment of more women and minorities — coexist. The idea that one necessarily displaces the other is a misconception.

Notably, the auditor also found that within the five-year period of review ending in June 2007, CSU spent \$5.3 million on outside counsel to defend 92 employment discrimination cases, among which 68 included at least one

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

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

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

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

<http://cper.berkeley.edu>

claim based on gender or ethnicity. Of those 68 cases, 30 were settled at a total cost of \$1.6 million dollars to CSU.

At its core, the audit's recommendations revolve around the need for CSU to develop clear and consistent guidelines for all campuses and departments with respect to hiring procedures. This should include, according to the audit, guidelines for developing "affirmative action plans to familiarize search committees with estimated availability for women and minorities, ... alternatives for including women and minorities on search committees, and a requirement to compare the proportion of women and minorities in the total applicant pool to the proportion in the labor pool to help assess the success of their outreach efforts."

Findings

The audit primarily focused on faculty hiring practices, noting that

authority for hiring has been delegated to the individual campuses. The campuses, in turn, have delegated to the individual departments most of the responsibility to search for and select their professors. However, the Chancellor's Office has failed to provide the campuses — and, consequently, the departments have failed to receive from their respective campuses — guidelines for the consideration of diversity during the hiring process. Not surprisingly then, the report states, the campuses reviewed by the auditor use different methods to consider gender and ethnicity.

The report notes that despite inconsistencies, the campuses and departments follow essentially the same three-step hiring framework, which begins with the allocation of positions, followed by the development and implementation of a search plan, and finally, the recommendation and appointment.

Allocation phase. During the allocation phase, department heads de-

velop requests submitted to campus administrators by the college deans to fill vacancies and create new positions. The report found that during the allocation stage, little, if anything, is done to consider gender or ethnicity. Only

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hiring process.*

one of the five campuses reviewed, Long Beach, requests departments to review the proportion of women and minorities currently employed in the department and to create qualitative goals for increasing faculty diversity. The report

recommends that CSU give greater consideration to gender and ethnicity at the allocation stage to demonstrate a good-faith effort to increase employment opportunities for women and minorities.

The report also points out that because professors can have careers that last 30 years or more, a department's decision to hire within a specialty or subspecialty can have a prolonged effect on whether women or minorities are hired and can stymie the university's efforts to acquire a diverse faculty.

To that point, the report refers to U.C.'s hiring practices and guidelines instituted after the California State Auditor's May 2001 examination of that system's hiring practices. The U.C. audit determined that some campuses were hiring too few female faculty. (For a summary of that report, see *CPER* No. 148, pp. 45-47.) After the audit, in January 2002, U.C. adopted the Affirmative Action Guidelines for Recruitment and Retention of Faculty. As part of those guidelines, U.C. advises that, while position descriptions should reflect the needs of the department, they should be broadly drafted to attract the largest and most diverse applicant pool.

The CSU report also urges departments to consider recruiting new professors from alternative disciplines in order to increase the likelihood that women or minority professors will be hired. Also, the report suggests, hiring professors at lower levels can positively impact diversity because assistant professor positions generally are filled by

those who recently have received their doctorates, thereby increasing diversity among the available applicants.

Search committees. The auditor found that diversity of the search committees themselves is not directed by consistent guidance. Increasing diversity on the search committees would provide different perspectives when evaluating candidates and affect the diversity of professors hired. Yet none of

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in place.*

the five campuses reviewed had written policies in place. Further, the lack of guidance from the Chancellor's Office has led some campuses to consider gender and ethnicity on search committees while other campuses forbid it.

For example, the Fullerton campus appoints search committee members to reflect the diversity of the existing faculty. Likewise, the San Francisco campus adjusts its committees to include women and minorities. Meanwhile, directors of the equity and diversity offices at Long Beach and Sacramento forbid such consideration. The Long Beach director believes that to consider gender and ethnicity in this way would run afoul of Prop. 209. The

director at CSU Sacramento pointed to the collective bargaining agreement between CSU and the California Faculty Association, which bars intervention by the administration in the search committee's membership unless there is evidence that the election to search committee membership has not been fairly conducted. Therefore, at that campus, membership on search committees is limited to faculty, and committee members cannot be appointed by administrators. The auditor points out, however, that the collective bargaining agreement permits the appointment of non-tenured employees to search committees at the department's request and the discretion of the campus president when hiring non-tenured professors.

Once again, the CSU audit refers to the advancements U.C. has made since 2001. According to the report, U.C. guidelines instruct that special effort be made to ensure that women and minorities have an equal opportunity to serve on the search committees, and that departments lacking diversity look to outside, but similar, departments to broaden their perspective.

Also of concern to CSU is the lack of systemwide guidance that information from campus affirmative action plans be shared with campus search committees. CFA, which represents the faculty members serving on search committees, recommends that a committee review its campus affirmative action plans in order to be aware of underrepresentation and the steps to

improve recruitment of women and minorities. Again, without systemwide guidance, campuses are inconsistent in their practices for sharing this information. In San Diego, the Equity and Diversity Office will, upon request, review the affirmative action plans with the committee to ensure compliance with Prop. 209. In contrast, three of the other campuses do not share this information. In fact, the Fullerton Equity and Diversity Office said that sharing such information could be perceived as violating Prop. 209. The Sacramento campus attempts to strike a balance by alerting search committees to the existence of the plan and to the website location where it can be read.

Applicant surveys. As a contractor with the federal government, CSU is required to analyze its employment process to determine if and where barriers to equal opportunity exist. To do this, campuses distribute surveys along with their applications, to ascertain the applicant's gender and ethnicity. Once again, however, the Chancellor's Office provides no guidance on how to use this information. Still, four of the five campuses have policies in place requiring applicant pools to be reviewed and approved early in the process. Unfortunately, these policies are not always followed.

Moreover, the report acknowledges that response rates can be low because completion of the survey is voluntary. The auditor notes, however, that Long Beach has tried to improve its response rate by sending email re-

mindings to applicants. The practice, which stresses the meaningfulness of the information collected, won praise from the auditor as a way to increase low response rates.

For obvious reasons, the auditor criticizes the practice of reviewing applicants' names as a way to determine gender and ethnicity.

Inconsistencies in procedure pervade evaluation of the available labor pool.

Lack of guidance. Inconsistencies in procedure pervade evaluation of the available labor pool. According to the report, the Chancellor's Office has provided no uniform method for estimating availability. As a result, some campuses define job groups for professors as campuswide while others define them by specific department. Consequently, a campus may not accurately calculate its placement goals in relation to its affirmative action goals or be able to measure the success of its efforts.

Despite the shortcomings in CSU's hiring process, the campuses reviewed have, collectively, hired women and minority professors at a higher percentage than their availability in the labor pool. Of the 165 professors hired during the five-year window in the three

departments at each of the five campuses, 72 were women. This represents 44 percent of the hires, which is 3 percent above the available labor pool. Forty-three of the newly hired professors were minorities, which represents 26 percent of the hires, 14 percent above the labor pool. The auditor cautions, however, that because these figures are based on a relatively small number of hires, individual hirings could skew the results significantly.

The report recognizes that the lack of a centralized hiring procedure gives flexibility to the CSU campuses and allows for a selection process that reflects the individual campus culture and needs. However, the report suggests, "some basic, systemwide guidance regarding hiring protocols, federal regulations, and Proposition 209 — factors that are consistent across all campuses — would be appropriate to minimize the inconsistencies...." Such considerations may cure practices that seem to violate Prop. 209.

For example, the lack of guidance may have contributed to the San Francisco campus's policy which directs that, when selecting among equally qualified candidates for a position in disciplines with an underrepresentation of women or minorities, the affirmative action candidate "must be selected." The dean of faculty affairs was unaware that the provision was still in existence and anticipated a "major overhaul" of the policy. At the time *CPER* went to press, the policy remained on the SFSU website.

The auditor found similar inconsistencies in hiring management personnel, presidents, and system executives. Hiring procedures for these positions lacked sufficient consideration of diversity, with the absence of formal procedures and guidance as the primary reasons.

The CSU Chancellor's Office responded to the report and agreed with the auditor's recommendations and plans to explore ways to address the problems raised. CSU cited the tension between federal requirements and Prop. 209 as a possible cause for many of the findings. Noting that other institutions' policies have not been legally challenged, CSU said it would carefully review policies before it implemented them.

Despite the auditor's criticism, CSU stressed that, "when compared to other institutions of higher education, the current ethnic and gender composition of our faculty and executive group compares very favorably." While CSU maintained that, in a system as large and complex as CSU, flexibility at the campus level is important, it also recognized the importance of "consistency and prudent decision-making."

The report, "California State University: It Is Inconsistent in Considering Diversity When Hiring Professors, Management Personnel, Presidents, and System Executives," is available through California Bureau of State Audits or online at <http://www.bsa.ca.gov/bsa>. *

Discrimination

Huge Class Certification Upheld in Wal-Mart Sex Discrimination Case

The Ninth Circuit Court of Appeals, by a vote of 2 to 1, upheld a district court's class certification of a nationwide group of women who claim Wal-Mart discriminated against them because of their sex in violation of Title VII of the Civil Rights Act of 1964. Estimated to include more than 1.5 million, the class is the largest ever certified.

The class consists of current and former employees in a range of positions, from part-time entry-level hourly employees to salaried managers. The women allege that they are paid less than men in comparable positions, despite having higher performance ratings and greater seniority, and that they receive fewer promotions, and wait longer for them than men. Because Wal-Mart has a strong, centralized structure that fosters or facilitates gender stereotyping and discrimination, they assert, discrimination is common to all women who work or have worked in its stores.

The district court granted the plaintiffs' motion for certification except for the proposed class's claim for backpay, finding that data relating to the challenged promotions were not available for all class members. Both parties appealed.

The Court of Appeals began its analysis by explaining that Federal Rule of Civil Procedure 23(a), which sets forth the criteria for certification of a class, allows a district court to certify a class only if the class is so numerous that joinder of all members is impracticable, there are common questions of law and fact, the claims or defenses of the representative parties are typical of the class claims or defenses, and the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b) also requires the district court to find either that prosecution of separate actions would create a risk of inconsistent or varying adjudications or individual adjudications dispositive of other members not a party to those adjudications; the party opposing the class has acted or refused to act on grounds generally applicable to the class; or the questions of law or fact common to the class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fair and efficient adjudication.

The court examined the parties' claims as to each factor. The majority found there was no dispute as to

numerosity, "given that both parties estimate that the proposed class includes approximately 1.5 million women." Turning to the commonality requirement, the Court of Appeals agreed with the district court's conclusion that the plaintiffs had provided evidence that significant factual and legal questions are common to all class members. The plaintiffs relied on evidence of companywide corporate practices and policies that include excessive subjectivity in personnel decisions, gender stereotyping, and a strong corporate culture. The record also included statistical evi-

This evidence 'raises an inference that Wal-Mart engages in discriminatory practices in compensation that affect all plaintiffs in a common manner.'

dence of gender disparities caused by discrimination and anecdotal evidence of gender bias. This evidence "raises an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner," concluded the court.

The majority also upheld the district court's finding that the claims of the named plaintiffs are typical of the class. Wal-Mart did not dispute that the named members are typical of the hourly members of the class, because five of the six named members are or were hourly employees. However, the class representatives are not typical of all female in-store managers, it argued, because only one of the class representatives holds a salaried managerial position. The court found it was unnecessary to have a class representative for each management category where "all female employees faced the same alleged discrimination."

The court also found that the named plaintiffs will fairly and adequately protect the interests of the class. Wal-Mart argued that this factor was not satisfied because of a conflict of interest between female in-store managers who are both class members and decisionmaking agents of the company. But "courts need not deny certification of an employment class simply because the class includes both supervisory and non-supervisory employees," concluded the court, citing *Staten v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938.

Regarding the requirements of Rule 23(b), the majority found the plaintiffs showed that Wal-Mart "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief...with respect to the class as a whole." The court rejected Wal-Mart's argument that the claims for monetary damages

predominate over claims for injunctive relief because they may amount to billions of dollars. "The predominance test turns on the *primary goal* of the litigation — not the theoretical or possible size of the damage award," said the court. "Focusing on the potential size of a punitive damage award would have the perverse effect of making it more difficult to certify a class the more egregious the defendant's conduct or the larger the defendant," it explained. "Such a result hardly squares with the remedial purposes of Title VII."

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The majority also concluded that, although the class was extremely large, it was not unmanageable, and that the due process rights of all parties would be protected. As a model procedure that could be applied in this case, the court pointed to *Hilao v. Estate of Ferdinand Marcos* (9th Cir. 1996) 103 F.3d 767, a large class action case where the court directed that a certain number of randomly selected claims be examined by

a special master in order to calculate the amount of compensatory damages.

In his dissent, Justice Andrew Kleinfeld asserted that the only requirement of Rule 23(a) met by the plaintiffs is numerosity. He argued that the class lacks commonality because the only question common to the class, whether Wal-Mart's promotion criteria are "excessively subjective," is insubstantial. "Vulnerability to sex discrimination is not sex discrimination," he wrote.

Justice Kleinfeld also found that the class lacks typicality. "Some of the seven named plaintiffs and members of the putative class work for Wal-Mart, some have quit, some have been fired," he noted. "Some claim sex discrimination, some claim mixed motive race and sex discrimination, some appear to claim only race discrimination," he continued. "Some claim retaliation, and some appear to claim unfairness but not discrimination."

Because the interests of the seven named defendants diverge from each other and from other members of the class, said Kleinfeld, they cannot "fairly and adequately protect the interests of the class," as required by Rule 23(a)(4). "Women who still work at Wal-Mart and who want promotions have an interest in the terms of an injunction," he explained. "But an injunction and declaratory judgment cannot benefit women who have quit or been fired and do not want to return. For them, compensatory and punitive damages are what matter."

Kleinfeld also disagreed with the view that injunctive and declaratory relief predominate over the claims for damages. “For anyone but the richest people in the world, billions of dollars are going to predominate over words and solemn commands and promises about how to behave in the future,” he wrote. “What Wal-Mart cashier or stocker would care much about how the district court told Wal-Mart to run its business after getting enough cash to quit?”

But Kleinfeld’s sharpest criticism focused on the majority’s opinion that the case could be managed in such a way as to protect the due process rights of the parties. He argued that the district court’s proposed plan for determining liability and damages was constitutionally defective because it is “inadequately individualized.” The plan

called for a jury to determine liability on a classwide basis, without adjudicating the merits of any individual claim. A special master would then determine the amount of damages “on the basis of some generally applicable formula.”

There are serious reasons for restraints on class actions,” said Kleinfeld, because “they are an exception to the rule that litigation is conducted by and on behalf of the individual named parties only.” The class action mechanism is designed to induce attorneys to take on cases with small recoveries, which is not the situation here. “Much of the bar now earns a living by litigating sex discrimination claims,” he argued, and “women discriminated against by Wal-Mart do not need a class action.” They can hire their own lawyers and enter into contingent fee agreements. And, he

argued, they likely would get more money from an individual suit than in a class action.

Kleinfeld concluded:

The district court’s formula approach to dividing up punitive damages and back pay means that women injured by sex discrimination will have to share any recovery with women who were not. Women who were fired or not promoted for good reasons will take money from Wal-Mart they do not deserve, and get reinstated or promoted as well. Compensatory damages will be forfeited. This is “rough justice” indeed. “Rough,” anyway. Since when were the district courts converted into administrative agencies and empowered to ignore individual justice?

(*Dukes v. Wal-Mart, Inc.* [9th Cir. 12-11-07] No. 04-16688, ___F.3d___, 2007 DJDAR 18233.) *

cper

Pocket Guide to

Workplace

Rights of

Public

Employees

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

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

By Bonnie Bogue, Carol Vendrillo and Liz Joffe • 2nd edition (2005) • \$12
<http://cper.berkeley.edu>

Supreme Court to Hear Important ADA Accommodation Case

The United States Supreme Court has agreed to review the employment law case of *Huber v. Wal-Mart*, and will determine the scope of an employer's obligation to accommodate a disabled employee under the Americans with Disabilities Act. The issue before the justices is whether the ADA requires an employer to reassign a disabled employee to an open and equivalent position for which he or she is qualified, or merely to allow the employee to apply for the post.

The case was brought by Pat Huber, who injured her right arm and hand while working at Wal-Mart. The

injury prevented her from performing her job duties as an order filler at a distribution center. She asked to be transferred to a vacant dispatcher position, a desk job for which she was qualified and that she could perform with her disability. Wal-Mart refused her request and filled the job with another, more qualified employee. Huber was placed in an inferior position at half her prior pay rate.

Huber sued, claiming that Wal-Mart had to do more than just allow her to compete for the job. The Eighth Circuit Court of Appeals ruled in favor of the company, stating, "the ADA is not

an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate."

Arguments will be heard by the Supreme Court in March, with a decision expected in June. Justice Stephen Breyer has recused himself from the case because he owns stock in Wal-Mart. This is considered good news for the plaintiff because Breyer wrote the majority opinion in *U.S. Airways v. Barnett* (2002) 535 U.S. 391, in which the court ruled that the employer did not have to violate its seniority-based hiring system in order to accommodate a disabled employee's job request. *

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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
<http://cper.berkeley.edu>

County Retaliated Against Whistleblower, But Supervisor's Comments Not Sexual Harassment

The Fourth District Court of Appeal affirmed a jury's determination that Orange County discharged the executive director of the county's Office on Aging for whistleblowing. However, the court in *Mokler v. County of Orange* did not go along with the jury's determination that Orange County Supervisor Chris Norby sexually harassed the executive director, finding his conduct was not sufficiently severe or pervasive to create an abusive work environment.

Factual Background

In November 2000, Pamela Mokler became the executive director of the County of Orange's Office on Aging, an agency that advocates on behalf of the county's elderly residents. William Baker, director of the county's Community Services Agency and Mokler's supervisor, rated Mokler's performance as "exceptional" from the time she was hired until Baker's retirement in March 2003.

Mokler's first interaction with Supervisor Chris Norby occurred on January 29, 2003, when the two met at a budget hearing shortly after Norby was elected. Norby inquired as to Mokler's marital status, and she told him that she was unmarried, to which Norby responded, "So you're the aging nun." Mokler was degraded by the

comment, and reported the statement to Baker. He told Mokler to be careful.

On February 5, 2003, Mokler again encountered Norby, this time at a victory party for the newly elected Supervisor Bill Campbell. Mokler greeted Norby, who was standing next to two women. Norby pulled Mokler toward him so that their bodies were touching, and inquired in a flirtatious manner, "Did you come here to lobby me?" Mokler responded that as a staff member she does not engage in lobbying. Norby retorted, "Why not? These women are lobbying me." Norby told Mokler she was wearing a nice suit, and had nice legs, and he looked her up and down. Mokler pushed herself away and reported the incident to Baker. Once again, Baker advised Mokler to be careful and told her she needed to "win him over."

On March 3, 2003, Mokler endured a third encounter with Norby, in the lobby of his office. Norby told her she looked nice, and put his arm around her. He asked Mokler to tell him her address. Norby again put his arm around Mokler and, as he did so, rubbed her breast with his arm. Mokler quickly pushed herself away.

When Mokler's supervisor, Baker, retired, he was replaced by Vicki Landrus. Landrus told Mokler the county planned to transfer the Office on Aging's contracts department to the

county executive's purchasing department. Mokler was concerned that this organizational change would jeopardize funding her office received through the California Department of Aging and could potentially violate state and federal laws. Mokler's supervisors warned her not to communicate with CDA and met personally with a CDA official to "short circuit" any allegations of illegal activity that Mokler might report.

*Norby inquired in a
flirtatious manner,
'Did you come here to
lobby me?'*

On May 5, 2003, when her supervisors learned that Mokler had spoken to a CDA official, she was escorted from her office and placed on administrative leave. Two months later, the county advised Mokler of its intent to discharge her based on an improper relationship and collaboration with a local community organization, and allegations of impropriety involving a bid for a health care project.

Mokler filed a lawsuit, and she proceeded to trial with her claim against the county for unlawful whistleblower retaliation under Labor Code 1102.5(b) and a claim of sexual harassment under the Fair Employment and Housing Act against Supervisor Norby. The jury concluded

Mokler had been terminated in retaliation for being a whistleblower, and sustained the harassment claim, finding that Norby's conduct had created a hostile work environment. While the jury awarded over a million dollars in damages on the retaliation claim, the trial court judge determined the verdict was excessive and ordered a new trial. Both sides appealed.

Court of Appeal Decision

The court first rejected the county's assertion that Mokler's retaliation claim was barred because she failed to exhaust her administrative remedies.

The court found the county's reasons for termination were merely pretextual.

Noting the county's failure to raise this argument at the trial court level, the appeal court found the county had implicitly consented to the lower court's jurisdiction over Mokler's retaliation claim. Exhaustion could not be raised for the first time on appeal.

Whistleblower claim. To prove her retaliation claim, Mokler first demonstrated that she engaged in protected activity when she disclosed to a governmental agency "reasonably based suspicions" of illegal activity.

With the burden shifting to the county to offer a legitimate reason for discharging Mokler, the county produced evidence that Mokler had breached the county's bidding procedures with respect to a local organization's proposal.

But the court found substantial evidence to prove that the county's reasons for termination were merely pretextual, pointing to Mokler's "exceptional" performance reviews. The court also relied on Mokler's supervisor's effusive praise for her performance set out in a recommendation letter one month before she was suspended. The court also found it ironic that Mokler's relationship with a community organization, so highly valued by her previous supervisor, became a negative factor and a basis for her termination.

Sexual harassment claim. The court also considered whether Norby's improper conduct was sufficiently pervasive to create a hostile or offensive work environment. Guided by the standard set out in *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, the court considered the nature and frequency of the unwelcome sexual acts, the total number of days over which the offensive conduct occurred, and the context in which the sexual harassment happened.

The court looked to the facts in *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, as illustrative of actionable incidents of sexual harassment. In *Sheffield*, a female county employee pursued a

romantic relationship with the plaintiff, a heterosexual female coworker. The court in *Sheffield* took note that the objectionable incidents occurred within a span of one week and included physically threatening acts that changed the conditions of employment.

With this in mind, the court found Mokler had not established a "pattern of continuous, pervasive harassment." The court observed that Mokler's interactions with Norby occurred three times over a five-week period. Mokler did not work in the same building with Norby, and Norby did not supervise Mokler. The court noted that the first

Norby's 'rude, inappropriate, and offensive behavior' was insufficiently 'severe or pervasive to create an abusive working condition.'

incident involved an isolated boorish comment but was not sexual, and there was no touching. The second incident involved nonsexual touching and a minor suggestive remark. The third and final incident involved only brief sexual touching and was not an extreme act of harassment. In sum, the court concluded Norby's "rude, inappropriate,

and offensive behavior” over a five-week period was insufficiently “severe or pervasive to alter the conditions of [her] employment and create an abu-

sive working condition.” (*Mokler v. County of Orange et al.* [2007] 157 Cal.App.4th 121. *

easier commute. His immediate supervisor recommended him for the job and, initially, Kane agreed. However, the decision was reversed by a senior vice president, Peter McDonald, after meeting with Kane. The position was posted and was given to another employee recommended by Kane, one who had not applied for the job.

Because of ACSC’s conduct, Wysinger became depressed and unable to work.

He filed a lawsuit claiming age and disability discrimination and retaliation in violation of the FEHA. The jury found that the company had not failed to provide a reasonable accommodation to Wysinger, nor had it discriminated against him because of his disability or age. However, it found that the company had retaliated against him for filing an age discrimination complaint and had failed to engage in an interactive process regarding accommodating his disability. The company appealed.

No Inconsistency in Reasonable Accommodation Verdicts

A jury’s conclusion that an employer had failed to engage in the interactive process to determine reasonable accommodations for an employee’s disability was not inconsistent with its finding that the employer was not liable for failing to provide a reasonable accommodation, concluded the Second District Court of Appeal in *Wysinger v. Automobile Club of Southern California*. The court found that the verdicts do not conflict because, under California’s Fair Employment and Housing Act, they are different causes of action and are proven by different facts. The court also upheld the jury’s finding of retaliation.

Factual Background

Guy Wysinger was a district manager in the Santa Barbara office of the Automobile Club of Southern California. He suffered from lupus, a heart condition, and arthritis. His arthritis was exacerbated by his daily commute to Santa Barbara.

The company implemented a new compensation plan that was opposed by the older managers, including Wysinger, because it provided them with a disproportionate decrease in pay. Wysinger and others were told by Robert Kane,

ACSC’s district vice president, that ACSC would not tolerate any opposition to the plan and that “we are going to crush” anyone opposing it.

The court found no inconsistency because the verdicts involved separate causes of action.

Wysinger filed a complaint with the Equal Employment Opportunity Commission, alleging age discrimination. ACSC did not impose the pay cuts, but Wysinger’s work environment changed. He was no longer invited to be on management committees or to apply for management positions. He was treated coldly and received poor job evaluations, and his requests for reasonable accommodations were ignored.

Wysinger applied for a position as manager of the Ventura office, which would have meant a promotion and an

Court of Appeal Decision

No inconsistency in accommodation verdicts. ACSC argued that the jury’s verdict that it had failed to engage in the interactive process regarding Wysinger’s disability was inconsistent with its finding that ACSC did not fail to provide a required reasonable accommodation and, therefore, must be reversed.

The court disagreed, finding no inconsistency because the verdicts involved separate causes of action and

required proof of different facts. Failure to engage in the interactive process “is a separate FEHA violation independent from an employer’s failure to provide a reasonable disability accommodation, which is also a FEHA violation,” said the court. It reasoned that, if an employer does not engage in the interactive process, it cannot claim there were no available reasonable accommodations. “The interactive process determines which accommodations are required,” said the court. “Indeed, the interactive process could reveal solutions that neither party envisioned.”

Unlike the FEHA, ADA does not impose liability on employers who refuse to engage in the interactive process.

The court found misplaced ACSC’s reliance on cases to the contrary decided under the federal Americans with Disabilities Act. Unlike the FEHA, the ADA does not impose liability on employers who refuse to engage in the interactive process unless the employee also shows that his or her disability could have been reasonably accommodated.

In this case, the jury reasonably could conclude that there was no failure to provide an accommodation be-

cause, due to ACSC’s refusal to engage in the interactive process, the parties never reached the stage of determining which accommodations were required, reasoned the court

Retaliation. Contrary to ACSC’s position, the Second District found there was ample evidence to support the jury’s finding that the employer had retaliated against Wysinger. The court rejected ACSC’s argument that the employer was not responsible for Kane’s retaliatory conduct. “An employer generally can be held liable for the retaliatory actions of its supervisors.” The court also was not persuaded by ACSC’s contention that McDonald independently decided not to promote Wysinger, noting that “McDonald said he followed Kane’s final recommendation to reject Wysinger and routinely relied on Kane’s advice about managers.”

The court dismissed the company’s contention that McDonald did not know about Wysinger’s EEOC complaint. The jury could reasonably infer that someone in his position would know about the complaint, because of its potential financial impact on the company. Further, said the court, “a decision maker’s ignorance does not categorically shield the employer from liability if other substantial contributors to the decision bore the requisite animus,” citing *Roebuck v. Drexel University* (3d Cir. 1988) 825 F.2d 715. Therefore, Kane’s animus was imputed to ACSC.

ACSC argued that, because of the lapse in time between the filing of the

EEOC complaint in 1999 and the decision not to transfer Wysinger to Ventura in 2002, the events were too remote to be causally connected. While it is true that a long period between the employee’s protected action and the employer’s retaliatory act may lead to an inference that the two are not related, said the court, that is not the case where the employer engages in a pattern of conduct consistent with retaliatory intent during the intervening period. “Here Wysinger was not invited to serve on management committees, to apply for management positions and was

The jury could reasonably infer that someone in McDonald’s position would know about the complaint.

treated with coldness,” noted the court.

The court also found ample evidence to support the jury’s verdict of retaliation in its refusal to engage in the interactive process. It cited the fact that ACSC completely ignored Wysinger’s repeated requests for accommodation.

The court upheld the jury’s verdict in its entirety. (*Wysinger v. Automobile Club of Southern California* [2007] 157 Cal.App.4th 413.)*

Section 1981 Provides No Private Cause of Action Against States

In *Pittman v. State of Oregon*, the Ninth Circuit Court of Appeals upheld the dismissal of a race discrimination case brought against the Employment Department of the State of Oregon, finding that 42 USC Sec. 1981 does not provide for a cause of action against states by a private party.

Helen Pittman, an African American woman, filed a lawsuit alleging race discrimination in employment against the department under Sec. 1981 and against the director of the department under 42 USC Sec. 1983. The department asked the district court to dismiss the case, arguing that there is no private right of action to sue a state actor under either Sec. 1981 or Sec. 1983. The court agreed and dismissed the case. Pittman appealed.

The Court of Appeals noted that, under Ninth Circuit precedent, a cause of action can be brought against a municipality, pointing to *Federation of African American Contractors v. City of Oakland* (9th Cir. 1996) 96 F.3d 1204. However, that case cannot be extended to permit a Sec. 1981 cause of action against a state as maintained by Pittman, it held.

Examining the historical record, the appellate court concluded that, prior to the amendments to Sec. 1981 included in the Civil Rights Act of 1991, the Supreme Court interpreted the language of the statute to prohibit

racial discrimination by both private parties and state entities in the making and enforcement of contracts, citing *Runyan v. McCrary* (1976) 427 U.S. 160. The Supreme Court, however, in *Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, held that the section did not create a private right of action to enforce that prohibition against state actors and that a cause of action for damages for a violation of Sec. 1981 can be enforced on state actors only through Sec. 1983. “The primary prac-

Pittman contended that Federation is equally applicable to arms of the state.

tical consequence of that holding, highlighted in *Jett*, was that actions for vicarious liability would not lie against state actors because of the ‘custom or policy’ limitation on actions against municipalities under Sec. 1983,” instructed the Ninth Circuit, meaning that a plaintiff must show that the violation was caused by a custom or policy.

The 1991 amendments added subsection (c) to Sec. 1981 that reads, “The rights protected by this section are protected against impairment by

non-governmental discrimination and impairment under color of State law.” The legislative history makes clear that the purpose of this subsection was to codify *Runyan*, said the court, and it found no reference in that history to *Jett* or to the availability of a private right of action against states or state officials.

Pittman contended, however, that the reasoning of the court in *Federation of African American Contractors*, which found that the addition of subsection (c) overruled *Jett* and created an implied private cause of action against municipalities, is equally applicable to arms of the state. The court acknowledged that her argument had merit in two respects. First, the language of Sec. 1981(c) makes no distinction between municipalities and the state. Second, “much of *Federation’s* analysis of whether it is appropriate to imply a private right of action does not depend on any distinction between municipalities and state entities,” said the court. “The statute, by its plain terms, creates rights in favor of individuals who have been discriminated against in employment on the basis of race,” it noted. “Further, causes of action against state actors for violation of federal civil rights have also not traditionally been relegated to state law.”

Nonetheless, the court refused to extend *Federation* to suits against arms of the state “for other reasons we conclude are more weighty.” “Most notably,” said the court, “the reasoning of *Federation* depended in part on its conclusion that implication of a cause of

action against municipalities under Sec. 1981 ‘imposes no substantive change on federal civil rights law,’ because it does not expand the remedies available under Sec. 1981 beyond those already available under Sec. 1983.’ The court was persuaded by the department’s argument that, on the other hand, “recognizing a cause of action against state actors under Sec. 1981, would, in fact, expand the remedies available under that statute beyond those available under Sec. 1983.”

The court refused to extend Federation to suits against arms of the state.

The court pointed to the fact that states are entitled to sovereign immunity under the Eleventh Amendment, while municipalities are not. In this case, the state had waived its right to claim sovereign immunity when it voluntarily invoked federal jurisdiction by removing the case from the state court to federal court. If, however, it had not done so, it could have claimed immunity from both Secs. 1981 and 1983, said the court, citing *Mitchell v. Los Angeles Community College Dist.* (9th Cir. 1988) 861 F.2d 198, and other cases.

But since the state did waive immunity, the question now is whether a private party can bring a cause of ac-

tion against a state entity under Sec. 1981. In *Jett*, the Supreme Court found no private cause of action against state actors in Sec. 1981, relegating those seeking to enforce Sec. 1981’s prohibitions against a state to the causes of action available under Sec. 1983. Further, in *Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, the Supreme Court held that Sec. 1983, while applying to municipalities, does not apply to states. “The practical effect of the holding in *Will* is that actions against arms of the state under both Sec. 1983 and Sec. 1981 cannot be brought in either federal or state court because the cause of action in Sec. 1983 does not reach arms of the state,” explained the court.

Therefore, “holding that Sec. 1981(c) creates a cause of action against state actors would bring about some change in federal civil rights law that was not created by allowing actions against municipalities,” the court said. It would allow cases in federal court against arms of the state in instances where they had waived sovereign immunity and, more importantly, it would allow actions to be brought in state court against the state for Sec. 1981 violations. “The Supreme Court has instructed that allowing suits against states in state court is a significant alteration in the federal/state balance that must be supported by a clear statement of Congressional intent,” said the court, again pointing to *Will*. The court did not find the requisite intent in Sec. 1981(c):

In fact, neither the language nor the legislative history of the statute suggests any intent to create a private right of action against arms of the state. *Federation* is not to the contrary, as it did not involve the application of *Will*; concerned only municipalities, not states; and stressed that it worked no practical changes in civil rights law because of the absence of sovereign immunity protection for municipalities.

The court found support for its conclusion in *Gonzaga University v. Doe* (2002) 536 U.S. 273, decided after *Fed-*

A significant alteration in the federal/state balance must be supported by a clear statement of congressional intent.

eration, in which the Supreme Court “made clear that, in determining whether a private right of action can be implied from a particular statute, rights-creating language is not determinative.” A private remedy must also be intended. Here, said the court, while “Section 1981(c) is phrased in explicit rights-creating terms,” it “says nothing about a private remedy, nor does the legislative history.” (*Pittman v. State of Oregon* [9th Cir. 12-5-07] No. 05-35900, ___ F.3d ___, 2007 DJDAR 17956.) *

General

First Amendment Protects Employee's Speech Where Complaints Are Not Job Related

Following the guidance outlined by the U.S. Supreme Court in *Garcetti v. Ceballos*, the Ninth Circuit found that a Washington State public employee was protected by First Amendment free speech guarantees because the corrupt

Marable had no official duty to ensure that his supervisors were refraining from alleged corrupt practices.

practices he reported were not related to his job duties. In *Marable v. Nitchman*, the court found that Ken Marable's complaints had "nothing to do with his job duties" and had "all the hallmarks that we normally associate with constitutionally protected speech."

Marable, an engineer for the Washington State Ferries, was subjected to disciplinary action for insubordination for allegedly violating orders regarding the operation of his vessel. Marable maintained that he was disciplined in

retaliation for his complaints about corrupt practices by his managers. He charged that they inappropriately claimed overtime and engaged in other forms of "pay padding," which he characterized as a waste of public funds. Marable filed suit against the ferry service and the director of maintenance who initiated the disciplinary action against him. The federal district court held that Marable's comments constituted on-the-job speech rather than speech as a citizen and were not protected.

On appeal, the Ninth Circuit found that the employer took adverse action against Marable and that there were triable issues of fact regarding whether the alleged protected speech was a motivating factor in the disciplinary action. With that, the court turned to the central issue — whether Marable's speech referred to issues of public concern and was protected or whether his speech was related to his official duties and outside First Amendment protection.

The court carefully reviewed the holdings in *Garcetti v. Ceballos* (2005) 126 S.Ct. 1951, 179 CPER 21, and *Freitag v. Ayers* (9th Cir. 2006) 468 F.3d 528, which involved a correctional officer's complaints about inmate misbehavior. Here, the Ninth Circuit in-

structed that it is not dispositive whether the employee complains internally or publicly or whether the subject matter of the complaints concerns his or her employment. What is critical is whether the employee's job duties require that he make the complaints to his or her superiors.

In *Freitag*, for example, the correctional officer was required as part of her official duties to report inmate misconduct and to pursue appropriate discipline. Freitag's communications al-

An employer cannot restrict First Amendment rights by creating excessively broad job descriptions.

leged that her supervisors were throwing away her complaints about the inmates' conduct. This prevented her from doing her job and was directly related to her job duties, the court ruled in that case.

In contrast, the court here concluded that Marable had no official duty to ensure that his supervisors were refraining from alleged corrupt practices. His official duties required that he ensure all machinery on his vessel be mechanically and electrically sound. Unlike *Freitag*, whose communications

about her supervisors' actions directly concerned her role as a correctional officer overseeing inmates, Marable's official duties did not extend to his communications about his superiors' time-keeping practices.

The court rejected the argument that the ferry service's training manual calls on a chief engineer such as Marable to "enforce all applicable federal and state rules and regulations." Relying on *Ceballos*, the court reiterated that an employer cannot restrict employees' First Amendment rights by creating excessively broad job descriptions. "The proper inquiry is a practical one into the duties an employee actually is expected to perform." (*Marable v. Nitchman* [12-26-07] No. 06-35940 [9th Cir.] ___F.3d___, 2007 DJDAR 18922.)*

School District Immune From Liability for Secretly Videotaping Teacher's Wedding

The Second District Court of Appeal has immunized a school district from liability for secretly videotaping a teacher's wedding, reception, and honeymoon while investigating the authenticity of her workers' compensation claim. In *Richardson-Tunnell v. School Insurance Program for Employees*, the court determined that the teacher's claims were barred by governmental investigatory immunity conveyed by Government Code Sec. 821.6.

Klare Richardson-Tunnell was a teacher employed by the Lucia Mar Unified School District. She suffered a back injury and underwent disc replacement surgery in June 2003. She was

married in October 2003, while on disability leave.

The district hired School Insurance Program for Employees to administer its workers' compensation claims. SIPE and the district directed Anthony Esparza, a private investigator, to videotape Richardson-Tunnell's wedding. Esparza misrepresented himself as an invited guest and videotaped the wedding and the reception. The next day, he used a telescopic lens to videotape the newlyweds as they sunbathed on the balcony of their hotel and as they left the hotel and visited the coastal town of Cambria, California.

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Pocket Guide to Family and Medical Leave Acts

A "user friendly" guide to the federal Family and Medical Leave Act of 1993 and the California Family Rights Act of 1993. The Pocket Guide spells out who is eligible for leave, increments in which leave can be used, various methods of calculating leave entitlements, record keeping and notice requirements, and enforcement. The rights and responsibilities of both employers and employees under each of the statutes are discussed. The reader is given an understandable summary of the acts' provisions that emphasizes the differences between the two laws and advises which provision to follow.

A clear and concise reference for employees who are eligible for benefits, union officials questioned about employee entitlements, and labor relations managers charged with implementing the act. Use it as a training tool or for resolving practical, day-to-day questions as they emerge.

By Peter Brown • 2nd edition (2002) • \$10

<http://cper.berkeley.edu>

Richardson-Tunnell filed a lawsuit against SIPE, the district, and Esparza, alleging violations of her constitutional right to privacy and Civil Code Sec. 1708.8, which imposes liability for an invasion of privacy. The trial court dismissed the case, and Richardson-Tunnell appealed.

Because SIPE and the district are both public entities, the Court of Appeal looked to state law concerning governmental tort liability. Under Gov.

Richardson-Tunnell argued that the defendants' conduct was not entitled to immunity because SIPE and the district intended to harass her.

Code Sec. 815.2(b), a public entity is not liable for conduct by an employee for which that employee is immune. And, under Sec. 821.6, a public employee is immune from liability for instituting or prosecuting judicial or administrative proceedings.

The court first rejected Richardson-Tunnell's contention that SIPE and the district waived any governmental immunity claim by failing to assert it in their answer to her complaint. "Gov-

ernment tort immunity is jurisdictional," said the court, "and may be raised for the first time on appeal."

Richardson-Tunnell argued that the defendants' conduct was not entitled to immunity by operation of Sec. 821.6. Because SIPE and the district intended to harass her, she urged, "their conduct was not part of a criminal investigation or disciplinary action, and they acted outside the scope of employment." The court disagreed. "Government tort immunity applies to intentional tortious conduct unless the immunity statute provides otherwise," it said, even if the employee acts maliciously and without probable cause. "Investigations are considered to be part of judicial and administrative proceedings for purposes of section 821.6 immunity," said the court, citing *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 77 CPER 28.

Further, the court determined that "the alleged conduct was within the scope of public employment" for purposes of Sec. 821.6. "An employee is acting in the course and scope of his employment when he is engaged in work he was employed to perform, or when the act is incident to his duty and is performed for the benefit of his employer, not to serve his own purposes or convenience," it instructed.

Nor did the court find persuasive Richardson-Tunnell's contention that Civil Code Sec. 1708.8 provides an exception to governmental investigatory immunity. That section "imposes liability for an invasion of privacy with

the intent to capture a visual image, sound recording or other physical impression of the plaintiff engaged in a personal or familial activity." It was enacted in reaction to the death of Lady Diana, Princess of Wales, explained the court.

Section 1708.8 does not create an exception to government immunity because it is outside the Tort Claims Act. "The general rule is that the governmental immunity will override a li-

'In our case, no provision of the Tort Claims Act authorizes an action for invasion of privacy against a public employee.'

ability created by a statute outside of the Tort Claims Act," absent an expression of legislative intent to the contrary, concluded the court, relying on *Gates v. Superior Court* (1995) 32 Cal.App.4th 481. Richardson-Tunnell pointed to *Gillan v. City of San Morino* (2007) 147 Cal.App.4th 1033, in support of her position. In *Gillan*, the plaintiff alleged false arrest under Civil Code Sec. 52.1, and the court found that Sec. 821.6 immunity did not override Sec. 52.1 because the Tort Claims Act specifically authorized an action for false arrest

against a public employee. *Gillan* does not apply here, said the court, because “in our case, no provision of the Tort Claims Act authorizes an action for invasion of privacy against a public employee.” The court found nothing in the language of Sec. 1708.8 or its legislative history to indicate any intent to create new government liability.

*The litigation
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based privacy
cause of action.*

The court also dismissed Richardson-Tunnell’s argument that Sec. 821.6 immunity does not apply to an invasion of privacy cause of action because statutory immunities do not apply to invasions of constitutional rights. Richardson-Tunnell relied on *Urbiank v. Newton* (1991) 226 Cal.App.3d 1128, 88 CPER 25, involving the litigation privilege in Civil Code Sec. 47, in support of her argument. The court found the *Urbiank* decision at odds with the holding in a recent case, *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948. There, the California Supreme Court said that “the litigation privilege applies even to a constitutionally based privacy cause of action.” The court in *Jacob B.* found noth-

ing in the history of the 1972 initiative that added the privacy right to the California Constitution indicating an intent to limit or override the litigation privilege. The Supreme Court said, “when the voters adopted California Constitution, article I, section 1, they did so mindful of the preexisting litigation privilege.”

The appellate court in this case followed the same reasoning, stating, “we assume the voters were similarly mindful of preexisting governmental tort immunities.” (*Richardson-Tunnell v. School Insurance Program for Employees* [2007] 157 Cal.App.4th 1056.) *

Public Sector Arbitration

District Must Give Notice Prior to Contract Termination.

Because the agreement between the Amalgamated Transit Union and the San Joaquin Regional Transportation District had expired, and the parties had not yet implemented a new one, the District claimed it did not have to deduct union dues from employees' pay and remit those sums to the union. But arbitrator John Kagel, writing for a three-member board of arbitration, disagreed. Kagel reasoned that the district did not have the authority to stop union dues' check off because the district never gave the union a clear and timely notice regarding the termination of the memorandum of understanding.

The district and the union were parties to an MOU from July 1, 2003, to June 30, 2006. Under the provisions of Public Utilities Code Sec. 50120(a), the parties submitted to arbitration issues about which they were unable to reach agreement. Although by July 2006, that arbitration decision had been received, the parties had not yet executed an agreement incorporating its terms. Among the matters not in dispute were provisions for "dues check-off" and remission of dues to the union.

Section 48(a) of the MOU, which carried over to the new agreement, stated that the agreement "shall con-

tinue in effect from year to year thereafter unless written notice of the desire to cancel or terminate the Agreement is served by either party upon the other party at least ninety (90) days prior to the date of expiration." Section 48(b) provided: "Where no such notice of cancellation or termination is served, and the parties desire to continue this Agreement but also desire to negotiate changes or revision in this Agreement, either party may serve upon the other party a written notice...."

On March 8, 2006, the union advised the district that in accordance with Sec. 48(b), it intended to reopen the current agreement to negotiate changes. The union also requested an exchange of contract proposals. The next day, the union wrote that it had received the district's verbal dates for exchanging proposals and advised that it would be prepared to negotiate in late April or early May.

On March 13, 2006, the district's general manager informed the union president that "time [was] of the essence" with regard to the commencement of negotiations, as the contract expired in June 2006. The general manager offered dates to negotiate and asked for the union's assurance that it

would respond immediately to avoid any delay. On March 30, 2006, the manager wrote the union again, stating she was surprised and disappointed that she had not heard from the union and that the union was not eager to start the negotiation process so as to avoid delay and expensive arbitration. She added, "Let me remind you of the statutory deadlines in the California Labor Code that apply and which you must meet....Each party shall exchange contract proposals not less than 90 days before the expiration of a contract, and

*The MOU 'shall
continue in
effect...unless written
notice to cancel
is served....*

shall be in formal collective bargaining not less than 60 days before such expiration." Under the code, the union was obligated to submit its proposals by April 1, the district manager urged.

According to the district, negotiations did not occur until June 20, 2006, "due entirely to union delay." On July 6, 2006, the parties mutually sought a list of arbitrators from the State Mediation and Conciliation Service, as they had "reached impasse." On July 7, the district maintained that the agreement had

expired, and it would no longer deduct union dues and payments from employees' pay or remit those sums to the union. It maintained that no changes would be made to bargaining unit employees' wages and benefits. The union filed a grievance, and arbitration ensued. Dues deductions were resumed in January 2007, after the December 2006 unanimous interest arbitration award resulted in a successor agreement.

The union argued that the agreement had not expired because there was no evidence that the district gave timely notice of termination of the contract. Correspondence between the parties was not timely notice of termination because it did not expressly state that the district intended to terminate the agreement, and references to the expiration date alone did not establish intent to cancel the contract. The union also claimed that reference to the creation of a new agreement did not mean that the prior contract had been terminated. The union also argued that the letters from the district merely showed

an attempt to expedite negotiations and that individual "dues check-off" authorization did not end with the contract's cessation.

The union argued that the district's actions were a violation of the

The letter made no unequivocal statement the district was terminating the agreement.

duty to bargain in good faith as shown by "self-help" designed to punish the union by "hitting its pocketbook." Furthermore, the union contended, the use of economic leverage is contrary to the intent of the interest arbitration provisions of the Public Utilities Code.

The district countered that the March 13, 2006, letter to the union

clearly stated that the contract expired in June and informed the union of the district's intent to negotiate a new contract. The district asserted that the "dues check-off" provision did not survive the expired contract and that, with no contract, the district could legally discontinue the "dues check-off" process. An employer is permitted to take such steps to encourage the union to go to the bargaining table. The district claimed it did not act with animus, but for the purpose of getting the union to the table. The interest arbitration statutory provisions do not prevent the district from discontinuing "dues check-off," it claimed.

Arbitrator John Kagel explained that Sec. 48(a) requires written service of notice to terminate the agreement. Service involves a clear, unambiguous statement that the serving party considers the agreement terminated as of its expiration date. The parties are then free to take such actions as may be permissible provided that a settlement has not been reached in the meantime.

cper

Pocket Guide to

Public Sector

Arbitration:

California

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

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

<http://cper.berkeley.edu>

The arbitrator found that the district's March 13 letter was not such a notice. The letter made no unequivocal statement in its two references to the expiration date of the agreement that the district was terminating the agreement. Those references, the arbitrator noted, merely sought to complete negotiations prior to that date. The letter was sent after the union had communicated that it was exercising its rights under Sec. 48(b) to seek revisions

The district acted because of what it perceived to be the union's unwillingness or inability to bargain.

to the agreement which, in turn, would allow the district to likewise seek revisions. The union's notice did not terminate the contract.

Arbitrator Kagel concluded that the district did not meet the Sec. 48(a) notice requirement, a prerequisite to the termination of the agreement. Accordingly, he held, there was no termination of the contract, and no authority on the part of the district to ignore the MOU "dues check-off" provisions.

The arbitrator explained that the thrust of the district's March 31 letter, the only other letter referring to the expiration of the agreement, was to get

negotiations going, avoid past delays, and comply with statutory requirements. Ultimately, the arbitrator explained, Sec. 48(a) requires a notice that is unequivocal, and no communications in the record met this standard.

Arbitrator Kagel noted that both parties allude to conduct on the part of the other that alleges bad faith bargaining. Those claims are not relevant, the arbitrator found, given the conclusion that the agreement was not properly terminated. The arbitrator explained that the district did not claim a unilateral right to eliminate its "check-off" obligation after impasse had been mutually declared. It acted because of what it perceived to be the union's unwillingness or inability to bargain about contract revisions before the agreement expired. Nor was there evidence of economic pressure applied by the union in 2006. The arbitrator remanded the remedy issue to the parties as stipulated during the arbitration hearing. (*Amalgamated Transit Union, Loc. 276, and San Joaquin Regional Transportation Dist.* [4-9-07; 37 pp.]. *Representatives*: Diana Marie O'Malley [Hansen Bridget] for the city; William J. Flynn, [Neyhart, Anderson, Flynn & Grosboll] for the union. *Arbitrator*: John Kagel [with Vince Contino, ATU, and Donna Kelsay, SJRTD].) *

Resources

Two Major Disability Laws Compared

A new guide clearly explains the similarities and differences between the two basic laws that target discrimination in the workplace: the Fair Employment and Housing Act and the Americans with Disabilities Act of 1990. *Pocket Guide to Disability Discrimination in the California Workplace* is the 14th title in the Pocket Guide Series published by the CPER Program.

Both laws prohibit employers — including public employers — from discriminating against qualified employees on the basis of an employee's disability. Both laws enable aggrieved employees to obtain monetary damages from employers and to enjoin employers from engaging in future discriminatory conduct.

Amendments adopted in 1999 and 2000 that expand the FEHA to protect a wide range of individuals and impairments the ADA does not cover, coupled with U.S. Supreme Court decisions limiting the ADA's impact, make the FEHA an aggrieved employee's likely choice. The FEHA also provides the possibility of higher monetary awards against employers. The FEHA is administered by the Fair Employment and Housing Commission. Although the most important FEHA provisions are contained in the statute itself, the commission has issued regulations explaining some of the FEHA's terms.

The ADA grants regulatory authority to different federal agencies in accordance with the law's varying purposes. Courts generally defer to a regulatory agency's interpretation of the laws it implements, as long as the regulations are reasonable and based on the statute they interpret. The ADA directs the Equal Employment Opportunity Commission to issue regulations implementing the various titles within the law, but no agency is empowered to issue regulations interpreting the ADA's generally applicable introductory provisions — including the all-important definition of "disability" — or the provisions of Title IV that include retaliation prohibitions. Despite the lack of direct statutory authority, the EEOC has drafted regulations explaining the meaning of "disability,"

and most courts and commentators have deferred to those regulations.

This Guide includes references both to the text of the laws and the agencies' regulations that implement the statutory requirements. A chart compares key provisions of the laws. The guide also discusses other laws that protect disabled workers, such as the federal Rehabilitation Act of 1973, the federal Family and Medical Leave Act and corresponding California Family Rights Act, and workers' compensation laws. Along with a chapter that summarizes major court decisions interpreting disability laws, the guide includes a table of cases and concludes with appendices of useful resources for obtaining more information about disability discrimination.

Pocket Guide to Disability Discrimination in the California Workplace, by M. Carol Stevens and Alison Heartfield Moller (2007) 197 pp. California Public Employee Relations, Institute for Research on Labor and Employment, U.C. Berkeley, <http://cper.berkeley.edu/>. Softcover, \$16 (plus tax and shipping).

Public Access to DOL Union Information

The U.S. Department of Labor's Office of Labor-Management Standards has announced a major new web resource: UnionReports.gov/. The site is designed to maximize public access to information that the DOL gathers about unions, and is very extensive. Offerings include annual financial disclosure reports; constitutions and bylaws; officer and employer reports; employer and labor relations consultant reports; and statutory, regulatory, and compliance information. A "How to Use" section familiarizes users with the site.

UnionReports.gov, <http://www.unionreports.gov/>.

Labor Super Hero

A CIA-connected labor union, an assassination attempt, a mysterious car crash, listening devices, and stolen documents — everything you'd expect from the latest thriller. Yet, this was the reality of Tony Mazzocchi, the Rachel Carson

of the U.S. workplace; a dynamic labor leader whose legacy lives on in today's workplaces and ongoing alliances between labor activists and environmentalists, and those who believe in the promise of America.

Author and labor expert Les Leopold recounts the life of the late Oil, Chemical, and Atomic Workers Union leader. Mazzocchi's struggle to address the unconscionable toxic exposure of tens of thousands of workers led to the passage of the Occupational Safety and Health Act and his work alongside nuclear whistleblower Karen Silkwood. His noble, high-profile efforts forever changed working conditions in American industry.

Mazzocchi's story of non-stop activism parallels the rise and fall of industrial unionism. From his roots in a pro-FDR, immigrant family in Bensonhurst, Brooklyn, through McCarthyism, the Sixties, and the surge of the environmental movement, Mazzocchi took on Corporate America, the labor establishment, and a complacent Democratic Party.

The Man Who Hated Work and Loved Labor: The Life and Times of Tony Mazzocchi, by Les Leopold (2007) 544 pp. Chelsea Green Publishing, <http://chelseagreen.com/>. Hardcover, \$40; softcover, \$24. 95.

Community Colleges Evolve

In recent years, American community colleges have evolved as the missions facing them expanded and their constituencies changed. No longer is their role solely to prepare students to transfer to four-year institutions or to provide occupational training. Now, they must also make available basic adult education, including ESL, and serve an economic development role by implementing training programs that assist in retaining existing employees and attracting new ones.

Have these expanded efforts addressed their constituents' requirements or are community colleges failing to be as responsive as they need to be? Authors Leigh and Gill use data from California's community college system to address this question.

Their efforts focus on two major sources of change at the local level. First, on the supply side, they examine how

responsive community colleges are at meeting the education and training needs of the growing immigrant population. Then, on the demand side, the authors look into whether the need of local employers for skilled workers is being met, an issue impacted by dynamic technological change and increased global competition. The result is a book that identifies key patterns that community colleges should be aware of in order to remain responsive in their communities.

Do Community Colleges Respond to Local Needs? Evidence From California, by Duane E. Leigh and Andrew M. Gill (2007) 219 pp. W.E. Upjohn Institute, <http://www.upjohninst.org/>. Hardcover, \$40; softcover, \$18.

Minimum Standards for Family Values at Work

The MultiState Working Families Consortium (including the Labor Project for Working Families at U.C. Berkeley's Institute for Research on Labor and Employment) in conjunction with 10 national organizations has released a new report calling for minimum standards on family-friendly workplaces. The report, *Family Values at Work — It's About Time!*, details consequences for workers, families, businesses, and the nation "when family values end at the workplace door." The report notes a huge jump in the percentage of mothers-with-children who are employed or looking for a job as well as the growing percentage of workers under age 60 who will be caring for an elderly relative within the next 10 years. Both the full report or a summary can be downloaded at the LPWF website.

Family Values at Work — It's About Time! The Labor Project for Working Families, Institute for Research on Labor and Employment, U.C. Berkeley, <http://www.working-families.org/>. For more information, call 510-643-7088 or email info@working-families.org.

Nurturing Diversity Post-Proposition 209

In 1996, the California electorate adopted Proposition 209, which amended the California Constitution to provide that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis

of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” In the decade since the initiative took effect, California municipalities and state and local agencies have expressed widespread confusion about the meaning and scope of Prop. 209.

This memorandum provides a comprehensive analysis of the legal landscape post-Prop. 209 and permissible race- and gender-conscious measures that local entities can take to ensure equal opportunity in public employment. It includes an appendix of cases related to Prop. 209 and to the use of race- and gender-conscious measures in public contracting, education, and employment. It also identifies concrete examples of impermissible and permissible state action in each of these three areas.

The goal of this document is to assist state agencies across California in evaluating existing race- and gender-conscious measures, and strengthening their commitment to providing equal opportunity.

Steps That Government Agencies Can Take to Ensure Equal Opportunity in Public Contracting, Education, and Employment, by Jeffrey Bleich and Todd Gluth (Munger Tolles & Olson LLP) (2007) 29 pp. The report is online at <http://www.sfbar.org/diversity/resources.aspx/>. Hard copies are available by contacting Yolanda Jackson, Director of Diversity, The Bar Association of San Francisco, yjackson@sfbar.org or 415/782-9000 ext. 8736.

Public Employment Relations Board

Orders & Decisions

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

Dills Act Cases

Duty of Fair Representation Rulings

Board agent must ignore revocation cards when determining sufficient support for severance election: State of California.

(*State of California, IT Bargaining Unit 22, and Service Employees International Union, Loc. 1000, CSEA*, No. Ad-367-S, 11-6-07; 6 pp. dec. By Chairperson Neuwald, with Members McKeag and Rystrom.)

Holding: The board agent was instructed to ignore revocation cards when determining whether a petitioner has shown sufficient support for a severance election. Although the board agent based his acceptance of the revocation cards on *Antelope Valley Health Care Dist.* (2006) No. 1816-M, 177 CPER 26, the board found that neither *Antelope Valley* nor the Dills Act provided adequate precedent for consideration of revocation cards where a party has challenged their validity. For a more detailed summary of the decision, see the State section of this issue of *CPER*.

EERA Cases

Unfair Practice Rulings

Untimely filing excused due to honest mistake: LAUSD.

(*Gold v. Los Angeles Unified School Dist.*, No. Ad-368, 11-15-07; 5 pp. dec. By Member Wesley, with Chairperson Neuwald and Member Shek.)

Holding: Because of an honest mistake, the charging party never received correspondence from the board; this led to dismissal of the charge for failure to file a timely response. The charging party was given another opportunity to file an amended unfair practice charge.

Case summary: On April 26, 2007, the charging party filed an unfair practice charge with PERB on her own behalf. On June 1, she submitted a “Notice of Appearance” form listing an attorney as her representative.

On July 17, a board agent issued a warning letter advising that the charge failed to allege sufficient facts to demonstrate discrimination. The warning letter was sent to the attorney listed in the notice but not to the charging party.

Reprint Service

Copies of PERB decisions and orders are available from *CPER* at \$.30 a page. When ordering, identify the decision by the case title and decision number given at the beginning of each abstract. Send your prepaid order to *CPER*, Institute for Research on Labor and Employment, 2521 Channing Way, University of California, Berkeley, CA 94720-5555. Make checks payable to Regents, U.C. (The number of pages in each decision is indicated at the beginning of the synopsis.) All orders will be filled promptly and mailed first class.

(Note: PERB headquarters in Sacramento will provide copies of decisions, currently at \$5 a case, plus \$3 shipping and handling. Also, PERB decisions are collected in the government documents section of all state depository libraries, including the libraries of major universities. Most county law libraries and major law school libraries also receive copies. The decisions also are available on PERB’s website at <http://www.perb.ca.gov>.)

Neither the charging party nor the attorney provided a timely response to this letter; thus, the charge was dismissed on August 1.

On August 17, the attorney advised the board agent that she had just received the board's correspondence because she had been out of the country. She explained that she did not represent the charging party but was a witness in her case.

On September 28, the charging party filed a request to reopen her case. Her request explained, "At some point after filing my PERB complaint, I received a Notice of Appearance form letter, which I did not really understand, thus causing all my paperwork to be sent to someone else." She further stated that she did not receive the board agent's correspondence since it was sent only to the attorney. On October 2, the board's appeals assistant informed the parties of the charging party's request and gave the district 10 days to file a response. The district did not do so.

The board explained that the charging party's appeal of the dismissal should have been received by August 27. The appeal was untimely filed. PERB Reg. 32136 provides, "A late filing may be excused in the discretion of the board for good cause only." Citing *Lodi Unified School Dist.* (2005) No. Ad-346, 173 CPER 81, the board explained that it has deemed "honest mistakes," such as mailing and clerical errors, as good cause.

The board found that its correspondence with the attorney supported the charging party's claim that she did not understand the Notice of Appearance form. The board acknowledged that because the charging party inadvertently misidentified the attorney as her representative, she did not receive the warning or dismissal letters. The board explained that the charging party's error was compounded by the attorney's absence from the country. Although the attorney attempted to secure an extension of time to allow the charging party to appeal, she directed the request to the wrong office. Thus, the board concluded that good cause existed to excuse the late filing.

Lodi USD also held that if the justification for a late filing is found to be reasonable and credible, then the board

should evaluate whether there is prejudice to the opposing party should the late filing be excused. The board noted that the district did not respond to or oppose the charging party's request. It explained that allowing the charging party to amend her charge would not prejudice the district because if a complaint were issued, the district would have an opportunity to respond.

EERA Sec. 3541.3(i) empowers the board to take action it deems necessary to effectuate the policies of the act. The board stated that in a similar case, *California Teachers Assn. (Underbill)* (2001) No. 1466, 152 CPER 95, the warning and dismissal letters were sent to the wrong person. There, the board remanded the charge to the general counsel to permit the charging party an opportunity to review the warning letter and file an amended charge.

Because the charging party did not have an opportunity to respond to the warning letter and file an amended charge, the board held that the policies of EERA would be best served by giving her an opportunity to do so. The board reversed the board agent's dismissal and remanded the case to the general counsel for further investigation and to grant the charging party the opportunity to file an amended unfair practice charge.

Lack of control over terms and conditions of employment precludes joint-employer status: San Jose/Evergreen CCD.

(Doberty and O'Neil v. San Jose/Evergreen Community College Dist., No. 1928, 11-16-07; 26 pp. dec. By Member McKeag, with Member Wesley; Member Shek dissenting.)

Holding: Because the district did not exert a significant degree of control over the terms and conditions of the charging parties' employment, a joint-employer relationship did not exist. Because the underlying retaliation charge was based solely on acts of non-district employees, the lack of a joint-employer relationship defeated the unfair practice charge.

Case summary: The charging parties are part-time instructors who have taught various classes offered by the South Bay Regional Public Safety Training Consortium.

They alleged that the San Jose/Evergreen Community College District retaliated against them for obtaining assistance from the San Jose Evergreen Faculty Association, AFT, Local 6157.

The district is comprised of two colleges, Evergreen Valley College and San Jose College. Throughout the 1980s and early 1990s, the district and Gavilan Community College District operated training academies for police officers, firefighters, and other public safety personnel. In 1995, in response to budget problems, the district and Gavilan CCD created a joint-powers agency and adopted a joint-powers agreement. That agency became known as the consortium.

Consortium bylaws require member districts to annually commit to a certain number of full-time equivalent student (FTES) units. The number of units determines district funding. Each district must offer a minimum of 25 FTES units to participate in the consortium.

The JPA provides that instructors teaching courses through the consortium “shall be employed via a contract with one of the participating college districts,” and that “such personnel shall be designated as the instructor of record for courses approved and offered by each member college.”

The consortium bylaws empower it “to contract with member districts for the employment of faculty or staff or to directly employ non-teaching staff,” and “all instructional staff shall be contracted from member districts via a written agreement with the consortium.” The district executed such a staffing agreement with the consortium under which it agreed “to provide, through its established employment policies and procedures, academic and classified employees to perform duties and responsibilities as required by the JPA within district job classifications.”

The staffing agreement, consistent with the JPA, requires all employees furnished by the district to meet qualifications specified in district position descriptions. The district certification process, known as “boarding,” confirms that an instructor meets the minimum qualifications of Title 5. This certification is necessary for reimbursement of an

instructor’s services, and only the district community colleges have the power to “board” instructors.

In practice, the district and consortium have disregarded most of the provisions in the JPA and staffing agreements, and the bylaws regarding the employment, management, and supervision of the consortium faculty. The consortium’s dean of instructions supervises the consortium’s training coordinators, who are responsible for scheduling classes and ensuring the instructor pool adequately satisfies the needs of the academies. Coordinators are also responsible for ensuring the instructors have the necessary credentials and have been “boarded.”

After recruiting instructors, coordinators send them to one of the community college districts for boarding. At present, 90 percent of the instructors are boarded through the district; approximately 250 to 300 are assigned by coordinators to teach various classes.

Notwithstanding the employment provisions in the bylaws, the consortium began to hire instructors on its own in 1997. The district never challenged this practice. Currently, there are approximately 30 classified employees of the consortium.

The district recognizes the association as the exclusive representative of the faculty. The district faculty is paid in accordance with the collective bargaining agreement between the district and the association. The staffing agreement provides that district employees affiliated with the consortium will not be considered employees of the consortium, but employees of the district. However, the pay rate of those employees is set by the consortium without reference to district pay schedules.

Although the district provides payroll services to the consortium, the consortium sets instructors’ salaries and controls employee hiring, firing, discipline, and management. The district does not maintain payroll records or personnel files for consortium faculty.

The staffing agreement provides that evaluations of consortium faculty will be conducted in accordance with district policies. However, the district does not participate in

the evaluation. Moreover, although the collective bargaining agreement contains provisions regarding the review of the district's faculty, those procedures have not been used for consortium faculty. Indeed, the board found no facts to suggest that consortium instructors enjoy any of the rights or privileges granted to district faculty under the contract.

One of the two charging parties was an experienced firefighter boarded by the district in 1994 and hired shortly thereafter. He first taught in the district's public safety training academy, and later accepted assignments at Gavilan CCD and San Mateo CCD. He was a training coordinator for the consortium from 1998 to 2002, but was paid through payroll checks issued by the district.

The other charging party was a reserve police officer. In 1994, after he was hired as an instructor in the communications dispatcher academy, he was boarded by the district. The district contributed to both charging parties' California State Teachers Retirement System accounts.

The underlying dispute concerns an unwritten consortium policy that imposes a 190-hour cap on instructional time within a college semester. The board explained that the genesis of the rule was likely Ed. Code Sec. 87482.5(a), which states, "Any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment...shall be classified as a temporary employee." The payroll department of the consortium monitors the hours worked, and when an instructor reaches the 190-hour mark, the instructor's name is put on a "watch list." Typically, when the limit is reached, the problem is resolved by voluntary compliance by the instructor. However, on certain occasions, coordinators have had to go to classrooms and remove instructors to prevent them from exceeding the limit.

In 2002, the charging parties began to question this rule. In August 2002, a union attorney advised both the district and the consortium that the charging parties should be reclassified as probationary employees because they worked in excess of the 60 percent limit in several preceding semesters. It is the alleged conduct of several consortium employees both before and after issuance of this letter that formed

the basis for the charging parties' retaliation claims. Specifically, they charged that their teaching hours were reduced by consortium employees in retaliation for their reclassification requests.

The board explained that the threshold issue was whether the district could be held accountable for the actions of the consortium employees. The charging parties asserted that the district was accountable under a joint-employer theory, but the board rejected that assertion.

It is well established, the board explained, that an employee may have more than one employer controlling the terms and conditions of employment. A "joint employer" situation arises where two or more employers exert significant control over the same employees and share or co-determine matters governing essential terms and conditions of employment. Citing *United Public Employees v. Public Employment Relations Board* (1989) 213 Cal.App.3d 1119, 83 CPER 32, the board explained that a joint-employer theory does not depend on a single integrated enterprise; rather, it assumes the enterprises are independent legal entities that historically have chosen to jointly conduct important aspects of the employer-employee relationship.

Here, the board found that the consortium, without input or assistance from the district, selected, evaluated, scheduled, supervised, and counseled the charging parties. The consortium set policies, determined what classes to offer, maintained the charging parties' personnel files and payroll records, assigned classes, and managed most aspects of the charging parties' employment as instructors at the consortium. Furthermore, the consortium set the charging parties' salaries without reference to the district's salary schedule. The board found that although the charging parties were paid by checks issued by the district, the district's role was that of a payroll service provider since the consortium reimbursed the district for all administrative costs.

Thus, the board found that although initially the district hired and boarded the charging parties, it ceded virtually all control over them to the consortium. Accordingly, the board concluded that the district and the consortium were not joint employers.

The PERB board admitted that boarding is a significant employer action as prerequisite to drawing state funding. However, the board explained, being boarded does not automatically qualify a prospective instructor to teach a class; additional requirements must sometimes be met. Although the district exercised some initial control over the charging parties, that control ceased when they began working for the consortium. In light of the fact that the consortium exerted almost exclusive control over the charging parties during the seven years they taught consortium classes, the board concluded that the district's initial acts of control failed to demonstrate the substantial control necessary to support a finding of a joint-employer relationship.

The board observed that the administrative law judge relied heavily on the language in the bylaws in concluding the district and the consortium were joint employers. Both the JPA and the bylaws require the consortium to employ instructors via contract with one of the member districts. But, citing *Ventura County Community College Dist.* (2003) No. 1547, 163 CPER 81, the board reasoned that it is not bound by contract language when determining the existence of a joint-employer relationship.

The board found that, notwithstanding the JPA, the consortium has been hiring instructors since 1997. Furthermore, notwithstanding the staffing agreement, instructors were not paid in accordance with the district's salary schedule. Nor did they derive any other rights or privileges from the district's collective bargaining agreement. Thus, the board concluded, these actions better reflect the true nature of the employment relationship between the district and the consortium, and the mere fact that the bylaws describe instructors as employees of the district does not, in light of the parties' conduct, create a joint-employer relationship.

When determining whether there is a joint employer, the central focus is the level of control each entity exerts over the shared employees; in contrast, the focus of the ALJ's proposed decision was on the relationship between the parties.

The board also criticized the ALJ's reliance on *Ventura*. In that case, PERB held that the county sheriff and the community college district were joint employers of instructors

teaching in a police-training POST-certified academy, previously operated solely by the sheriff. The two employers negotiated an affiliation agreement that purported to treat the instructors as non-employees of the community college district. Despite that agreement, the board found that the community college district treated instructors as employees, and found joint-employer status. The board explained that, unlike here, actual control was not an issue in *Ventura*. In *Ventura*, there was an assumption that the district exercised a significant level of control over the employees.

Here, the board concluded that because the charging parties failed to show that the district exerted a significant degree of control over the terms and conditions of their employment, a joint-employer relationship did not exist. Accordingly, because the underlying retaliation charges were based solely on alleged acts of consortium employees, the lack of a joint-employer relationship precluded the filing of the charges.

Board Member Shek dissented from the decision. She argued that the board's rationale provides an unwarranted safe harbor for the district, which would otherwise be subject to PERB's jurisdiction over EERA pursuant to the FTES regulations and the consortium bylaws. Shek stressed that the majority's interpretation of the law excuses the district from its duty to control and direct district employees, necessary to receive state funding. Finding no evidence that the parties officially terminated any of the agreements, Shek found them to be operative. Furthermore, the dissent pointed out, the charging parties are left without a remedy, frustrating the intent of EERA.

Charge dismissed due to lack of dates of violations: LAUSD.

(*United Teachers of Los Angeles v. Los Angeles Unified School Dist.*, No. 1929, 11-16-07; 7 pp. dec. By Member Shek, with Members McKeag and Rystrom.)

Holding: The charging party's unfair practice charge was dismissed because the board could not calculate the timeliness of the filing due to an absence of a concise statement of the dates of the occurrences underlying the alleged violations in the charge.

Case summary: The case came before the board on appeal by the union of the dismissal of its unfair practice charge. The charge alleged that the district violated EERA by retaliating against two adult education teachers' representatives for engaging in protected activities.

In its charge filed September 13, 2006, the union stated that the elected representatives engaged in protected activities, namely, representing members, advocating union positions, and organizing bargaining unit members. The union alleged that from June to September 2005, the district engaged in a series of reprisals against the representatives, following the district's investigation of an employee's complaints of harassment and discrimination against the representatives.

The alleged acts of reprisal included issuance of complaints of harassment and discrimination absent any supporting evidence, breach of confidentiality by the district during its investigation of the complaints, violation of the representatives' *Weingarten* rights, issuance by the district's equal opportunity section of critical material against the representatives after its own investigation established the charges were unfounded, and involuntary transfer of the representatives from their assigned work location.

The union argued that the charge was timely since the representatives filed a grievance related to the allegedly retaliatory involuntary transfer on September 19, 2005. The union also contended that the statute of limitation was tolled during the time that the parties had attempted to resolve the charge through the grievance machinery, a process that continued from September 19, 2005, through March 29, 2006.

On December 6, 2006, the union filed an amended unfair practice charge alleging additional facts it asserted would toll the statute of limitations. These included claims that the union attorney was notified on March 22, 2006, of a February 24, 2006, filing of a harassment and discrimination complaint against the representatives; a grievance filed by the representatives on August 24, 2005, regarding the district's alleged breach of confidentiality during its investigation; and a grievance filed on March 24, 2006, addressing

the alleged issuance of critical material by the district's equal opportunity section.

The district argued that the union had failed to plead facts with sufficient specificity and that matters referencing notices issued to the representatives already were resolved as they were the subject of two prior PERB charges.

In a warning letter dated November 21, 2006, a board agent found that the retaliatory, involuntary transfer allegation was timely filed because on September 19, 2005, the union filed a grievance alleging that same charge. The related grievance progressed through the parties' dispute resolution process until March 29, 2006. The board agent found, based EERA Sec. 3541.5, that the allegation was to be deferred to arbitration.

The board agent issued a notice of dismissal and deferral to arbitration on December 27, 2006, stating that all of the allegations in the original and amended unfair practice charge — except for those addressed by the grievance filed on September 19 and the harassment and discrimination complaint filed against the representatives on February 24 — were untimely. The board agent explained that the union failed to provide a date for the occurrence of the alleged retaliatory investigation and the discrimination complaints, making it impossible for the board to calculate if the charge was timely.

With regard to the claim that the union's attorney was notified on March 22, 2006, of the filing of the harassment and discrimination complaint by a fellow employee against the representatives on February 24, 2006, the board agent found the allegations insufficient to state a prima facie case because the charge did not assert that the fellow employee was a supervisor or agent of the district at the time the complaint was filed.

In its appeal, the union argued that the statute of limitations was tolled for the allegations contained in the unfair practice charge based on the two grievances filed by the representatives, on August 24, 2005, and March 24, 2006. The union asserted that the parties' contract implicitly requires grievances to be filed within 15 days of the occurrence of a violation. The union contended that the district's acceptance

of the grievances without challenging their timeliness showed that the grievances were timely filed and subsequently tolled the statute of limitations for purposes of the unfair practice charge. The union therefore challenged the board agent's finding that PERB could not calculate the timeliness of the charge without evidence pertaining to dates of occurrences of the alleged retaliatory events.

The board cited *City of Santa Barbara* (2004) No. 1628-M, 167 CPER 98, where it held that by failing to allege the date of a meeting at which an alleged violation occurred, the charging party had failed to demonstrate that the charge was timely. Here, the board found that the union had failed to satisfy its burden of stating sufficient facts to establish that the alleged unfair practice occurred no more than six months prior to the filing of the charge. The board explained that the union did not provide the dates of the occurrences of the alleged retaliatory events, which were the subjects of the grievances filed in August and March. Additionally, the board found that the union had failed to state sufficient facts to show that the six-month limitations period had been tolled during the time it took the charging party to exhaust the grievance machinery. The union did not state unambiguously when the grievance procedure had ceased.

The board concurred with the board agent's finding that, absent a concise statement of the dates of the occurrences of the alleged violations, and the date of the exhaustion of the grievance procedure, the timeliness of the allegations based on the two grievances in question could not be determined. The board concluded by deferring to arbitration the allegation of retaliatory involuntary transfer and dismissing the remainder of the unfair practice charge.

Retaliation allegations dismissed because no nexus between protected activities and adverse actions: LAUSD.

(*Kettenring v. Los Angeles United School Dist.*, No. 1930, 11-28-07; 2 pp. + 14 pp. ALJ dec. By Member Wesley, with Members McKeag and Shek.)

Holding: The charging party's unfair practice charge was dismissed because there was no nexus between the protected activities and the adverse retaliatory actions taken by the district.

Case summary: The charging party, a popular teacher and union activist, alleged that he suffered four adverse actions in retaliation for his union activities. All of these actions allegedly were taken by the principal of Evans Community Adult School, where the charging party was employed.

On June 13, 2005, the principal encountered an Evans staff member who told the principal that she felt she had been harassed by the charging party. A meeting between the principal and the charging party took place on July 12, 2005, to discuss the allegations. The next day, the principal issued the charging party a conference memorandum summarizing the meeting. It stated that the charging party argued that most of the allegations against him were untrue and did not constitute harassment. But according to the testimony at the hearing, the charging party had not specified what was true or untrue because the principal never asked him.

The principal's memorandum concluded that the charging party's behavior was unacceptable and that he should take courses in anger management. He also was given copies of the district's policies regarding non-discrimination and respectful treatment of employees. Furthermore, the principal directed the charging party to stop his harassing behavior, demonstrate respectful treatment of coordinators, and take no retaliation against his accuser.

Instead of responding to the memorandum by the date specified, the charging party filed an unfair practice charge with PERB on July 21, 2005. The next day, the charging party sent the principal a memorandum stating that he would not follow her directive because he could not cease a behavior he did not initiate and that his accuser's allegations did not amount to improper activity. He also asserted that the principal's failure to ask him about the accuracy of the allegations and to conduct a cursory investigation indicated a predisposition toward prejudicial actions. Also, he argued that the principal's behavior toward union representatives was unacceptable, pointing to EERA Sec. 3543.5, which pro-

hibits retaliation against union representatives for their union activities. He also criticized the principal's recommendation that he take courses in anger management and the provision of the district's policies regarding non-discrimination and respectful treatment of employees.

The charging party distributed his memorandum to several Evans staff members, with the unfair practice charge attached. On July 27, the principal wrote the charging party that his memorandum was insubordinate, derogatory, defamatory, and retaliatory against his accuser. The principal also warned the charging party to stop distribution of his memorandum.

In addition to the harassment allegations, the charging party was notified about unacceptable behavior concerning his students' attendance. Evans staff members had observed that the charging party's classroom was empty on June 20 and 21, 2005. When the principal questioned the charging party about his students' whereabouts, he explained that they had been given a home study assignment. The principal told him that home study hours could not be reported on his rosters for those days.

On July 13, 2005 the principal issued the charging party a memorandum directing him to maintain regular attendance throughout the entire trimester, including the last week of school. The memorandum did not indicate that the charging party's conduct might result in discipline.

After issuance of the July 13 conference memorandum, the principal followed the recommendation of the staff relations coordinator and issued the charging party a notice of unsatisfactory acts and a three-day suspension.

According to the ALJ, the principal "credibly" testified that she would have taken the same actions against the charging party if he had not engaged in protected activity. While the charging party was not the only teacher to have few students on June 20-21, 2005, the principal explained that she cited the charging party because he had actively discouraged attendance.

The ALJ found that the charging party had exercised his rights under EERA, both by engaging in union activities

and by filing his unfair practice charge, and that the principal knew about these activities. However, the ALJ found no evidence that the charging party's request that a district assistant superintendent be investigated for payroll fraud was union activity or protected conduct.

The ALJ also found that the charging party suffered adverse action, most obviously in the notices of unsatisfactory acts and suspension, but also in the principal's July 13 and 27 memoranda. The ALJ explained that the memoranda threatened disciplinary action and that a reasonable person would find them to have an adverse impact on the charging party's employment.

Citing *Novato Unified School Dist.* (1982) No. 210, 54 CPER 43, the ALJ explained that the key issue was whether the adverse actions were taken because of the charging party's protected conduct. The ALJ rejected the charging party's assertion that there was direct evidence of unlawful motivation based on the superintendent's negative comment about the charging party's request for an investigation. The ALJ found that the request was not protected conduct.

The charging party also argued that there was circumstantial evidence of unlawful motivation since the principal treated him differently regarding the July 13 memorandum and conducted no investigation. The charging party pointed out that when he had complained of a hostile work environment, the principal had asked for details and had concluded the complaint had merit after hearing from 11 witnesses.

The ALJ found this argument unpersuasive. The ALJ explained that the accusations against the charging party were detailed and specific, in contrast to the charging party's complaints which were less specific and referred to multiple victims without identifying them.

With regard to the investigation of the complaint against the charging party, the ALJ found it was the charging party who "short-circuited" the investigation. After the principal postponed the conference twice to accommodate the charging party, and after she presented him with detailed allegations, the charging party told the principal that most of the allegations were untrue, but several were true. The

ALJ found it was reasonable for the principal to accept this as the response the charging party chose to make, and to find it inadequate.

As for the charging party's argument that the principal treated him differently and conducted no investigation with regard to the notices of unsatisfactory acts and suspension, the ALJ found no evidence that the principal failed to consider the fact that other teachers also had meager attendance during the end of the school year. It was reasonable for the principal to conclude that the charging party, "while paying lip service to district policy," effectively discouraged student attendance, and that this merited disciplinary action. Also, the ALJ found that the charging party did not prove the district improperly disciplined him after issuing him a conference memorandum covering the same underlying conduct.

The ALJ found the principal to be a credible witness and a fair-minded person, and credited her testimony that she would have taken the same actions against the charging party even if he had not engaged in protected activity. Therefore, the ALJ dismissed the unfair practice charge.

The board found the ALJ's proposed decision free of prejudicial error and adopted it as the decision of the board itself. It added, however, that it would not credit the principal's testimony that she would have taken the same actions against the charging party even if he had not engaged in protected activity. The board explained that because the charging party failed to demonstrate a nexus between his protected activity and the district's adverse actions, it need not reach that issue.

Unfair practice charge partially dismissed as untimely: Santa Cruz County Superior Court.

(California Federation of Interpreters/TNG/CWA v. Santa Cruz County Superior Court, No. 1931, 11-29-07; 6 pp. dec. By Member Neuwald, with Members McKeag and Rystrom.)

Holding: Allegations that occurred more than six months prior to the filing of the unfair practice charge were dismissed as untimely filed.

Case summary: The union's unfair practice charge, filed March 15, 2006, alleged that the Santa Cruz County Superior Court violated the Trial Court Interpreter Em-

ployment and Labor Relations Act by (1) giving independent contractors priority over employees for job assignments; (2) hiring non-certified independent contractors despite the availability of certified and registered contractors; and (3) retaliating against bargaining unit employees for their exercise of protected rights.

The union is the exclusive representative of all employees of the superior courts of California in Region 2. The employees provide language interpretation services in court and related proceedings.

On July 5, 2005, the court hired a large number of independent contractors for a multi-defendant preliminary examination referred to as the "Honda Express." In late August, the union heard rumors that the court was paying premium rates to independent contractors hired to work on the preliminary examination. On August 25, the union made a request for information regarding interpreter calendaring, activity logs, and compensation data. The court responded on September 14.

The compensation data showed that both certified and non-certified contract interpreters were paid a per diem amount slightly higher than the standard rate. The standard rate of pay for non-certified contractors was \$175 per day and \$92 per half-day. The court hired a number of non-certified contract interpreters who were paid at a significantly higher rate. Also, the court sought out non-certified contract interpreters from the start of the preliminary examination, before it completed a diligent search for certified interpreters. After the "Honda Express" preliminary examination concluded on September 27, the court continued to employ contract interpreters at the same premium rates of pay and with similar working conditions as during the examination.

On December 19, 2006, a board agent issued a partial dismissal of the charges because all events prior to September 14, 2005, were untimely filed. The union's appeal to the board agent's partial dismissal was limited solely to the finding regarding the statute of limitations. The union argued that it was entitled to a reasonable amount of time to review the court's "voluminous response" to the union's informa-

tion request. The union complained that it “was required not only to review each invoice presented, but it then had to contact members of the bargaining unit to determine whether they had been offered the same premiums.”

The board explained that the limitations period begins to run once the charging party knew, or should have known, of the conduct underlying the charge. Because the union filed an unfair practice charge with the board on March 15, 2006, all allegations that occurred prior to September 14, 2005, were untimely. The board thus affirmed the board agent’s partial dismissal of the unfair practice charge.

Reconsideration request denied because no prejudicial errors of fact, newly discovered evidence: San Leandro USD.

(*Mandell v. San Leandro Unified School Dist.*, No. 1924a, 12-21-07; 2 pp. dec. By Member McKeag, with Chairperson Neuwald and Member Shek.)

Holding: The charging party’s request for reconsideration was denied because it neither identified prejudicial errors of fact, nor presented newly discovered evidence.

Case summary: The charging party sought reconsideration of the board’s decision in *San Leandro Unified School Dist.* (2007) No. 1924, 187 CPER 90. In *San Leandro*, the board upheld the dismissal of an unfair practice charge alleging that the district violated EERA by discriminating against the charging party when he filed a grievance. The charging party sought reconsideration based on his belief that the decision was due to prejudicial errors of fact.

Requests for reconsideration are governed by PERB Reg. 32410, which provides, “The grounds for requesting reconsideration are limited to claims that: (1) the decision of the board itself contains prejudicial errors of facts, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with exercise of reasonable diligence.”

The board found that the charging party’s request for reconsideration neither identified prejudicial errors of fact, nor presented newly discovered evidence. Rather, the board explained, the request merely reiterated the arguments pre-

viously raised on appeal. Citing *Oakland Unified School Dist.* (2004) No. 1654a, 168 CPER 102, the board reiterated that simply arguing the same facts as were presented on appeal does not fulfill the requirements of PERB Reg. 32410. Accordingly, the board denied the charging party’s request for reconsideration.

Delivery of reprimand does not trigger representation rights: Los Banos USD.

(*Ulmschneider v. Los Banos Unified School Dist.*, No. 1935, 12-21-07; 2 pp. + 8 pp. R.A. dec. By Member McKeag, with Chairperson Neuwald and Member Rystrom.)

Holding: The charging party’s unfair practice charge was dismissed because the delivery of a predetermined disciplinary action, such as a letter of reprimand, does not trigger the right to representation.

Case summary: The charging party alleged that the Los Banos Unified School District violated EERA by conducting unscheduled and unplanned meetings with him and by denying representation to him at these meetings.

The charging party was employed as a teacher by the district and taught at Los Banos High School. The district’s teachers are exclusively represented by the Los Banos Teachers Association.

The charge alleged that on December 5, 2006, the principal of Los Banos High School had a meeting with the charging party that was unscheduled and unplanned, the charging party was not allowed representation, and he subsequently received a series of formal reprimand letters. On December 15, 2006, the charging party had a letter of reprimand read to him in the presence of a teacher and association representative. Then on January 30, 2007, another letter of reprimand was read aloud to the charging party, over his objections.

On February 13, 2007, during instruction time, the high school vice principal entered the charging party’s classroom to deliver a letter requiring him to meet with the principal later that morning. The charging party appeared at the meeting and requested to be represented by a different union representative than his current one, but his request was re-

fused. A letter of reprimand from the district personnel director was read to him.

The charge further alleged that on April 23, 2007, the principal made another unscheduled visit to the charging party's classroom to issue him a warning and tell him that he was not allowed representation. The next day, the charging party received yet another letter of reprimand in the presence of another teacher.

Citing *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251, the R.A. explained that an employee required to meet with the employer is entitled to union representation where the employee requests representation at an investigatory meeting that he reasonably believes might result in disciplinary action. In approving the *Weingarten* rule, the U.S. Supreme Court noted that the rule would not apply to "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." In *State of California (California Highway Patrol)* (1997) No. 1210-S, 125 CPER 88, the board held that there is no right to representation where the purpose of a meeting is simply to deliver notice of the discipline and not to elicit damaging facts or possibly modify discipline.

The R.A. explained that the charging party was not required to provide information as a part of an investigation at any of the meetings referenced by the charge; a meeting must be investigatory in order for the *Weingarten* right to representation to be applicable. Further, the R.A. explained that the charge also demonstrates the charging party had an association representative present at many of these meetings, and the board has held in *State of California (Dept. of Transportation)* (1994) No. 1049-S, 107 CPER 72, that an employee is not entitled to demand a specific union representative. Also, in that case, the board held that delivery of a predetermined disciplinary action, such as a letter of reprimand, does not trigger the right to representation. The R.A. found that under the above standards, the charge did not state a violation of the charging party's *Weingarten* rights, and dismissed the charge.

The board found the R.A.'s dismissal proper and adopted it as the decision of the board itself.

Duty of Fair Representation Rulings

Employee's self representation defeats DFR claim: Long Beach Council of Classified Employees, AFT, AFL-CIO.

(*Osewe v. Long Beach Council of Classified Employees, AFT, AFL-CIO*, No. 1934, 12-21-07; 7 pp. dec. By Member Shek, with Members McKeag and Rystrom.)

Holding: The charging party's charge alleging a breach of the duty of representation was dismissed, in part, because it was untimely filed. The timely portion of the charge was dismissed because the charging party ignored the union's advice regarding grievance proceedings, thus effectively choosing to represent himself and relieving the union of its representation responsibilities.

Case summary: The case came before the board on appeal by the charging party of a board agent's dismissal of his unfair practice charge. The charge alleged that the union violated EERA by insisting on an informal appeal regarding the charging party's annual job performance evaluation and then abandoning the appeal. The charging party asserted that this conduct violated the duty of fair representation.

The charging party was employed as a custodian at the Long Beach Community College District's Pacific Coast campus. He received a poor annual evaluation from the district at a meeting on May 11, 2006. The union president was at the meeting and represented the charging party.

The union president testified that under the collective bargaining agreement, the first step in the grievance procedure is an informal meeting, followed by a formal written grievance. The charging party argued that pursuant to the contract, a grievance could be filed at any level. The relevant contract provision, Article 18.4.3 provides: "Whenever the district and LBCCE agree it is appropriate, they may permit a grievance to be initiated at any step in the grievance procedure."

On May 24, the union president insisted that the informal grievance process be initiated, and that the charging party would "be on his own" if he chose to file his own grievance. Against this advice, on June 1, the charging party filed his own formal grievance against the district.

On June 5, the union president wrote the charging party, “since you chose to file your own grievance, you dismissed the union from representing you, and now you have the responsibility to represent yourself, and there will be no union representative at any of your grievance meetings.” The grievance was subsequently denied on August 11, 2006.

The charging party also alleged that his September 6 email to the union president, asking for copies of union reports and records regarding his grievance for the past year, was ignored. He argued this also violated the duty of fair representation.

After a board agent warned the charging party that his charge was untimely filed, the charging party filed an amended unfair practice charge on March 29, 2007, alleging that “it wasn’t until August 11, 2006 when the union vice president issued an arbitrary decision based on intimidations and threats from the acting facilities director, he became aware that his right to pursue his claim was foreclosed.”

The union argued that the president’s conversation on May 24, 2006, informed the charging party that his grievance regarding the poor evaluation should be filed pursuant to the informal grievance process, and that the union would not assist him if he chose to file his own grievance at another level. This same advice was given to the charging party repeatedly in June.

The board agent reviewing the charging party’s case stated in a warning letter dated March 19, 2007, that the charge was untimely filed. The board agent found that the charging party was put on notice as early as May 24, 2006, or at the latest July 17, 2006, that the union president would not serve as his representative if he ignored union advice and filed his own grievance. Thus, the board agent found that the statutory time period began to run on May 24, 2006, or July 17, 2006, and that the charge, which was filed on January 29, 2007, was outside the six-month statute of limitations period. The board agent further found that even if the charge were timely, it failed to state a case of arbitrary conduct violating the duty of fair representation.

The board agent dismissed the charge on July 25, 2007. The dismissal letter stated that the August 11, 2006, date

mentioned in the amended charge had no bearing on the relevant date of inquiry — when the union confirmed that it would cease representing the charging party.

On appeal, the charging party contended that the unfair practice charge was timely and that it properly stated a violation of the duty of fair representation.

The board relied on its decision in *Los Angeles Unified School Dist.* (2007) No. 1929, 188 CPER 94. In that case, the board held that the charging party has the burden of alleging facts showing that the unfair practice charge was timely filed. There, by failing to allege the date of a meeting at which an alleged violation occurred, the charging party had failed to demonstrate that the charge was timely filed.

Here the board found that the charging party similarly failed to establish that the alleged unfair practice occurred no more than six months prior to the filing of the charge. Based on the charging party’s own allegations, the board found that he “knew or should have known” that the union president and the union would not represent him in his grievance on or about June 5, 2006, or at the latest, on July 17, 2006, when the union president informed him that the union would not represent him with regard to another incident. All of these dates, the board explained, occurred more than six months prior to the filing of the unfair practice charge on January 29, 2007. Therefore, the board concluded, the allegation that the union failed to represent the charging party was untimely filed.

The charging party’s allegation that the union president ignored his request for information on September 6, 2006, was timely filed, but the board held that the facts surrounding this incident could not support a duty of representation violation. Citing *Valley of the Moon Teachers Assn.*, CTA/NEA (1996) No. 1165, 120 CPER 96, the board explained that where an employee chooses self-representation, the employee organization has no obligation to provide representation or assistance. Consistent with this precedent, the board held that the union did not violate the duty of fair representation even if it failed to respond to the charging party’s information request.

The board affirmed the dismissal of the charge.

Untimely filed appeal rejected due to lack of ‘excusable misinformation’ or explanation how illness prevented prompt filing: Long Beach Council of Classified Employees.

(*Osewe v. Long Beach Council of Classified Employees, AFT, AFL-CIO*, No. Ad-369, 12-21-07; 5 pp. By Member Shek, with Members McKeag and Rystrom.)

Holding: The charging party’s appeal of the dismissal and request that the board accept the late filing of his appeal were rejected because he failed to provide a reasonable excuse for the late filing or show excusable misinformation. The charging party failed to explain how his hospitalization prevented timely filing.

Case summary: The charging party’s unfair practice charge was dismissed by a board agent on July 31, 2007. On August 28, along with his appeal of dismissal, he filed a request that the board accept his late filed appeal, which was due on August 27. He alleged that he called the board agent three weeks before his filing, attempting to obtain an extension of time to file the appeal, but an answering machine recording stated that the board agent was out of the office until August 20.

A PERB appeals assistant had called to inform him that the proof of service in a separate unfair practice charge, *Osewe v. Long Beach Council of Classified Employees, AFT, AFL-CIO* (2007) No. 1934, 188 CPER 100, was incorrectly filed. In a letter sent to the charging party on August 6, the appeals assistant afforded him until August 24, 2007, to provide PERB with a proper proof of service in that matter.

The charging party contended that he assumed the appeals assistant had granted an extension of time to his appeal in the present case. He also stated that he “had been hospitalized since last week and just came home.”

The board explained that the charging party’s unfair practice charge was dismissed on July 31, 2007, and his appeal of the dismissal was due no later than August 27, 2007. The board found that under PERB Reg. 32132, his attempted verbal request for an extension, by telephone on August 6, did not satisfy the requirement for a written request to be

submitted at least three days before the expiration of the time required for filing.

PERB Reg. 32136 provides that the board may excuse a late filing for good cause. Good cause may exist in situations where the explanation is reasonable and credible. The board found that the charging party’s alleged misunderstanding of the appeals assistant did not constitute excusable misinformation. The board explained that the appeals assistant’s correspondence in the other case made no reference to the present matter, and contained no information that would have caused a reasonable person under similar circumstances to reach the charging party’s conclusion.

The board further explained that when a late filing is caused by an alleged illness, the party still must demonstrate a conscientious effort to timely file. In *State of California (Dept. of Social Services)* (2001) No. Ad-308-S, 148 CPER 79, the party claimed a serious illness had prevented his timely filing. A doctor visit verification form indicated that the party was unable to work for a specified period of time. Although the party submitted proof of illness, the board found he did not explain how the illness prevented him from making a conscientious effort to timely file.

In the present case, the board noted, the charging party claimed that he had been hospitalized, but he offered no verification of hospitalization. The board held that even assuming the charging party had been hospitalized for a week prior to the filing of his appeal, such an assumption, uncorroborated by a reasonable and credible explanation of how his hospitalization prevented his prompt filing, did not reasonably excuse him from his obligation to make a conscientious effort to file in a timely manner. Thus, the charging party’s request that the board accept his late-filed appeal was denied.

HEERA Cases

Unfair Practice Rulings

Implementation of computer use policy is managerial prerogative: CSU.

(*California Faculty Assn. v. Trustees of the California State University*, No. 1926-H, 10-31-07; 12 pp. dec. By Chairperson Neuwald, with Members McKeag and Rystrom.)

Holding: The association's unfair practice charge alleging that the university unilaterally implemented a computer use policy in violation of HEERA was dismissed because implementation was a managerial prerogative not within the scope of bargaining. The union's refusal to negotiate the effects of the policy in reliance on the contract's zipper clause did not bar implementation of the policy.

Case summary: The charging party alleged that in bypassing the association and dealing directly with unit employees by implementing a computer use policy at its Monterey Bay campus, the university took unilateral action in violation of HEERA Secs. 3571(a) and (c).

CFA represents a unit of approximately 2,100 academic support employees. All the employees are assigned CSU computers. On April, 29, 2003, CSU notified the association of a proposed "Interim Appropriate Use Policy for Information Technology" at the Monterey Bay campus to be implemented on May 29. The university offered to meet with CFA. The association responded by stating that the policy contained a number of matters within the scope of bargaining, and that it was uninterested in opening the contract for renegotiation. CFA asserted that the matter should be deferred to statewide contract negotiations, and that the policy should not be enforced against association unit employees.

The university contended that the policy was not within the scope of representation, but that it was willing to meet and discuss the policy's impact on unit employees. On July 28, 2003, after the university implemented the policy, the association filed an unfair practice charge alleging that enactment of the policy at the Monterey Bay campus was a unilateral change.

An administrative law judge found that CSU breached its duty to negotiate in good faith with the association when it implemented the policy without providing prior notice and an opportunity to bargain the decision and its effects in violation of Sec. 3751(c). The ALJ relied on *Trustees of the California State University* (2003) No. 1507-H, where the board had found that while some portions of a computer policy concerned matters of management prerogative, other aspects of the policy were negotiable.

The ALJ further found CFA had not waived its right to bargain and could rely on the "zipper clause" of the collective bargaining agreement to resist CSU's efforts to change the status quo. It is a well-established principle, the ALJ explained, that a zipper clause may not be construed as a waiver of bargaining rights. And, while a union may use it as a shield to resist the employer's efforts to change the status quo, the employer may not use it as a sword to make unilateral changes over a union's refusal to bargain. Thus, the ALJ noted, an employer is prevented from using a zipper clause to change the status quo during the life of a collective bargaining agreement without the union's consent. As was relevant in this case, the ALJ explained that while an employer may be privileged during the life of a contract to unilaterally implement a matter that is a management prerogative, a union's refusal to bargain the effects of that decision based on a zipper clause likewise would serve to prevent the employer from implementing the decision itself and changing the status quo.

On appeal, the university argued that the policy was a non-negotiable management prerogative, and thus not within the scope of representation. CSU claimed that its campuses must have a computer use policy as a requirement established by Internet service providers, and that Internet access is vital to serving its education mission. CSU also argued that the ALJ erred in finding that the computer use policy was amenable to bargaining because it was discussed at the statewide negotiating table.

The university further contended that the ALJ erred in concluding that unions could prevent CSU from implementing a decision within management's prerogative by refusing

to bargain based on a zipper clause. Such a conclusion, CSU argued, would essentially eviscerate the concept of management rights, extending the effect of a zipper clause to not only prevent management from unilaterally implementing changes within the scope of bargaining, but also from exercising management prerogatives that only have tangential effects on negotiable matters.

The board found that CFA's interpretation and reliance on *Trustees of the California State University* was incorrect. It explained that in *Trustees*, the threshold question was whether the subject matter in the policies fell within the scope of representation under HEERA, not whether the decision to implement the computer policy was negotiable.

Here, the board expressly held that the decision to implement a computer resource policy is a managerial prerogative and, therefore, not negotiable. In support of this conclusion, the board found that CSU's computer policy was necessary for its educational mission. The board noted that computer virus attacks have the potential to shut down an entire network thereby preventing CSU from fulfilling its educational mission. The board found it necessary for the university to have a uniform policy for all users. Therefore, the board found that the decision to implement computer use policies implicates a fundamental managerial prerogative and falls outside the scope of bargaining. As such, CSU did not commit an unfair practice when it implemented the policy without bargaining.

The board added that while the decision to implement a computer use policy is within the university's managerial prerogative, CSU is not relieved of its duty to negotiate the effects of the policy on bargaining unit members if it impacts matters within the scope of representation.

The board also found that because there was no duty to bargain over the decision to implement the policy, the contract's zipper clause was inapplicable. The board held that the zipper clause did not preclude CSU from implementing the policy if CFA declined to negotiate the policy's effects. The board explained that a contrary conclusion would lead to absurd results. It would allow a union to delay the implementation of a non-negotiable layoff until after the

expiration of the contract simply in reliance on the zipper clause, the board hypothesized. Thus, the board held that an exclusive representative cannot properly refuse to bargain the effects in reliance on a zipper clause when the decision to implement the policy is itself a managerial prerogative.

Duty of Fair Representation Rulings

Charge dismissed as untimely filed: CFA.

(*Chapman and Druzgalski v. California Faculty Assn.*, No. 1933-H, 12-21-07; 10 pp. dec. By Member Wesley, with Members McKeag and Shek.)

Holding: The charging parties' allegations that the association obstructed implementation of a Senate bill governing grievance procedure rights were dismissed as untimely because the charge was not filed until three years after the bill's provisions were not incorporated into the memorandum of understanding.

Case summary: The charging parties are faculty members employed by the California State University and members of a bargaining unit exclusively represented by the California Faculty Association. The charge alleged that the association violated HEERA by interfering with the charging parties' statutory rights and failing to fairly represent them. Specifically, it asserted that the association blocked implementation of certain grievance procedures, thus requiring its members to use a grievance procedure that did not meet the requirements of Education Code Sec. 89542.5. The charge also alleged that the association interfered with the charging parties' efforts to convince the university's academic senate to implement certain grievance procedures.

Section 89542.5 requires the university to establish grievance and disciplinary action appeal procedures, including peer review and binding arbitration. Prior to October 2001, HEERA Sec. 3572.5 authorized the association and the university to supersede the requirements of Sec. 89542.5 when negotiating a memorandum of understanding.

HEERA Sec. 3562.5(b) now requires that Sec. 89542.5 procedures must, at a minimum, be included in the negotiated grievance procedure. Under the terms of Senate Bill

1212, applicable to contracts entered into after January 1, 2002, the parties are allowed to negotiate greater benefits and rights than those set out in Sec. 89542.5.

The association and university were parties to an MOU from July 1, 1998, through June 30, 2001. The agreement contained procedures for contract grievances, faculty status grievances, and disciplinary action appeals. The contract grievance procedure did not include peer review, but the faculty status procedure did.

When S.B. 1212 was enacted, the association and CSU were in the midst of negotiations over a successor agreement. On March 3, 2002, the association and the university agreed to extend the terms of the MOU “until such time as an agreement on S.B. 1212 implementation is reached or until the statutory bargaining process applicable to the S.B. 1212 implementation issue is completed.” The parties reached agreement on the remainder of a successor contract, which was effective May 14, 2002, through June 30, 2004. However, negotiations on implementation of S.B. 1212 continued and eventually reached impasse.

On October 15, 2003, the association filed an unfair practice charge alleging that CSU had unlawfully insisted that the association waive statutory rights and that this conduct led to impasse. The parties disagreed about whether there could be limits on the authority of the arbitrator to resolve grievances.

On May 9, 2004, one of the charging parties filed a grievance alleging a violation of the MOU. The contract grievance was processed pursuant to MOU Article 10, which did not include peer review by a faculty review committee. The university rejected the grievance in November 2004, and in April 2005, the association declined to submit the grievance to arbitration.

In November 2004, the other charging party complained to the association that it had prohibited faculty from exercising their right to peer review and binding arbitration of grievances. She argued that S.B. 1212 removed the grievance procedure from the scope of representation, thus prohibiting the association from negotiating with the university over the terms. She also contended that after S.B. 1212 was enacted,

peer review was exclusively within the purview of the academic senate, where grievances would be heard by faculty review committees established by the senate.

On December 13, 2004, an association director of representation informed the charging party of the association’s ongoing efforts to reach an agreement with CSU on implementation of S.B. 1212. He stated that the association had filed an unfair practice charge regarding the dispute. He reported that the parties reached a tentative agreement giving employees the option of two different grievance procedures, including one that incorporated Ed. Code Sec. 89542.5. Providing this option was consistent with S.B. 1212 in offering employees greatest procedural leeway. However, the associate director also stated that CFA and CSU had not concluded grievance procedure negotiations.

In January 2005, the charging party informed the academic senate of the requirements of S.B. 1212, opining that it had an obligation to form faculty review committees to review faculty grievances. The senate later advised the charging party that it would not do so because the grievance procedure was a negotiable subject outside the purview of the senate.

The charging parties filed their unfair practice charge on March 11, 2005. On September 28, 2005, a board agent dismissed the charge as untimely filed.

On appeal, the charging parties contended that the charge was timely because they did not become aware of the association’s opposition to implementation of the statutory grievance procedures until they received the association director’s letter on December 13. Further, they argued that the association processed the May 9, 2004, grievance within the statutory limitations period using procedures that unlawfully denied access to peer review. They asserted that the association interfered with efforts to convince the academic senate to implement S.B. 1212 when the association informed academic senators that it was continuing to negotiate changes to grievance procedures.

Next, the charging parties contended the association interfered with employee rights by blocking peer review of faculty grievances. They cited the charging party’s May 19, 2004, grievance, which did not include peer review or arbitration.

Finally, the charging parties argued the association breached its duty of fair representation by requiring employees to use a grievance procedure that did not meet minimum statutory standards, by failing to inform employees of their rights under S.B. 1212, and by bargaining over faculty rights that were not within the scope of representation.

The board explained that on March 3, 2002, the association and the university entered into an agreement to maintain the existing grievance procedure while they continued to negotiate implementation of S.B. 1212. And, on May 14, 2002, the parties reached an agreement on the remainder of the terms and conditions of employment. The agreement included a statement that the parties would continue to negotiate the implementation of the bill. It stated that the provisions of the revised grievance procedure would be added when negotiations were completed. Based on these events, the board found that the charging parties “knew or should have known” soon after May 14, 2002, that the association had not implemented the terms of the bill. Thus, the board found that the charge was untimely filed on March 11, 2005.

Regarding the May 19, 2004, grievance, the board found that simply by reviewing the grievance article in the MOU, the charging party “knew or should have known” his grievance would be processed under a procedure that did not include consideration by a faculty review committee. The board found the date of the grievance also fell outside the statutory limitations period. Thus, the board held the allegations that the association interfered with employee rights and breached its duty of fair representation by failing to implement S.B. 1212 were untimely filed.

The board explained that an unfair practice allegation may still be timely filed if the alleged violation is a continuing one. To establish a continuing violation, a charging party must demonstrate that the violation has been revived by subsequent unlawful conduct within the statutory limitations period.

The board rejected the charging parties’ argument that they only learned that CFA opposed the requirements of S.B. 1212 on December 13, 2004. First, the board found, the association director’s December 13 letter did not express

opposition to the requirements of the bill; in fact, the letter showed support for bill requirements. Also, citing *Fairfield-Suisun Unified School Dist.* (1985) No. 547, 68 CPER 69, the board explained that the statute of limitations runs from discovery of the conduct constituting the unfair practice, not from discovery of the legal significance of the unlawful conduct.

In March 2002, CFA and CSU agreed to extend the existing grievance procedures, as reflected in the May 2002 MOU, and since then, there has been no change in the association’s efforts to implement S.B. 1212, the board noted. The fact that the charging parties received a bargaining update from the association within the statutory limitations period did not make this allegation a continuing violation. Thus, the board concluded, it was untimely filed.

The charging parties also contended that the association’s continued use of a grievance procedure which did not include all of the Education Code provisions demonstrated a continuing violation. Here, the board found no evidence that the association’s conduct during the time in question independently constituted an unfair practice. Thus, the board emphasized the charging parties “knew or should have known” shortly after May 2002 that the association had not incorporated provision of S.B. 1212. Because the unfair practice charge was filed nearly three years after the MOU was effective, the allegations were untimely filed.

Finally, the charging parties alleged the association’s communication with the academic senate interfered with their efforts in January 2005 to convince the senate that it was responsible for review of faculty grievances. The board held that while this allegation was timely, it did not state a prima facie case. To state a prima facie case of interference, a charging party must establish that the respondent’s conduct tended to or does result in some harm to employee rights granted under HEERA.

HEERA Sec. 3565 grants employees the right to participate in the activities of their employee organization or to refuse to join the organization. However, rights involving faculty participation in the academic senate are not covered by HEERA. The board found that the charging parties did

not demonstrate that the association interfered with their protected rights under HEERA when the association informed the senate that it would continue to negotiate with the university over implementation of S.B. 1212. The board dismissed the unfair practice charge.

MMBA Cases

Unfair Practice Rulings

Charging party's withdrawal granted because his former representative lacked standing to file application for joinder: Bay Area Air Quality Management Dist.

(*Mauriello v. Bay Area Air Quality Management Dist.*, No. 1927-M, 11-6-07; 5 pp. dec. By Member McKeag, with Chairperson Neuwald and Member Wesley.)

Holding: Because the joinder application filed by the charging party's former representative was not related to the subject matter of the unfair practice charge and was based on a common law tort beyond the scope of the board's statutory authority, the representative lacked standing to file such an application.

Case summary: In December 2005, the charging party filed a retaliation claim against the district. A proposed decision dismissing the case was issued by an administrative law judge in September 2006. On March 12, 2007, the charging party notified the board that he now would be representing himself in his case and that the matter was settled. Also, he requested the withdrawal of his unfair practice charge.

Shortly thereafter, on March 16, 2007, the charging party's former representative filed a "Declaration of Interference" as a supplemental filing to the charging party's statement of exceptions to the proposed decision. According to the declaration, an attorney for the district met with the charging party at least two times outside the presence of the representative for the purpose of settling the matter. The attorney demanded that the charging party keep actions to resolve the case secret from the representative. The declara-

tion stated that this conduct denied fundamental fairness to the charging party.

On the same day the declaration was filed, the charging party informed the board that he had not authorized his former representative's filing and that he still wanted to withdraw his charge.

In July 2007, the representative filed an "Application for Joinder of Interested Party & Request to Reject Withdrawal of Charges." The application stated that the district engaged in contractual interference by intentionally inducing the charging party to breach his agreement with the representative. According to the representative, he could only collect his fees following a full hearing on the retaliation claim. The representative argued that the charging party's settlement was coerced in violation of the MMBA, and that the charging party's withdrawal could not be properly upheld.

The board explained that PERB Reg. 32164(a) provides that an "employee, employee organization, or employer" may file an application for joinder. Because the charging party's former representative was not an "employee, employee organization, or employer," the board held that he lacked standing to file such an application.

Under *Sacramento City Unified School Dist.* (1994) No. Ad-252, 106 CPER 70, the board may order the joinder of a party pursuant to PERB Reg. 32164(d) if the party has an interest that is related to the subject matter of the unfair practice charge at issue. The board found that the charging party's former representative's interference claim was not based on interference in violation of MMBA Sec. 3506; rather, it was based on a common law tort and therefore was beyond the scope of the board's statutory authority. Thus, the board held that it lacked jurisdiction to entertain the claim. Moreover, unlike the party seeking joinder in *Sacramento City USD*, the representative's interest was not related to the subject matter of the unfair practice charge. Instead, the representative was interested in the collection of his fees.

Because the representative was not authorized to intervene in the proceedings, the board found that the charging party's settlement and withdrawal were in the best inter-

ests of the parties over whom the board had jurisdiction and that the settlement was consistent with the purposes of the MMBA. Accordingly, the charging party's withdrawal was granted.

Reassignment is not unilateral change: City and County of San Francisco (International Airport).

(IFPTE, *Loc. 21, AFL-CIO v. City and County of San Francisco (International Airport)*, No. 1932-M, 12-21-07; 2 pp. + 10 pp. R.A. dec. By Member Shek, with Members McKeag and Wesley.)

Holding: The charging party's unfair practice charge was dismissed because reassignment of an employee to similar work in the same location is neither a transfer nor a mandatory subject of bargaining.

Case summary: Local 21 is the exclusive bargaining representative for the city's professional and technical employees. The union alleged that the airport violated the MMBA by changing the work assignment of one of its employees, which the union contended was a unilateral change. The employee in question worked for the city as a contract compliance officer at San Francisco International Airport. His duties required him to oversee and enforce the performance of public works construction contracts between the city and private construction companies. He also had to "shadow" private construction companies to ensure compliance with city contracts and safety standards.

On August 21, 2006, the owner of a private construction company monitored by the employee, sent a letter to airport administrators regarding the employee's allegedly inappropriate behavior. In response, the airport assigned the employee to another project at the airport. The charging party contended that this constituted a unilateral change in the transfer policy, and that in previous cases an employee was not immediately removed from a project upon receipt of a complaint.

Citing *City and County of San Francisco* (2004) No. 1608-M, 166 CPER 78, the R.A. explained that the board has consistently held that the assignment of job duties that are rea-

sonably related to one's classification are not a mandatory subject of bargaining. Thus, the R.A. found that the new job assignment given to the airport employee was not a matter within the scope of representation, and as such did not constitute a unilateral change. The R.A. emphasized that the employee was reassigned, not "transferred," because he continued to work at the same location and did similar work under the same working conditions.

The board found the R.A.'s dismissal free of prejudicial error and adopted it as the decision of the board itself.

Arbitration Log

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

Los Angeles County Metropolitan Transportation Authority and Amalgamated Transit Union, AFL-CIO, Loc. 1277. (2-12-07; 21 pp.).

Representatives: Ronald Stamm (deputy county counsel) for the county; William Flynn (Neyhart Anderson Freitas Flynn & Grosboll) for the union. *Arbitrator:* Bonnie G. Bogue.

Issue: Did the transportation authority violate Article 11 when it purchased rebuilt engines for revenue buses, and had those engines re-machined by an outside contractor?

Union's position: (1) The Metropolitan Transportation Authority violated Article 11 of the collective bargaining agreement by purchasing rebuilt engines and ordering engine re-machining (re-boring) services from an outside contractor. The contract permits MTA to purchase new parts or equipment, but not to buy rebuilt parts and equipment, for "revenue" vehicles. Nor can MTA "contract out" the re-machining (a step in the rebuilding process) of engines, including those rebuilt in the MTA shops.

(2) The prohibition of subcontracting work normally performed by unit members has been in the parties' contract since 1964. Rebuilding engines is the type of work normally performed by unit members and does not

fall into any of the contractually provided exceptions, such as emergency work. Re-boring of the engine block is part of the engine rebuilding process and was routinely done at the MTA shops before the transit authority moved to the Regional Rebuild Center in 1987.

(3) Rebuilding and re-machining of engines is not included in Sec. D of Article 11, which lists work that customarily has been contracted out.

(4) The authority has violated the notice provisions of Article 11. Both Secs. C and D require notice to the union prior to subcontracting or purchase. The union was not given notice before purchasing rebuilt "6V92" engines or contracting to re-machine them. The union president never received notice or gave permission for the transit authority's actions. The shop steward's erroneous statement in the grievance that ATU had "authorized" subcontracting of machine work is not binding on the interpretation of the parties' contract.

Employer's position: (1) For 20 years, with the union's actual and constructive knowledge, all machine work on bus engines, new or used, has been performed by outside vendors. To rebuild an engine, the used core block from an MTA bus has been sent offsite to be re-machined by a contractor. The union has not performed this work since 1987, as recognized in the grievance, which stated that machine work can be "contracted out." Since the engine shop was relocated in 1987, the union has known that engine re-machining was being subcontracted.

(2) When the supply of used engine blocks ran low and the only new blocks available were defective, MTA had no reasonable alternative but to purchase newly machined, used engine blocks from a supplier. The union ignores the past practice of having a contractor machine both new and used engine blocks, and offers no reasonable alternative for keeping the 6V92 engine in service.

(3) The contract only prohibits contracting out of work "normally performed" by employees of the unit. It is immaterial that this work is not listed in the contract as an "exception." Work that is not "normally performed" by

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union members can be subcontracted regardless of whether it is an enumerated exception. If union employees never made the needed part, MTA's purchase of the part is not governed by Article 11. If unit members cannot provide the part, it makes no difference if MTA purchases a used or rebuilt part instead of a new one.

(4) The shortage of usable MTA engine blocks, and the inability to purchase new blocks, constituted an emergency condition under Article 11, Sec. C. This includes "unexpected situations requiring immediate action, abnormalities in service requirements, or other conditions beyond management control." Thus, even if union employees normally manufactured engine blocks, the shortage of spare blocks and the unavailability of new blocks is a matter beyond management's control and allows MTA to purchase used blocks. MTA's good faith determination of an "emergency" is entitled to deference.

(5) MTA did not fail to give adequate notice to the union prior to its purchase of used engine blocks and prior to the re-machining. The director of inventory management testified that MTA did give notice to the grievant and to the union that used blocks would be purchased.

Arbitrator's holding: Grievance partially sustained.

Arbitrator's reasoning: (1) The threshold dispute is whether rebuilding bus engines and/or re-machining the blocks of rebuilt engines is "work normally performed" by the bargaining unit.

(2) A machinist recalled unit members "boring out" cylinder blocks for engines before the 1987 relocation. The union president was not informed that MTA had been sending engine blocks out to contractors for re-machining since 1987. However, the current equipment maintenance manager testified that no machine work was done in-house by unit mechanics after 1989. When an engine was torn down, the cores were sent to an outside contractor to be re-machined and then used by unit mechanics to rebuild engines. In 2005, when the original manufacturer stopped producing the 6V92 engines, and replacement models proved unsatisfactory, MTA had to buy rebuilt engines.

(3) The evidence demonstrates that the re-machining of engine blocks had not been work normally performed in the unit since 1987, but the rebuilding of engines pulled from MTA buses had been normally performed.

(4) Based on the plain meaning of the contract language, work that consistently had been sent to an outside contractor, and that never had been performed in the unit since 1987, cannot reasonably be called work "normally performed" by the unit when the grievance was filed in 2005.

(5) In 1997, when the parties negotiated the list of "exceptions" to the contract, re-machining work had not been performed in the unit for 10 years, and thereafter the practice of sending engine re-machining to an outside contractor continued openly and consistently. Accordingly, the union did not consider re-machining of engine cyl-

inder blocks work "normally performed" in the unit. MTA did not violate the contract by contracting with an outside vendor to perform such work.

(6) The contract language supports the view that rebuilding engines taken from MTA buses is bargaining unit work. Other than the re-machining part of the rebuilding process, engine rebuilding has been continuously performed by unit employees as part of their normal duties. Thus, allowing an outside vendor to rebuild MTA engines would violate the contract. However, the grievance does not contend that MTA has sent its engines out to be rebuilt, only that rebuilt engines were purchased.

(7) Since unit employees normally rebuilt the used engines in the past, the contract prohibits the purchase of used and/or rebuilt engines. There is no exception in Article 11 for the purchase of used or rebuilt parts for "revenue vehicles" because new parts are not available. The contract allows for subcontracting only in "emergencies." Thus, the question is whether the circumstances that prompted MTA to purchase rebuilt engines was an emergency. The contract allows subcontracting to respond to a situation caused by a "condition beyond the control of management" that is an "unexpected situation requiring immediate action."

(8) MTA's inability to find new engines was "beyond the control of management." A good faith effort was made to find new engines. MTA resorted to buying rebuilt engines only when the original manufacturer ceased to make them and substitute models were

deemed defective. The unavailability of new engines from the manufacturer is an “unexpected situation” that “require[d] immediate action.” The purchase of rebuilt engines was reasonable stockpiling of no-longer-produced engines.

(9) The union’s proposal to pull engines from buses before selling them is not a reasonable alternative to buying rebuilt engines. Because of the high costs associated with this work, it has never been the practice, and buses that are operational sell for higher prices. The costs of “mining” buses for usable engine blocks justifies MTA’s decision to purchase rebuilt engines, invoking the exceptions permitted by the contract.

(10) The circumstances that prompted the purchase of used or rebuilt engines was the type of emergency anticipated by the parties when they negotiated their contract. There was an unexpected situation beyond management’s control that required immediate action to assure the supply of rebuilt engines. Thus, the contract was not violated by the purchase.

(11) Article 11 requires that MTA give the union written and verbal notice 72 hours prior to the purchase of

an item. Verbal notice to the shop steward who filed the grievance does not satisfy the contract’s requirement. It is reasonable to infer from MTA’s failure to produce any documentary evidence that no written notice was given to the union.

(12) The lack of prior notice of MTA’s intent to buy rebuilt engines under the emergency circumstances that allowed it to do so did not cause any loss of work to the unit. Nor was there evidence of any monetary loss to any unit employees. Therefore, while the notice provisions of the contract were violated, no monetary remedy is appropriate. The authority is directed to cease and desist from failing to comply with the contract’s notice requirement.

(Binding Grievance Arbitration)

- **Contract Interpretation**
- **Seniority**

Los Gatos-Saratoga District Teachers Assn., CTA/NEA, and Board of Trustees of Los Gatos-Saratoga Joint Union High School Dist. (2-20-07; 16 pp.). *Representatives:* John R. Yeh (Miller Brown & Dannis) for the district; William Empey (chapter services consultant) for the association. *Arbitrator:* William E. Riker.

Issue: Did the district violate the collective bargaining agreement when it selected another candidate over the grievant?

Pertinent contract language: Article X-3 regarding “reassignment and transfer” states: “3.1 Transfers and reassignments shall consider the best interests of students and teachers.

3.2 Insofar as possible, employees shall be placed in the department and level at which their experience and training qualify them to be placed.

3.3 All other considerations being equal the least-senior member in the district or school shall be transferred or reassigned.

3.4 The administrators will help every teacher accommodate to a transfer or reassignment. Some measures of compensation may be offered when deemed appropriate by the principal.”

Association’s position: (1) When hiring for the position of Los Gatos High School band director for the 2006-07 school year, the district violated the parties’ contract by selecting a teacher who had not previously worked for the district. The grievant, who had worked for the district for 24 years as a music teacher, should have been selected.

(2) The grievant was the only employee in the district who was credentialed and qualified for the job. There should have been no interview process, and the district, by its selection, demonstrated prejudicial behavior against the grievant. After selecting the outside candidate, it assigned the grievant to his current duties where there was no student enrollment.

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(3) The action taken against the grievant in denying him the opportunity to be band director was punitive and contrary to the intent of the collective bargaining agreement. Section 3.3 contemplates that the least-senior bargaining unit member will be impacted by a personnel action unless there is a legitimate reason to vary from that scheme. Assuming that “all other considerations are equal,” the grievant should have been transferred to the band director position.

(4) The district penalized the grievant for alleged problems about which there is no record. The grievant has had no negative evaluations over the past five years. The district has placed the grievant in situations that impacted his ability to use his experience and doctoral degree in music education, conducting, and music literature.

(5) The contract requires the district, insofar as possible, to place employees in a department at a level that is consistent with their experience and training. As a matter of fairness and consistent with the terms of the contract, the grievant, because of his seniority, should have been permitted to demonstrate his competency and should not have been deprived of his rights to teach his chosen subject.

District's position: (1) The district's selection for the 2006-07 band director was fair and not in violation of the contract. Section 3.2 requires the district to place a unit member in a position matching his qualifications. The grievant was properly assigned to teach beginning brass and woodwinds. Section 3.3 obligates the district to con-

sider seniority only where “all other considerations are equal.” And, it applies only to transfers within a site.

(2) The district selected the outside candidate because it determined he would better serve the interests of the students. Students, administrators, parents, and others expressed concerns about the grievant's communication skills. Testimony revealed that the grievant was a very rigid teacher, was “not personable,” and once caused a student to cry over an issue related to band performance.

(3) In her 2000-01 evaluation, the school principal found the grievant needed “more positive relationships with students and booster parents.” The grievant recognized the need to improve his relationships with students, but said he had difficulty showing them respect.

(4) The selection process used to fill the band director position did not conflict with the contract. It does not restrict the district's ability to fill vacancies. Section 3.3 is intended to govern situations when two unit members are candidates for transfer or reassignment within a site, a circumstance not applicable here.

(5) The district rejected the grievant as a result of a unanimous vote of the interview panel. It believed the grievant was the inferior candidate for the position. The grievant was not deprived of his property interest; he enjoyed his right to continued employment with the district at his regular rate of pay.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) The association failed to demonstrate that the grievant's assignment to teach beginning brass and woodwinds was inconsistent with his credential and the contract. The grievant's displeasure with his assignment does not alone indicate a violation of the contract.

(2) The process used to choose the band director did not violate the contract. The panel that interviewed the candidates was fair and impartial. There is no evidence that two panel members who the grievant believed were biased against him controlled the votes of other members. The panel members' opinions of the grievant were formed during the evaluation process independent from influence of the two allegedly biased parents.

(3) The parents, teachers, and administrators on the panel believed the grievant was not the better candidate. The two applicants were asked identical questions, and panel members independently submitted their ratings. The committee formed the reasonable opinion that the grievant lacked the communication skills needed for the position. The superintendent and principal credibly testified that the grievant was not a good fit for the environment in which he was seeking to work. Even the grievant was aware of his interpersonal skill problems.

(4) The contract protects the rights of educators to work and teach in an environment of choice where their experience, credentials, and training qualify them for placement. It recognizes that, if all considerations are equal,

senior members should be given preference against outside applicants. However, the district may choose a candidate with no tenure if that individual is more qualified. Here, because the grievant was less qualified, his seniority was not dispositive. The stipend accorded for educational activities such as band director depend on the faculty member's ability to relate to actively engaged parents in a positive manner. The district reasonably felt that the grievant would jeopardize those relationships.

(Binding Grievance Arbitration)

- **Absenteeism**

- **Discipline — Just Cause**

Bay Area Rapid Transit Dist. and Service Employees International Union, Loc. 790 (3-9-07; 19 pp.). *Representatives:* Marco Gomez (Office of the General Counsel) for the district; Anne I. Yen (Weinberg, Roger & Rosenfeld) for the union. *Arbitrator:* Jerilou H. Cossack.

Issue: Was the grievant terminated for just cause?

Employer's position: (1) The grievant, an administrative analyst in the marketing and research department of the Bay Area Rapid Transit District, had a cavalier attitude regarding attendance. She had been disciplined numerous times after failing to obtain permission to come in late or leave early.

(2) Attendance problems create a hardship for the district, and in light of the grievant's repeated violations, progressive discipline warrants termination. Prior to the March 9, 2006, absence that prompted the termination,

the grievant was suspended for two weeks and received a written reprimand for attendance-related misconduct. She also had received dozens of informal warnings regarding poor attendance. The grievant was given countless opportunities to improve, but did not. She would not benefit from another chance to do so.

(3) The grievant did not refute that she abused sick leave on September 2, 2004, as indicated in a September 14, 2004, written reprimand.

(4) The grievant's only explanation with respect to her two-week suspension after being late on August 24, 2005, was that she was at work on time. Yet, she could identify no one who saw her at work that morning, and there was no record of her using her electronic entrance card to get onto her floor. Her claim that she received a call before 9:30 a.m. regarding another employee is false, as the telephone records demonstrate.

(5) On March 9, 2006, the grievant made no effort to advise her supervisor that she intended to attend a union election ballot count, which she had learned about on February 22.

(6) The grievant's interest in watching the ballot count was not "union business" within the meaning of Sec. 20.1. Only elected union officials or stewards are eligible to request time off for union business, and the grievant was neither; she was only running for office. In addition, Sec. 20.1 defines union business as "only...investigation or processing of a grievance," which observing the ballot count was not. Also, Sec. 20.1 states that union busi-

ness must be authorized; more than notice to the employer is required.

(7) The grievant's claim that she did not know she could not take "union business" time to observe the vote count is farfetched. The language of Sec. 20.1 is clear, and the grievant was a 20-year employee and a candidate for union office.

(8) It is not harassment for an employer to expect full-time employment from an employee who receives a full-time salary. The district could not operate in an efficient manner if employees can decide for themselves what time they show up or leave work.

Union's position: (1) The grievant was a long-term employee. Every effort should have been made to salvage her career with the district.

(2) The September 14, 2004, written reprimand is the only prior action that demonstrated progressive discipline before the suspension and termination. It cannot be properly relied on because it remains contested and unresolved as a step III grievance.

(3) The grievant was not absent without official leave on September 2, 2004, because she called in sick consistent with Sec. 9.1. That provision does not mandate that an employee be considered absent without leave if the employee lacks accrued sick time but still calls in sick. Section 9.1.D explicitly contemplates that an employee can take unpaid leave if she has no available vacation leave, personal holiday time, or compensatory time off.

(4) The district's reliance on Sec. 4.5 is misplaced. That section simply indicates that an employee occasionally may be required to request time off

without pay. It does not mandate that an employee make an advance request for leave if the employee elects to call in sick without having accrued sick time.

(5) The employer did not prove the grievant was tardy on August 24, 2005. The grievant testified she came in on time. The absence of swipe-card records does not establish the grievant was not present at the workplace. Employees frequently enter the building without using their security cards when let in by, or following, another employee.

(6) Even if the arbitrator believes there is sufficient evidence that the grievant was tardy on August 24, a two-week suspension was not appropriate because there were no interim steps between the reprimand and the two-week suspension. The suspension should be removed from the grievant's record.

(7) With respect to attendance at the ballot count, the grievant's supervisor told her that if she was leaving for business reasons, she was to record her absence on the white board. Following these rules, the grievant looked for her supervisor first, and, when she did not find him, marked her absence on the white board. The grievant reasonably interpreted that the vote count was work-related business and followed the appropriate rules.

(8) If the arbitrator believes discipline is appropriate, discharge is too severe. Because the prior discipline was not valid, the district failed to exhaust corrective progressive discipline before proceeding to termination. Even if the discipline were valid, it is "quite a severe jump" from two-week suspension to termination.

Arbitrator's holding: Grievance denied.

Arbitrator's reasoning: (1) Despite management's repeated efforts to impart the importance of showing up to work when scheduled, the grievant continued to ignore her responsibilities.

(2) The September 2004 written reprimand, while not specifically an issue in these proceedings, is so intertwined with the stipulated issues as to require resolution. The grievant had no accrued sick leave when she notified her supervisor on September 2 that she would be out sick on that day and the next. She did not request leave of any kind, either orally or in writing, as she had been instructed to do. The grievant's failure to recognize her attendance responsibilities is highlighted by her failure to submit a written commitment to improve in this area, which would have reduced the written reprimand to an oral one. The written reprimand was warranted.

(3) It is disingenuous of the union to suggest that because the grievance filed to protest the September 2004 written reprimand has languished unattended, it cannot be relied on to establish progressive discipline. It is the responsibility of a union to press grievances forward.

(4) The suspension for the grievant's August 24, 2005, tardiness was reasonable. While witnesses consulted by the grievant's supervisor were not responsible for keeping track of her whereabouts, their proximity to the grievant's desk makes it more likely than not that one of them would have seen the grievant had she been present

that morning. It is not believable that the grievant was able to enter the building and three other floors without using her electronic card even once. Finally, the telephone log disproves the grievant's claim that she received a call before her supervisor saw her in the hallway.

(5) The district had just cause to terminate the grievant. She had been warned on multiple occasions, both orally and in writing, about the need to seek approval before she was absent from work. It is irrelevant whether the absence was due to work-related business. In February, the grievant knew the ballots would be counted in March, but made no effort to inform her supervisor or seek his approval to observe the count.

(6) Observing the ballot count is not "union business" under Sec. 20.1. A candidate for office is not entitled to be paid during the conduct of union business. Even those persons permitted to take paid time for certain union activities must get approval from management to be absent from their jobs for that purpose.

(Binding Grievance Arbitration)

- **Contract Interpretation**
- **Scope of Bargaining**
- **Transfer**
- **Unilateral Action**

California Correctional Peace Officers Assn., Bargaining Unit 6, and State of California, Department of Corrections and Rehabilitation (6-11-07; 9 pp.). *Representatives:* Christopher E. Thomas (labor relations counsel) for the state; Ronald Yank

(Carroll, Burdick & McDonough, LLP) for the association. *Arbitrator*: C. Allen Pool.

Issue: Did the state, by implementing a statewide freeze on lateral transfers of correctional officers, violate the memorandum of understanding?

Association's position: (1) On April 15, 2005, and May 23, 2006, the Department of Corrections ordered a freeze on lateral transfers of correctional officers. This was in violation of the MOU. The freeze is not insignificant and is not outside the scope of representation. The ability of employees to transfer is a negotiated right.

(2) The language and intent of Sec. 27.01 is clear. Employees have a negotiated right to transfer near a desired area according to the conditions set out in that provision.

(3) The state failed to notify the union of the freeze or give the union an opportunity to meet and confer.

State's position: (1) The state is not in violation of Secs. 12.04 and 27.01 of the contract. The Department of Corrections has a labor shortage in all classifications and is entitled to impose a freeze on lateral transfers to address the vacancy rate. The department's needs outweigh the union's concerns.

(2) The matter is outside the scope of representation.

(3) The freeze on lateral transfers is "de minimis," or insignificant.

(4) The consequences of lifting the freeze would be enormous because it would impede the department's ability to achieve its functions. The needs of the state must be given first priority.

(5) The grievance is not arbitrable,

and even if it were, the union failed to timely appeal the matter to arbitration.

Arbitrator's holding: Grievance sustained.

Arbitrator's reasoning: (1) The contract extends a negotiated right to employees to request and receive lateral transfers in accordance with the conditions expressed in Sec. 12.04.

(2) The state's de minimis contention is not persuasive. The freeze on lateral transfers is not a trifling matter. It is a "big deal" and denies the employees the fruits of a mutually agreed-on right.

(3) If a temporary change in terms and conditions of the agreement is necessitated by a crisis or an emergency, the state has an obligation to meet with the union to explain the need to act, provide an expectation as to the length of the temporary freeze, and give the union an opportunity to assist in dealing with the problem through the meet and confer process. In this case, prior to the 2005 freeze, the state did not give notice to the union or inform the union of the freeze once it was implemented. The state conducted itself in the same manner in 2006.

(4) The record is void of any operational reason not to meet and confer while preparing to implement the freeze. The state's unilateral action was arbitrary and unreasonable.

(5) There is a real shortage of prison guards, and critical vacancies in some facilities continue to grow along with the inmate population. However, the problem cannot be dealt with by unilateral changes to the terms and conditions of the MOU.

(6) The record does not support the state's contention that the matter is outside the scope of bargaining. The Dills Act mandates bargaining over wages, hours, and terms and conditions of employment. The employees' right to lateral transfers is a bargained-for right and was incorporated in Sec. 12.04 in the parties' MOU.

(7) The state violated Secs. 12.04 and 27.01 by implementing the 2005 and 2006 freeze. It is directed to lift the freeze on lateral transfers at all prison facilities in the state. If the state intends to re-impose the freeze, it must give notice to the union and provide a reasonable opportunity to negotiate in good faith before implementation.

(Binding Grievance Arbitration)

- **Discipline — Just Cause**
- **Free Speech**

Salem Education Assn. and Salem-Keizer School Dist. (11-8-07; 21 pp.). *Representatives*: Paul A. Dakopolos (Garrett, Hemann, Robertson, Jennings, Comstick & Trethewy, P.C.) for the district; Karen Spies (association consultant) for the association. *Arbitrator*: Luella E. Nelson.

Issue: Did the district have just cause to issue a letter of reprimand to the grievant for refusing to remove political cartoons from his classroom?

District's position: (1) The grievant failed to follow a directive to remove from his classroom inappropriate information, posters, or "materials that attempt to persuade students to adopt political views or religious beliefs, or that can be deemed as harassing or bi-

ased toward a protected class.” He was ordered to check with his superiors if he was uncertain about an item’s appropriateness. The grievant also failed to comply with an email directing him to check with the vice principal regarding questionable materials he was considering for display.

(2) The grievant ignored the directives to submit material for review before posting. The vice principal went to the grievant’s classroom and observed two cartoons he deemed inappropriate. He directed the grievant to remove them. The grievant made no effort to do so or to contact his supervisors for direction. Just cause supports issuance of a letter of reprimand for failure to follow these directives.

(3) The district retains the right to regulate classroom materials under the parties’ contract. The district’s policies and guidelines delegate authority to the principal to enforce employee conduct, and employees are informed of these guidelines and may not use school property for non-educational benefit without approval. District guidelines specify that instructional materials must be well-balanced. The grievant’s cartoons violated these rules.

(4) The district’s evaluation handbook and job descriptions direct teachers that instructional activities and materials be clearly related to district, school, and department goals and objectives with supplementary materials based on course goals. The grievant’s postings were not based on curriculum.

(5) The vice principal previously conveyed to the grievant concerns about

the appropriateness of his teaching content, including the use of supplementary materials and cartoons. Some inappropriate items had been removed. The vice principal has authority to make the final decision on the appropriateness of classroom materials, and he had given the grievant “a good idea” of which cartoons to remove.

(6) The grievant’s defense that he asked for clearer guidance is contrived. He did not follow the order because he wanted different guidelines. His only defense was censorship.

(7) The district’s expectations were clear. The grievant was repeatedly told his postings were inappropriate, and why. And, he was told to remove the items from classroom walls. His choice to disobey the order was based on disagreement about what to post, not on confusion.

(8) There is no First Amendment protection for government employee speech pursuant to official duties, and no protections for teachers’ opinions within the classroom. As stated in *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951, 180 CPER 13, if an employee is not speaking as a citizen on a matter of public concern, there is no First Amendment cause of action for an employer’s reaction to the speech.

Association’s position: (1) The district did not conduct a fair and impartial investigation or provide the grievant due process. It had no policy or rule regarding what employees could not post, and the grievant was unaware his behavior would be considered grounds for discipline. The district did not dis-

cipline other teachers for similar offenses.

(2) When the principal met with the grievant to discuss his “non-compliance,” he already had concluded the grievant was in violation of the directive to remove offensive material.

(3) The first directive did not instruct the grievant to remove either of the two disputed cartoons. The cartoons do not fit the vice principal’s examples of inappropriateness. The “Exxon cartoon” had been posted since 1999, and the “Truth in Advertising” cartoon also had been posted before the first directive was issued. If these cartoons were inappropriate, the district has not explained why this directive did not ask that they be removed.

(4) The directive ordering the removal of the two cartoons did not inform the grievant he would be subject to potential discipline if he did not comply. And, it was unclear which two cartoons the vice principal wanted him to remove. Absent any written policy or rule on what employees can post, the grievant was entitled to a better understanding of what he was expected to do.

(5) Other teachers display “political” items in their classrooms unrelated to their curriculum. For example, a teacher was not asked to remove a “Stumps Don’t Lie” sticker. The directive was not applied even-handedly.

(6) The principal and vice principal believed that the grievant taught his opinion in the classroom, but they had no evidence to support that belief. They used that as the basis for the directive to remove the two disputed cartoons.

(7) The posted “Truth in Advertising” cartoon was relevant to a congressional bill banning the sale of junk food in public schools and the district ban of the sale of soda in all schools.

(8) The grievant removed the cartoons after he received the principal’s letter of reprimand. The letter of reprimand should be rescinded and removed from the grievant’s personnel file.

Arbitrator’s holding: Grievance sustained.

Arbitrator’s reasoning: (1) The fact that the grievant signed the letter of reprimand at the time it was issued is irrelevant to the merits. An employee’s signature acknowledging receipt of a disciplinary document is not an admission of the charges or that discipline was warranted.

(2) The grievant was told that posted items in the classroom which were of a sensitive nature or not part of the curriculum should be removed. The grievant removed some posted items thereafter, and no evidence exists that the district identified any additional materials that should be removed. The grievant complied with the directive issued at that time.

(3) The first directive did not identify any particular item as objectionable. No evidence exists that the grievant failed to comply with any of these directives; on the contrary, he thereafter sought guidance about materials he was considering posting.

(4) No evidence exists that the grievant failed to comply with the second directive. The scope of the district’s objections to postings in the classroom was ambiguous and the directive dealt only

with potential new postings. This lack of clarity is significant because the “Exxon” cartoon had been posted in the grievant’s classroom for years, and the grievant believed the other cartoon already had been posted as well. Thus, the grievant was not “considering displaying” them; he already had displayed at least one, without objection from his superiors, at the time he received the directive.

(5) The directive that ordered removal of two disputed cartoons was sufficiently clear to give the grievant notice the vice principal wanted them taken down.

(6) By this directive, the grievant had notice that the vice principal deemed two cartoons inappropriate. He told the vice principal he wanted to discuss the matter, but did not act promptly to have the desired conversation or let the vice principal know he did not intend to remove the materials until after their talk. He simply did not follow the directive.

(7) The grievant did not have notice of the potential disciplinary consequences should he not comply with the second directive by the end of the week. Thus, one of the critical elements of insubordination was missing. The lesser charge of failure to follow instruction is therefore the most that has been proven and only for failure to comply with the second directive. The evidence is insufficient to sustain the very serious charges in the letter of reprimand, particularly in view of the lack of clarity in the communication. The letter of reprimand is reduced to an oral warning.

(Binding Grievance Arbitration)